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September 6, 2018

Regan A. Smith
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VIA E-MAIL

Re: Exemptions to Permit Circumvention of Access Controls on
Copyrighted Works, Dkt. No. 2017-10 – Class 7 Exemption

Ms. Smith:

This letter summarizes the September 4, 2018 *ex parte* meeting of representatives of Auto Care Association and Dorman Products, Inc. with you, Anna Chauvet, Kevin Amer, and Nicholas Bartelt, discussing issues relating to the proposed Class 7 exemption for Computer programs; specifically, computer programs and databases for repair, maintenance, and customization of motorized land vehicles. Present for Auto Care Association were Aaron Lowe, Senior Vice President, Regulatory and Government Affairs, and the undersigned as outside counsel. Present for Dorman Products was Thomas Knoblauch, Senior Vice President, General Counsel.

The discussion focused on proposed extension of the Class 7 Exemption to more fully accommodate the marketplace needs of independent motor vehicle servicers, manufacturers of replacement and remanufactured parts, and, ultimately, consumers who prefer to have their vehicles serviced by competitive independent businesses rather than only by dealerships. The exemption would be defeated, as a practical matter, unless those who provide the services and parts also fell within the protected class. The June 2017 Section 1201 Report of the Copyright Office appropriately interprets “user” to encompass persons other than an “owner” as used, for example, in Section 117 – which will make the exemption more available to class beneficiaries. These arguments were articulated previously by Auto Care in its comments and reply comments, and in the testimony of Auto Care and Dorman Products at the April 10, 2018, Section 1201 roundtable in Washington, D.C.

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Repair of vehicle modules incorporating or controlled by embedded software typically requires replacing a broken part with a refurbished part from another vehicle of the same make, model, and year. Replacement part manufacturers maintain or have access to banks of these “cores” for refurbishment. Software on the refurbished unit generally must be replaced, which may require circumvention of a technological protection measure. Parts remanufacturers also must be able to circumvent to perform quality assurance testing of each part, which requires access to functioning software in both the replacement part and the systems with which the part must interoperate. The servicer too must be able to circumvent to install and test the part in the system, and in many cases to install the software into the part itself. This process can apply to each of the scores of electronic modules in each vehicle, controlling everything from transmissions to door locks. In many cases, technological protection measures employed by certain original equipment manufacturers (OEMs) cryptographically link the embedded software in each part to the Vehicle Identification Number (VIN) of the vehicle into which the part will be installed. Thus, replacement of these parts with the correct VIN can be achieved on a timetable acceptable to consumers (and, therefore, competitive with OEM-authorized dealers) only if the parts manufacturer and the repair facility each have access to both the software via circumvention, and a tool that can install software incorporating the VIN into the part.

Remanufacturing of “infotainment” systems follows much the same process. Infotainment systems are expensive units designed for particular make and model vehicles, that contain numerous systems that may require repair over the life of the vehicle – including optical drives, hard disk or solid state storage, and programmed modules that perform various functions in the vehicle such as displaying rear view camera images, integrating navigation functions, controlling radios, and displaying controls for air conditioning systems.¹ Refurbished infotainment systems are used as replacement parts, and the refurbishing process requires replacement of individual system hardware elements and the requisite software to operate all system functions. In addition, where such units allow consumer storage of content, such as music files or photographs, consumers have a reasonable expectation that the replacement process will remove files from their old systems and re-install them on the replacement unit – just as computer service companies copy files from old computers or broken hard drives to upgraded computers and replacement drives; or companies transfer files from mobile phones to upgraded phones. The exemption should enable all these consumer expectations to be fulfilled as integral to permissible repair. To do otherwise would allow copyright law to sanction a monopoly for OEM-authorized replacement and repair.

¹ We noted that the nature of these systems and the contents of the hard drives of infotainment systems of several major manufacturers are discussed in the Memorandum Opinion, *Alliance of Artists and Recording Cos. V. General Motors*, No. 14-cv-1271 (KBJ) (Mar. 23, 2018), available through the case docket via PACER or Westlaw, or online at https://scholar.google.com/scholar_case?case=10793747462382364841.

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Similarly, independent servicers and replacement parts manufacturers need to circumvent technological protection measures to repair, replace, or upgrade telematics systems. Increasingly, telematics systems are used for communications relating to vehicle repair as well as access to emergency, guidance, and entertainment services via the vehicle's cellular or Wi-Fi networks. It is estimated that by 2020, 90 percent of all cars sold in the United States will have such connectivity. Independent servicers and parts manufacturers need to circumvent technological protection systems to enable repair or replacement of the physical and software elements of vehicle telematic systems. Further, major automobile manufacturers have indicated their intention to phase-out or severely limit use of the onboard diagnostics (OBD) port in favor of telematic diagnosis and downloading of software for repair. Servicers would need access to diagnostic repair codes that might only be available through telematic systems rather than OBD ports.

Repair or replacement of infotainment and telematics systems does not inherently affect audio or audiovisual works that may be performed or streamed via these systems, or the integrity of technological protection measures applied to protect them. The interest of independent servicers and parts manufacturers is to enable the consumer to use these systems for their intended purposes, not to expand into new or unauthorized functionality. No evidence has been shown that, for example, access to or repair of a telematics or infotainment system somehow avoids subscription-based controls over satellite radio or online media services. Moreover, the repaired or replacement system retains, rather than removes, the technological protection measure. To the extent it becomes necessary to circumvent so as to allow replacement parts to function interoperably within the vehicle system and network, this is accomplished by satisfying the technological protection measure (e.g., by providing the correct response to an authentication sequence, or by ensuring proper operation of standard protection systems for optical disk playback). Therefore, there is no non-speculative risk that an exemption enabling competition by servicers and parts remanufacturers will expose audio or audiovisual content to unlawful access or infringement.

We respectfully asked the Copyright Office not to limit the scope of the exemption based on concerns for trafficking in tools. The Librarian has authority with respect to the exemption for circumvention of access controls under Section 1201(a)(1). Courts are granted authority to address trafficking under Section 1201(a)(2) and 1201(b), and can do so independent of any use-based exemptions. Such determinations necessarily will be fact-specific and therefore should not be prejudged based on factual assumptions in a rulemaking proceeding.

Finally, the exemption should not be limited (as in the last rulemaking proceeding) based on concerns extrinsic to copyright, such as emissions standards. We noted that, pursuant to Executive Order, California has an exemption application process covering manufacture of add-

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on and modified parts, which assures compliance with California emissions standards.² Inasmuch as California has the most stringent emissions standards in the United States, this process typically is respected in other states as well and should resolve any concerns.

Auto Care Association and Dorman Products again thank the Copyright Office for your time and consideration. Should you have any follow-up questions, please contact the undersigned.

Respectfully submitted,

/s/ Seth D. Greenstein

Seth D. Greenstein

cc: Aaron Lowe, Esq.
Thomas Knoblauch, Esq.

² See, e.g., <https://www.arb.ca.gov/msprog/aftermkt/forms/forms.htm> (last accessed Sept. 5, 2018).