

Before the
**United States Copyright Office,
Library of Congress**

In the Matter of)	
)	
)	
Exemption to Prohibition on)	Docket No. 2014-07
Circumvention of Copyright Protection)	
Systems for Access Control Technologies)	
)	

PROPOSED CLASS #21 PROPONENTS

RE: “ADDITIONAL WRITTEN MATERIALS SUBMITTED FOR CLASS 21”

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The USC Intellectual Property & Technology Law Clinic hereby responds to each of the four “Additional Written Materials Submitted for Class 21” submitted by the Alliance of Automobile Manufacturers (“Auto Alliance”) at the May 19, 2015 hearing.

I. THE STATEMENT OF STEVE DOUGLAS

Steve Douglas makes two primary contentions in his statement: (1) that vehicle owners have “no need to circumvent access controls on Electronic Control Units (ECUs)” in order to diagnose or repair their vehicles;¹ and (2) that permitting an exemption allowing vehicle owners to modify the ECUs on their vehicles “could put lives at risk.”² Both of these contentions lack merit.

First, the supposedly viable alternatives Mr. Douglas refers to – i.e., the Right to Repair MOU and the 2002 ‘Dorgan letter’ – have no application to agricultural machines, which represent an enormous portion of the proposed class. Counsel for the Auto Alliance expressly admitted this point during the hearing. Even in the automobile sector, Mr. Douglas is incorrect that all the necessary information and tools have been available at a “fair and reasonable price.” At the hearing, Craig Smith testified that there are a number of instances where the tools made available by OEMs are insufficient; and that the prices for those tools can be prohibitive in some circumstances.

Second, Mr. Douglas’ speculation about air pollution and public safety fails both because it lacks evidentiary support, and also because copyright law does not seek to regulate public health and safety. On this latter point, the Ninth Circuit’s recent decision in *Garcia v. Google* is particularly instructive.³

In *Garcia*, an actress sought to enjoin YouTube from hosting an offensive film based on her claim that she was an “author” (for copyright purposes) of a five-second portion of the film involving her performance.⁴ The Ninth Circuit rejected the actress’ claim of irreparable harm based on her receipt of death threats, “severe emotional distress” and “the destruction of her career and reputation,” because these harms were “untethered from – and incompatible with – copyright and copyright’s function as the engine of expression.”⁵ Although the Ninth Circuit was “sympathetic to her plight,” it emphasized that the actress’ claim for relief was “grounded in copyright law, not privacy, emotional distress, or tort law” and that a copyright owner’s damages must be related “to the value and marketability of their works” in order to be cognizable.⁶

¹ Statement of Steve Douglas, p. 2.

² *Id.* at p. 4.

³ *Garcia v. Google, Inc.*, No. 12-57302, 2015 WL 2343586, at *8 (9th Cir. May 18, 2015).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

Mr. Douglas' speculation about air pollution and public safety presents a similar "mismatch" between the potential harm alleged (i.e., safety and environmental harm), on one hand, and the copyright interests at stake (i.e., the interests of copyright holders in protecting the value of their works and the rights of users of those works to make fair and noninfringing uses) on the other hand.⁷

II. THE LETTER FROM THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION

NADA's letter focuses on two things: (1) "the integrity and security of the automobile data ecosystem and that of the American automotive infrastructure,"⁸ and (2) "the potential safety risks to *dealership employees* who are working on a vehicle with undisclosed software modifications."⁹ Like Mr. Douglas' assertions, these concerns lack both evidentiary support and relevance.

NADA fails to offer any evidence that the proposed exemption will cause "unnecessary and potentially profound safety, environmental, and other risks."¹⁰ Indeed, the record lacks any evidence indicating that the exemption would incentivize vehicle owners to make dangerous modifications to vehicle software. As NADA itself concedes, the "overwhelming majority of vehicle owners do not wish to tamper with the safety, emissions, or other computerized functionality of their vehicle."¹¹ This fact alone makes the harmful results that NADA envisions highly unlikely.

NADA also fails to provide any evidence in support of its contention that permitting software modifications will lead to "numerous ways that dealership employees could be physically injured or endangered."¹² As discussed at the May 19 hearing, dealers can simply test ECU software to see if modifications have been made in much the same way dealers can check a vehicle's physical components.

Moreover, this alleged safety concern, as well as NADA's alleged concern for "the safety of the driving public," both have nothing to do with copyright law.¹³ Even if NADA had presented some evidence of the likelihood of such risks (it has not), NADA has failed to establish that Congress intended for the DMCA to regulate public health and safety.

⁷ *Id.* at 1.

⁸ Letter from NADA, p. 1.

⁹ Letter from NADA, p. 2 (emphasis in original).

¹⁰ Letter from NADA, p. 3.

¹¹ *Id.*

¹² *Id.* at 2.

¹³ *Id.* at 3.

III. THE LETTER FROM THE AUTOMOTIVE SERVICE ASSOCIATION

The concerns of the ASA¹⁴ also mirror those of Steve Douglas and NADA. The ASA opposes the new exemption because it allegedly threatens the effectiveness of the Right to Repair MOU; and as such, the ASA contends that “further government intervention is not required.”¹⁵ This contention lacks merit.

As discussed above, the Right to Repair MOU only relates to vehicles “designed for transporting persons or property on a street or highway.”¹⁶ As Opponents concede, it does not apply to any types of agricultural machinery. Farmers simply do not have equal access to independent repair facilities “on fair and reasonable terms.” Opponents do not even purport to contend that such an agreement exists for them.

IV. THE LETTER FROM THE NATIONAL NETWORK TO END DOMESTIC VIOLENCE

The National Network to End Domestic Violence (NNEDV) asserts that the proposed exemption will lead to “unintended consequences,” i.e., an environment in which it is “easier for violent partners and predators to monitor, stalk, and harm victims.”¹⁷ This assertion lacks merit for at least three reasons.

First, while the NNEDV’s argument may be emotionally compelling, the exemption’s possible implications surrounding domestic violence have no logical nexus to federal copyright law. Proponents do not deny the horrors of domestic violence and agree that eliminating domestic violence should be a national priority. But as the Ninth Circuit observed in *Garcia*, issues of violence and personal safety have no remedy in copyright law. Opponents continuously emphasize that the Librarian has the authority to review “such other factors as the Librarian considers appropriate,”¹⁸ but cite no authority for the proposition that Congress intended these factors to include non-copyright interests.

Second, NNEDV has not presented any evidence to show that granting the exemption would give abusers “more power over victims” and increase “the risk of remote unauthorized access to a victim’s car.”¹⁹ For this to be a tangible risk, an abuser must first have enough technical expertise to hack into a vehicle’s complex software

¹⁴ In its letter to the Copyright Office, ASA stresses its “independence.” We note that ASA’s corporate affiliates (i.e., “businesses that supply goods, equipment or services to the automotive service industry and have generously chosen to support ASA at a level beyond the associate level of membership”) include Ford Motor Company, (see <http://asashop.org/membership/meet-our-members/corporate/directory/>), a member of the Auto Alliance.

¹⁵ Letter from ASA, p. 2

¹⁶ R2R Agreement, § 1.

¹⁷ Letter from NNEDV, p. 1.

¹⁸ 17 U.S.C. § 1201(a)(1)(C)(v)

¹⁹ Letter from NNEDV, p. 1-2.

without the victim's knowledge. NNEDV has not provided evidence of even one instance of this ever occurring.

Third, our society already has a legal system for dealing with domestic abusers: criminal law. If someone wishes to abuse another, a minor monetary fine for violating the DMCA will probably not deter such behavior. Copyright law seeks to foster innovation; not to address violent crime.