
Exemptions to Permit Circumvention of
Access Controls on Copyrighted Works

Docket No. COLC-2023-004

COMMENT OF
THE UNITED STATES DEPARTMENT OF JUSTICE
AND FEDERAL TRADE COMMISSION

Jonathan Kanter
Assistant Attorney General

Lina M. Khan
Chair

Doha Mekki
Principal Deputy Assistant Attorney General

Rebecca Kelly Slaughter
Commissioner

David Lawrence
Policy Director

Alvaro M. Bedoya
Commissioner

Karina Lubell, Chief
Jennifer Dixon, Assistant Chief, Special
Counsel for Policy and IP
Garrett Windle, Attorney Advisor
Competition Policy and Advocacy Section

Hannah Garden-Monheit, Director
Ian Barlow, Deputy Director
Anu Sawkar, Special Counsel for IP
Office of Policy Planning

U.S. Department of Justice
950 Pennsylvania Ave., N.W.,
Washington, D.C. 20530-0001

Federal Trade Commission
600 Pennsylvania Ave., N.W.,
Washington, D.C. 20530-0001

The U.S. Department of Justice Antitrust Division (the “Antitrust Division” or the “Division”) and the Federal Trade Commission (the “FTC” or the “Commission”) (collectively, the “Agencies”) appreciate this opportunity to comment on the ninth triennial rulemaking under the Digital Millennium Copyright Act (“DMCA”).¹ This proceeding concerns possible temporary exemptions to the DMCA’s prohibition against circumvention of technological protection measures (“TPM” (at 12 0 0 12 320.4 641.2 Tm[(T)-6 (-5.3 138F6a6 (t)0.7 (r)5.7 5 T’)]TJ-0.0.PM

The Antitrust Division also has challenged conduct by companies that use repair restrictions to limit competition in aftermarket repair or otherwise force purchasers to use the company's own repair services. For example, the Division challenged a medical device company's licensing restrictions that allowed hospitals to make their own repairs to medical equipment

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manufacturers and sellers.²⁸ The policy statement focuses on manufacturer practices that restrict competition for repair services and describes how these practices can increase the cost of repairs, generate harmful waste, and deny opportunities to entrepreneurs and local businesses. The policy statement emphasizes that the Commission will “prioritize investigations into unlawful repair restrictions” under Section 5 of the Federal Trade Commission Act and will bring an interdisciplinary approach to the issue by using resources and expertise from both the FTC’s Bureau of Consumer Protection as well as the FTC’s Bureau of Competition.

The FTC is committed to restoring the right to repair by vigorously enforcing the law to combat repair restrictions that violate antitrust or consumer protection laws. For example, the FTC sued motorcycle manufacturer Harley-Davidson, grill maker Weber, and the manufacturer of Westinghouse outdoor power equipment for illegally restri T(bu3o (i)-5.3 (.7 (s)11.6 (u)6 (4g.7 (t)0.đ[(of W -

and Commission staff has provided technical assistance to legislators in numerous other states on proposed legislation to promote competition in repair markets. Chair Khan also recently participated in a White House convening of state legislators and others in support of the right to repair.³⁵

The Agencies are committed to using all their enforcement and policy tools to combat unlawful repair restrictions and promote competition in repair aftermarkets.

President Biden's Executive Order on Promoting Competition in the American Economy

can improve access to local and timely repairs as well as access to repairs that OEMs and authorized repair providers do not offer.³⁹ For example, Americans living in rural communities often lack access to a nearby authorized repair provider. Therefore, more open repair ecosystems can allow consumers to have their goods repaired more quickly or repair them in a timely manner themselves.

The harms stemming from repair restrictions are also well documented. When engineers are restricted from fixing hospital equipment, patient care can suffer, and the inability to repair equipment becomes a matter of life or death.⁴⁰ When farmers are blocked from repairing tractors and other equipment, delays in obtaining repair can lead to spoiled crops and reduced income.⁴¹ In addition, repair restrictions contribute to environmental and electronic waste when they reduce the useful lifespan of products.⁴²

Moreover, the Nixing the Fix Report noted that the burden of repair restrictions may fall more heavily on communities of color and lower-income communities.⁴³ There are Black-owned small businesses in the repair and maintenance industries, and difficulties facing small businesses can disproportionately affect small businesses owned by people of color.⁴⁴ Repair restrictions for some products—such as smartphones—may also place a greater financial burden on communities of color and lower-income Americans.⁴⁵ Black and Hispanic Americans and

³⁹ *Id.* at 44.

⁴⁰ See Rohit Chopra, Commissioner, Fed. Trade Comm’n., Prepared Remarks Regarding a Motion to Adopt a Policy Statement on Repair Restrictions Imposed by Manufacturers and Sellers (July 21, 2021); Lina Khan, Chair, Fed. Trade Comm’n., *Remarks on Repair Restrictions* (July 21, 2021), <https://www.ftc.gov/press-release/2021-07-21-ftc-chair-lina-khan-remarks-repair-restrictions>.

Congress created the triennial rulemaking process to help mitigate overly broad applications of TPMs. The Librarian of Congress may issue temporary exemptions from the prohibition against circumvention of TPMs if certain factors counsel in favor of granting the exemptions.⁵³ The Librarian considers:

- i. the availability for use of copyrighted works;
- ii. the availability for use of works for nonprofit archival, preservation, and educational purposes;
- iii. the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;
- iv. the effect of circumvention of technological measures on the market for or value of copyrighted works; and
- v. such other factors as the Librarian considers appropriate.⁵⁴

In deciding whether to grant exemptions to the DMCA, the rulemaking process requires the Librarian to consult with the Department of Commerce's Assistant Secretary for Communications and Information and Administrator of the National Telecommunications and Information Administration (NTIA).⁵⁵ NTIA's consultation letter in the Eighth Triennial Rulemaking supported renewing each of the then-existing exemptions and supported expanding certain repair-related exemptions. In the present rulemaking, stakeholders have requested to renew most of the current circumvention exemptions and to

Public Knowledge and iFixit have proposed expanding the current exemption to further include computer programs that control access to commercial and industrial equipment.⁵⁸ NTIA has consistently supported a similar expansion of this exemption in prior triennial rulemakings.⁵⁹ In 2021, for example, NTIA supported expanding the exemption to reach “the diagnosis, maintenance, and repair of all software-enabled devices, machines, and systems” for lawfully acquired devices, including as required by third parties to make necessary repairs.⁶⁰

As described by Public Knowledge and iFixit, four “index” examples of commercial and industrial device categories would benefit from the proposed expansion: commercial soft serve machines, proprietary diagnostic kits, programmable logic controllers, and enterprise IT.⁶¹ In each case, an exemption would give users more choices for third-party and self-repair and would likely lead to cost savings and a better return on investment in commercial and industrial equipment. It would also facilitate innovation and competition among third-party repair and maintenance servicers, against whom OEMs would have to compete meaningfully in these important aftermarkets.

The proposed expansion would benefit competition in areas beyond those outlined by Public Knowledge and iFixit. For example, increasingly sophisticated agricultural equipment often employs onboard computers that control error identification and repair, limiting options for farmers in need of quick repairs.⁶²

In the Agencies’ view, facilitating greater freedom and choice in repairs will alleviate costly downtime due to broken equipment that results in a significant loss of revenue for businesses.⁶³ For example, during a 2016 hearing before the Nebraska legislature, a representative of an agricultural replacement company testified that “if [a tractor is] down for one or two days during planting season or during harvest season, they’re 7 (e)-6st-6 (s)5.6 (on or duri)-5.4 (ng ,.7

tractor, then they're out. So they're essentially tying up all the market into a monopoly to themselves, not allowing competition which drives prices up.”⁶⁴

Expanding the current exemption to include computer programs that control access to commercial and industrial equipment would open repair aftermarkets to competition. OEM lock-in reduces opportunities for service and repair aftermarkets and decreases incentives to innovate and compete on price. OEM-authorized technician and dealer networks are often the only market participants because of TPMs.⁶⁵ NTIA has expressed concerns to the Librarian about lock-

a purchaser is to obtain the full value of a product, and controlling access to repair information can lead to lock-in and other market distortions.

\$22,000 per minute.⁷⁵ And even sophisticated commercial entities can be unexpectedly harmed by TPMs. For example, Public Knowledge and iFixit explain that TPMs caused a train operator to experience extended downtime through a “workshop detection system” that used GPS coordinates to thwart third-party repairs.⁷⁶ Repair aftermarkets also are important avenues for entrepreneurship and have an impact on the product markets for industrial and commercial goods. For example, the availability of independent repair and service options may enhance competition in the market for software-enabled devices by reducing the user’s reliance on OEM-authorized service providers. These additional factors counsel in favor of the exemption.

An exemption currently exists for computer programs that control motorized land vehicles, marine vessels, and mechanized agricultural vehicles for purposes of diagnosis, repair, or lawful modification of the vehicle or vessel function.⁷⁷ The Copyright Office intends to recommend renewal of this exemption,⁷⁸ and the Agencies support this recommendation. The Agencies also support adopting an additional exemption to allow vehicle owners or the repair shop of their choice to access, store, and share vehicle operational data.

MEMA, the Vehicle Suppliers Association, proposes a new, related exemption to access, store, and share vehicle operational data, including diagnostic and telematics data, from

vehicles. Giving owners the option of providing their own data to their chosen repairer need not increase cybersecurity risks. The Nixing the Fix Report record contains no empirical evidence to suggest that independent repair shops are more likely than authorized repair shops to compromise or misuse customer data.⁸¹ Moreover, the proposed exemption would simply empower owners by providing them access

TPMs can undermine research into vehicle

The Agencies appreciate the opportunity to offer our views in this rulemaking. For the reasons stated, we urge the Copyright Office to recommend that the Librarian renew the existing repair-related exemptions; expand the exemption for Class 5 to include computer programs that control access to commercial and industrial equipment; and grant the proposed exemption for Class 7 to allow circumvention by lawful vehicle owners and lessees, or those acting on their behalf, to access, store, and share vehicle operational data.