

**Before the  
United States Federal Trade Commission**

**Comments of Auto Care Association<sup>1</sup>  
FTC Hearing #4: Competition and Consumer Protection in the 21<sup>st</sup> Century**

**Introduction and Summary**

Auto Care Association (“Auto Care” <http://www.autocare.org>) submits these comments in response to Topic 6: “How should the current status of copyright law and current business practices influence the FTC’s enforcement and policy agenda?”

Auto Care supports the observations of panelists during the October 23, 2018 discussion on Competition Policy and Copyright Law, that certain copyright owners improperly leverage intellectual property rights to impede competition unrelated to the copyrighted works themselves – particularly in context of software embedded in products that controls product functions. In these comments, Auto Care elaborates on the panelists’ discussions of:

- **The overreach of End User License Agreements** by licensors who assert that non-negotiable EULAs override the right to repair motorized vehicles based on patent exhaustion and copyright first sale.
- **The wrongful application of technological protection measures (TPMs)** to software-enabled products and past abuses of Section 1201(a) and (b) of the Digital Millennium Copyright Act (“DMCA”) to preclude repair activities that would be deemed lawful under copyright and patent law.

Auto Care and its members have experienced first-hand how abuses of EULAs and TPMs preclude competition in the market for vehicle repair and modification, including manufacture of competitive replacement parts and provision of service in competition with original equipment manufacturers. Auto Care therefore joined other groups in petitioning the Librarian of Congress to issue rules under Section 1201(a) of the DMCA (17 U.S.C. § 1201(a)) exempting circumvention of TPMs for the purpose of diagnosis, repair, and modification of motor vehicles.<sup>2</sup>

Three days after the panel, the Librarian issued her Rulemaking on exceptions to DMCA Section 1201(a), which renewed and expanded previously-granted exemptions permitting circumvention of TPMs for diagnosis, repair, and modification of software in motorized

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<sup>1</sup> Also joining these comments is the Association of Service and Computer Dealers and North American Association of Telecom Dealers, a worldwide not-for-profit association representing companies that provide IT and Telecom hardware, software, maintenance services, leasing services, business solutions, technical support and value-added service. See <http://www.ascdi.org>

<sup>2</sup> Final Rule, Seventh Triennial Proceeding, Section 1201 Exemptions to Prohibition Against Circumvention of Technological Measures Protecting Copyrighted Works, <https://www.gpo.gov/fdsys/pkg/FR-2018-10-26/pdf/2018-23241.pdf>; see generally, Seventh Triennial Section 1201 Proceeding, 2018, <https://www.copyright.gov/1201/2018/>.

vehicles. However, the Rulemaking does not obviate the need to address abuses of the DMCA; rather, it highlights the need. First, the need to circumvent, even where subject to exemption, erects often-insurmountable barriers to entry. Vehicle owners and most repair shops typically lack the expertise necessary to circumvent sophisticated encryption; and even where feasible and subject to exemption, circumvention imposes expense, delay, and legal risk. Second, tools necessary to exercise the right to circumvent may not be available, and any commercial offer of tools still may be attacked legally as “trafficking” – which the Librarian lacks power to exempt.

Where no statutory right prohibits circumvention, there is no bar to lawful competition by those who circumvent and, therefore, no justification for original equipment manufacturers (“OEMs”) to assert Section 1201 to stifle competition. As a result of these wrongful threats of consumer liability for repairing their own vehicles, vehicle owners incur the financial and deadweight losses from restricting access to aftermarket competition, higher costs for parts and service, and from delays in effectuating repairs that they otherwise might do themselves or at a shop closer to home. Therefore, **anticircumvention misuse -- a remedy against misuse of DMCA Section 1201<sup>3</sup> – should be recognized to protect consumers and competitors who repair and modify software-enabled products** in at least four circumstances:

- (1) Where there is no copyrighted work protected by the TPM,
- (2) Where the protected material is not copyrightable,
- (3) Where the technological method does not “effectively control access to a work” or “effectively protect a right of a copyright owner” under Title 17; and
- (4) Where the TPM is applied to prevent competition rather than to protect a copyrighted work; *e.g.*,
  - a. where the TPM is applied to protect the function of software that controls physical parts and products rather than the copyright-protected aspects of the work, or
  - b. where the copyrighted work serves as a pretext for anticompetitive conduct.

Abuse of Section 1201 to lock out consumer rights and competition, rather than to protect a work, presents a classic case for remedy under Section 5 of the FTC Act. The prescribed remedy for copyright misuse – precluding enforcement of the copyright – does not by itself remedy the harm to consumer welfare and competition.<sup>4</sup> Under the DMCA, TPM use need not be limited to protection against infringing exploitation of the work; and courts have found

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<sup>3</sup> See Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. Rev. 1095 (2003).

<sup>4</sup> “A successful defense of misuse of copyright bars a culpable plaintiff from prevailing on an action for infringement of the misused copyright.” *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970, 972 (4<sup>th</sup> Cir. 1990). *Accord, Assessment Techs. Of WI, LLC v. Wiredata, Inc.*, 350 F.3d 640, 647 (7<sup>th</sup> Cir. 2003); *Practice Mgt. Info. v. Amer. Med. Ass’n*, 121 F.3d 516, 520 (9<sup>th</sup> Cir. 1997); *DSC Communications Corp. v. DGI Technologies, Inc.*, 81 F.3d 597, 601 (5<sup>th</sup> Cir. 1996). See *321 Studios v. Metro Goldwyn Mayer Studios*, 301 F. Supp. 2d 1085, 1107 (N.D. Cal. 2004) (denying leave to amend to add copyright misuse defense against Section 1201 counterclaim).

liability under Section 1201 even in the absence of infringement.<sup>5</sup> While these comments focus on the market for vehicle maintenance and service, Auto Care’s observations apply equally to any of the myriad contexts in which consumer products are controlled by embedded software – everything from doorbells and kitchen appliances to sophisticated home office equipment. These adverse effects only will multiply as the Internet of Things expands in consumer homes.

Competition-based remedies are necessary for those sued for competitive advantage rather than for infringing intellectual property rights. We explain below the need and contours of a proposed Section 5 remedy for anticircumvention misuse.

### **Background**

Auto Care is a national trade organization of 3,000 members representing more than 150,000 independent businesses that manufacture, distribute, and sell motor vehicle parts, accessories, tools, equipment, materials, and supplies, and perform vehicle service and repair. This independent aftermarket industry represents a significant slice of American commerce and affects millions of American consumers annually. Vehicle repair employs more than 4.3 million people in the United States. An estimated \$392 billion dollars was spent on motor vehicle care in the United States in 2017, and is projected to be a \$433 billion industry in 2021. Following expiration of a new car warranty, more than 70 percent of car owners who patronize auto repair shops rely on independent repair shops instead of new car dealerships. Approximately 20 percent of American consumers buy automotive parts and products to maintain, repair, and customize their own vehicles.

Vehicle repair fills a critical need for consumers and business. According to the U.S. Department of Transportation, in 2016 about 269 million vehicles were registered in the United States.<sup>6</sup> As cars advance in age, so does the need for consumers and businesses to repair, customize, or replace the software in these motor vehicles. American consumers and businesses keep their cars and trucks in service longer. On average, cars and light trucks will remain on the road more than 11-1/2 years -- two years longer than the average in 2006.<sup>7</sup>

Consumers and businesses have the right to repair their motor vehicles at their preferred repair shops, and independent repair shops have the right to provide consumers with necessary parts and service. It long has been permissible under patent law<sup>8</sup> and

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<sup>5</sup> See *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 945 (9<sup>th</sup> Cir. 2010); *Universal City Studios v. Corley*, 273 F.3d 429, 443 (2d Cir. 2001). But see *Chamberlain Group v. Skylink Techs.*, 381 F.3d 1178 (Fed. Cir. 2004).

<sup>6</sup> U.S. Department of Transportation, Federal Highway Administration, State Motor-Vehicle Registrations – 2016, <https://www.fhwa.dot.gov/policyinformation/statistics/2016/mv1.cfm>

<sup>7</sup> U.S. Department of Transportation, Bureau of Transportation Statistics, “Average Age of Automobiles and Trucks in Operation in the United States,” <https://www.bts.gov/content/average-age-automobiles-and-trucks-operation-united-states>

<sup>8</sup> *Aro Mfg Co. v. Convertible Top Replacement Co.*, 365 U.S. 336 (1961) (replacing fabric convertible tops); *Dana Corp. v. American Precision Co.*, 827 F.2d 755 (Fed. Cir. 1987) (rebuilding automobile clutches using new parts and used parts from many disassembled worn clutches held permissible repair); *Automotive Parts Co. v. Wisconsin Axle Co.*, 81 F.2d 125 (6<sup>th</sup> Cir. 1935) (reaffirming right to repair or replace broken parts to make axles operative). See also *Impression Products, Inc. v. Lexmark Int’l*, 137 S. Ct. 1523 (2017).

trademark law<sup>9</sup> to clean, repair, and refurbish parts. Courts long have held replacement of worn or broken patented parts to be lawful, whether those repairs or refurbishments are performed by the owner or someone acting on her behalf. It is similarly lawful under the Copyright Act's "first sale" doctrine and Section 109 to repair software embedded in products, and that right should not be denied or doubted where the software effectively performs the functions of a physical part.

In the past, consumers could repair most cars armed with a toolbox and Chilton manual. Many consumers continue to attempt to repair their own vehicles – some out of preference, others out of necessity.<sup>10</sup> But repairs previously made to physical parts today implicate software for:

- vehicle diagnostics
- transfer of software from the broken part to a replacement part
- replacement of corrupted software, and/or
- modification of software to repair or optimize functionality.<sup>11</sup>

OEM firmware and software pervasively is used to control the function and operation of significant motor vehicle functions. In 2000, a typical SUV had fewer than ten (10) electronic control unit (ECU) modules with embedded software controllers. By the 2015 model year, the same model incorporated 70 or more ECUs. Exhibit 1 illustrates more than 45 functions in a typical automobile – everything from valve timing to interior lighting –that are controlled by ECU modules with embedded software.<sup>12</sup> Software modules also control "telematics" that restrict wireless access to vehicle diagnostic information to only those entities chosen by the OEM – making OEMs the gatekeeper over the software and data "parts" necessary to vehicle repair.

## **I. Impact of the DMCA and Anticircumvention Misuse on Competition and Consumer Welfare, and Effects and Shortcomings of the Section 1201 Rulemaking**

In 1998, Congress enacted the Digital Millennium Copyright Act which, as its title suggests, augmented existing law to a new environment for distribution of digital copyrighted works, online and in physical formats. Technological protection measures (TPMs) such as passwords and encryption could deter unauthorized access and copying of digitally-distributed

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<sup>9</sup> *Champion Spark Plug Co. v. Sanders*, 331 U.S. 125 (1947) (use of OEM trademark to accurately identify repaired and reconditioned auto parts is permissible under Lanham Act).

<sup>10</sup> See, e.g., Jon Christian, "The Rogue Tesla Mechanic Resurrecting Salvaged Cars," (Jul. 27, 2018) [https://motherboard.vice.com/en\\_us/article/qvm3z5/rich-rebuilds-tesla-repair-and-salvage](https://motherboard.vice.com/en_us/article/qvm3z5/rich-rebuilds-tesla-repair-and-salvage); Andrew Evers and Lora Kolody, "This man was so fed up trying to get his Tesla fixed that he ended up doing it himself," (Aug. 28, 2018) <https://www.cnbc.com/2018/08/28/tesla-owner-frustrated-so-fixes-his-own-model-s-easy-as-legos.html>

<sup>11</sup> See Robert N. Charette, "This Car Runs on Code," IEEE Spectrum (Feb. 11, 2009), <http://spectrum.ieee.org/transportation/systems/this-car-runs-on-code> (last visited Oct. 20, 2016); National Instruments, "ECU Designing and Testing using National Instruments Products," (Nov. 7, 2009) <http://www.ni.com/white-paper/3312/en/>.

<sup>12</sup> Electronic control units in motor vehicles also may include databases or compilations, such as of numeric parameters used to control system performance. References to "software" in this comment should be read to include any such databases or compilations to the extent they are contended to be protectable by TPMs.

literary, audio, and audiovisual works; Congress enacted Section 1201 of Title 17 – to deter and provide legal recourse against unauthorized circumvention to access or make infringing copies of the works. Congress understood that the blunt power of Section 1201 also could deter lawful noninfringing uses of copyrighted works, and so established in Section 1201(a) a triennial rulemaking proceeding to exempt from anticircumvention liability certain classes of noninfringing uses.

While the DMCA protections quickly fulfilled their purpose to stimulate distribution of copyrighted works (e.g., motion pictures on DVD), other industries rushed to abuse Section 1201 by broadly applying TPMs to prevent competition for non-copyrightable goods and services.

The Copyright Office’s proceedings have revealed that the category of functional embedded software has been the one most subject to abuse. Vehicle manufacturers deploy TPMs over their ECUs to thwart competition—to prevent independent servicers and consumers from making repairs and routine maintenance—not to protect copyright. OEMs increasingly apply TPMs to software-controlled ECUs to prohibit access to the software and, thereby, prohibit otherwise lawful vehicle repair by competing independent parts manufacturers and repair services. Some manufacturers design their TPMs to preclude use of non-OEM replacement parts, such as by tying the copy of the embedded software to the car’s unique Vehicle Identification Number, or by shutting down operations where the vehicle does not use “authorized” replacement parts.<sup>13</sup> In two cases, federal district courts have dismissed automaker complaints under the DMCA—in one case, where the technological measure protected access to the electronic control module itself, and not to the embedded software,<sup>14</sup> and in another case, where technological measures were circumvented solely for the purpose of accessing non-copyrightable data and operating parameters in the embedded software.<sup>15</sup>

Such abuses of technological measures protect business models, not rights granted under Section 106 of the Copyright Act. Auto Care submits that these measures misuse Section 1201, just as the makers of garage door openers<sup>16</sup> and printer cartridges<sup>17</sup> did, by invoking laws intended to protect copyrighted works to, instead, lock out competition for non-copyrightable parts and services. As the concurrence in the *Static Control* case warned:

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<sup>13</sup> Similar technology strategies have been undertaken by major players in other industries, to preclude competition for: replacement parts and repairs for smart phones, *see* Ivan Mehta, “Apple confirms its T2 chip will block some third-party repairs,” <https://thenextweb.com/plugged/2018/11/13/apple-confirms-its-t2-chip-will-block-some-third-party-repairs>; replacement garage door openers, *Chamberlain Group v. Skylink Techs.*, 381 F.3d 1178 (Fed. Cir. 2004); and replacement parts for computer printers, *Lexmark v. Static Control*, 387 F.3d 522, 530 (6th Cir. 2004) (technological protection measure on printer cartridge chip prevented use of “unauthorized” toner cartridges) and Alex Hern, “HP ‘timebomb’ prevents inkjet printers from using unofficial cartridges,” *The Guardian* (Sept. 20, 2016), <https://www.theguardian.com/technology/2016/sep/20/hp-inkjet-printers-unofficial-cartridges-software-update>; and single-serve coffee pods, Karl Bode, “Keurig Will Use DRM In New Coffee Maker To Lock Out Refill Market” (March 3, 2014), <https://www.techdirt.com/articles/20140227/06521826371/keurig-will-use-drm-new-coffee-makerto-lock-out-refill-market.shtml>.

<sup>14</sup> *General Motors LLC v. Dorman Products, Inc.*, No. 15-12917 (E.D. Mich. Sept. 30, 2016).

<sup>15</sup> *Ford Motor Company v. AUTEL US Inc.*, No. 14-13760, Opinion and Order, (E.D. Mich. Sept. 30, 2015).

<sup>16</sup> *Chamberlain Group v. Skylink Tech.*, *supra*.

<sup>17</sup> *Lexmark Int’l v. Static Control Components*, 387 F.3d 522 (6th Cir. 2004).

[M]anufacturers could potentially create monopolies for replacement parts simply by using similar, but more creative, lock-out codes. Automobile manufacturers, for example, could control the entire market of replacement parts for their vehicles by including lock-out chips. Congress did not intend to allow the DMCA to be used offensively in this manner, but rather only sought to reach those who circumvented protective measures ‘for the purpose’ of pirating works protected by the copyright statute.<sup>18</sup>

The Federal Circuit expressed the same concern for plaintiff abuse of Section 1201:

Chamberlain's proposed construction would allow any manufacturer of any product to add a single copyrighted sentence or software fragment to its product, wrap the copyrighted material in a trivial "encryption" scheme, and thereby gain the right to restrict consumers' rights to use its products in conjunction with competing products. In other words, Chamberlain's construction of the DMCA would allow virtually any company to attempt to leverage its sales into after-market monopolies—a practice that both the antitrust laws and the doctrine of copyright misuse normally prohibit.<sup>19</sup>

The Ninth Circuit similarly suggested that courts properly could raise antitrust counterclaims against overbroad and unjustified assertions of anticircumvention liability under Section 1201.<sup>20</sup>

The 2017 Report of the Register of Copyrights concluded that legislative amendment to Section 1201 is unnecessary because unfair competition law exists to remedy anticircumvention misuse.<sup>21</sup> The Librarian of Congress concurred in her 2018 Section 1201 rulemaking, noting “that other causes of action, such as unfair competition or unjust enrichment, may be available to address injury to non-copyright interests.”<sup>22</sup>

Unless effective and vigorous enforcement of competition law is available, consumers and market competitors will remain vulnerable to anticompetitive assertions of technological measures and copyright law by OEM manufacturers of consumer and commercial vehicles.

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<sup>18</sup> *Id.*, 387 F.3d at 552 (Merritt, J., concurring).

<sup>19</sup> *Chamberlain*, 381 F.3d at 1201. See June M. Besek, *Anti-Circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media, and the Arts*, Columbia Journal of Law & the Arts Vol. 27, No. 4 389, 507 (2004) (“Congress . . . and the courts, share a concern about use of the DMCA to eliminate competition in interoperable computer programs or machine replacement parts. Equipment manufacturers should not be permitted to use the DMCA to monopolize the market for replacement parts.”)

<sup>20</sup> “If a § 1201(a)(2) defendant in a future case claims that a plaintiff is attempting to enforce its DMCA anti-circumvention right in a manner that violates antitrust law, we will then consider the interplay between this new anti-circumvention right and antitrust law.” *MDY*, 629 F.3d at 951.

<sup>21</sup> “Indeed, principles underlying existing doctrines of antitrust law or misuse, and the permanent exemptions, such as section 1201(f)’s exception for interoperability, may accommodate many anti-competitive concerns.” Section 1201 of Title 17: A Report of the Register of Copyrights at 49 (June 2017). *Cf. Besek, supra* (recommending legislative amendment to DMCA to prevent assertions of Section 1201 over machine parts, if not resolved by courts).

<sup>22</sup> Library of Congress, Exemption to prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Dkt. No. 2017-10, 83 Fed. Reg. 54010, 54020 (Oct. 26, 2018) (hereinafter “Rulemaking”).

Recognizing how Section 1201(a) could foreclose lawful vehicle repair, and the reality that OEMs had attempted such foreclosure, the Librarian has granted exemptions to Section 1201(a) relating to vehicle repair. The 2018 Rulemaking broadened the prior 2015 exemption in two key ways. First, it recognized that the statutory exemption applies to “users” of the software, including professionals that assist the vehicle owner, rather than being limited, as in the past, to only the vehicle owner. 83 Fed. Reg. at 54022. Second, the exemption now covers the vehicle’s telematics and infotainment systems linked to diagnosis and repair of vehicle functions. *Id.*

However, the Rulemaking necessarily is limited within the bounds of the Librarian’s authority under Section 1201(a)(1). The Rulemaking covers circumvention to obtain access to ECU software, but not the availability of tools that make such circumvention feasible to repair service organizations that lack expertise in cryptography – a field normally far afield from expertise in vehicle repair. This limitation leaves open avenues for OEM conduct that effectively denies consumers and competitors the benefits of the exemption. **Antitrust and unfair competition law can close those loopholes, as can a defense of anticircumvention misuse.**

A competition law remedy protects both competition and consumer welfare. Abuse of Section 1201 forecloses competition for the manufacture of replacement parts and the repair of motor vehicles; restricts consumer choice in repair facilities; precludes consumer repair and modification; constrains choice and availability of refurbished or replacement parts; and deprives the market of innovations in parts and service. Even denying servicers the simple ability to adjust parameters used by ECU software to regulate vehicle systems prevents the market from optimizing performance to the region and driving conditions experienced by the vehicle owner. **These restraints on competition ultimately increase the cost of repair by forcing consumers to get their vehicles serviced by “authorized” dealers, and excluding competition from than independent repair and service shops and their own parts suppliers.**

Moreover, the inability to access software embedded in broken parts forces consumers to pay not only for a replacement part but also for another copy of software that they already own and that otherwise could be reused – much in the same way as remanufacturers are able to reuse working elements of broken physical parts. And when being forced to purchase that second copy of software, that consumer may be compelled to agree to more onerous licensing terms of a EULA that prevents otherwise lawful diagnosis, reverse engineering, maintenance, and repair.

As the courts cited above observed, Section 1201 has no application where the TPM does not protect a copyrighted work or copyrightable aspects of a work, where the measure is not a TPM, or where the purpose of the TPM is to foreclose competition rather than to protect rights under copyright law. **Accordingly, where the OEM has no legal right to prevent circumvention, there is no countervailing justification to shield OEMs from liability under antitrust and unfair competition law.**

## II. EULAs Do Not Turn Vehicle Sales Into Licenses.

Even where circumvention is lawful, certain manufacturers seek to foreclose competition from self-help and independent repair services under the terms of overbroad EULAs. Copyright law exempts from infringement the maintenance of computer software by or under the authority of “the owner of a copy of a computer program.”<sup>23</sup> However, some vehicle manufacturers attempt to limit the vehicle purchasers’ choice of repair facilities by licensing the embedded control software.<sup>24</sup> Breach of the EULA, including by otherwise lawful repair, at minimum would void the vehicle owner’s warranty and threatens the vehicle owner with suits under copyright law and the DMCA.<sup>25</sup>

Key issues relating to the intersection of copyright and contract law remain unresolved, and subject to circuit splits on key questions of law, such as:

- (1) Whether the consumer owns or licenses her copy of the embedded software. *Krause v. Titleserv, Inc.*, 402 F.3d 119 (2<sup>nd</sup> Cir. 2006) rejected the passage of formal title as indicia of ownership, relying instead on practical considerations such as payment of consideration; the right to perpetual possession and use with no right of repossession by the copyright owner; and freedom to discard or destroy the software. *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9<sup>th</sup> Cir. 2010) looked to whether the relationship was formally denominated as a “license”; and whether the license terms imposed significant restrictions on the transfer and use of the software. Not surprisingly, various companies have crafted their EULAs to impose restrictions under the broader *Vernor* test, even though it is unlikely such restrictions could ever be realized.
- (2) Whether copyright law preempts EULA restrictions that purport to divest consumers of their rights under copyright law; if not, whether such contracts of adhesion should be deemed unconscionable as a matter of law and public policy.

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<sup>23</sup> 17 U.S.C. § 117.

<sup>24</sup> “Repairing the Right to Repair,” *Columbia Business Law Review* (Nov. 7, 2018), <https://cblr.columbia.edu/repairing-the-right-to-repair/>; Rian Wainstreet, “America’s Farmers Are Becoming Prisoners to Agriculture’s Technological Revolution,” (Mar. 8, 2018) [https://motherboard.vice.com/en\\_us/article/a34pp4/john-deere-tractor-hacking-big-data-surveillance](https://motherboard.vice.com/en_us/article/a34pp4/john-deere-tractor-hacking-big-data-surveillance); Jason Bloomberg, “John Deere’s Digital Transformation Runs Afoul of Right-To-Repair Movement,” (Apr. 30, 2017), <https://www.forbes.com/sites/jasonbloomberg/2017/04/30/john-deeres-digital-transformation-runs-afoul-of-right-to-repair-movement/#2b24e29e5ab9>; Pete Bigelow, “General Motors says it owns your car’s software,” (May 20, 2015), <https://www.autoblog.com/2015/05/20/general-motors-says-owns-your-car-software/>

<sup>25</sup> These concerns are particularly acute for repair and service of farm vehicles and equipment. Certain manufacturers have taken an aggressive stance against circumvention to cut off independent parts and service options for farmers. Yet, farmers risk catastrophic losses without the right to self-service or obtain third party service for their equipment, as the authorized dealers can be hundreds of miles away and farmers have but a limited window to bring in their harvests. See Comments of American Farm Bureau Federation, *et al.* Regarding a Proposed Exemption under 17 U.S.C. § 1201 (Dec. 18, 2017) <https://www.copyright.gov/1201/2018/comments-121817/class7/class-07-initialcomments-afbf-ncga-nfu.pdf>; License Agreement for John Deere Embedded Software, [https://www.deere.com/privacy\\_and\\_data/docs/agreement\\_pdfs/english/2016-10-28-Embedded-Software-EULA.pdf](https://www.deere.com/privacy_and_data/docs/agreement_pdfs/english/2016-10-28-Embedded-Software-EULA.pdf)

These legal uncertainties compound the risks to consumers and commercial users, making these vehicle owners wary of resorting to independent service and repair for fear of violating the EULA and, thereby, voiding vehicle repair warranties and subjecting them to litigation and damages under contract and/or copyright law. But regardless of how these questions ultimately may be resolved in the courts, such contractual restrictions do not override antitrust law protections over competition and consumer rights. In the absence of statutory intellectual property rights to prohibit circumvention, contractual restraints designed to force end-users to relinquish their own rights of access and use can violate antitrust law.

### **III. Competition Law Provides a Remedy against Abuse of Section 1201 to Exclude Lawful Repair, Including a Role for the FTC Under Section 5.**

Just as patent misuse and copyright misuse arise where a right owner attempts to improperly extend its rights beyond those granted by statute, the law should recognize anticircumvention misuse where a competitor asserts Section 1201 to protect its market position in noncopyrightable products and services.

Because Section 1201 is designed to protect copyrighted works, copyright misuse should be available to render unenforceable the copyright alleged to be protected by the technological protection measure, until the misuse is purged. However, precluding infringement allegations alone does not remedy anticircumvention misuse, since anticircumvention liability is independent of infringement.<sup>26</sup> A remedy for misuse of Section 1201 thus is needed to rectify the separate harm to competition caused by unfair assertions of TPMs over software-enabled consumer products.

Therefore, competition law should recognize an additional remedy for anticompetitive effects caused by misuse of Section 1201 of the DMCA. The elements of liability for anticircumvention misuse should take into account the context in which the TPM was applied. Recognized precedents include where the copyrighted work was registered by fraud or intentional deception of the Copyright Office (akin to *Walker Process Equip., Inc. v. Food Machinery & Chem. Corp.*, 382 U.S. 172 (1965)); or where the Section 1201 claim otherwise was pretextual, objectively baseless, or made in bad faith (akin to *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus. Inc.*, 508 U.S. 49 (1993) or *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986 (9<sup>th</sup> Cir. 1979)). In some cases, anticircumvention misuse may violate the Sherman Act, *e.g.*, where undertaken in an attempt to monopolize or in combination with “authorized” dealers or servicers. Additional examples of unfair competition that could be remedied under Section 5 of the FTC Act include where the TPM does not protect a copyrightable work – *e.g.*, where the material is not copyrightable or where the TPM protects functionality rather than copyright-protected elements of a work. In such cases, the OEM cannot justify its anticompetitive conduct as an assertion of intellectual property rights, since the OEM has no exclusive right to protect under Section 106 or 1201 of Title 17.

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<sup>26</sup> *Supra*, at 2 & n.3.

The FTC can play a constructive role by remedying unfair methods of competition from anticompetitive misuse that fall short of the elements for liability under the Sherman Act. Courts historically have affirmed the FTC's jurisdiction over abuses of intellectual property rights<sup>27</sup> including where such abusive practices conflict with the basic policies of, but may not actually violate, the antitrust laws.<sup>28</sup> Assertions of DMCA Section 1201 for anticompetitive purposes meet the FTC Act Section 5 definition of unfair methods of competition. And, actions under Section 5 to remedy misuse satisfy all the FTC's Statement of Enforcement Principles:

- They promote consumer welfare as a constraint on OEM efforts
  - to raise prices by restricting or monopolizing sources for parts and service to only “authorized” dealers
  - to limit consumer choice by preventing consumers from selecting the parts and services or from servicing their own equipment
  - to stifle innovation in parts, services, and software
- They provide relief where there is no justification for suit, such as by asserting statutory Section 1201 claims against otherwise lawful competition.
- They challenge practices affecting secondary markets that may not be subject to enforcement under the Sherman or Clayton Act.

The Section 5 remedy of a cease and desist order can provide meaningful relief to a large number of smaller competitors and consumers who otherwise might not have the means to act alone. Preventing further abuse of Section 1201 enables competitors to exercise their rights and privileges under patent and copyright law, and to benefit from the exceptions granted in the Triennial rulemaking proceedings. Moreover, the FTC can step in to protect consumer welfare in circumstances where neither consumers nor competitors can afford to litigate their rights to repair. Motor vehicles are one of the most expensive assets consumers will own, generally second only to their residence. Many commercial businesses such as trucking companies and farmers succeed or fail based on their ability to obtain affordable and timely repairs for their fleet. None of these individual or commercial consumers can risk losing their warranty or their investments by taking on OEM vehicle manufacturers. They need a champion like the Commission to protect their interests against anticompetitive assertions of TPMs and Section 1201.

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<sup>27</sup> See *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6<sup>th</sup> Cir. 1966) (finding Commission jurisdiction over patentee misconduct resulting in issuance of a patent); *FTC v. Qualcomm Inc.*, No. 17-CV-00220-LHK (Nov. 6, 2018) Order Granting Partial Summary Judgment at 10-11.

<sup>28</sup> *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966); *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 136-137 (2d Cir. 1984).

## **Conclusion**

The panelists' concerns for anticompetitive effects from improper enforcement of Section 1201 are real, and have been experienced first-hand by Auto Care and its members. A remedy for unfair competition can be achieved by recognizing anticircumvention misuse as a cause of action as well as an affirmative defense, in both private litigation and, in appropriate cases, as an unfair method of competition under FTC Act Section 5.

Respectfully submitted,

*/s/ Aaron Lowe*

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# Exhibit 1

## Electronic Modules Controlled by Embedded Software

