

## **REPLY COMMENT**

### **ITEM A. COMMENTER INFORMATION**

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### **ITEM B. PROPOSED CLASS ADDRESSED**

**Proposed Class 12: Computer Programs — Repair**

### **ITEM C. REPLY COMMENT**

#### **OVERVIEW**

In the 2018 Round, the American Farm Bureau Federation (“Federation”) and allies (collectively “Farmers”) in their Long Comments provided six detailed Declarations, by a software engineer, large and small scale farmers, and a Lead Mechanic, establishing why expert assistance to farmers through use of software tools is necessary in order to maintain, repair, and upgrade motorized farm equipment, and does not infringe on the rights of others. Through these Declarations, Farmers established for the record:<sup>1</sup>

1. Functions that are entirely mechanical on older vehicles and agricultural implements are, on newer vehicles, controlled and restricted by embedded, proprietary software, passwords, and computer memory modifications.<sup>2</sup>

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<sup>1</sup> Text is from 2018 Long Comments, footnotes are to Declarations included in text.

<sup>2</sup> Mills Declaration (“Mills”) ¶ 2.b, Pratt ¶¶ 3,6, Shamblin ¶¶ 4, 5, Doe ¶ 3.

2. Internal electronic control units (“ECUs”) or engine control modules (“ECMs”) increasingly govern the operation of agricultural equipment. Where maintenance, upgrade, or repair is necessary, the ECU may control the ability to diagnosis, access, and repair, and whether the equipment, once repaired, will recognize the user and accept commands.<sup>3</sup>
3. Proprietary embedded software frustrates the ability of Farmers and local servicers to maintain equipment that is owned by the Farmer and which the Farmer would like to maintain himself, with assistance of a local servicer as may be necessary.<sup>4</sup>
  - a. Original Equipment Manufacturers (“OEMs”) commonly use Technical Protection Measures (“TPMs”) in order to limit access to and control over the ECU software and firmware. The TPMs are designed to limit access and control to only OEM-authorized dealers, to the exclusion of independent local dealers and servicers.<sup>5</sup>
  - b. Due to these TPMs, as well as manufacturer restrictions on distribution of necessary codes, information, and software, Farmers cannot maintain their equipment themselves, as was possible with older equipment that is less dependent on embedded software, or to which TPMs were not applied.<sup>6</sup>
  - c. Some major OEMs do not license necessary software to local, independent dealers and repair shops.<sup>7</sup>

Farmers’ Long Comments concluded by arguing that access to software tools does not diminish their value to rights holders:

The experience of other industries shows that access to software tools by independent dealers does not diminish their worth, as intellectual property, to OEMs. In the auto industry, for example \*\*\* there is no evidence that auto manufacturers have chosen to be less reliant on embedded functional software in designing vehicles and components, or that the value of their intellectual property has suffered. Rather, the 2002 agreement was expanded in 2014. No complaint was raised regarding expanded circumvention as a result of these tools being in the hands of independent repair persons. The availability of the tools was, in fact, cited only as evidence of reduced harm to independents.

Accordingly, Farmers’ 2018 Round petition sought an Exemption that would read:

**Computer programs that are contained in and control or assist the functioning of a mechanized agricultural vehicle or implement, where the owner or authorized user of the vehicle or implement, or one rendering**

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<sup>3</sup> *Id.* and Kenney ¶¶ 2, 3.

<sup>4</sup> Kenney ¶¶ 1 – 5, Mills ¶ 4.b, Pratt ¶ 6, Schwarting ¶ 3, Shamblin ¶ 4, Doe ¶ 3.

<sup>5</sup> Kenney ¶¶ 1 – 5 and Mills ¶¶ 2.b, 3.a; Schwarting, ¶ 3.

<sup>6</sup> Mills ¶¶ 2.b, 3.a, Pratt ¶ 6, Shamblin, ¶ 4, Doe, ¶ 3.

<sup>7</sup> Kenney ¶¶ 6,7, Mills ¶¶ 2.b, 3.a.

**expert assistance toward maintaining or improving its use, determines that circumvention lawful under the copyright law or an enabling tool for such circumvention is necessary for the diagnosis, repair, or lawful modification of the vehicle or implement’s function, and such assistance or tool is to be applied to this lawful purpose.**

Farmers included references to “expert assistance” and to “tools” in order, as stated in Farmers’ Long Comments, to “focus on the pressing need to *make this exemption useful to their businesses and livelihoods*.”<sup>8</sup> This can occur only by interpreting this exemption as including the assistance of *expert local mechanics when equipped with the necessary software tools*.<sup>9</sup> The Exemption as recommended by the Register addressed these needs and issues by removing the “undertaken by the authorized owner” language of previous exemptions, thus including third party experts as “users” within the contemplation of the statute:

**(1) Computer programs that are contained in and control the functioning of a lawfully acquired motorized land vehicle such as a personal automobile, commercial vehicle, or mechanized agricultural vehicle, except for programs accessed through a separate subscription service, when circumvention is a necessary step to allow the diagnosis, repair, or lawful modification of a vehicle function, 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, and is not accomplished for the purpose of gaining unauthorized access to other copyrighted works.**

In the Final Rule, the Librarian explained (emphasis added):

Regarding motor vehicles, the recommended exemption removes the requirement that circumvention be “undertaken by the authorized owner” of the vehicle, instead providing that it apply where such items are “lawfully acquired.” *This change responds to proponents’ concerns that the language of the existing exemption improperly excludes other users with a legitimate interest in engaging in noninfringing diagnosis, repair, or modification activities*. The Acting Register expressed no view on whether particular types of third-party

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<sup>8</sup> Farmers, with livelihoods at stake, are a core example of what the Register has identified as the “legitimate concern for exemption beneficiaries, many of whom may be increasingly frustrated by a lack of access to the tools or skills required to make use of exemptions, particularly when trying to engage in activities, such as automobile repair, that simply did not implicate copyright in the analog world.” U.S. Copyright Office, *Section 1201 of Title 17*, at 59 (2017) (“1201 Study”).

<sup>9</sup> Emphasis and footnote are as appearing in 2018 Long Comments. Farmers sought this Exemption language for motorized agricultural implements only, and expressed no opinion on application to other devices or software.

assistance may or may not implicate the anti-trafficking provisions. Those provisions, found in section 1201(a)(2) and (b), are unchanged and must be separately analyzed to determine whether third-party assistance would be permissible.

Given this outcome, explicitly recognizing the need for and importance of lawful expert assistance to maintain, repair, and update farm equipment and other devices and software, in this Round the Federation has sought only the renewal of the 2018 exemption, to which no Opposition has been filed. However, such opposition now might be inferred from elements of Long Comments filed in opposition to “new” exemptions that seek to expand the 2018 Class 7 Exemption to additional devices and software. *The Federation takes no position on these proposed new exemptions*, but is obliged to respond to Comments that, despite the announced intent to renew the 2018 exemption, could be interpreted as seeking to narrow its terms as applied to farm machinery.

### REPLY TO COMMENTERS

#### Comments of Equipment Dealers Association *et al* (“Dealers”)

Dealers are listed as having commented to the Office in the course of the 2017 1201 Study, in which the Register carefully considered and sought public comment on who should be considered a “user” within the meaning of the statute.<sup>10</sup> In filing “Opposition” comments now, however, Dealers appear to address farm equipment with a view to narrowing the 2018 Class 7 exemption, which the NPRM has already stated will be renewed without change. Dealers:

- Do not oppose “renewal” of the Class 7 exemption as applied to farm machinery,
- Agree that that this exemption can be renewed without expansion, *but*,
- Seek definitional “clarifications.”

The Federation can have no quarrel with the first two points. But re “clarifications” – this is a book that, *as to the exemption for farm machinery*, the NPRM has declared closed.

Re farm equipment the Federation has sought only the *renewal* of the exemption previously granted in 2018 Class 7, and has taken no position as to any device or computer software other than farm machinery as considered in 2018 Class 7. Thus now the Dealers, in seeking to reinterpret and “clarify” the previously granted exemption, *including its definition of “user,”* as it sits in Class 12, is asking the Register to re-open an exemption that it addressed in its 1201 Study and on which it then received massive input in the 2018 Round, which was then accepted and explained by the Librarian, and as to which in this NPRM the Office now has *already* said it intends to “adhere” without change:

The Office addressed the relationship of this exemption to the anti-trafficking provisions in some detail in the 2018 Recommendation. In response to petitioners’ requests, *the Office recommended removal of the language in the prior repair*

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<sup>10</sup> See 1201 Study, Third Party Assistance, at 56 – 62.

*exemption requiring that circumvention be “undertaken by the authorized owner.”* 94 *That change, the Office explained, was intended to “account[] for the possibility that certain third parties may qualify as ‘user[s]’ eligible for an exemption from liability under section 1201(a)(1).”* 95 In making this recommendation, which the Librarian accepted, the Office declined to express any “view as to whether particular examples of assistance do or do not constitute unlawful circumvention services”—specifically, “whether vehicle or other repair services may run afoul of the antitrafficking provisions when engaging in circumvention on behalf of customers.” 96 *The Office adheres to this position* and accordingly expresses no view as to the activities described by ACA and MEMA.

Based on the information provided in the renewal petitions and the lack of opposition to the specific exemption, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. *Accordingly, the Office intends to recommend renewal of this exemption.*<sup>11</sup>

Thus, *with respect at least to farm machinery*, there is no room for or materiality to the sorts of “clarifications” sought by Dealers. The place for any such concerns (none of which are new or different from factors discussed in 2018, the 1201 Study, and prior rounds) would have been an opposition to renewal.

#### Comments of Auto Innovators

Auto Innovators (“Innovators”), as participants in the 2018 round, recite that in that round they disagreed with the outcome that allows repair professionals to stand in the shoes of lawful users, but Innovators recognize that, as stated in the NPRM, this cannot be relitigated here. Innovators also confine their comments strictly to “automobiles” and “the automobile industry” and (like the Federation) take no position outside their declared area of product concern.

The Federation notes, however, that Innovators suggest that the existing unchallenged exemption “does not permit third party commercial services to *manufacture* or traffic circumvention tools ....” (emphasis supplied) But to the extent repair professionals are “users,” *they are also exemption beneficiaries to the same extent as the device owners who have requested assistance*, because they are standing in their shoes. The right of an exemption beneficiary to manufacture tools has never been seriously questioned, and has recently been confirmed to the Congress by the Associate Register as not in need of clarification:

The Office agrees that exemption beneficiaries should be permitted to develop necessary tools solely for their own use in carrying out exempted circumventions. The existing statutory language, however, does not appear to prohibit such activity. The statutory text and structure indicate that the manufacturing provision was intended to apply only in connection with trafficking conduct, and not to

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<sup>11</sup> NPRM, 85 F.R. 65293 at 65300 (emphasis supplied).

exemption beneficiaries engaging in self-help. The Office is not aware of any court that has construed the statute otherwise. Therefore, we are not currently recommending legislative change as to this provision.<sup>12</sup>

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In summary, this proceeding and the previous Round have left no room to “clarify” the exemption that currently pertains to farmers, which the Office has said it intends to renew. The American Farm Bureau Federation appreciates the Office’s continued recognition of the importance to farm livelihoods of the timely maintenance, repair, and improvement of farmers’ equipment.

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<sup>12</sup> Statement of Regan A. Smith, General Counsel and Associate Register of Copyrights, U.S. Copyright Office, Before the Subcommittee on Intellectual Property Committee on the Judiciary, United States Senate, September 16, 2020