



July 12, 2018

VIA E-MAIL ONLY ([REGANS@COPYRIGHT.GOV](mailto:REGANS@COPYRIGHT.GOV))

Regan A. Smith  
General Counsel  
U.S. Copyright Office  
Library of Congress  
101 Independence Avenue, SE  
Washington, DC 20559-6000

**Re: Docket No. 2017-10**  
**Exemptions to Prohibition Against Circumvention of Technological Protection Measures Protecting Copyrighted Works (Proposed Class 10)**

Dear Ms. Smith:

On behalf of The Alliance of Automobile Manufacturers (“Auto Alliance”), I write in response to your letter of June 29, 2018 inviting responses to the June 28, 2018 letter from the Computer Crime and Intellectual Property Section (CCIPS) of the U.S. Department of Justice regarding Proposed Class 10 (security research).

As an initial matter, the Auto Alliance recognizes that CCIPS supports maintaining at least some of the limitations of the existing exemption. For example, CCIPS indicates that the limitation in the existing exemption that security research must be conducted on devices that are “lawfully acquired” is “preferable to” the alternative. In addition, CCIPS makes clear that its comments are predicated on the principle that security research must be conducted in good faith. This would seem to support maintaining the existing exemption’s requirement that research must be conducted “solely” for the purpose of good-faith security research. As indicated in our comment on Class 10, removing the term “solely” from the existing exemption as proponents suggest would allow researchers to justify doing almost anything with the research information, regardless of its relationship to good-faith security research.

Regarding the Device Limitation, as indicated in our comment on Class 10, since motorized land vehicles are already listed in the existing exemption as devices on which circumvention is allowed (despite the prohibition in Section 1201(a)(1)(A)), Auto Alliance takes no position on modification of the Device Limitation. Thus, Auto Alliance does not address the comments by CCIPS directed to that limitation.

While CCIPS proposes “clarification” of the Controlled Environment Limitation, the letter suggests that any modification of the scope of the Controlled Environment Limitation should not apply to automobiles. CCIPS’s primary objection to the Controlled Environment Limitation is that it may be construed too narrowly, and limited to “isolated lab-like settings.”

Yet it is not clear why this limitation would be construed so narrowly, considering that the phrase “isolated lab-like setting” does not appear anywhere in the current text. To the extent that this is a concern, language could be added to the existing exemption that clarifies that “controlled environment” is not necessarily limited to an “isolated lab-like setting.” Moreover, although CCIPS states that it could support unspecified alternative language to “clarify” what constitutes a “controlled environment,” CCIPS makes clear that safety concerns, while “critically important” in all cases, are “especially” so regarding security testing on automobiles: “We believe reducing the risk of harm to the public is critically important, especially with regard to subject matter with obvious and significant safety implications such as motorized vehicles.” Thus, to the extent CCIPS may be proposing a relaxation of the Controlled Environment Limitation for other devices, the letter’s emphasis on the safety concerns regarding motorized vehicles suggests that there should be no such relaxation regarding automobiles.

CCIPS’s argument for modifying the “other laws” limitation appears to be rooted simply in a bias for prioritizing a law that it is responsible to enforce over laws for which enforcement is handled by other agencies. CCIPS states that it “would not object” to removal of the prohibition against violating “any applicable law” in the existing exemption, but argues that it “cannot support” removal of the reference to the Computer Fraud and Abuse Act (CFAA) because of overlap between the CFAA and the DMCA, and because removal “might mislead researchers into believing that operating within the DMCA exemption would also provide an exemption from CFAA liability.” Yet, these same arguments for maintaining the prohibition against violations of a law for which CCIPS is the primary enforcer (the CFAA) also apply to maintaining the prohibition against violations of laws and regulations that other agencies enforce.

Indeed, the Librarian put in place the existing exemption’s prohibition against violating other laws precisely because there are laws (in addition to the CFAA) that overlap the DMCA, and that may potentially be violated by researchers engaging in security research pursuant to the existing exemption. During the last rulemaking cycle, the U.S. Environmental Protection Agency (EPA) sent a letter opposing a proposed security research exemption because it “would hinder its ability to enforce the tampering prohibition” under the Clean Air Act. Similarly, the U.S. Food and Drug Administration (FDA) submitted a letter stating “such an exemption for such devices could potentially create regulatory confusion for FDA, medical device manufacturers, and third party software developers that choose to modify medical devices.” In her Recommendation, the Register acknowledged the concerns of the EPA and the FDA regarding “the potential for any exemption to undermine other legal or regulatory mandates,” concluding that “any actions taken under the exemption will need to be compliant with all applicable laws and regulations” and recommending “that the exemption require explicitly that the covered security research be lawful.” Therefore, the same arguments CCIPS articulates for maintaining the limitation that the security research activities cannot violate the CFAA also provided the foundation for the prohibition in the existing exemption against violations of other laws, and support maintaining that prohibition.

Furthermore, while CCIPS repeatedly questions whether the “anti-circumvention provisions” of the DMCA are the “most appropriate or efficient means” of placing limits on

security research, this is beside the point. While this rulemaking is primarily focused on copyright concerns, the question is whether the scope of an exemption to the prohibition in Section 1201(a)(1)(A) may under any circumstances be limited to mitigate risks to health and safety and to address regulatory and other non-copyright concerns. The answer to this question is plainly yes, as CCIPS itself acknowledges by opposing elimination of the reference to the CFAA, and by recognizing the “obvious and significant safety implications” of permitting research on automobiles outside of a controlled environment. Indeed, the statute expressly permits the Librarian to take into account “other factors” in this proceeding. Moreover, as noted in the 1201 Study, “the statute itself makes relevant certain non-copyright concerns,” including by limiting “the availability of permanent exemptions based on non-copyright concerns.” For example, the permanent exemption for security research in Section 1201(j) includes the “other laws” limitation, indicating that Congress intended the Office to take into account important non-copyright concerns, such as ensuring researchers do not violate other laws, to limit the scope of exemptions to the prohibition of Section (a)(1)(A). This is perhaps why in the 2015 Recommendation the Register noted that she was recommending requiring the “other laws” limitation “consistent with the congressionally enacted exemption in section 1201(j).” Neither CCIPS nor the proponents of this exemption have provided any compelling reason to change the conclusion the Register reached in 2015.

Thank you for the opportunity to respond to the CCIPS letter. Please let me know if you have any further questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin M. Rosenbaum".

Kevin M. Rosenbaum  
MITCHELL SILBERBERG & KNUPP LLP

cc: Kevin Amer, Senior Counsel for Policy and International Affairs  
([kamer@copyright.gov](mailto:kamer@copyright.gov))

KMR/psb