

**LONG COMMENT REGARDING
A PROPOSED EXEMPTION UNDER 17 U.S.C. § 1201
ROUND 3, MARCH 14, 2018**

ITEM A. COMMENTER INFORMATION

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ITEM B. PROPOSED CLASS ADDRESSED

Class 7 (Computer Programs – Repair)

ITEM C. OVERVIEW

This is the second set of comments submitted on behalf of The Motor & Equipment Manufacturers Association ("MEMA") during the seventh triennial Digital Millennium Copyright Act ("DMCA") review. For additional information about MEMA and its support of the proposed Class 7 exemption, please see MEMA's Long Form Comment dated December 18, 2017.

ITEM E. ASSERTED ADVERSE EFFECTS ON NON-INFRINGEMENT USES

Opponents of the proposed Class 7 exemption raise several concerns. The Alliance of Automobile Manufacturers ("Auto Alliance"), for example, argues that a less-restrictive exemption is impermissible because third party circumvention services are prohibited under the DMCA; that proponents have failed to adequately demonstrate that consumers have been adversely affected by the limited scope of the existing exemption; and, that a less-restrictive exemption is not necessary because of the 2014 Memorandum of Understanding ("MOU") between original equipment manufacturers ("OEMs") and representatives of the automotive aftermarket.¹

The Copyright Office demonstrated during the sixth triennial review that it is more than capable of carefully calibrating the temporary anti-circumvention exemptions to balance the sometimes-competing priorities of consumer safety; protection of valuable intellectual property; and, protection of consumer choice in the automotive aftermarket, which includes remanufactured goods. MEMA is not proposing that the Copyright Office issue a new exemption that would disregard the DMCA's anti-trafficking provisions or ignore the very legitimate concerns raised by the Copyright Office or opponents during the current or previous rulemakings.

¹ See Auto Alliance, Long Comment Regarding Proposed Class 7 (Feb. 12, 2018).

Rather, MEMA believes that the Copyright Office can, as it did during the sixth triennial review, issue a narrowly-tailored exemption for vehicle diagnosis, repair, or modification that better effectuates the intent of the current vehicle repair exemption while remaining faithful to existing law.

i. A less-restrictive exemption for vehicle diagnosis, repair, and modification is permissible under existing law

Opponents of the proposed Class 7 exemption argue that a less-restrictive exemption would violate the DMCA’s anti-trafficking provisions.² MEMA does not support a broad new exemption that would permit the creation and distribution of tools primarily designed to circumvent Technological Protection Measures (“TPMs”) and this is not what MEMA is proposing.

Under the existing exemption for vehicle diagnosis, repair, and modification, circumvention of TPMs is only permissible “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.” The Copyright Office felt it necessary to expressly restrict the eligible exemption beneficiaries in this manner due to concerns with the DMCA’s anti-trafficking provisions. Subsequently, however, the Copyright Office acknowledged that the anti-trafficking provisions likely do not prevent it from allowing exemption beneficiaries to seek third party assistance in certain circumstances.

For example, the Copyright Office noted after the sixth triennial review that it is under no obligation to define the class of eligible exemption beneficiaries as restrictively as it did in the existing repair exemption and that it has taken this approach in other instances, including with the current regulatory exemption for assistive technology.³ In addition, the Copyright Office has now acknowledged that in adopting the Unlocking Act, Congress did not intend to create a negative inference against the lawfulness of third-party assistance generally.⁴ Accordingly, MEMA believes, as the Copyright Office itself has suggested, that existing law does not prevent the Copyright Office from issuing a less “unduly narrow definition of exemption beneficiaries.”⁵

What would be the practical effect of adopting the Class 7 exemption as proposed by MEMA? Third party service providers would be able to assist vehicle owners with the diagnosis, repair, or modification of their vehicles. For example, a consumer whose vehicle is displaying a check engine light could bring their vehicle into an independent auto repair shop, the technician could circumvent access controls on the relevant ECU, the technician could create a temporary copy of the software contained in the ECU, review the data in the ECU to diagnose any problems with the check engine light or the vehicle’s sensors, and reload the ECU software onto a new or remanufactured replacement part. If the technician were to determine that the ECU hardware was

² *Id.* at 7.

³ U.S. Copyright Office, Section 1201 of Title 17, A Report of the Register of Copyrights, at 61 (2017).

⁴ *Id.* at 59.

⁵ *Id.* at 62.

damaged or broken, then under the proposed exemption, the technician could transfer the ECU software onto a replacement part and reinstall the working ECU back into the vehicle.

These and similar services are expressly authorized under Section 117 of the Copyright Act, which allows the owner of a copy of a computer program to “authorize” a third party to make a copy of a computer program, subject to certain limitations.⁶ In 2016, the Copyright Office noted that if a consumer owns a copy of software that is embedded in a product, then “section 117(a) provides broad protections for repair and tinkering activities.”⁷ The Copyright Office goes on to note that under Section 117(a) “the owner of the copy of a computer program may make a new copy of that program or create an adaptation of that program if the ‘new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine,’ and ‘is used in no other manner’” and that “the owner may authorize a third party—such as a repair technician—to make an additional copy or create an adaptation on his or her behalf.”⁸

In the same report, the Copyright Office also rejected the argument that a consumer is not the “owner” of a copy of the software, noting, “[f]or example, specialized software controlling certain mechanical components of an automobile, like windshield wipers or transmission, may essentially be invisible to the consumer. In such cases, it would be unusual to characterize the sale of the automobile as involving the licensing of that software for purposes of the Copyright Act.”⁹

The Copyright Office’s “unduly narrow” definition of exemption beneficiaries in the existing repair exemption renders Section 117 virtually superfluous for motorists. Conduct that Congress expressly authorized and that the Copyright Office acknowledged is legal under copyright law (namely, fixing malfunctioning computer programs, transferring programs to a new operating system, and adding new features to make the software more useful to its owner),¹⁰ currently cannot be undertaken by independent automotive repair technicians without threat of legal liability under the DMCA’s anti-trafficking provisions.

Ironically, by considering and then declining to issue the vehicle repair exemption during the sixth triennial review for third parties operating “on behalf of” or “at the direction of” consumers, the Copyright Office raised doubts about whether conduct that is clearly permissible under Section 117 is not permissible under the anti-trafficking provisions. Therefore, in order to remove the threat of liability to independent auto repair technicians, MEMA urges the Copyright Office to adopt the proposed Class 7 exemption.

⁶ 17 U.S.C. § 117.

⁷ U.S. Copyright Office, Software-Enabled Consumer Products, A Report of the Register of Copyrights, at 36 (2016).

⁸ *Id.* (quoting 17 U.S.C. § 117(a)).

⁹ *Id.*

¹⁰ *Id.*

ii. Most consumers cannot take advantage of the existing exemption for vehicle diagnosis, repair, and modification

While MEMA respects the Copyright Office’s thoughtful attempt to strike a balance between legitimate diagnosis, repair and modification activities and the DMCA’s anti-trafficking provisions, the resulting exemption is unworkable for the majority of consumers.

The do-it-yourself (“DIY”) community notwithstanding, the majority of consumers do not have the desire or know-how to service their own vehicles. Instead, over 70 percent of all vehicles are serviced by trained and knowledgeable technicians, either at an OEM dealer or at an independent repair facility. This is especially true in light of an aging motoring-public and the changing technology found in today’s vehicles. Moreover, consumers are keeping their vehicles longer; the average vehicle age in the U.S. is 11.6 years.¹¹ Even consumers who may feel comfortable changing their own oil or fixing a brake light are generally going to delegate the repair of any number of different vehicle control modules (window module, seat module, engine module, etc.), to their preferred repair outlet.

Under the existing exemption for vehicle diagnosis, repair, and modification, the Copyright Office has made it impossible for independent service providers to circumvent access controls on vehicle ECUs without risk of DMCA liability, even when acting with express instructions from a vehicle owner.

By only allowing circumvention of access controls “by the authorized owner of the vehicle,” the existing exemption deprives consumers of the ability to delegate their rights as owners of copies of the software to trained independent repair facilities of their choosing. Furthermore, the exemption is virtually rendered useless to most motorists; the vast majority of whom prefer service and maintenance outside the OEM dealer network.

iii. The 2014 Memorandum of Understanding does not solve the problem

Opponents of the proposed Class 7 exemption argue, as they did during the sixth triennial review, that the 2014 Memorandum of Understanding and the Right to Repair Agreement provide independent repair facilities and individual vehicle owners with access to the necessary diagnostic and repair tools.¹² This argument is not persuasive.

As the Copyright Office correctly concluded after the sixth triennial review, the MOU “cannot fully address the cited adverse impacts” stemming from the prohibition on circumvention.¹³ For instance, not all OEMs are party to the MOU and certain types of vehicles, such as mechanized agricultural vehicles, motorcycles and RVs, are not covered by the MOU. This fact was also noted in the record during the sixth triennial review.¹⁴

¹¹ Bureau of Transportation Statistics, National Transportation Statistics: “Average Age of Automobiles and Trucks in Operation in the United States” (Updated July 2017).

¹² See Auto Alliance, Long Comment Regarding Proposed Class 7, at 3. (Feb. 12, 2018).

¹³ U.S. Copyright Office, Section 1201 Rulemaking: Sixth Triennial Proceeding, Recommendation of the Register of Copyrights, at 240 (Oct. 2015).

¹⁴ *Id.* at 225-26.

Moreover, rather than making it easier for consumers to have their vehicles repaired or modified, the MOU, in some ways, makes this task more difficult. For example, vehicles are typically sold embedded with all of the necessary software. If, after a malfunction, a mechanic determines that a part must be replaced, the MOU permits the OEMs to require the replacement part be re-programmed and to charge the associated programming fees, even where a hardware problem caused the malfunction and the existing software was fully operational. The proposed exemption enables consumers to access and—subject to the First Sale Doctrine—use their existing copies of software, thus avoiding the need to purchase duplicative copies as part of the repair process. The MOU is entirely silent on this issue and, as a result, enables OEMs to require consumers to purchase software every time they repair parts, even if the repairs are not caused by software issues.

For these reasons, the MOU was, and continues to be, insufficient to fully mitigate the adverse effects of the DMCA’s anti-circumvention provisions on consumers.

iv. Conclusion

MEMA believes that the vehicle repair exemption adopted after the sixth triennial review effectively addressed concerns related to consumer safety and regulatory compliance. Unfortunately, however, most of the exemption beneficiaries will not be able to take advantage of the exemption without assistance from trained third party technicians.

As MEMA noted in its first set of comments, the U.S. Supreme Court’s decision in *Impression Products v. Lexmark* provides important guidance here. In that case, the Court cautioned against allowing the claims of rights owners to disrupt the “smooth flow of commerce,” while expressly analogizing to copyright law and the automotive aftermarket.¹⁵ It is apparent—at least with respect to the automotive market—that the anti-circumvention provisions and the unduly narrow existing exemption are disrupting the smooth flow of commerce and adversely affecting consumers’ ability to maintain their vehicles.


MEMA is confident that the Copyright Office can once again strike an appropriate balance between the rights of vehicle owners and the rights of intellectual property owners. One way to do so would be to define exemption beneficiaries less restrictively, while retaining the other restrictions in the existing exemption for vehicle diagnosis, repair, and modification. Such an exemption would not provide a green light to companies to traffic in products designed to circumvent access and copy controls. It would merely recognize that existing law already authorizes consumers to have their vehicles repaired and serviced by vehicle repair technicians of their choosing and give them a means of doing so.

¹⁵ *Impression Prod., Inc. v. Lexmark Int’l, Inc.*, 137 S. Ct. 1523, 1536 (2017) (“[D]ifferentiating the patent exhaustion and copyright first sale doctrines would make little theoretical or practical sense: The two share a ‘strong similarity ... and identity of purpose,’ and many everyday products - ‘automobiles, microwaves, calculators, mobile phones, tablets, and personal computers’ - are subject to both patent and copyright protections.”) (citations omitted).

Long Comment – DMCA Seventh Triennial Rulemaking
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