



UNITED STATES COPYRIGHT OFFICE

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

ITEM A. COMMENTER INFORMATION

Auto Care Association

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ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 7: Computer Programs – Repair

ITEM C. OVERVIEW

These Comments by Auto Care Association (“Auto Care”) support our joint petition with Consumer Technology Association (“CTA”) for a new exemption for circumvention with respect to maintenance, repair, and upgrade of motor vehicles. Auto Care joined CTA, iFixit, and the Owners’ Rights Initiative in petitioning for renewal of the previously-granted 2015 “Class 21” exemption, now renewed. In these Class 7 comments Auto Care remains focused only on motorized land vehicles – specifically, on the need for a new exemption that is understood to include expert assistance, with necessary tools, at the direction of a lawfully entitled user.

In the 2015 Round, NTIA, on behalf of the Administration, recommended the grant of the Class 21 exemption for circumvention “by or at the request” of a lawfully-entitled user.¹ After

¹ “Computer programs embedded in motorized land vehicles or agricultural machinery, when circumvention is initiated by or at the request of the owner of the vehicle or machinery, in order to make repairs or modifications to the vehicle or machinery. This exemption does not obviate the need to comply with other applicable laws and regulations, such as those relating to vehicle safety or environmental protection.” NTIA 2015 Round Recommendations to Register.

receiving comments on its Notice of Inquiry² and at its 2016 Roundtables, the Register in its 2017 Report³ and in this Notice of Proposed Rulemaking⁴ observed that a more generous and practical definition of “user” might produce an outcome more useful to users than the previous exemption, yet still consistent with the text of Section 1201(a). In these Comments, Auto Care focuses on how to apply the Register’s forward-looking insights in the context of motor vehicle maintenance, repair, and modification.⁵ Our main points are:

- The Register is correct that an independent dealer or servicer is necessarily a “user” as contemplated by the statute.
- The auto industry Memorandum of Understanding does not and cannot address all the tools necessary for independent dealers and servicers to compete efficiently and effectively with franchised dealers who are devoted to a single brand. Moreover, it subjects independent competitors to prohibitive costs (by requiring them to purchase OEM-approved tools and parts at OEM-imposed prices) that could be avoided if circumvention tools and parts could be created in the competitive aftermarket.
- An independent dealer or servicer application of a software tool at the vehicle owner’s direction for a purpose lawful under copyright law should not be considered “trafficking,” so long as the dealer or servicer does not commercially distribute that tool.
- The Register should not exclude circumvention to obtain access to “telematics” data. Telematics data is not subject to copyright. To the extent any transmission might be considered subject to copyright, the vehicle’s owner would have a superior claim to the contents’ ownership, and at least a clear right to its fair use.
- The 2015 Class 21 exclusion of access to the storage capacity of “infotainment” systems should not be repeated. Gaining access to the storage capacity of a device one owns is neither a direct nor a secondary infringement of any copyright.

ITEM D. TECHNOLOGICAL PROTECTION MEASURE(S) AND METHOD(S) OF CIRCUMVENTION

Original equipment manufacturers (“OEMs”) increasingly use firmware and software to control the function and operation of motor vehicle parts, as well as to diagnose faults or breakdowns.

² See, e.g. U.S. Copyright Office Docket No. 2015-8 Section 1201 Study: Notice of Inquiry and Request for Public Comment, Comments of Auto Care Association, March 3, 2016 (“Auto Care 2016 Comments”).

³ Section 1201 of Title 17, A Report of the Register of Copyrights, June 2017 (“June Report”) at 61 - 62.

⁴ 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 42 - 43.

⁵ Auto Care will not revisit issues, such as the essential fair use nature of auto repair and the general merit of expert assistance that, in the renewal of the 2015 Class 21 exemption and the texts cited above, may be considered as effectively resolved, unless new objections arise in opposing comments.

Software that controls function and operation is the equivalent of a physical part; diagnostic software is the equivalent of a physical meter, gauge, or tool. The law applicable to physical parts and tools should therefore apply where the manufacturer elects to implement mechanical functions via software. User-directed auto maintenance, repair, and upgrade can no longer sensibly be discussed in any other context.⁶

The Register is Correct That Independent Dealers and Servicers May be Identified Under Section 1201(a) as Users.

Specialists equipped with software tools now work at the direction of the home driveway mechanic who once bought and installed replacement parts. As Auto Care reported in its 2016 Comments, “new car buyers in 2015 will keep their vehicles for 6.5 years, and used car buyers keep those cars on the road for 5.3 more years – a total of more than 11-1/2 years, and more than 4 years longer than the average in 2006.”⁷ Auto Care explained:

It generally is infeasible for the ordinary consumer to repair software-enabled parts. OEMs intentionally design vehicles to deter access to software except through the use of specialized and costly tools. Those making repairs also need to understand how software for a specific part may interact with other software controlled vehicle systems. Thus, the aftermarket repair and customization industry provides much-needed and cost-effective services that consumers often cannot do for themselves.⁸

The Auto Industry “MOU” is Necessary but Not Sufficient for Economical Assistance to Owners.

The 2014 Memorandum of Understanding⁹ that gives independent dealers access to OEM software is increasingly useful to independent dealers and repair shops,¹⁰ but is not and cannot be sufficient for them to lawfully and efficiently serve consumers. The MOU requires standardization of ports and interfaces, but the software, though now licensed, remains proprietary and brand-specific. Independent shops, most of which must service a variety of brands to stay in business, remain at a disadvantage compared to franchised dealers. The franchised dealer can maintain a single set of expensive software tools, whereas the independent servicer is obliged to purchase proprietary access, including TPM circumvention rights, across many brands and multiple models. These costs rapidly become prohibitive for independent servicers, thus compelling the servicer to choose whether to send the customer to the franchised

⁶ See, e.g., Comments of Auto Care Association, *In the Matter of Section 1201 Study*, Dkt. 2015-8 at 4-6; Comments of Auto Care Association, *In the Matter of Software-Enabled Consumer Products*, Dkt. 2015-16 (“Auto Care 2016 Comments”) at 1-4; Copyright Office Roundtable discussion transcript, May 20, 2016, at 17 – 75.

⁷ Auto Care 2016 Comments at 4, citing data from the Institute of Highway Safety.

⁸ *Id.* at 5.

⁹ See Memorandum of Understanding, Jan. 25, 2014, http://www.nastf.org/files/public/OtherReference/MOU_SIGNED_1_15_14.pdf.

¹⁰ Starting with the 2018 model year, the MOU affords access to most OEM repair, as well diagnostic, software.

dealer or incur a loss to keep the customer. Franchised dealers that compete to re-sell or service additional auto brands would better serve their customers through lawful uses of TPM circumvention tools.

As Auto Care reported in its 2016 Comments at 6, TPMs also are used to control whether refurbished parts from one vehicle can be installed on another vehicle of the same model. They have also been used to control which servicers are authorized to install a new part.

The Register, given its insight into the nature of “user,” should appreciate that the auto industry MOU, while a laudable and necessary step, is far from sufficient to afford consumers a range of economical repair options equivalent to those they enjoyed when cars were strictly mechanical.

Use of a Tool at the Direction of a Vehicle Owner is Not Trafficking.

Neither law nor technology requires that independent dealers be prohibited from using software that can diagnose and fix more than one OEM’s brand or model. In many cases, the constraint is simply that an OEM has chosen to restrict access to tools on a brand-specific basis. It would not impair any OEM’s *copyright* interests for an independent service shop or dealer to use software, including circumvention tools, that can diagnose, maintain, or fix more than one brand of automobile. Expert users require expert tools. Such shops are not in the business of copying software or firmware for any commercial purpose other than assisting the vehicle’s owner, at his or her direction; an exemption can be limited to this lawful purpose.

The use of tools is not affected by whether they have previously been “trafficked,” so long as they are applied at the instruction and on behalf of a vehicle owner for a lawful purpose. Whether a tool is obtained under MOU or is otherwise invented or acquired, the Librarian’s Section 1201(a) jurisdiction is identically limited to *use*. The Librarian was never given any jurisdiction to determine whether, prior to use for a lawful purpose, a tool has ever been trafficked.¹¹

Circumvention of TPMs to Enable a Vehicle Owner’s Access to His Own Vehicle’s Telematics Data is Necessary and Lawful.

Of the legal and privacy issues that may pertain to the telematics data generated by an owner’s operation of a motor vehicle, the least controversial should be the entitlement of the owners themselves to access to this data. Whether access should be available to others is beyond the scope of this proceeding. The collected data pertains to how and where the owner drives the vehicle, the diagnostic fault codes that might be available through the OBD port, and the number of miles driven. The owner is entitled to it. Nothing in copyright law or the DMCA should prevent the owner’s access to her own data.

There is little reason to believe that such data is copyrighted; data is generally not subject to copyright.¹² Even if copyrighted, such data’s private transmission to the vehicle’s owner, or to a servicer acting at the owner’s direction, is not a reproduction or a public performance. And even

¹¹ See Copyright Office Roundtable discussion transcript, May 20, 2016, at 20 – 21 (Besek).

¹² *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

if somehow infringing, the owner’s access to data about her own driving or her own vehicle would be an obvious fair use.

In the 2015 Class 21 exemption the Register excluded telematics by asserting that there was no evidence of need for telematics data. It would have been more useful, and should be the result in the current Round, to declare instead, as the Librarian has in previous instances with respect to access to content in the public domain, that such content is “beyond the scope of the rulemaking” because it is not covered by copyright.¹³ As to the industry need for this result, or for an exemption should the Register not wish to go this far, there is in fact plentiful evidence. Due to a growing trend of vehicle manufacturers restricting the amount of information available through the OBD port where most shops currently obtain diagnostic codes, independent servicers, as well as users, need data available from telematic systems to maintain the vehicle’s condition and safety. That is why this data is increasingly being sent to franchised dealers, so that they can solicit vehicle owners for service. Moreover, access to telematics capabilities will increasingly be necessary for diagnosis and for uploading software modifications, updates, and repairs to the vehicle as more and more vehicle manufacturers move to over the air software updates. Auto Care is sufficiently concerned about this issue that Auto Care is part of a public affairs campaign aimed at entitling vehicle owners to data about their own vehicles.¹⁴ There is no basis in law for the Librarian to impair such access by excluding telematics data from lawful TPM circumvention.

There is No Copyright Law Basis to Deny a Vehicle Owner Access to Her Own Vehicle’s Storage Capacity for “Infotainment” Content.

Auto Care agrees with CTA’s analysis, in CTA’s 2016 NOI Comments at 7 – 8, that the Register’s exception for access to “infotainment” storage capacity was contrary to clear Supreme Court precedent. CTA explained:

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. In the Class 21 exemption discussion, it was only agricultural equipment provider John Deere that even suggested, without

¹³ See Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights at 13 – 15 and n. 66, citing similar outcomes in 2010 and 2003 Final Rules. (Oct. 2012). Auto Care suggested a similar outcome in its 2015 Class 21 Comments based on similar precedent: “The Register previously has held that no exemption would be needed to the extent that necessary reverse engineering activities for the purpose of promoting interoperability already may be protected more broadly by Section 1201(f).³ [n3:] See Recommendation of the Register of Copyrights in RM 2002-4; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, at 172-183 (Oct. 27, 2003).

¹⁴ See video, “Your Car. Your Data. Your Choice.” <https://yourcaryourdata.org/#homeIndustry>

proof, that circumvention could result in infringing material being *imported* into vehicle infotainment storage.¹⁵ 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.

Moreover, *even if* Supreme Court precedent were otherwise, for there to be contributory infringement there must be evidence of direct infringement. There was no evidence or other basis in the record for the Register to presume that material added to storage – such as copies of entertainment content the consumer owned or created or personal photographs – would be infringing, or that access to one’s own infotainment system would be for other than the user’s lawful purpose for which an exemption was sought.

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGEMENT USES

As Auto Care notes above, the necessary and lawful nature of circumventing TPMs for purposes of vehicle maintenance, repair, and upgrade has already been established in the 2015 Class 21 exemption, the renewal of that exemption, the Register’s interim study, and this NPRM. The only issue for this Round *with respect to motor vehicles* is whether any difference is made by construing “user” as including expert assistance at the direction or at the request of the vehicle owner. For this purpose only a summary recapitulation is necessary:

- *Whether the proposed class includes at least some works protected by copyright.*

While software technically can be considered a “literary” work, it is widely agreed (including by Members of Congress involved in passing the legislation) that protection of this sort of functional software from consumer access was not foreseen as a purpose of the DMCA.¹⁶ Nor do all the TPMs applied to software protect copyright-eligible content – many shield data, error codes, and other status indicators from being read by anyone other than an OEM-licensed person. Nor is copyrighted software necessarily copied when access is gained for purposes of running the software in aid of repair. And even when copied, the copying for purposes of repair is functional in nature, rather than for purposes of independent commercial exploitation.

- *Whether the uses at issue are noninfringing under title 17.*

The Register has already concluded that the uses involved in auto repair are noninfringing when undertaken by the vehicle owner. Access to the software often involves activity that implicates no protectable copyright interest at all, such as obtaining or altering non-copyrightable data parameters used by the software to control or calibrate performance, or accessing the software to replace it with another program. The purpose and status of these noninfringing uses do not

¹⁵ No claim of inducement, contributory, or vicarious liability was made – and it would be fatuous to suggest that a *user* is capable of inducement with respect to her own vehicle’s radio.

¹⁶ *See* the relatively recent comments of Members of Congress quoted in CTA’s 2016 NOI Comments at 3 – 6.

change when the vehicle owner receives expert assistance to enable this use – regardless of whether the expert makes use of some tool.

- *Whether users are adversely affected in their ability to make such noninfringing uses or, alternatively, whether users are likely to be adversely affected in their ability to make such noninfringing uses during the next three years.*

In renewing the 2015 Class 21 exemption the Register has already determined these issues in favor of a user exemption.

- *Whether the statutory prohibition on circumventing access controls is the cause of the adverse effects.*

In renewing the 2015 Class 21 exemption the Register has already determined this issue in favor of a user exemption.

I hereby affirm that I have verified the information set forth in these Comments with members of the Auto Care Association, and that the statements made are true and correct to the best of my present knowledge.



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