Supplemental Reply Comment of the Auto Care Association and the Automotive Parts Remanufacturers Association in Neither Support Nor Opposition to Proposed Exemption Under 17 U.S.C. 1201

(Proposed Exemption 21 Vehicle Software—Diagnosis, Repair, or Modification)

Commenter Information

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Proposed Class Addressed

Proposed Class 21: Vehicle Software—Diagnosis, Repair, or Modification.

Supplemental Statement of Auto Care Association and Automotive Parts Remanufacturers Association

The three rounds of comments established by the December 12, 2014 NPRM failed to adduce any reason, material to the section 1201(a)(1)(C) factors or to copyright law policies more generally, why the Class 21 petitions should not be granted. The additional round of permissive inputs also fails to establish, or to attempt to document, any such reason. If anything, the May 15, 2015 filing of the National Automobile Dealers Association ("NADA") and the May 12 filing of the Automotive Service Association ("ASA") seem aimed at *refuting* the arguments, made in the March 27 oppositions by GM, John Deere, and the Auto Alliance, that *other* provisions of federal, state, and local law effectively pre-empt the regulatory field with respect to safety and environmental concerns.[1]

[1] *See* discussion of these filings in the May 1 Short Comment of the Consumer Electronics Association at 2-3.

In our May 1 Short Statement, Auto Care Association and Automotive Parts Remanufacturers Association made these points:

- Vehicle software functions as vehicle parts. Repair shops access that software only to restore and adjust vehicle functionality – not copyrightable expression. The TPMs prevent access to non-copyrightable factual elements, data, and parameters that are not protectable by copyright. Repairing or optimizing vehicle performance often involves adjusting parameters in the software. These parameters consist of numerical values derived from analysis and observation of the effect on performance of vehicle parts and systems. These numerical values are not themselves protectable by copyright.

  - The technological protection measures applied to vehicle software serve no purpose cognizable under copyright law.

    - Nowhere do the commenters suggest that the purpose of the TPMs is to protect copyrightable expression against infringement of a right protected under Title 17. To the extent those purposes do not implicate copyright, and are governed by other federal and state laws, circumvention cannot be prohibited by or remedied under Section 1201.

    - Consumers own their cars, including the copy of vehicle operation software embedded in the car's Electronic Control Unit, and have a right of privacy to control distribution of their personal data over telematics software.

    - To the extent these TPMs are considered protectable under copyright, an exception must be granted based on fair use principles.

  - Congress intended Section 1201 as a means to protect expressive copyrighted works and applications in digital format, not as a lever to restrain competition in markets for vehicle parts and services. TPMs constrain legitimate aftermarket competition as sought by vehicle owners on whose behalf the exemption would be granted.

  - The MOU does not fully preserve consumer rights and choice, or competition in fulfilling such rights.[2] The ability of independent repair facilities and car owners to augment, adjust, or restore the performance of a vehicle frequently depends on the ability to access vehicle system software.

    - The MOU addresses diagnostic and repair information and tools, but not the ability to access the software to improve vehicle performance or to add functionality.

[2] As noted in our May 1 statement, Auto Care is a signatory to the January 15, 2014 MOU.

- The costs involved in acquiring these hardware and software tools pursuant to the MOU may be prohibitively expensive for many smaller shops. Until 2018, these costs are exacerbated by the need to acquire specialized proprietary tools from the manufacturer to effectuate the repairs, and such costs may not prove economical for a large repair shop; and may not be affordable for more than one make of automobile.

- In the absence of competition to develop alternative tools and software, manufacturers will continue to charge supracompetitive prices to sell access to software and repair tools.

The NADA May 15 filing does not attempt to refute any of these points made by Auto Care and APRA and others on the copyright-related merits of the inquiry. Rather, NADA argues (1) that non-copyright considerations should be and are the business of the Register of Copyrights and the Librarian under the DMCA, and (2) such extraneous considerations should be weighed in favor of opponents. However, six months after this proceeding was officially noticed on December 12, 2014, no law is argued in support of point (1), and no supporting declaration or other material is proffered in support of point (2).

The Register's Jurisdiction Extends Only to Concerns Grounded in Copyright. Any assertion that the DMCA somehow conferred on the Register and the Librarian of Congress the jurisdiction to weigh and rule on competing claims as to, e.g., public safety vs. consumer rights and market competition requires more support than NADA has mustered with its bald statutory citation. That the Librarian may *consider* such factors as it may find appropriate does not grant the Library discretion to expand its *jurisdiction* beyond copyright concerns. NADA cites no reason why the Copyright Office, the Register, and the Librarian should be considered to have such authority. ASA simply repeats manufacturers' undocumented assertions that the MOU should be considered sufficient, and that "the repair professionals we represent are ready, willing and able … to deliver quality diagnostic and repair services to their customers." Implicit here is the argument that, based on *copyright* considerations and Librarian expertise and jurisdiction, a

line can and should be drawn between those businesses able to benefit from the MOU, and those that are not. Nothing in the record can support such a line, even if the Librarian had the information, expertise, and jurisdiction to attempt to draw one.

Finally, the National Network To End Domestic Violence suggests that "remote unauthorized access to a victim's car" may lead to unfortunate and dangerous tampering. This argument asks the Librarian to simply mis-read the statute, which provides for an exemption only for "persons who are users" of the copyrighted work. *No exemption has been or can be sought* in this proceeding for third party meddlers – hence circumvention by others, no matter how deplorable (and already illegal[3]), *cannot be a basis for opposing* exemptions sought by the the users to whom the provision is actually directed. For the Librarian to make any determination to the contrary would be to further arrogate to the Library authority that was never delegated to it by the Congress.

Even if material, no declaration or documentation has been offered to support these late assertions. Six months after the NPRM, no opposing entity has attached any declaration or document (other than the MOU itself) to support the assertion that the Librarian should give weight to considerations that (1) are immaterial to copyright, (2) are beyond the Library's jurisdiction, and (3) would involve the weighing of public policies as to which the Library has neither the expertise nor the capacity to receive and evaluate private sector business information.

In summary, these petitioners have fully met their burden with respect to all matters pertinent to copyright. Those who filed opposing comments, and those who filed the late

[3] Remote tampering with another's computers is made a criminal and civil offense by the Computer Fraud and Abuse Act, 18 U.S.C. § 1030.

comments as to which the Office has allowed this opportunity for reply, have submitted no argument that the Office has the capacity to consider, and no material that the Office would have the capacity to weigh. Auto Care and APRA again thank the Register and the Copyright Office for considering these points.

Submitted: June 2, 2015