UNITED STATES COPYRIGHT OFFICE

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

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ITEM A. COMMENTER INFORMATION

The Alliance of Automobile Manufacturers ("Auto Alliance") submits this comment in opposition to the adoption of the proposed exemption of Class 7. The Auto Alliance is the leading advocacy group for the auto industry. Auto Alliance represents 77% of all car and light truck sales in the United States, including the BMW Group, FCA US LLC, Ford Motor Company, General Motors Company, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche, Toyota, Volkswagen Group of America and Volvo Cars North America. For further details, see http://www.autoalliance.org/.

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This comment is joined by The Association of Global Automakers ("Global Automakers"):[1] Global Automakers represents international automakers that design, build, and sell automobiles in the U.S. It currently represents 12 automakers including: Hyundai, Honda, Toyota, Aston Martin, Kia, McLaren, Nissan, Subaru, Ferrari and others.

ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 7: Computer Programs — Repair

The existing exemption codified at 37 CFR 201.40(b)(6) allows circumvention of access controls on certain motor vehicle software for diagnosis, repair or lawful modification of a vehicle function ("existing exemption"). The December 18, 2017 Notice of Proposed Rulemaking (NPRM) described Class 7 as expanding the existing exemption "to cover additional repair and related activities."[2] The NPRM further identified petitions seeking to expand the existing exemption to (1) allow "third parties to provide services on behalf of owners of motorized land vehicles"; (2) allow the "development and sale of repair tools"; (3) "permit companies . . . to develop and make circumvention and repair solutions available to servicers and customers"; and (4) remove the provision of the existing exemption that maintains the statutory

[1] *See About Us*, GLOBALAUTMAKERS, http://www.globalautomakers.org/about (last visited Feb. 8, 2018).
[2] *See Exemptions To Permit Circumvention of Access Controls on Copyrighted Works: Notice of Proposed Rulemaking*, 82 Fed. Reg. 49550, 49561-62 (Oct. 26, 2017) ("NPRM").

prohibition with regard to "telematics or entertainment systems" in automobiles. While the NPRM also identified petitions seeking to expand the existing exemption to cover a broader range of devices, this Auto Alliance and Global Automakers comment only addresses aspects of the proposed exemption that directly impact the automobile industry, and takes no position on any other issues raised by proponents. In their comments on the proposed exemption of Class 7, Auto Care Association (ACA), Consumer Technology Association (CTA), Motor and Equipment Manufacturers Association (MEMA), and Consumers Union (CU) argue that the existing exemption should be expanded to cover third party services. ACA and CTA also argue that the existing exemption should be expanded to permit acquisition and use of circumvention tools by third parties, and to permit circumvention of access controls for "telematics or entertainment systems."

ITEM C. OVERVIEW

The Auto Alliance and Global Automakers oppose any expansion of the existing exemption, at least with respect to automobiles. Proponents have not provided even a single example of a user who has been unable to diagnose, repair, or make lawful modifications of his or her automobile because of the limited scope of the existing exemption. As set forth below, expanding the existing exemption to third party services is unnecessary because, through an agreement with automobile manufacturers, independent repair shops already have access to the necessary diagnostic and repair tools and information. Proponents' complaints regarding competition in the automobile repair market should be rejected because they are unsupported, misplaced, and reflect an agenda largely separate from the issues here. Moreover, such an expansion is impermissible because third party circumvention services are prohibited under the statutory framework that authorizes this proceeding. Likewise, allowing independent repair shops to acquire and use circumvention tools to provide such services is both unnecessary and impermissible under the statutory framework.

In addition, proponents have not met their burden of persuasion to expand the existing exemption to allow circumvention in order to gain unauthorized access to telematics and entertainment systems. Proponents have not provided any evidence that the copies and adaptations of copyrighted works that access to those systems would enable are noninfringing; nor have they provided any evidence of any harm due to the current prohibition. Moreover, consideration of the very serious risks to safety, the environment, data privacy, and other important regulatory interests counsels against granting the expansion.

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

N/A

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

I. Third Party Services and Trafficking in Circumvention Tools Should Not Be Enabled

In seeking to expand the existing exemption, proponents have the burden to show that users are presently unable to engage in noninfringing activities to diagnose, repair, or make lawful modifications to their automobiles, and that this inability is due to the limitations in the

existing exemption that they propose to dismantle.[3] Proponents have not met that burden. They have not provided even a single example in which the limitations in the existing exemption have impeded any motor vehicle owner from diagnosing, repairing, or modifying his or her motor vehicle.[4] Independent repair shops and individual vehicle owners already have access to the necessary diagnostic and repair tools through an agreement with automobile manufacturers, and the statutory framework does not permit an exemption that covers third party services or trafficking in circumvention tools.

A. Third Party Servicers Already Have Access to Circumvention Tools Pursuant to the R2R Agreement and Nationwide MOU.

On January 15, 2014, the major organizations representing automobile Original Equipment Manufacturers ("OEMs") and auto repair and aftermarket services nationwide signed an MOU. Besides the Auto Alliance and Global Automakers, signatories included:

- The Automotive Aftermarket Industry Association ("AAIA"): The AAIA is a trade association for repair shops, parts stores and distribution outlets of aftermarket products that are typically geared towards hard parts – e.g., hoses, lubricants, gaskets, and other OE replacement type parts. AAIA's 23,000 members and affiliate companies include suppliers, distributors, retailers, service providers, program groups, manufacturers' representatives, educators, and publishers.[5]

- The Coalition for Auto Repair Equality ("CARE"):[6] CARE's membership encompasses automotive part stores, independent repair shops, and other sellers of equipment as well as enthusiasts and hobbyists. CARE's underlying role is to ensure that consumers receive safe, affordable and convenient vehicle repair and service. Members of CARE include NAPA, Midas, CARQUEST, AutoZone, Advance Auto, O'Reilly's Auto Parts and Bridgestone-Firestone as well as numerous independent small businesses.

[3] *See* U.S. Copyright Office, *Section 1201 of Title 17: A Report of the Register of Copyrights* 27-28 (2017) ("1201 Report"). The NPRM refers to the 1201 Report as well as prior recommendations for "the substantive legal and evidentiary standard for the granting of an exemption under section 1201(a)(1)." *See* NPRM at 49551.

[4] The NPRM clearly says, "Proponents of exemptions should present their complete affirmative case for an exemption during the initial round of public comment, including all legal and evidentiary support for the proposal . . . Reply comments should not raise new issues . . ." *See* NPRM at 49558. Proponents have had ample opportunities to bring forward any evidence that may exist to support their assertions, including the opportunity to petition for renewal of the existing exemption in July 2017 and the opportunity to petition for expansion of the existing exemption in December 2017. To the considerable extent that some proponents rely upon the record in the study that produced the Copyright Office's 1201 Report, that proceeding also provided multiple opportunities to produce any such evidence. If proponents use the reply round in this proceeding to bring forward any such evidence, Auto Alliance and Global Automakers urge the Office to disallow it. Acceptance of new evidence on this point in the reply round would raise serious questions regarding the fairness of this proceeding because opponents would not have an opportunity to adequately respond.

[5] Since signing the MOU, AAIA has rebranded and is now the Auto Care Association ("ACA"). ACA represents "500,000 businesses in the auto care industry [that] form a coast-to-coast network of independent manufacturers, distributors, repair shops, marketers and retailers small and large." *See Home Page,* AUTO CARE ASSOCIATION, www.autocare.org (last visited Feb. 8, 2018).

[6] *See Home Page*, CARE http://www.careauto.org/ (last visited Feb. 8, 2018).

Attached to the MOU was a comprehensive "Right to Repair" or R2R Agreement. All the automobile manufacturing members of the Auto Alliance and the Global Automakers submitted individual letters of endorsement agreeing to comply with the MOU and the R2R Agreement throughout the United States. A copy of the MOU and R2R Agreement is attached as Exhibit A.

For purposes of this proceeding, the key commitment of the entire U.S. auto industry is set forth in Section 2(a) of the R2R Agreement:

> [F]or Model Year 2002 motor vehicles and thereafter, a manufacturer of motor vehicles sold in United States shall make available for purchase by owners of motor vehicles manufactured by such manufacturer and by independent repair facilities the same diagnostic and repair information, including repair technical updates, that such manufacturer makes available to its dealers through the manufacturer's internet-based diagnostic and repair information system or other electronically accessible manufacturer's repair information system. All content in any such manufacturer's repair information system shall be made available to owners and to independent repair facilities in the same form and manner and to the same extent as is made available to dealers utilizing such diagnostic and repair information system. Each manufacturer shall provide access to such manufacturer's diagnostic and repair information system for purchase by owners and independent repair facilities on a daily, monthly and yearly subscription basis and upon fair and reasonable terms.[7]

Section 2(b)(i) of the R2R Agreement contains a similar commitment with respect to "all diagnostic repair tools" that the manufacturer makes available to dealers. The tools provided to any vehicle owner or independent repair facility must have the "same functional repair capabilities" as are made available to franchised dealers.

The R2R Agreement includes further commitments in Section 2(c)(i) relating to tool standardization. Under this provision, beginning with 2018 Model Year vehicles, OEMs must provide access to their onboard diagnostic and repair information systems through an off-the-shelf personal computer and a non-proprietary vehicle interface or a system entirely self-contained within the vehicle. There has been no suggestion that any Auto Alliance or Global Automakers member has not fully complied with this commitment at least since the 2018 Model Year, and many have complied earlier.[8]

It is clear that the MOU and R2R Agreement guarantee independent vehicle repair facilities (and individual vehicle owners) that may wish to undertake diagnostic and repair activities, access to a wealth of the information that proponents inaccurately assert cannot otherwise be obtained without expanding the current exemption to permit third party circumvention services or third party use of circumvention tools. In 2015, the only specific reason cited by the Office for its conclusion that the MOU "cannot fully address the cited adverse impacts" of the Section 1201(a)(1)(A) prohibition was the assertion that, at least as to

[7] *See* Exhibit A attached hereto, R2R Agreement at ¶ 2(a).

[8] As noted below, the R2R Agreement includes a dispute resolution mechanism for instances in which an independent repair facility or vehicle owner believes the manufacturer has failed to provide information or a tool required by the MOU. No facility operator or vehicle owner has ever invoked this mechanism.

passenger vehicles, the MOU did not apply to "a significant portion" of vehicles because it did not cover pre-2002 vehicles.[9] This concern is substantially lessened in 2018, because there are significantly fewer pre-2002 vehicles on the road than there were in 2015. According to the federal government's Bureau of Transportation Statistics, the average age of all light vehicles on the road in 2016 was less than 12 years.[10] Thus, a clear majority of vehicles on the road even in 2016 were fully covered by MOU, and that majority is almost certainly even larger today.

ACA and CTA appear to acknowledge in their comments that the necessary repair and diagnostic tools are available to independent servicers, but argue that acquiring these tools is too expensive, which hinders competition with automobile dealers.[11] According to ACA, the MOU is insufficient to allow independent dealers and services to "compete efficiently and effectively with franchised dealers," and "it subjects independent competitors to prohibitive costs."[12] These and similar assertions, which are completely unsourced, reflect an agenda quite distinct from the issues involved here, and are largely beside the point.

As an initial matter, independent repair services have not brought any complaints about the cost or availability of diagnostic or repair tools or information under the MOU to the appropriate mechanism for addressing such complaints. The MOU includes a dispute resolution provision, which can be invoked by any repair facility that believes an auto manufacturer has failed to provide information or tools required by the MOU.[13] According to the provision, "If an independent repair facility or owner believes that a manufacturer has failed to provide the information or tool required by the MOU, he may challenge the manufacturer's actions by first notifying the manufacturer in writing."[14] The MOU further requires that diagnostic and repair information and tools be made available on "fair and reasonable terms," and includes an extensive list of factors to use in determining whether a price is on fair and reasonable terms.[15] The same dispute resolution provision applies to this pricing obligation under the MOU. Thus, should any independent repair facility have any issue regarding the fairness or reasonableness of the price of accessing repair or diagnostic tools or information, it could challenge the price under the dispute resolution provision. If the manufacturer does not "cure the failure," a 5-person Dispute Resolution Panel (DRP) comprised of representatives of the parties to the agreement is convened to "attempt to reach agreement between the parties."[16] If no agreement is reached, the

[9] *See* U.S. Copyright Office, *Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights* 240 (2015) ("2015 Recommendation"). The Copyright Office also noted that the MOU did not cover mechanized agricultural vehicles. As indicated above, this comment solely addresses issues concerning the automobile industry.

[10] *See Bureau of Transportation Statistics, Table 1-26: Average Age of Automobiles and Trucks in Operation in the United States*, U.S. DEPARTMENT OF TRANSPORTATION, https://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/national_transportation_statistics/html/table_01_26.html (last visited Feb. 8, 2018).

[11] *See* ACA, Class 7 Long Comment at 3-4 (Dec. 18, 2017) ("ACA Comment"); *see also* CTA, Class 7 Long Comment at 4 (Dec. 18, 2017) ("CTA Comment").

[12] *See* ACA Comment at 2.

[13] *See* R2R Agreement at ¶ 6.

[14] *See id.*

[15] *See* R2R Agreement at ¶ 1 (defining "Fair and Reasonable Terms"); R2R Agreement at ¶ 2(a) (requiring diagnostic and repair information to be provided to owners and independent repair facilities on "fair and reasonable terms"); R2R Agreement at ¶ 2(b)(i) (requiring diagnostic repair tools to be provided to owners and independent repair facilities on "fair and reasonable terms").

[16] *See* R2R Agreement at ¶ 6.

DRP issues a decision within 30 days and, if the parties still cannot reach an agreement, the complainant "may take whatever legal measures are available to it."[17] This provision has never been invoked by any repair facility operator in the four years since the MOU was signed.

More fundamentally, in using this proceeding to attack the alleged "prohibitive" cost of diagnostic and repair tools and information, and to bemoan the difficulties of competition between independent services and dealers, proponents' unsubstantiated complaints are misplaced. In its 2017 Report on Section 1201 (1201 Report), the Copyright Office reiterated its statement from the 2015 Recommendation that "rulemaking must be 'principally focused on the copyright concerns implicated by any proposed exemption.'"[18] The Copyright Office should reject proponents' call for the Office to attempt to deregulate the market for auto repair tools because this is clearly not a copyright concern. The cost of auto repair tools or competition concerns regarding independent services and automobile dealers are at best marginal to this proceeding. To the extent that they are relevant, they do not match up with the reality of a nationwide system in which manufacturers have fulfilled their publicly stated obligation to share with independent facilities and interested owners essentially all the information related to diagnosis and repair that they provide to dealers. Moreover, throughout the history of this proceeding, and faithful to Congressional intent, it has been a truism that *de minimis* impacts or "mere inconveniences . . . do not rise to the level of a substantial adverse impact."[19] Applications of this principle in previous rulemakings lead to the conclusion that proponents' evidence-free assertions that they should be allowed to circumvent because making use of the information and tools made available to them pursuant to the MOU would be too expensive or burdensome are just the sort of complaints the Office and Librarian should reject. The assertion that alternatives may be more expensive than circumvention should not validate claims that an exemption should be granted.[20]

[17] *See id.*
[18] *See* 1201 Report 125 (quoting from the 2015 Recommendation).
[19] *See id.* at 28 (quoting the Commerce Committee Report and the House Manager's Report); *see also* NPRM at 49551-52 (indicating that proponents must show "'distinct, verifiable, and measurable impacts'" compared to 'de minimis impacts.'").
[20] *See, e.g.*, U.S. Copyright Office, *Section 1201 Rulemaking: Third Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights* 75-76 (2006) ("2006 Recommendation") (denying exemption to allow circumvention of region coding on DVDs, because "there are numerous options available to individuals seeking access to content from other regions," including purchasing additional DVD players or DVD-ROM drives set to play products from other regions); U.S. Copyright Office, *Section 1201 Rulemaking: Fourth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights* 224 (2010) ("2010 Recommendation") (noting that it is "not the purpose of this rulemaking to provide consumers with the most cost-effective manner" to access copyrighted material; "[t]he statute does not provide the Register with the responsibility of enabling the most convenient method"; and where "there are many reasonably-priced alternatives that may fulfill the consumers' wants and needs…. purchasing a DVD player is not an unreasonable, cost-prohibitive alternative" to circumvention so that DVDs can be played on incompatible operating systems); U.S. Copyright Office, *Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention: Recommendation of the Register of Copyrights* 47 (2012) ("2012 Recommendation") (exemption denied because "abundant alternatives to circumvention" existed where non-infringing use [independent development of "homebrew" videogames and applications] can be carried out through programs sponsored by manufacturers, "even though there may be participation fees" for such programs).

The relevant inquiry is whether users are able to make noninfringing uses of their vehicle firmware pursuant to the existing exemption in order to carry out diagnoses, repairs, or lawful modifications. Proponents have not submitted anything in the record that indicates otherwise. Users who need third party assistance in order to benefit from the existing exemption may take their vehicle to an independent repair servicer that has access to all the same diagnostic and repair tools and information that are available to the dealer. To the extent independent servicers wish to complain about the cost or difficulty of acquiring tools, the dispute settlement provision of the MOU is the appropriate mechanism to address those issues, not this proceeding.

B. Enabling Third Party Services is Outside the Scope of This Proceeding

The statute is clear that the Copyright Office is not authorized to expand the existing exemption to enable the manufacture or trafficking of circumvention tools or the provision of circumvention services. This rulemaking proceeding is conducted to determine exemptions for users of copyrighted works who are prohibited from circumventing access controls under 17 USC § 1201(a)(1). The exemptions derived from this proceeding do not apply to the prohibitions under Section 1201(a)(2) against the manufacture or trafficking of circumvention tools, and providing or trafficking in services for circumventing access controls, nor to the prohibitions under Section 1201(b) against the manufacture or trafficking of circumvention tools, and providing or trafficking in services for circumventing copy controls. In the 2015 Recommendation, the Copyright Office acknowledged as much, stating, "[N]either 1201 nor the Unlocking Act authorizes the Librarian of Congress to adopt exemptions that would allow circumvention to be performed by third parties on behalf of those who are actually entitled to an exemption."[21] In the 1201 Report, the Copyright Office further explained that it did not, in the preceding rulemaking cycle, recommend that the existing exemption extend to activity done "on behalf" of the vehicle owner "because it might separately constitute an unlawful service under subsections (a)(2) and b;" and that the Office "continues to believe that it cannot affirmatively recommend exemption language that is likely to be read to authorize unlawful trafficking activity."[22] The Office specifically stated its disagreement with those who "argued that the Librarian is authorized to adopt such language."[23] These conclusions are correct, and the Office should re-affirm them by rejecting the invitation to expand the exemption to enable trafficking in circumvention tools or circumvention services, both of which are clearly prohibited by sections 1201(a)(2) and 1201(b).

MEMA disputes the Copyright Office's conclusion that the statute precludes it from adopting exemptions for third party services, asserting that Congress did not intend for the anti-trafficking provisions to restrict "legitimate" services.[24] Congress of course did not intend to restrict legitimate services, but it is clear that Congress prohibited trafficking in circumvention tools and providing circumvention services precisely because these are *not* legitimate services. The legislative history MEMA cites is inapposite; it merely indicates that that Section 1201(a)(2) is intended to outlaw trafficking in tools that are expressly intended to facilitate circumvention, not other products, such as general purpose computers, that have legitimate functions but may also be used to circumvent. Thus, this legislative history actually underscores that trafficking in

[21] *See* 2015 Recommendation at 247.
[22] *See* 1201 Report at 61-62.
[23] *See id*. at 62, n.337.
[24] *See* MEMA, Class 7 Long Comment at 4 (Dec. 18, 2017) ("MEMA Comment").

such circumvention tools or providing circumvention services is prohibited under Section 1201(a)(2). Contrary to MEMA's assertion, a person who traffics in a prohibited circumvention tool or provides an unlawful circumvention service is liable under Section 1201(a)(2) regardless of whether that person may also sell legitimate products or provide legitimate services; just as the accounting firm in the famous Enron scandal was liable for its unlawful activity even though it also provided legitimate services to other clients.

MEMA also argues that copyright law does not permit a copyright owner to prevent the downstream use of lawfully acquired copies of protected software, citing a Supreme Court decision on patent exhaustion. The cited Supreme Court case (*Lexmark*) is irrelevant, and it appears the primary reason MEMA cited it is because it happens to mention automobiles. The hypothetical example the Supreme Court describes in *Lexmark* is to illustrate the point that it would be untenable for a used car dealer to worry about patent liability for using or selling each car or car part provided to the dealer by a previous owner. Putting aside that *Lexmark* is based on the totally distinct legal framework of patent law, any comparison of that hypothetical to the issues involved in this proceeding evinces a total misunderstanding of the purpose of the Digital Millennium Copyright Act (DMCA), which is to facilitate commerce in digital works by prohibiting circumvention of technological protection measures that control access to those works. Digital works of course are different from physical goods because, among other things, they do not degrade and can be easily reproduced and distributed. Access controls are, therefore, necessary to prevent rampant piracy, thereby promoting the development of the legitimate market for innovative digital works. Unlike the *Lexmark* hypothetical, the DMCA does not create any uncertainty about whether repair shops or individual vehicle owners risk any liability for using or selling car parts or re-selling cars. The scope of the existing exemption has no impact on that issue. Moreover, under the MOU, repair shops (and vehicle owners) also have access to all of the tools necessary to repair today's motor vehicles. What repair shops clearly cannot do is provide an unlawful service to circumvent access controls that protect proprietary software.

1. Exemption Beneficiaries Cannot be Expanded to Enable Services

ACA and CTA argue that the Copyright Office should expand the concept of "users" under the statute to include independent repair servicers because vehicle owners need expert assistance and these servicers are working at the direction of the vehicle owner.[25] In its comment, CTA indicates that the Copyright Office in the 1201 Report and the NPRM signaled a willingness to expand the definition of "user."[26] Without any citation, ACA apparently assumes that the Copyright Office has decided that independent dealers and servicers may be identified as users.[27] It is true that the Copyright Office said it could "consider exemptions that define the class of eligible users less restrictively" and "where appropriate" it would "seek to avoid recommending unduly narrow definitions of exemption beneficiaries."[28] But, as indicated above, the Copyright Office also stated that it cannot recommend an exemption that may be read to authorize unlawful trafficking activity, nor can it authorize a prohibited service.[29] In the 1201

[25] MEMA also appears to suggest that exemption beneficiaries be expanded to include third parties.
[26] *See* CTA Comment at 2.
[27] *See* ACA Comment at 3.
[28] *See* 1201 Report at 61; *see also* NPRM at 49551 (citing to the language in the 1201 Report).
[29] *See* 1201 Report at 61-62.

Report, the Office further recommended that Congress should amend the statute to allow greater flexibility to expand exemption beneficiaries to include circumvention performed "at the direction of" intended beneficiaries.[30] As Congress has not acted, this recommendation indicates that the Office does *not* believe it currently possesses this authority under the statute. Although the Copyright Office suggests that expanding beneficiaries would "provide greater opportunity for the courts to provide guidance on the proper construction of the anti-trafficking provisions," there is no basis in the statute for the Office to recommend a broad exemption that the Office itself has indicated is at odds with a plain reading of the statute, in order to invite a legal challenge that might provide guidance. For the Office to do so would be not only imprudent, but illegal.

Moreover, to the extent the Copyright Office is looking to make the beneficiaries of the proposed exemption as expansive as possible, while remaining within the metes and bounds of the statute, it still would not be appropriate to include independent repair servicers. As an initial matter, as set forth above, independent servicers have access to all necessary repair and diagnosis tools pursuant to the MOU. But the obvious problem with proponents' argument to expand the exemption beneficiaries is that independent servicers are providing a *service*; and, as noted above, expanding the beneficiaries of the existing exemption to include these entities that would provide circumvention services to the public is clearly not permissible under the DMCA provisions governing this proceeding. Moreover, proponents' unsourced allegation that vehicle owners may require expert assistance is beside the point. Expanding the definition of "users" to include service providers simply because some, or even most, users may need assistance to perform a noninfringing activity would undermine the statutory framework, which does not permit temporary exemptions to the prohibitions of 1201(a)(2) and 1201(b) against circumvention services.

2. The Exemption Cannot Enable Trafficking in Circumvention Tools

The arguments by ACA and CTA that the mere acquisition of circumvention tools should not be equated with "trafficking" are a red herring. The repair services represented by these proponents do not wish to merely acquire circumvention tools; they intend to use them to *provide a commercial service* that requires circumventing access controls, which is indisputably trafficking in an unlawful service under 1201(a)(2) and 1201(b). It is worth noting that proponents are split on this issue: while ACA and CTA argue that merely acquiring tools should not be equated with "trafficking," MEMA states that it "does not agree with some petitioners that the new Class 7 exemption should permit creation and distribution of [circumvention] tools."[31] The "evidence" cited by CTA in support of this argument – including comparison to the 2006 Class 5 exemption, and arguments that the acquisition of tools is for a lawful use and that the legislative history of both the DMCA and Unlocking Act show acquiring a tool for purposes of interoperability is not trafficking – is inapplicable.[32] The 2006 Class 5 exemption allowed owners of wireless handsets to lawfully connect to a wireless telephone communication network; it did not enable unlawful third party commercial services. Acquisition of a circumvention tool by repair services is not intended for lawful use; it is to enable an unlawful service. And

[30] *See id.* at 60.
[31] *See* MEMA Comment at 2.
[32] *See* CTA Comment at 5.

acquisition of the circumvention tool is not intended for purposes of interoperability; again, it is to provide an unlawful service to modify copyrighted software. Finally, even ignoring the fundamental issue that acquisition of circumvention tools by repair shops is only done for the purpose of enabling an unlawful service, it is likely, under the statute, that trafficking does indeed encompass the mere acquisition of circumvention tools.[33]

II. The Current Exemption Should Not Be Expanded to Allow Access to Telematics and Entertainment Software

Proponents have not met their burden to demonstrate that the existing exemption should be expanded to allow access to telematics and entertainment software. ACA and CTA are seeking to expand the existing exemption,[34] but provide essentially no evidence that uses of telematics and entertainment software enabled by circumvention of access controls would be non-infringing, or that users are suffering any adverse effects due to the prohibition.[35] Moreover, a reasonable consideration of the serious regulatory, safety and environmental risks compels rejection of the requested expansion.

A. Uses Enabled by Circumvention of Access Controls on Telematics and Entertainment Software Are Not Likely to Be Non-Infringing

Proponents have fallen far short of their burden to demonstrate that "uses affected by the prohibition on circumvention are or are likely to be noninfringing."[36] The 1201 Report spells out the significant burden that the statute imposes on a proponent regarding claimed non-infringing uses: "In determining whether a use is likely noninfringing, the office has stated that '[t]he statutory language requires that the use is or is likely to be noninfringing, not merely that the use might plausibly be considered noninfringing.'"[37]

Proponents have not provided any evidence to rebut the Copyright Office's decision in the last rulemaking cycle to exclude circumvention of access controls protecting entertainment and telematics systems from the existing exemption.[38] ACA and CTA assert, without any basis, that telematics systems consist of non-copyrightable data and that entertainment systems are merely comprised of "storage capacity" for noninfringing uses.[39] To the contrary, telematics and entertainment systems provide access to a range of non-software copyrighted content, including for example maps, databases of geographic data, and other navigational information accessed

[33] Although "traffic" is not defined in section 1201, it is defined elsewhere in title 17 to include "obtain control of" and "possess." *See* 17 U.S.C. § 1101 on unauthorized trafficking in sound recordings, which refers to the definition of "traffic" found in 18 U.S.C. § 2320.
[34] MEMA apparently agrees with the existing prohibition against access to the telematics and entertainment systems, except to the extent it prohibits access of "non-entertainment-related telematics systems." *See* MEMA Comment at 6.
[35] As noted in n. 4, *supra*, proponents have had ample opportunity build the factual record on this point. It is now too late in the proceeding to permit them to cure their failure to do so.
[36] *See* 1201 Report at 27.
[37] *See id*. at 28 (quoting the 2015 Recommendation).
[38] *See* 2015 Recommendation at 246 (noting "insufficient evidence in the record to support a need for circumvention [of access controls protecting telematics and entertainment systems] . . . especially when balanced against concerns about unauthorized access to the services and content they protect.").
[39] *See* ACA Comment at 4-6; *see also* CTA Comment at 5-6.

through telematics systems; and entertainment products and services, such as music, movies, and videogames, accessed through entertainment systems for streaming to the vehicle. Telematics systems are not merely non-copyrightable data; they are in reality a set of computer programs that perform a variety of functions, clearly subject to copyright under 17 USC § 102. Moreover, data collected through telematics systems is creatively arranged to support innovative telematics systems and, therefore, also clearly subject to copyright. Similarly, entertainment systems are not merely comprised of "storage capacity" for non-infringing uses; they allow users to gain access to proprietary streaming content. While vehicle owners are generally licensed to access some of this material as part of their subscriptions to these services, removing the prohibition on circumvention of access controls on vehicle software for telematics and entertainment could enable unauthorized access to value-added services without paying for them – for example to premium entertainment content or enhanced navigational or geographic information. Indeed, the circumvention of access controls could severely diminish the value of this copyrighted content by enabling vehicle owners to cancel their subscriptions altogether and rely upon unauthorized access facilitated by circumvention.

Furthermore, to the extent that proponents rely upon 17 USC § 117 to justify their desired uses as non-infringing, their assertions are unfounded. Under Section 117, the unauthorized use of certain exclusive rights in computer programs is declared noninfringing under specified circumstances, but only if carried out or authorized by "the owner of a copy of a computer program." Proponents have failed to prove that vehicle owners are owners of copies of telematics and entertainment software within the meaning of 17 U.S.C. § 117. Many telematics and entertainment systems are subject to license agreements that clearly show the user does not own the copyrighted software. Based on these license agreements, the Copyright Office in 2015 concluded that users may not own the computer programs that operate vehicle entertainment or telematics systems.[40] Even if these license agreements are not dispositive to the question of ownership, proponents have not submitted any evidence to rebut this conclusion. Because proponents bear the burden to prove that each use they wish to make "is or is likely to be noninfringing," the exception to copyright protection under Section 117 should not apply.

Similarly, proponents assert, without any evidentiary basis, that use of telematics and entertainment software constitutes a fair use.[41] But removing the telematics and entertainment software limitation from the existing exemption would significantly change the fair use analysis the Copyright Office undertook in 2015. For example, in the 2015 Recommendation, the Office acknowledged that the first fair use factor, regarding the purpose and character of the proposed uses, does not favor use of vehicle entertainment and telematics software because that software protects proprietary content.[42] The Office's analysis for factor four, regarding the effect on the market for or value of the copyrighted work, depended on the conclusion "that computer programs on the majority of [Electronic Control Units (ECUs)] are only meaningful in connection with the vehicle, that the copies are generally sold only with the vehicle, and that the consumer pays for those copies when purchasing the vehicle."[43] Telematics and entertainment

[40] *See* 2015 Recommendation at 238. The Office's conclusion to the contrary in the 2015 rulemaking recommendation was specifically limited only to "computer programs that are not chiefly designed to operate vehicle entertainment or telematics systems." *Id.*
[41] *See* ACA Comment at 4-6; *see also* CTA Comment at 5-6.
[42] *See* 2015 Recommendation at 235.
[43] *See id.* at 236.

software often interact with servers outside the vehicle, have value apart from the vehicle, are often sold separately from the vehicle, and may be paid for subsequent to or even after purchase of the vehicle. Telematics and entertainment services, such as *OnSTAR* from General Motors or *mbrace* from Mercedes-Benz, require a services contract that is paid separately from the purchase of the vehicle. These services communicate with external servers to provide a range of services, including turn-by-turn navigation, security and entertainment services, services that enable a vehicle owner to interact with the car remotely through a mobile device, and even services that facilitate retail shopping.[44] Many of the services, such as for entertainment or for facilitating retail shopping, have meaningful value apart from the vehicle. Moreover, as set forth above, permitting access to the software enabling these services could potentially cause significant harm to the market for this copyrighted content. Indeed, in its 2015 recommendations, one of the reasons the Office excluded access controls for telematics and entertainment systems from this exemption was because "circumvention of access controls on entertainment and telematics ECUs could result in a diminution in the value of copyrighted works if those systems could no longer reliably protect the content made available through them."[45] Proponents have not provided any evidence to justify revising or even revisiting this conclusion. Therefore, proponents have failed to meet their burden that use of telematics and entertainment software enabled by circumvention is a fair use that is adversely impacted by 17 USC § 1201(a)(1)(A).

B. The Prohibition Against Circumvention of Access Controls on Telematics and Entertainment Software Has No Adverse Effects on Non-Infringing Uses

Proponents have not identified even a single instance of harm due to the exclusion from the current exemption of access controls for telematics and entertainment systems. As explained in the 1201 Report, proponents carry the burden to demonstrate "that as a result of a technological measure controlling access to a copyrighted work, the prohibition is causing, or in the next three years is likely to cause, an adverse impact on [non-infringing] uses."[46] The NPRM indicates that proponents must show "'distinct, verifiable, and measurable impacts'" compared to 'de minimis impacts.'"[47] The 1201 Report further clarifies that "[l]ikely adverse impacts must be more than speculative or theoretical harms," and "mere inconveniences, or individual cases . . . do not rise to the level of a substantial adverse impact."[48]

As set forth above, the MOU ensures that all necessary tools and information for diagnosis and repair of motor vehicles, including any tools and information that may be related to the telematics and entertainment systems, are available to independent repair servicers. Proponents argue that access to telematics information is "increasingly necessary" for vehicle diagnosis and repair,[49] but have not provided any evidence to back up this dubious assertion.[50] In

[44] *See*, e.g., *Welcome to Onstar*, ONSTAR, https://www.onstar.com/us/en/home/ (last visited Feb. 8, 2018); *Mercedes-Benz mbrace*, MERCEDEZ-BENZ, https://www.mbusa.com/mercedes/mbrace (last visited Feb. 8, 2018).
[45] *See* 2015 Recommendation at 241.
[46] *See* 1201 Report at 27-28 (quoting the 2015 Recommendation).
[47] *See* NPRM at 49551-52.
[48] *See* 1201 Report at 28 (quoting the Commerce Committee Report and the House Manager's Report).
[49] *See* ACA Comment at 5.
[50] Nor have proponents provided any evidentiary support to undermine the Office's conclusion in the last rulemaking proceeding that "vehicle functions like ignition, gear shifting, and engine power," which were "the focus of proponents' request" and the paradigmatic functions to which vehicle owners sought to diagnose problems, make

fact, access to telematics information is not necessary for diagnosis and repair of a motor vehicle. All information necessary for diagnosing and repairing an automobile that is available to dealers is already made available to independent repair services (and vehicle owners) through the MOU. While the agreement does include a partial exemption regarding "telematics services," it insures that any information in the telematics systems necessary to diagnose and repair a customer's vehicle that is available to dealers is also made available to independent repair facilities.[51] It is telling that proponents have not pointed to a single instance in which a vehicle owner was unable to diagnose, repair or modify his or her vehicle because telematics information or entertainment services were not available. As noted above, alleging harm that is merely "theoretical" or "speculative" is not sufficient. Without any evidence of harm due to a user's inability to engage in noninfringing uses, the Office cannot expand the current exemption.

C. Modification of Entertainment and Telematics Systems Raises Significant Safety and Other Regulatory Concerns

In the 1201 Report, the Copyright Office declined to fully exclude "non-copyright" considerations from the rulemaking process, but indicated that consumers, businesses, and other government agencies have had the opportunity to address these issues regarding the existing exemption and, therefore, the Office will be less likely to consider them moving forward.[52] Yet removal of the restriction against circumvention of access controls protecting telematics and entertainment software would result in vehicles that are less safe and less secure, and would reduce the level of compliance with important safety and environmental protections. Just as these concerns were considered in the last rulemaking cycle, these important issues should not be ignored this year. The Auto Alliance long-form comment in opposition to the proposed class 21 exemption during the last rulemaking cycle details the myriad of safety and environmental restrictions with which motor vehicles must comply, including for fuel economy, emissions controls, and driver and passenger safety; and illustrates the potential negative consequences of allowing unrestricted modification of motor vehicle ECUs.[53] In 2015, the Office received letters from the Department of Transportation and the Environmental Protection Agency outlining their concerns. This ample record led the Office to conclude that safety and environmental risks constituted "serious 'other factors' that weigh against an exemption."[54] Those risks must also be taken into account in evaluating proponents' pleas for an expanded exemption.

All vehicle ECU systems are interconnected through a central Controller Area Network (CAN), and modifications made to one ECU system may inadvertently impact other ECU's control of other vehicle functions, and can also wreak havoc with the CAN system as a whole. Thus, accessing software for telematics and entertainment systems would create opportunities for

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repairs or carry out lawful modifications, are controlled by ECUs other than those "primarily designed to support vehicle entertainment and telematics systems." 2015 Recommendation at 235.

[51] The agreement does exclude telematics information services derived from or received by the vehicle through mobile communications, but it nevertheless guarantees that the telematics diagnostic and repair information available to dealers is made available to independent servicers. Thus, notwithstanding this exclusion, any telematics diagnostic and repair information transmitted to dealers through mobile communication must still be made available to independent servicers, although such information may be made available through means other than mobile communication (e.g., through a scan tool).

[52] *See* 1201 Report at 125.

[53] *See* Auto Alliance, Class 21 Long Comment at 16-21 (Mar. 27, 2015).

[54] The Office summarized this record in the 2015 Recommendation at 241-44.

modifications that could inadvertently, or even deliberately, weaken safety and environmental protections and undercut regulatory compliance by enabling interference with emission controls and safety systems. In addition, access to the telematics systems may provide access to data that is personal to the user; thus, allowing third party services access to this data, as proposed by proponents, would raise significant privacy concerns**.** Automobile manufacturers abide by transparent privacy principles that, among other things, clearly outline limits on the collection of personal data, provide for the security of user data, and require certain measures for users to control what data is collected.[55] Expanding the exemption as proponents suggest would enable third party services to have unfettered access to private data, risking theft or misuse, without any knowledge by the owner of the vehicle. We urge the Copyright Office to give full consideration to the potential negative impacts to motor vehicle safety, data privacy, as well as energy and environmental standards that could result from an expansion of this proposed exemption.

III. Conclusion

For the foregoing reasons, proponents have not met their statutory burden to demonstrate a need to expand the existing exemption. Expanding the existing exemption to cover third party services or use of circumvention tools by third parties is unnecessary and is not permitted under the statute. Likewise, any reasonable consideration of the evidence provided by proponents should not alter the Copyright Office's 2015 conclusion that there should not be an exemption allowing access to telematics and entertainment systems.

[55] For more information, *see Privacy Principles for Vehicle Technologies and Services, Principles*, AUTO ALLIANCE, https://autoalliance.org/connected-cars/automotive-privacy-2/principles/ (last visited Feb. 8, 2018).

DOCUMENTARY EVIDENCE

Exhibit A:

Memorandum of Understanding and Right to Repair (R2R) Agreement (January 15, 2014)

AUTO ALLIANCE
DRIVING INNOVATION®

GlobalAutomakers

AAIA®
Automotive Aftermarket
Industry Association

CARE

MEMORANDUM of UNDERSTANDING

The Automotive Aftermarket Industry Association ("AAIA"), Coalition for Auto Repair Equality ("CARE"), Alliance of Automobile Manufacturers ("Alliance") and Association of Global Automakers ("Global Automakers") ("the Original Parties") enter into this Memorandum of Understanding (MOU) on this Fifteenth (15th) day of January, 2014 and voluntarily agree as follows:

1. The Original Parties fully support this MOU and attached "Right to Repair" (R2R) agreement ("R2R Agreement"). Automobile manufacturer members of the Alliance and Global Automakers indicate their individual company's agreement to comply with the MOU and R2R Agreement in all fifty (50) States and the District of Columbia through their individual letters of endorsement.

2. Until such time as the provisions of Section 2(c)(i) (common interface device) of the R2R Agreement have been fully implemented, with respect to model year 2018 and newer vehicles, for two years or January 2, 2019, whichever is earlier, and provided the OEMs comply with the MOU during this period, CARE and AAIA agree to continue to work with other Original Parties to fully implement the MOU and to oppose and not to fund or otherwise support, directly or indirectly, any new state R2R legislation.

3. The Original Parties agree to work to strongly encourage any new entrants to the U.S. automotive market or to R2R issues to become signatories to the MOU.

4. The Original Parties agree to work together to resolve any future or related R2R issues that might otherwise be the subject of state legislation and, subject to the mutual consent of the Original parties, amend the MOU and R2R Agreement to include these additional matters.

5. Once the Original Parties have signed on to the MOU, additional parties may join but any amendments or revisions to the terms of the MOU and R2R Agreement, triggered by admission of additional participants, shall require consent of the Original Parties.

6. The Original Parties agree to meet as needed and at least semi-annually, to assess how the MOU is operating, address operational concerns and discuss any other matters relevant to R2R or the MOU or future amendments or parties to the MOU. In the event that one of

the Original Parties concludes that, due to changed circumstances, the MOU or R2R Agreement may no longer be viable, that party shall, upon thirty (30) days written notice to the other three Original Parties, call a meeting to discuss the need for the MOU and R2R Agreement to continue.

7. The Original Parties agree that should a state(s) pass a law relating to issues covered by this MOU and R2R Agreement, after the effective date of the MOU and R2R Agreement, any automobile manufacturer member of the Alliance and Global Automakers may elect to withdraw its letter of endorsement for the MOU and R2R Agreement partially or entirely for the impacted state(s).

Signed on this 15th day of January, 2014:

Mitch Bainwol
President & CEO
Alliance of Automobile Manufacturers

Michael Stanton
President & CEO
Association of Global Automakers

Kathleen Schmatz
President & CEO
Automotive Aftermarket Industry Association

Ray Pohlman
President
Coalition for Auto Repair Equality

R2R AGREEMENT

Section 1. As used in this agreement, the following words shall, unless the context clearly indicates otherwise, have the following meanings:

"Dealer", any person or business who, in the ordinary course of its business, is engaged in the business of selling or leasing new motor vehicles to consumers or other end users pursuant to a franchise agreement and who has obtained a license, as required under applicable law, and is engaged in the diagnosis, service, maintenance or repair of motor vehicles or motor vehicle engines pursuant to said franchise agreement.

"Franchise agreement", a written arrangement for a definite or indefinite period in which a manufacturer or distributor grants to a motor vehicle dealer a license to use a trade name, service mark or related characteristic and in which there is a community of interest in the marketing of new motor vehicles or services related thereto at wholesale, retail, leasing or otherwise.

"Fair and Reasonable Terms" Provided that nothing is this MOU and R2R Agreement precludes an automaker and an owner or independent repair shop who is subject to the agreement from agreeing to the sale of information and tools on any other terms on which they agree, in determining whether a price is on "fair and reasonable terms," consideration may be given to relevant factors, including, but not limited to, the following:

(i) The net cost to the manufacturer's franchised dealerships for similar information obtained from manufacturers, less any discounts, rebates, or other incentive programs.

(ii) The cost to the manufacturer for preparing and distributing the information, excluding any research and development costs incurred in designing and implementing, upgrading or altering the onboard computer and its software or any other vehicle part or component. Amortized capital costs for the preparation and distribution of the information may be included.

(iii) The price charged by other manufacturers for similar information.

(iv) The price charged by manufacturers for similar information prior to the launch of manufacturer web sites.

(v) The ability of aftermarket technicians or shops to afford the information.

(vi) The means by which the information is distributed.

(vii) The extent to which the information is used, which includes the number of users, and frequency, duration, and volume of use.

(viii) Inflation.

"Immobilizer system", an electronic device designed for the sole purpose of preventing the theft of a motor vehicle by preventing the motor vehicle in which it is installed from starting without the correct activation or authorization code.

"Independent repair facility", a person or business that is not affiliated with a manufacturer or manufacturer's authorized dealer of motor vehicles, which is engaged in the diagnosis, service, maintenance or repair of motor vehicles or motor vehicle engines;

"Manufacturer", any person or business engaged in the business of manufacturing or assembling new motor vehicles.

"Dispute Resolution Panel (DRP)", a 5-person panel established by the Original Parties comprised of the following: one Alliance representative, Alliance member or Alliance designee, one Global Automakers representative, Global Automakers' manufacturer member or Global Automakers designee, two representatives of the independent vehicle repair industry to be selected and mutually agreed upon by AAIA and CARE, and one DRP Chair. The DRP Chair shall be an independent professional mediator with no affiliation to any of the Original Parties, shall be selected by unanimous consent of the Original Parties and shall be funded in equal amounts by each of the Original Parties. The Original Parties shall, at one of the two annual meetings, have an opportunity to revisit their respective representative or ask the Original Parties to revisit the person acting as DRP Chair.

"Motor vehicle", any vehicle that is designed for transporting persons or property on a street or highway and that is certified by the manufacturer under all applicable federal safety and emissions standards and requirements for distribution and sale in the United States, but excluding (i) a motorcycle; (ii) a vehicle with a gross vehicle weight over 14,000 pounds; or (iii) a recreational vehicle or an auto home equipped for habitation.

"Owner", a person or business who owns or leases a registered motor vehicle.

"Trade secret", anything, tangible or intangible or electronically stored or kept, which constitutes, represents, evidences or records intellectual property including secret or confidentially held designs, processes, procedures, formulas, inventions, or improvements, or secret or confidentially held scientific, technical, merchandising, production, financial, business or management information, or anything within the definition of 18 U.S.C. § 1839(3).

Section 2.

(2)(a). Except as provided in subsection (2)(e), for Model Year 2002 motor vehicles and thereafter, a manufacturer of motor vehicles sold in United States shall make available for purchase by owners of motor vehicles manufactured by such manufacturer and by independent repair facilities the same diagnostic and repair information, including repair technical updates, that such manufacturer makes available to its dealers through the manufacturer's internet-based diagnostic and repair information system or other electronically accessible manufacturer's repair information system. All content in any such manufacturer's repair information system shall be made available to owners and to independent repair facilities in the same form and manner and to the same extent as is made available to dealers utilizing such diagnostic and repair information system. Each manufacturer shall provide access to such manufacturer's diagnostic and repair information system for purchase by owners and independent repair facilities on a daily, monthly and yearly subscription basis and upon fair and reasonable terms.

(2)(b)(i) For Model Year 2002 motor vehicles and thereafter, each manufacturer of motor vehicles sold in the United States shall make available for purchase by owners and independent repair facilities all diagnostic repair tools incorporating the same diagnostic, repair and wireless capabilities that such manufacturer makes available to its dealers. Such tools shall incorporate the same functional repair capabilities that such manufacturer makes available to dealers. Each manufacturer shall offer such tools for sale to owners and to independent repair facilities upon fair and reasonable terms.

(ii) Each manufacturer shall provide diagnostic repair information to each aftermarket scan tool company and each third party service information provider with whom the manufacturer has appropriate licensing, contractual or confidentiality agreements for the sole purpose of building aftermarket diagnostic tools and third party service information publications and systems. Once a manufacturer makes such information available pursuant to this section, the manufacturer will have fully satisfied its obligations under this section and thereafter not be responsible for the content and functionality of aftermarket diagnostic tools or service information systems.

(2)(c)(i) Commencing in Model Year 2018, except as provided in subsection (2)(e), manufacturers of motor vehicles sold in the United States shall provide access to their onboard diagnostic and repair information system, as required under this section, using an off-the-shelf personal computer with sufficient memory, processor speed, connectivity and other capabilities as specified by the vehicle manufacturer and:

(a) a non-proprietary vehicle interface device that complies with the Society of Automotive Engineers SAE J2534, the International Standards Organizations ISO 22900 or any successor to SAE J2534 or ISO 22900 as may be accepted or published by the Society of Automotive Engineers or the International Standards Organizations; or,

(b) an on-board diagnostic and repair information system integrated and entirely self-contained within the vehicle including, but not limited to, service information systems integrated into an onboard display, or

(c) a system that provides direct access to on-board diagnostic and repair information through a non-proprietary vehicle interface such as Ethernet, Universal Serial Bus or Digital Versatile Disc. Each manufacturer shall provide access to the same on-board diagnostic and repair information available to their dealers, including technical updates to such on-board systems, through such non-proprietary interfaces as referenced in this paragraph. Nothing in this agreement shall be construed to require a dealer to use the non-proprietary vehicle interface (i.e., SAE J2534 or ISO 22900 vehicle interface device) specified in this subsection, nor shall this agreement be construed to prohibit a manufacturer from developing a proprietary vehicle diagnostic and reprogramming device, provided that the manufacturer also complies with Section 2(c)(i)and the manufacturer also makes this device available to independent repair facilities upon fair and reasonable terms, and otherwise complies with Section 2(a).

(2)(c)(ii) No manufacturer shall be prohibited from making proprietary tools available to dealers if such tools are for a specific specialized diagnostic or repair procedure developed for

the sole purpose of a customer service campaign meeting the requirements set out in 49 CFR 579.5, or performance of a specific technical service bulletin or recall after the vehicle was produced, and where original vehicle design was not originally intended for direct interface through the non-proprietary interface set out in (2)(c)(i). Provision of such proprietary tools under this paragraph shall not constitute a violation of this agreement even if such tools provide functions not available through the interface set forth in (2)(c)(i), provided such proprietary tools are also available to the aftermarket upon fair and reasonable terms. Nothing in this subsection (2)(c)(ii) authorizes manufacturers to exclusively develop proprietary tools, without a non-proprietary equivalent as set forth in (2)(c)(i), for diagnostic or repair procedures that fall outside the provisions of (2)(c)(ii) or to otherwise operate in a manner inconsistent with the requirements of (2)(c)(i).

(2)(d) Manufacturers of motor vehicles sold in the United States may exclude diagnostic, service and repair information necessary to reset an immobilizer system or security-related electronic modules from information provided to owners and independent repair facilities. If excluded under this paragraph, the information necessary to reset an immobilizer system or security-related electronic modules shall be obtained by owners and independent repair facilities through the secure data release model system as currently used by the National Automotive Service Task Force or other known, reliable and accepted systems.

(2)(e) With the exception of telematics diagnostic and repair information that is provided to dealers, necessary to diagnose and repair a customer's vehicle, and not otherwise available to an independent repair facility via the tools specified in 2(c)(i) above, nothing in this agreement shall apply to telematics services or any other remote or information service, diagnostic or otherwise, delivered to or derived from the vehicle by mobile communications; provided, however, that nothing in this agreement shall be construed to abrogate a telematics services or other contract that exists between a manufacturer or service provider, a motor vehicle owner, and/or a dealer. For purposes of this agreement, telematics services include but are not limited to automatic airbag deployment and crash notification, remote diagnostics, navigation, stolen vehicle location, remote door unlock, transmitting emergency and vehicle location information to public safety answering points as well as any other service integrating vehicle location technology and wireless communications. Nothing in this agreement shall require a manufacturer or a dealer to disclose to any person the identity of existing customers or customer lists.

Section 3. Nothing in this agreement shall be construed to require a manufacturer to divulge a trade secret.

Section 4. Notwithstanding any general or special law or any rule or regulation to the contrary, no provision in this agreement shall be read, interpreted or construed to abrogate, interfere with, contradict or alter the terms of any franchise agreement executed and in force between a dealer and a manufacturer including, but not limited to, the performance or provision of warranty or recall repair work by a dealer on behalf of a manufacturer pursuant to such franchise agreement.

Section 5. Nothing in this agreement shall be construed to require manufacturers or dealers to provide an owner or independent repair facility access to non-diagnostic and repair information

provided by a manufacturer to a dealer, or by a dealer to a manufacturer pursuant to the terms of a franchise agreement.

Section 6. If an independent repair facility or owner believes that a manufacturer has failed to provide the information or tool required by this MOU, he may challenge the manufacturer's actions by first notifying the manufacturer in writing. The manufacturer has thirty (30) days from the time it receives the reasonably clear and specific complaint to cure the failure, unless the parties otherwise agree. If the complainant is not satisfied, he has thirty (30) days to appeal the manufacturer's decision to the DRP. The DRP shall be convened by the Chair within thirty (30) days of receipt of the appeal of the manufacturer's decision. The DRP will attempt to reach agreement between the parties. If unsuccessful, the DRP shall convene and issue its decision. The decision must be issued within 30 days of receipt of the appeal of the manufacturer's decision, unless otherwise agreed to by the parties. The DRP decision shall be disseminated to the complainant, the manufacturer, and the Original Parties. If the manufacturer and complainant still cannot reach agreement, the complainant may take whatever legal measures are available to it.