



UNITED STATES COPYRIGHT OFFICE

Long Comment Regarding a Proposed Exemption Under 17 U.S.C. § 1201

REPLY COMMENT March 14, 2018

ITEM A. COMMENTER INFORMATION

Consumer Technology Association*

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*Some CTA auto manufacturer member companies do not endorse this position.

ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 7: Computer Programs – Repair

ITEM C. REPLY

- (1) The Need for Relief, When Necessary, Was Established by Renewal of the 2015 Round Class 21 Exemption.

The Opposition filed by the Auto Alliance – asserting that CTA and Auto Care failed to introduce evidence of a “need” for relief – overlooks a foundational point of this NPRM:

[A]fter reviewing the petitions for renewal and comments in response, the Office concludes that it has received a sufficient petition to renew each existing exemption and it does not find any meaningful opposition to renewal.

Accordingly, the Register intends to recommend readoption of all existing exemptions in their current form.¹

¹ U.S. Copyright Office, 37 CFR Part 201 [Docket No. 2017-10], Exemptions to Permit Circumvention of Access Controls on Copyrighted Works, Oct. 26, 2017 (“NPRM”) at 9 – 10.

With respect to motor vehicles, the 2015 Class 21 exemption, whose renewal was not opposed by Auto Alliance and which was effectively renewed by this NPRM, reads:

Computer programs that are contained in and control the functioning of a motorized land vehicle such as a personal automobile, commercial motor vehicle or mechanized agricultural vehicle, except for computer programs primarily designed for the control of telematics or entertainment systems for such vehicle, when circumvention is a necessary step undertaken by the authorized owner of the vehicle to allow the diagnosis, repair or lawful modification of a vehicle function; and where such circumvention does not constitute a violation of applicable law
....²

Pursuant to the NPRM's statement of renewal of the exemption, which already included a finding of necessity, CTA on December 18 framed its support for a *new* exemption as follows:

EFF's experts and others who provided statements in support of the Class 21 petitions demonstrated to the satisfaction of the Register that:

- (1) Most of the circumvention necessary to overcome vehicular technical protection measures is for a purpose that does not violate copyright, and
- (2) Expert assistance, using tools, is necessary in order for a user to benefit from an exemption for such lawful use.

*In keeping with the Register's renewal of the Sixth Round exemption and its overall more efficient approach to this Round, CTA sees no need to re-prove what was established to the Register's satisfaction in the last Round.*³

- (2) The Renewed Class 21 Exemption Re Motorized Land Vehicles Already Is Limited by Necessity.

The Auto Alliance claim that formal enhancements to the industry "MOU" make further relief unnecessary misses the point of the "new" petition. In addition to being based on an established need, the 2015 Class 21 Exemption *also* applies only "when circumvention is a necessary step undertaken by the authorized owner of the vehicle to allow the diagnosis, repair or lawful modification of a vehicle function" Assuming that this will be a requirement of any "new" exemption, the *only* issues at stake in this round are those posed by the Copyright Office in its June 2017 Policy Study and in this NPRM:⁴

² See Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights at 248 – 249 (2015).

³ CTA Dec. 18 Comments at 4 (emphasis supplied, internal footnote omitted).

⁴ Section 1201 of Title 17, A Report of the Register of Copyrights, June 2017 ("Policy Study") at 61 - 62; NPRM at 42 - 43.

(a) Should “owner” be replaced by the more accurate and effective term “user,” which may subsume lawful and necessary expert assistance, and

(b) Should the acquisition of software tools, when necessary for effective utilization of this Exemption, be considered “trafficking”?

(3) The Industry MOU Pertains To Implementation of the New Exemption, Not To The Necessity of An Exemption.

While the 2018 model year enhancement of the industry MOU for motor vehicles, agreed to in 2014 and known to the Register in the 2015 Round, is constructive, it is not conclusive of the necessity for specific instances of circumvention.

- The MOU does not cover all automotive manufacturers.
- It may be implemented on an unnecessarily narrow or restrictive basis.
- It may be required when multi-brand tools would be far more useful for an independent dealer or repairer to remain viable.
- The MOU does not assist in lawful modification for enhancement of comfort or performance.
- Brand-specific licenses under the MOU may be offered on specific and restrictive terms, down to a VIN number and use, so as to preclude or make impractical other lawful assistance to consumers that a manufacturer may wish, for non-IP reasons, to effectively reserve to authorized dealers.

So long as the need for an exemption has been established, lawful conduct should not be precluded from the terms of the exemption simply because there are other avenues toward obtaining a similar result. Such an outcome would be against public policy and should be frowned upon in the absence of any compelling IP justification.

(4) Auto Alliance’s Opposition To The Copyright Office’s Formulation of Expert Assistance As A Lawful “User” Lacks Any Basis.

Nominally, the Auto Alliance Opposition is based on a formal insistence that there is no demonstration that a vehicle owner needs *expert assistance* to repair a software-enabled vehicle. This need, however, was well established in the record of the 2015 round. The only issue there was whether the Register felt empowered to include expert assistance in its formulation of the recommended relief. The Register (well aware of the MOU terms, *including* the 2018 model year provisions) would not have discussed this issue in its Policy Study and in this NPRM if this need had not been established. Nor would the NTIA have *included* a provision for such assistance in its own recommendation.⁵

As to the appropriateness under the DMCA of lawful expert assistance, Auto Alliance can offer only a *tautology* in opposition: That even when lawful under copyright law, under the DMCA it

⁵ See CTA Comment at 1.

is “clearly not permissible” and would “undermine the statutory framework.”⁶ This view, as the Copyright Office observed in its Policy Study, runs head-on into the language of the statute:

“This approach appears supported by section 1201(a)(1)(C)’s reference to permitting “users of a copyrighted work” to engage in circumvention, as opposed to “owners” of a work. 17 U.S.C. § 1201(a)(1)(C).”⁷

(5) Opponents Overlook The Value Of Telemetry Data.

Auto Alliance’s opposition to lawful data access appears grounded on its legal argument that a vehicle owner does not “own” her vehicle’s data or software. Whether or not that view (which broadly pertains to more than one Class in the current Round) is accepted, the issue for this “new” exemption is whether the vehicle owner, as a lawful *user*, is entitled, on a *nonexclusive* basis,⁸ to the benefit of the data generated by her own vehicle.

The Auto Alliance references to non-copyright concerns about lawful access are also beyond the scope of this proceeding. It is perhaps for such purposes that, on behalf of the Administration, the NTIA may offer advice. Moreover, as CTA pointed out in its NOI comments to the Copyright Office after the 2015 Round,⁹ there are other federal and state remedies for conduct not pertaining to intellectual property. *Just as the Register should not stay its hand out of concern over trafficking that it has no authority to exempt, it should not limit its exemptions out of concern over conduct that does not engage intellectual property rights, hence lies outside the ambit of the DMCA.*

Just as the replacement of analog tools by software should not be an occasion to cut back consumer options and choice in repair of her vehicle, neither should the migration from physical ports to telemetry. *A consumer who has repair and information options based on data appearing at a physical port should not lose these options just because the data is now provided by telemetry.*

(6) There Remains No Copyright Basis For Excluding Access To Vehicular Storage Capacity.

The speculative objections of the Auto Alliance provide no basis for the Register to exclude from the exemption conduct that the Supreme Court has established is lawful when done

⁶ Auto Alliance Opposition at 9.

⁷ Policy Study at 61, n.335.

⁸ CTA stressed in its Comments at 3 that this proceeding does not pertain to the right of the vehicle’s manufacturer (or others not authorized by the vehicle owner) to data generated in the course of the vehicle’s operation, and in this proceeding CTA takes no position on such questions.

⁹ U.S. Copyright Office Docket No. 2015-8 Section 1201 Study: Notice of Inquiry and Request for Public Comment, Comments of the Consumer Technology Association, March 3, 2016 at 6 - 7.

for the purpose of making storage capacity available to conduct that may be infringing or non-infringing. As CTA argued after the 2015 round:

As a matter of copyright law, the Office’s rationale is also directly contrary to the law as established by the Supreme Court in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984). The Supreme Court held in *Sony* that it is lawful to provide consumers with a device that can store both infringing and non-infringing content, so long as there are commercially significant non-infringing uses for the stored content. . . . Hence the only copyright interest or concern that the Office could have had would be about a closed storage system becoming open to storing infringing content. It was clearly established in *Sony* that allowing such capacity into the marketplace is not copyright infringement, even where accomplished by a third party with a commercial interest.¹⁰

(7) Acquisition of Software Tools Necessary For Lawful Repair Is Not Trafficking.

As CTA has argued in its NOI comments¹¹ and in its December Comments at 4 – 5, the Register would vitiate the value of exemptions by equating the acquisition and use of a software tool with “trafficking” in one. CTA discussed this subject at length as the primary focus of its October 27, 2016 Further Comments.¹² For the many reasons expressed there, the Register should not refrain from granting an otherwise worthy exemption based on any concern that an appearance of suborning “trafficking” could be entailed.

¹⁰ *Id.* at 7 – 8.

¹¹ *Id.* at 8 – 10.

¹² U.S. Copyright Office [Docket No. 2015–8] Section 1201 Study: Request for Additional Comments, Sept. 27, 2016, Further Comments of the Consumer Technology Association at 2 – 6 (“Further Comments”).