

**LONG COMMENT REGARDING
A PROPOSED EXEMPTION UNDER 17 U.S.C. § 1201**

ITEM A. COMMENTER INFORMATION

Commenter:

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ITEM B. PROPOSED CLASS ADDRESSED

Class 7 (Computer Programs – Repair)

ITEM C. OVERVIEW

The Motor & Equipment Manufacturers Association ("MEMA") represents 1,000 vehicle suppliers that manufacture and remanufacture components and systems for use in passenger cars and heavy trucks, providing original equipment ("OE") to new vehicles as well as aftermarket parts to service, maintain and repair vehicles on the road today. MEMA represents its members through four divisions: Automotive Aftermarket Suppliers Association ("AASA"); Heavy Duty Manufacturers Association ("HDMA"); Motor & Equipment Remanufacturers Association ("MERA"); and, Original Equipment Suppliers Association ("OESA").

Vehicle suppliers are the largest manufacturing sector in the United States directly employing over 871,000 Americans in all 50 states plus the District of Columbia. Together with indirect and employment-induced jobs, the total employment impact of the motor vehicle parts manufacturing industry is 4.26 million jobs. Nearly \$435 billion in economic contribution to the U.S. GDP is generated by the motor vehicle parts manufacturers and its supported activity.

More than 77 percent of the value in today's vehicles comes from motor vehicle suppliers, who innovate and develop advanced, transformative technologies for the global marketplace. These technologies enable safer, smarter, and more efficient vehicles while meeting increased regulatory and customer demands.

MEMA represents every supplier segment in the automotive industry, including original equipment, aftermarket, and remanufactured components and systems. This diverse group of member companies gives MEMA a unique perspective on the real-world impact of vehicle software exemptions on the automotive industry. MEMA believes that any proposed exemptions affecting the automotive industry must strike a careful balance between three key priorities: consumer safety; protection of valuable intellectual property; and, protection of consumer choice in the automotive aftermarket, which includes remanufactured goods.¹

¹ Congress has also expressly recognized the importance of remanufactured goods in the automotive aftermarket. See Federal Vehicle Repair Cost Savings Act of 2015, Pub. L. No. 114-65.

During the sixth triennial rulemaking proceeding, MEMA opposed the proposed exemptions for vehicle software for purposes of repair and security/safety research. MEMA was concerned that the proposed exemptions were too broad and would undermine critical consumer safety systems and regulatory objectives. MEMA was therefore pleased that the final exemptions adopted by the Copyright Office after the sixth triennial rulemaking were narrower in scope than the proposed exemptions and included safeguards to help ensure that the exemptions do not undermine safety and regulatory standards. For this reason, MEMA supported renewal of these more-limited exemptions.

Although MEMA is satisfied that the current exemptions have adequate safeguards to protect consumer safety, MEMA continues to believe that the exemptions could improve balancing the interests of copyright owners with the rights of consumers to make non-infringing uses of lawfully-acquired copies of protected works.

For this reason, MEMA supports the adoption of a new temporary exemption that would make it easier for consumers to have their vehicles serviced by third parties. To be clear, MEMA agrees with petitioners that a new temporary exemption would help clarify that the DMCA does not bar consumers from having their vehicles repaired by third parties. That said, MEMA does not agree with some petitioners that the new Class 7 exemption should permit the creation and distribution of tools primarily designed to circumvent Technological Protection Measures (“TPMs”). The proposed Class 7 exemption would help ensure that consumers can benefit from a vehicle repair exemption. It should not be used to foster a new market in devices that would undermine the ability of copyright owners to protect their rights.

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

Automobiles contain a suite of electronic control units (“ECUs”) and modules that control various vehicle functions. Each ECU and module contains computer software that enables vehicle parts’ functionality and ensures that the vehicle operates within the confines of safety and environmental regulations. The ECUs and modules control numerous aspects of the vehicle, such as the fuel ratios, ignition timing, seat position settings, and a variety of other functions.

The software of ECUs is protected by TPMs, such as encryption. The TPMs help ensure that the ECUs are not improperly tampered with. Also, TPMs protect the valuable intellectual property underlying these systems, namely the proprietary computer software embedded in the ECUs.

ITEM E. ASSERTED ADVERSE EFFECTS ON NON-INFRINGING USES

Under the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 1201, the Copyright Office is empowered to issue a temporary exemption from the DMCA’s prohibition on circumvention of TPMs if it determines that “persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition . . . in their ability to make non-infringing uses under [title 17] of a particular class of copyrighted works.”² Thus, with respect to the proposed Class 7 exemption for vehicle software, the

² 17 U.S.C. 1201(a)(1)(C).

Copyright Office should issue the exemption if it determines that consumers are likely to be adversely affected by prohibition on circumvention of TPMs in vehicle ECUs and that vehicle repair is a non-infringing use of the copyrighted software.

The Copyright Office addressed most of the key issues under this legal standard when it issued a temporary exemption for repair of vehicle software after the sixth triennial review. In the final Rule issued on October 28, 2015, the Copyright Office concluded that “owners of vehicles and agricultural machinery are adversely impacted as a result of TPMs that protect the copyrighted computer programs on the ECUs that control the functioning of their vehicles.”³ It also concluded that “reproducing and altering the computer programs on ECUs for purposes of facilitating diagnosis, repair and modification of vehicles may constitute a non-infringing activity as a matter of fair use and/or under the exception set forth in section 117 of the Copyright Act.”⁴ There is no reason for the Copyright Office to revisit these issues that were settled during the sixth triennial rulemaking proceeding.

The critical issue during the seventh triennial rulemaking is, therefore, whether current law prohibits third-party assistance for exemption beneficiaries. MEMA respectfully urges the Copyright Office to conclude that the DMCA does not prohibit such third-party assistance and therefore to issue a new exemption that defines the class beneficiaries less restrictively.

Such an exemption would be supported by existing law in two ways. First, the DMCA’s anti-trafficking provisions do not prohibit vehicle repair services provided by third parties. Second, the Copyright Office is not obligated to define exemption beneficiaries as narrowly as it did during the sixth triennial rulemaking.

i. The DMCA’s anti-trafficking provisions do not prohibit vehicle repair services provided by third parties

The Copyright Office concluded during the sixth triennial review that allowing third parties to engage in circumvention activities on behalf of others would be “in tension with the anti-trafficking provisions of section 1201(a)(2) and (b)” of the DMCA.⁵ These provisions prohibit, *inter alia*, “offer[ing] to the public, provid[ing] or otherwise traffic[king] in any technology, product, service, device, component, or part thereof that is primarily designed or produced for the purpose of” or “has only limited commercially significant purpose or use other than” to circumvent a TPM that controls access to a protected work or protects the rights of a copyright owner.⁶ According to the Copyright Office, the anti-trafficking provisions preclude it from adopting exemptions that would allow circumvention to be performed by third parties on behalf of those who are actually entitled to an exemption.⁷

³ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 80 Fed. Reg. 65944-01, at 65954 (Oct. 28, 2015).

⁴ *Id.*

⁵ *Id.*

⁶ 17 U.S.C. 1201(a)(2) and (b).

⁷ U.S. Copyright Office, Section 1201 of Title 17, A Report of the Register of Copyrights, at 247 (2017).

This conclusion has a significant adverse effect on consumers and members of the automotive aftermarket industry who keep over 260 million of our country’s vehicles on the road. Under this restrictive reading of the anti-trafficking provisions thousands of independent auto repair shops would conceivably be violating the DMCA when they access vehicle computer software in order to return a vehicle to working order. Not only is this reading of the DMCA unworkable in the real world, it is also unsupported by the law.

The DMCA’s legislative history materials clearly state that Congress’s primary concern in enacting 1201(a)(2) and (b) was “black boxes” that are expressly intended to facilitate circumvention:

The Committee believes it is very important to emphasize that Section 102(a)(2) is aimed fundamentally at outlawing so-called “black boxes” that are expressly intended to facilitate circumvention of technological protection measures for purposes of gaining access to a work. This provision is not aimed at products that are capable of commercially significant non-infringing uses, such as consumer electronics, telecommunications, and computer products—including videocassette recorders, telecommunications switches, personal computers, and servers—used by businesses and consumers for perfectly legitimate purposes.⁸

As stated above, Congress did not intend for the anti-trafficking provisions to restrict “perfectly legitimate” services, such as the diagnosis, repair and modification of vehicles.⁹ These provisions are targeted toward devices and services that are “expressly intended to facilitate circumvention.”

The conclusion that legitimate vehicle repair services must by necessity be excluded from the DMCA’s “services” ban is supported by the Supreme Court’s recent decision in *Impression Products, Inc., v. Lexmark International, Inc.*¹⁰ In that case, the Court considered whether Lexmark’s patent rights entitled it to restrict post-sale use of patented ink cartridges. Citing the principle of patent exhaustion, the Court ruled that Lexmark’s patent rights in its ink cartridges are exhausted after the products are sold to consumers. Lexmark’s patent rights therefore do not allow it to restrict use of the product post-sale.

Although a patent case, *Lexmark* has important implications here. The DMCA’s anti-trafficking provisions extend only to cognizable rights under U.S. copyright law. *Lexmark* suggests that once a vehicle is sold (or leased) to a consumer, the consumer is entitled to make lawful use of

⁸ H.R. Rep. 105-551(II), 38 (July 22, 1998). *See also id.* at 39-40 (“As previously stated in the discussion of Section 102(a)(2), the Committee believes it is very important to emphasize that Section 102(b)(1) is aimed fundamentally at outlawing so-called “black boxes” that are expressly intended to facilitate circumvention of technological protection measures for purposes of gaining access to a work. This provision *40 is not aimed at products that are capable of commercially significant noninfringing uses, such as consumer electronics, telecommunications, and computer products—including videocassette recorders, telecommunications switches, personal computers, and servers—used by businesses and consumers for perfectly legitimate purposes”).

⁹ In MEMA’s view, “diagnosis, repair and modification of vehicles” encompasses the remanufacturing of vehicle components, as Congress defined and supported that activity in the Federal Vehicle Repair Cost Savings Act of 2015, Pub. L. No. 114-65.

¹⁰ 137 S. Ct. 1523 (2017)

his or her lawfully-acquired copy of the software contained within that vehicle, including by having that copy serviced by an authorized third party. Notably, the Court in *Lexmark* drew a direct comparison to an auto repair shop when it explained the negative consequences that would result from too restrictive of an interpretation of patent rights:

Take a shop that restores and sells used cars. The business works because the shop can rest assured that, so long as those bringing in the cars own them, the shop is free to repair and resell those vehicles. That smooth flow of commerce would sputter if companies that make the thousands of parts that go into a vehicle could keep their patent rights after the first sale. Those companies might, for instance, restrict resale rights and sue the shop owner for patent infringement. And even if they refrained from imposing such restrictions, the very threat of patent liability would force the shop to invest in efforts to protect itself from hidden lawsuits. Either way, extending the patent rights beyond the first sale would clog the channels of commerce, with little benefit from the extra control that the patentees retain. And advances in technology, along with increasingly complex supply chains, magnify the problem.¹¹

Lexmark tells us that the anti-trafficking provisions of the DMCA, which extend only to cognizable rights under the Copyright Act, do not prohibit third parties from servicing vehicles because copyright law does not permit a copyright owner to prevent such use of lawfully acquired copies of protected vehicle software. This is not to say that copyright owners do not have valid and enforceable rights in the vehicle software – just that those rights do not prevent consumers from having their cars serviced by third parties.

Thus, contrary to the Copyright Office’s conclusion after the sixth triennial rulemaking, the DMCA’s anti-trafficking provisions do not pose a bar to authorizing third parties to repair vehicles on behalf of consumers.

ii. The Copyright Office is not obligated to define exemption beneficiaries as narrowly as it did during the sixth triennial rulemaking.

As an alternative, MEMA urges the Copyright Office to be less restrictive in how it defines its exemptions, as it suggested in its Report on Section 1201.¹² For example, rather than specifying who may engage in the actual circumvention, the Copyright Office could instead remain silent as to who is authorized under a temporary exemption to engage in circumvention.¹³ In the words of the Copyright Office, it could “where appropriate, [] seek to avoid recommending unduly narrow definitions of exemption beneficiaries.”¹⁴

MEMA believes it would be reasonable for the Copyright Office to issue an exemption that defines exemption beneficiaries without expressly restricting how beneficiaries may take advantage of that exemption.

¹¹ *Id.* at 1532.

¹² U.S. Copyright Office, Section 1201 of Title 17, A Report of the Register of Copyrights, at 61 (2017).

¹³ *Id.*

¹⁴ *Id.* at 62.

iii. Proposed Exemption


Considering the foregoing arguments, MEMA respectfully requests that the Copyright Office adopt a proposed Class 7 exemption, such as the following:

Computer programs that are contained in and control the functioning of a motorized land vehicle such as a personal automobile, commercial motor vehicle or mechanized agricultural vehicle, except for computer programs primarily designed for the control of telematics or entertainment systems for such vehicle, when circumvention is a necessary step to allow the diagnosis, repair or lawful modification of a vehicle function; and where such circumvention does not constitute a violation of applicable law, including without limitation regulations promulgated by the Department of Transportation or the Environmental Protection Agency.¹⁵

This proposed exemption very closely mirrors the exemption that the Copyright Office adopted after the sixth triennial rulemaking, while merely deleting the requirement that circumvention to be undertaken “by the authorized owner of the vehicle.” Such an exemption would not require the Copyright Office to expressly endorse circumvention of TPMs “on behalf of” consumers and would not conflict with the DMCA’s anti-trafficking provisions.

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Respectfully submitted,

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¹⁵ MEMA has used the language of the existing vehicle repair exemption as the basis for the proposed exemption in order to demonstrate that only minor changes would be necessary to permit third parties to assist consumers with repair of their vehicles. That said, use of the existing exemption language is intended for illustrative purposes only and does not necessarily reflect MEMA’s endorsement of any particular aspect or interpretation of the existing exemption. In particular, in MEMA’s view, the carve out for telematics and entertainment systems does not and should not be interpreted as precluding the automotive aftermarket from accessing non-entertainment-related telematics systems.