

May 28, 2024

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U.S. Copyright Office
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RE: ACT | The App Association (the App Association) Provides Follow Up Comments To The United States Copyright Office Public Hearing on Docket No. 2023-5- Exemptions to Prohibition Against Circumvention of Technological Measures Protecting Copyrighted Works – Class 5: Computer Programs - Repair

I. Introduction and Statement of Interest

The App Association is a policy trade association for the small business technology developer community. Our members are entrepreneurs, innovators, and independent developers within the global app ecosystem that engage with verticals across every industry. We work with and for our members to promote a policy environment that rewards and inspires innovation while providing resources that help them raise capital, create jobs, and continue to build incredible technology. App developers like our members also play a critical role in developing entertainment products such as streaming video platforms, video games, and other content portals that rely on intellectual property protections. The value of the ecosystem the App Association represents—which we call the app ecosystem—is approximately \$1.8 trillion and is responsible for 6.1 million American jobs, while serving as a key driver of the \$8 trillion internet of things (IoT) revolution.¹

The small business community that the App Association represents relies on intellectual property to grow and create jobs, and the App Association urges the USCO to recognize that its consistent and narrow approach to evaluating proposed and renewable exemptions to Section 1201 of the Digital Millennium Copyright Act (DMCA) is key to upholding the goals of copyright law; that is to ensure that businesses can protect and benefit from their copyrighted works, while not stifling the ability to continue advancing new creations.

II. The Record For Evidence That The Proposed Exemption Approaches “Actual Harm” Is Slim

We appreciate the USCO’s thoughtful questions to the proponents of the proposed exemption for Class 5 (Computer Programs – Repair), namely:

¹ ACT | The App Association, State of the App Economy (2022), <https://actonline.org/wp-content/uploads/APP-Economy-Report-FINAL.pdf>.

1. Please identify and provide any additional examples where the proposed repair-related uses of commercial food preparation equipment are being adversely affected by the prohibition against circumvention.
2. Please provide your views on whether the Office can extrapolate from the Taylor soft serve ice cream machine to consider an exemption that would cover equipment used in commercial food preparation.

We do not believe the proponents have or can provide additional concrete examples of where repair-related uses of commercial food preparation equipment are being adversely affected by Section 1201. We also do not believe that the Taylor soft served ice cream machine example properly exemplifies harm that could further be extrapolated for general commercial food preparation. The questions asked by the USCO implicate a significant portion of the agency's consideration of proposed exemptions to Section 1201: the proponents' burden to prove **actual harm**. As a reminder, the App Association opposes this proposed new exemption to expand the repair exemption for consumer electronic devices to include commercial industrial equipment such as automated building management systems and industrial equipment. We oppose this proposed exemption because it is overbroad, providing no evidence of concrete harm, and contributes to ill-defined right to repair exemption proposals that have been submitted as part of the Section 1201 triennial rulemaking process overtime. These proposals effectively legalize a "market for exceptions" that can lead to increased cyberattacks.

Section 1201(a)(1)(B) necessitates that an exemption to the prohibition show "whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition...in their ability to make noninfringing uses under this title of a particular class of copyrighted works." The burden of proof is on the proponents of the exemption to show this injury by a preponderance of the evidence.² The proponents did not satisfy this burden in their petition nor in their statements in the associated public hearing. Instead, they repeatedly discussed general anecdotes and the bad experience of using a "Taylor soft served ice cream machine." The harmed class: McDonald's Corporation, a multi-billion-dollar company that chooses to use a Taylor brand ice cream machine instead of comparable or potentially better alternatives.³ Their chief complaint: The copyright holder can benefit from their own creation by controlling the derivative market for repairs to their software. Having the benefit of your work's derivative markets is not only a right of the copyright holder, but it is an important measure to maintain the safety and quality of their products.

On the other hands, the App Association provided examples of **actual harm** as a result of this proposed exemption without more evidence that the petition would prevent the stifling of creative activity that copyright incentivizes. We reiterate that this harm includes that:

- allowing circumvention for device repair will undermine the important incentives in the DMCA for creators and jeopardize the safety and privacy of consumers.
- circumventing technical protection measures (TPMs) that traditionally cover layers of licensed software within devices with digital content disrupts investment and distribution in existing products for future innovations that benefit consumers at every price point.

² <https://www.copyright.gov/policy/1201/section-1201-full-report.pdf>

³ See <https://www.gofoodservice.com/c/soft-serve-ice-cream-machines>.

- exemptions that allow the offering of third-party assistance or tools to circumvent TPMs protecting embedded device software compromise the protections afforded to other licensed software, putting consumers and their personal information at risk when products malfunction.
- this petition works against the legal responsibility of tech developers to use technical means, including encryption, to comply with federal, state, and international privacy laws to protect consumer privacy, including the Children’s Online Privacy Protection Act (COPPA), the Health Insurance Portability and Accountability Act (HIPAA), the Fair Credit Reporting Act, the California Consumer Privacy Act (CCPA), and the EU’s General Data Protection Regulation (GDPR).
- this petition poses serious implications on critical infrastructure that lay the foundation for the functioning of the U.S. government and the U.S. economy, particularly as cyberattacks become more prevalent and larger scaled and the U.S. government is incentivized to provide developers and manufactures with the tools and legal obligation to deploy secure products on the market.

The App Association stresses that while narrow and well-defined exemptions may be necessary to maintain the flexibility of the DMCA, this petition and its recent right to repair predecessors misrepresent copyright and copyright-related protections as anticompetitive without more. Outside a narrow copyright-centered context, exemptions should not be enabled to weaken U.S. copyright laws. We appreciate the opportunity to provide additional comments in follow up to our statements in the USCO public hearing on Proposed Class 5 (Computer Programs – Repair).

Sincerely,



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