

UNITED STATES COPYRIGHT OFFICE



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

Reply Comment

ITEM A. COMMENTER INFORMATION

Auto Care Association

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ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 7: Computer Programs – Repair

ITEM C. REPLY COMMENT

The Opposition filed by Auto Alliance rests on the assumption that the “MOU” between major auto manufacturers and independent retailers and servicers has set a new circumstance, in which Auto Care is yet again required to establish that, unaided, consumers are not capable of maintaining or fixing their own vehicles. This is contrary to both the 2015 Round record and the NPRM in this present round.

- The full MOU, *including* the 2018 model year provisions (for vehicles generally introduced in calendar 2017), was a matter of record in the 2015 Round, which governs 2016 – 2018. *No exclusion for 2018 models was recommended by either the Register or the NTIA.*
- In the present NPRM process, Auto Alliance had the opportunity to oppose renewal of the 2015 Round exemption on the basis of need, based on identical MOU circumstances. Auto Alliance did not. Consequently, the NPRM establishes as a premise that *all* prior exemptions will be renewed. *This concludes the question of need for an exemption.*
- In recommending renewal of the 2015 Round exemption, the Register establishes as a baseline that the exemption should be available “when circumvention is a necessary step undertaken by the authorized owner of the vehicle” The only

issues at stake for a “new” iteration of the exemption are: (1) should the exemption, consistent with statute, be available to the vehicle’s lawful “user,” as the Register’s Policy Study¹ has suggested; and (2) should the acquisition of necessary software tools for a lawful purpose be considered “trafficking,” and if so, should the Register decline to include this conduct on such basis? These are predominantly legal, not factual, questions, on which the Auto Alliance and Harman Oppositions shed no new light.

- On the issue of telematics and telemetry data, opponents ignore the material referenced in Auto Care’s Comments. These issues are discussed further below.

An Independent Expert Providing Lawful Assistance Should Properly be Regarded as a “User” Per 17 U.S.C Section 1201(a)(1)(C).

Auto Care in its Comments supported the suggestion in the Policy Study that the Register should be guided by the statutory reference to “user” rather than “owner” of a vehicle. Auto Alliance opposes this idea, but provides nothing more than a flat assertion that it disagrees with this plain reading of the statute.

The formulation in the Policy Study provides a real-world solution to the problem that has vexed Section 1201 in previous rounds – “owners” are seldom equipped to take advantage of formal exemptions, making the exemption essentially unavailable to the vast majority of the affected class. Focusing on “users” also side-steps, at least in some instances, the unnecessary debate about whether a device owner “owns” the copyrighted work. Focusing on the lawful user, within the bounds of the exempted activity, solves these problems in a way that is entirely consistent with the statute and the statutory scheme. As the Policy Study and this NPRM note, this does not put aside *all* issues (e.g., “trafficking”) but is a major and constructive step forward.

Acquiring a Software Tool for a Lawful and Exempt Purpose is Not “Trafficking.”

In opposing the Auto Care and CTA position that *use* of independently-obtained software tools is not “trafficking,” Auto Alliance at 9 bases its argument on the fact that the independent dealer or repairer will “*intend to use them to provide a commercial service*” This is a line the Register has declined to draw. As the Policy Study explains, Section 1201 was not necessarily intended to preclude self-help,² and the right to produce and share tools is often predicated on constructive sharing for the same lawful purpose.³ Indeed, any such limitation would have destroyed the

¹ Section 1201 of Title 17, A Report of the Register of Copyrights, June 2017 (“Policy Study”) at 61 - 62; *see also* NPRM at 42 - 43.

² “To the extent the law prohibits the development of such software, many users would be unable to engage in activities expressly permitted by the relevant exemption, unless they rely on circumvention programs produced unlawfully. The Office accordingly agrees that exemption beneficiaries should be able to make necessary tools solely for their own use in carrying out exempted circumventions. *** [T]here are strong reasons to conclude that Congress did not intend to apply the manufacturing bar to exemption beneficiaries from producing their own circumvention tools for personal use.” Policy Study at 53 - 55.

³ *Id.* n. 305.

value of the exemption to the institutions and archives that required this ability for document preservation and other lawful purposes.⁴

The only other distinction offered by Auto Alliance is that the previous instances of exemptions that acknowledged the need for third party assistance were for necessary and *lawful* purposes. Auto Alliance asserts participation of an independent dealer would render the service unlawful – but that could be the case only if one rejects the Register’s suggestion, consistent with the statutory language, that the exemption covers the *user*, not just the “owner.” Auto Alliance’s Opposition regarding *use* of software tools on grounds of “trafficking” adds *nothing* to the discussion of “user,” and falls apart if the Policy Study’s suggested construction of “user” is adopted in the Register’s recommendation to the Librarian.

Even if Acquisition of a Tool May be “Trafficking,” The Librarian Would Not Exceed Her Authority by Exempting Use of the Tool for a Lawful Purpose in Aid of an Exempted User.

Auto Care and CTA have disagreed with the Register’s concern, voiced in the Sixth Round, that granting an exemption that may involve acquisition of a tool would be tantamount to endorsing “trafficking.” As Professor Besek pointed out in a “roundtable” discussion,⁵ and the Policy Study (p. 62, n. 338) has noted, the Librarian lacks the authority to exempt “trafficking” from court scrutiny. Courts are aware that any determination of “trafficking” is up to the court, not the Librarian. Therefore, it is both unnecessary and harmful to the statutory construct for the Librarian to assume otherwise, and to limit a lawful *use* based on any concern that a court would be unduly influenced by this outcome.

The MOU Does Not Displace the Relevance of Lawful Use of Independent Expertise and Tools.

The Auto Alliance Opposition appears aimed, too late and too broadly, at displacing the renewal of the 2015 Round motorized vehicle exemption, and ruling out all expert assistance through lawfully-applied tools. As Auto Care previously has argued, this resistance is aimed at preserving market primacy, not preserving any intellectual property rights.⁶ Hence, the Auto Alliance assertion that the MOU shuts the door on competing lawful uses cannot stand.

This proceeding is past the stage of debating the need for an exemption for users of motorized vehicles. The questions now are: Where do existing licensed services leave off; where does lawful, independent assistance begin; and should one preclude the other based on a desire to maintain market control?

⁴ See, e.g., Copyright Office Roundtable discussion transcript, May 20, 2016, at 34 – 38 (Butler).

⁵ *Id.* at 38 - 39.

⁶ U.S. Copyright Office Docket No. 2015-8 Section 1201 Study: Notice of Inquiry and Request for Public Comment, Comments of Auto Care Association, March 3, 2016 (“Auto Care 2016 Comments”).

Lawful Users Should Not Have to Pay Multiple Times to Use the Same Software.

In its December 18 Comment and in the preceding Round, Auto Care pointed out the limited nature of the industry MOU:

- It is limited on a brand / model basis.
- In some instances it has been limited in a VIN NUMBER basis – requiring a *separate license* for each vehicle serviced.

The effect of these limitations in the MOU, in the context of expert-assisted repair, is that the DMCA still requires a user, to effectuate a necessary repair, to pay *again* for the use of her own vehicle’s embedded software, even in the absence of any threat whatsoever to any intellectual property right.

- Embedded software functionally replaces elements of analog-era mechanical components. When a mechanical part must be serviced or replaced, typically the embedded software must be uploaded from the vehicle and then reloaded into the repaired or replaced mechanism.
- The MOU does not provide for access to such embedded software or data solely for the lawful purpose of repair or replacement. Rather, the vehicle user must still pay a fee for the reprogramming of the re-installed or replacement part – even where the defect was caused *entirely by a mechanical, hardware malfunction* and the software “part” itself remains intact. This is no different in concept from reuse of parts that historically has been deemed by courts within the scope of permissible repair rather than infringing reconstruction.
- Despite the MOU, manufacturers claim a purported right under Section 1201 to charge for *every instance of* access to embedded software – even where the software is re-installed without modification in a repaired or replaced mechanical part.
- The porting and reinstallation of embedded software in the process of automotive repair does not involve any exploitation of intellectual property beyond that necessary to repair a specific vehicle, in aid of whose function the software was originally embedded and then acquired by the vehicle owner. Whether the vehicle owner “owns” or “licenses” this software, there is no intellectual property justification for denying her its lawful use when a malfunction in a mechanical part requires that the software be accessed and re-installed.

The MOU Provides No Relief When Lawful Users Seek to Upgrade Vehicles.

Users also seek access to third party mechanical and electronic devices to improve a vehicle’s performance or comfort. There is a large lawful market of innovative devices designed to satisfy these needs, for which expert assistance may be necessary for proper installation. Even

where third party devices contain no circumvention software, an encrypted vehicle bus or encrypted software or data may prevent the lawful attachment of the device. ***Here again, the MOU provides no assistance in allowing the user to replace or upgrade one mechanical part with another.*** As in the case of repair, no intellectual property rights are threatened. In this instance as well, failure to grant the exemption would allow manufacturers to leverage the DMCA so as to re-sell or re-license a use right that has already been paid for.

The MOU Provides No Relief When Lawful Access to Ports and Data is Limited or Not Provided.

Until recently, repair facilities only could obtain diagnostic information from motor vehicles through physical ports on the vehicle itself. The advent of telematics permits wireless transmission of diagnostic information from the vehicle to the owner's chosen service facility.⁷ Currently, manufacturers are benefitting from this capability, but are restricting access to this data by third party service and repair facilities.

The MOU provides no relief to independent dealers and servicers where physical ports are either supplemented or replaced by telemetry. *Id.* Federal law requires independent access to "OBD II" ports only for environmental data.⁸ Hence, when manufacturers encrypt non-environmental data or restrict or deny its availability from existing "OBD II" ports in favor of telemetry, the MOU will not protect users who wish to rely fully on independent experts for diagnosis, service, and repair.

The reliance on technical measures to restrict the availability of telemetric user and vehicle-generated data is not in all cases principled. As a matter of first principle, this data describing vehicle use and condition is not protected by copyright, and belongs to the vehicle owner. Attempts to use Section 1201 to prevent access to this data, by any person so authorized by the vehicle owner, cannot be justified.

⁷ See Aaron Lowe, "The Battle Over Access To Telematics: Didn't We Fight This War Before?" Dec. 18, 2017, <http://www.searchautoparts.com/aftermarket-business/opinion-commentary-distribution/battle-over-access-telematics-didnt-we-fight-w>; Aaron Lowe, "Extended Vehicle: A Deal On Telematics That Is Too Good To Be True?" Oct. 18, 2017, <http://www.searchautoparts.com/aftermarket-business/opinion-commentary-distribution/extended-vehicle-deal-telematics-too-good-be-tr>.

⁸ See 42 U.S.C. § 7401 *et seq.* and 40 CFR 86.1806-17. See generally, U.S. Environmental Protection Agency, "On-Board Diagnostic (OBD) Regulations and Requirements: Questions and Answers" at 2, re "OBD II" ports, <https://nepis.epa.gov/Exe/ZyNET.exe/P100LW9G.txt?ZyActionD=ZyDocument&Client=EPA&Index=2000%20Thru%202005&Docs=&Query=&Time=&EndTime=&SearchMethod=1&TocRestrict=n&Toc=&TocEntry=&QField=&QFieldYear=&QFieldMonth=&QFieldDay=&UseQField=&IntQFieldOp=0&ExtQFieldOp=0&XmlQuery=&File=D%3A%5CZYFILES%5CINDEX%20DATA%5C00THRU05%5CTXT%5C00000034%5CP100LW9G.txt&User=ANONYMOUS&Password=anonymous&SortMethod=h%7C-&MaximumDocuments=1&FuzzyDegree=0&ImageQuality=r75g8/r75g8/x150y150g16/i425&Display=hpfr&DefSeekPage=x&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results%20page&MaximumPages=1&ZyEntry=2>.

Replacing physical ports with telemetry does not change the analysis. Analogous to replacing moving parts with software, replacing physical ports with telemetry offers opportunities to reap a competitive advantage by monetizing transactions in which the user should have a plenary interest. This replacement (and desire for monetization) has nothing to do with protecting intellectual property. Hence circumvention for the *sole purpose of maintaining the user's interest in choosing the diagnostic and repair site and terms for his or her vehicle* needs to be recognized in this exemption in this Round. As Auto Care has emphasized, this need not be exclusive from an IP perspective of manufacturers' rights to access the same data with authorization from the vehicle owner.

The Auto Alliance Resistance to Owner Access to Telematics Remains Grounded in Considerations That Are Orthogonal to This Proceeding and Subject to the Jurisdiction of Other Government Agencies.

Despite the compelling circumstances summarized above, the Oppositions of Auto Alliance and Harman seem grounded in two assertions that should be considered orthogonal to this proceeding:

- (1) That auto purchasers don't "own" either their vehicle's software or the data it generates, so have no legitimate interest in either; and
- (2) That it is the Librarian's job to exercise the responsibilities of unrelated statutes and other government agencies, pertaining to the circumstances under which a user, whether receiving assistance that is lawful under our intellectual property laws, modifies her vehicle.

The first argument, like others, is dispatched by the statutory focus on the "user," as suggested by the Policy Study. The second suggests (a) that the NTIA would not consider such factors in its own input to the Register, and (b) that other agencies would not perform their own responsibilities with respect to impermissible modifications. Neither assumption can be borne out by the public record.

Auto Care's December Comment reviewed the legitimate rights and expectations of vehicle owners with respect to software and data telemetry, irrespective of who may "own" the software and the data. Auto Care does not assert that such rights are exclusive; only that they are also available to lawful users on behalf of the vehicle owner.