



September 8, 2020

FILED VIA REGULATIONS.GOV

Regan A. Smith
General Counsel and Associate Register of Copyrights
U.S. Copyright Office
Library of Congress
101 Independence Avenue, SE
Washington, DC 20559-6000

Re: Docket No. COLC-2020-0010
Comments of the Alliance for Automotive Innovation in Response to Petitions to
Renew the “Streamlined Renewal Process” Exemption (85 Fed. Reg. 37399, June 22,
2020)

Dear Ms. Smith:

I submit this letter on behalf of the Alliance for Automotive Innovation (Auto Innovators),¹ the singular voice of the automotive industry. Auto Innovators does not submit this letter in opposition to any specific petition requesting renewal of an existing regulatory exemption to the anti-circumvention prohibition of 17 U.S.C. § 1201(a)(1). Instead, Auto Innovators raises concerns with the submissions of the Auto Care Association (ACA) and Motor Vehicle Equipment Manufacturers (MEMA) to the extent these submissions are inconsistent with the “streamlined renewal” process laid out in the Notice of Inquiry (NOI). The ACA submission can be found here: <https://www.regulations.gov/document?D=COLC-2020-0010-0005>, and the MEMA submission can be found here: <https://www.regulations.gov/document?D=COLC-2020-0010-0010>.

Pursuant to the NOI, the streamlined renewal process is only available to petitioners seeking to renew existing exemptions that were granted during the seventh rulemaking. *See* 85 FR 37399. As noted in the NOI, “Renewal may only be sought for current exemptions as they are currently formulated, without modification.” *See* 85 FR 37401. Although the submissions of the ACA and MEMA are purportedly to support renewal of the current temporary exemption outlined in 37 C.F.R § 201.40(b)(9), these submissions unfortunately mischaracterize the scope of the existing exemption and appear to argue for an expanded exemption, rather than for renewal of the existing exemption as it is “currently formulated, without modification.”

¹In 2020, the Alliance of Automobile Manufacturers and Global Automakers merged to create the Alliance for Automotive Innovation. The newly established organization, a combination of the Association of Global Automakers and the Alliance of Automobile Manufacturers, includes motor vehicle manufacturers, original equipment suppliers, technology and other automotive-related companies and trade associations.

I. The Existing Exemption Does Not Permit Unlawful Trafficking in Circumvention Tools or Services

The statute is clear that the exemptions derived from this rulemaking 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. Accordingly, the existing exemption does not permit third party repair services to manufacture or traffic circumvention tools or provide circumvention services. Underscoring this limitation, the existing exemption expressly permits circumvention only “where such circumvention does not constitute a violation of applicable law.” In its Final Rule, the Copyright Office “expressed no view on whether particular types of third-party assistance may or may not implicate the anti-trafficking provisions” in Sections 1201(a)(2) and (b), but noted that these provisions “are unchanged and must be separately analyzed to determine whether third-party assistance would be permissible.” *See* 83 FR 54022.

Both the ACA and MEMA submissions misstate the scope of the exemption to the extent that they suggest that the exemption permits activity that is unlawful under the prohibitions of Sections 1201(a)(2) and (b). In particular, the ACA submission indicates that the exemption permits its members to “lawfully [assist] consumers in the maintenance, repair, and upgrade of their vehicles.” Likewise, MEMA states that the exemption “allows third parties, such as technicians at independent auto repair shops, to access computer software on behalf of consumers for purposes of diagnosis, repair, or modification of their vehicles.” Their suggestions that the existing exemption permits third party repair shops to circumvent access controls on vehicle software in order to provide commercial repair services is incorrect. Providing a commercial service that requires circumventing access controls or copy controls (e.g., using or providing certain engine tuning software) is indisputably trafficking in an unlawful service under Sections 1201(a)(2) and (b) and, therefore, is clearly outside the scope of the existing exemption.

Furthermore, the ACA submission suggests that the existing exemption may permit “innovative competitors” to circumvent technological protection measures to add “new software functionality that interoperates with the existing software,” and producers of diagnostic tools to circumvent technological protection measures to copy vehicle software “for the purpose of reverse engineering the vehicle systems to ensure operability with their own tools.” These activities would similarly appear to constitute unlawful manufacturing or trafficking in circumvention tools or provide unlawful circumvention services under Sections 1201(a)(2) or (b) and, accordingly, would not be permissible under the existing exemption.

ACA also falsely asserts that motor vehicle manufacturers have adopted technological protection measures “intending to hinder access by independent repair shops to the software that is necessary to car repair.” To the contrary, access controls to these vital computer programs are necessary to protect the safety and security of drivers and passengers and to reduce the level of non-compliance with regulatory standards. Automakers continue to take important steps to strengthen and secure vehicle security and to help protect against cyberattacks, consistent with cybersecurity best practices and National Highway Traffic Safety Administration’s (NHTSA)

guidance. This includes taking deliberate steps to prevent *unauthorized* access to a vehicle's safety systems and implementing layers of defense into all levels of a vehicle's architecture. The Copyright Office recognized the importance of these technological protection measures by narrowly circumscribing the existing temporary exemption to prohibit any circumvention that violates applicable law, including Department of Transportation and Environmental Protection Agency regulations.

II. Third Party Servicers Already Have Access to Circumvention Tools

The Copyright Office should reject any argument to expand the current exemption to permit unlawful trafficking in circumvention tools or the unlawful provision of circumvention services by third party servicers because this streamlined renewal process only applies to the existing exemption as currently formulated, without modification. Furthermore, contrary to ACA's and MEMA's suggestions, independent repair shops already have access to all necessary diagnostic and repair tools and information. For almost two decades, both the U.S. Environmental Protection Agency (EPA)² and the California Air Resources Board (CARB)³ have maintained vehicle service information regulations for light-duty vehicles and heavy-duty vehicles up to 14,000 pounds. Among other things, these regulations require Original Equipment Manufacturers (OEMs) to make full text emissions-related service information and training information available via the Internet, provide equipment and tool companies with information that allows them to develop equipment with passthrough reprogramming capabilities, make enhanced diagnostic information available to equipment and tool companies, and make OEM-specific diagnostic tools available for sale to interested parties.

In the attached letter of September 20, 2002, to Senator Dorgan (ND), automakers agreed to provide the "emissions and non-emission service information, training information, and diagnostic tools in the same manner and to the same extent as specified by the California Air Resources Board regulations for emission-related systems and components." Automakers also committed to "make available to information providers and tool companies the service and training information, tools, and tool information." It bears repeating: this commitment was for both emission and non-emission related information. Automakers have abided by this commitment for well over a decade.

In fact, this commitment by automakers has been updated several times over the intervening 15 years to incorporate updated regulations (such as when EPA adopted its regulations in 2003) and legislation (such as the when Massachusetts adopted a "Right-to-Repair" law in 2013). Most recently, as noted in its comment, ACA signed a January 15, 2014 "Memorandum of Understanding (MOU)" with the two predecessor automotive trade associations that have since combined to form Auto Innovators.⁴ Under that MOU, automakers

²See <https://www.govinfo.gov/content/pkg/FR-2003-06-27/pdf/03-14461.pdf>, Federal Register Vol. 68, No. 124, at 38428, June 27, 2003

³13 CCR §1969, the California Light Duty Vehicle Service Information regulations were adopted in 2001, for current regulations which have included heavy-duty vehicles since 2006 see [https://govt.westlaw.com/calregs/Document/I75141BE02DDD11E197D9B83B68A61150?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://govt.westlaw.com/calregs/Document/I75141BE02DDD11E197D9B83B68A61150?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default))

⁴The obligations under the MOU to which the automakers committed have not changed since the merger.

committed to provide independent repair facilities and owners access to the same diagnostic and repair information that a manufacturer provides a franchised dealer, and to make available to owners and independent repair facilities diagnostic repair tools that incorporate the same repair capabilities that manufacturers make available to dealers. These commitments and obligations remain in place, and neither ACA nor MEMA have alleged otherwise.

Since the MOU entered into force, there has not been a single instance of an owner or independent repair facility employing the dispute resolution panel (DRP) contemplated by the MOU for unresolved issues with diagnostic and repair access. Simply put, the MOU is working. Vehicle owners and independent repair facilities continue to have the information and access to diagnose vehicles and complete vehicle repairs.

While apparently acknowledging that the necessary repair and diagnostic tools are made available to independent servicers, ACA complains about the cost of acquiring hardware and software tools under the MOU. The cost of items under the MOU is irrelevant to the scope of the existing exemption and this petition process is not the appropriate forum to debate the issue. Moreover, ACA's complaint has no merit. The MOU guarantees "fair and reasonable" terms for access and permits various subscription levels to be tailored for varying use cases.⁵ For instance, the regulations provide for subscription pricing such that a repair shop owner that does a high volume of repair work on a particular line may choose to subscribe annually whereas the owner of a shop that does very little work on a particular line may choose a shorter term subscription. Prices are adjusted accordingly. As a result, no independent repair shop has ever alleged that an automobile manufacture did not provide a fair and reasonable price, even though such an allegation could be raised with EPA, CARB, or through the DRP.

More fundamentally, to the extent ACA argues for expanding the current exemption to cover unlawful circumvention by third party repair services because making use of the information and tools currently available to them would be too expensive or burdensome, this argument must be rejected. As stated in the NOI, this streamlined renewal process is only applicable to exemptions as currently formulated, without modification. Moreover, ACA's complaints do not match up with the reality of a nationwide system in which manufacturers have fulfilled their legally mandated (emissions-related) and publicly stated (non-emissions-related) obligations to share with independent repair facilities and vehicle owners the same information necessary to diagnose and repair vehicles that they provide to dealers. To the extent independent repair facilities wish to complain about the cost or difficulty of acquiring tools, the dispute settlement provision of the MOU, not this proceeding, is the appropriate mechanism to address those issues.

⁵The "fair and reasonable" language is taken directly from the EPA and CARB regulations. While the EPA and CARB language applies to emissions-related information and tools, to our knowledge, there is no additional cost to obtain the non-emissions-related service information. In other words, automakers offer all service information for one subscription price that is approved by both EPA and CARB. Thus, if EPA and CARB approve the service information price for emissions-related access and therefore deem it fair and reasonable, providing more service information (i.e., both non-emissions-related information and emission-related information) for the same price must also be fair and reasonable.

III. Conclusion

For the foregoing reasons, the Copyright Office should reject any part of the ACA and MEMA petitions that argue for expanding the existing temporary exemption outlined in 37 C.F.R. § 201.40(b)(9). Consistent with the streamlined process available to petitioners seeking to renew existing exemptions, the Copyright Office should only consider these petitions to the extent they seek renewal of the existing exemption as it is currently formulated, without modification.

Sincerely,



Kevin M. Rosenbaum
MITCHELL SILBERBERG & KNUPP LLP

cc: Kevin R. Amer, Deputy General Counsel
(kamer@copyright.gov)

KMR/psb



September 20, 2002

The Honorable Byron Dorgan
Chairman
Subcommittee on Consumer Affairs, Foreign Commerce and Tourism
U.S. Senate Commerce, Science, and Transportation Committee
Washington, D.C. 20510

Dear Chairman Dorgan:

As the Subcommittee requested, our associations have discussed the issues reviewed at the Subcommittee's July 30, 2002 hearing on Customer Choice in Automotive Repair Shops (S. 2617). We believe the following commitments by automakers will provide independent repairers the necessary service information and diagnostic tools to compete and serve consumers in the marketplace.

The members of the Alliance of Automobile Manufacturers and the Association of International Automobile Manufacturers listed below fully support the following:

Automobile manufacturers hereby commit to make available, by August 31, 2003, emission and non-emission-related service information, training information, and diagnostic tools in the same manner and to the same extent as specified by California Air Resources Board (CARB) regulations for emission-related systems and components. This means that 1) the same service and training information related to vehicle repair will be made available to independent repair shops either via the Internet, or in the same manner and extent as it is made available to franchised dealerships and 2) the same diagnostic tools related to vehicle repair that are made available to the franchised dealers will be made available to the independent repair shops. These will be made available at a reasonable price consistent with the guidelines provided in CARB regulations. The service and training information and manufacturer tools will be available to independent repair shops without the need for them to return to a franchised dealership (to the extent allowed by law).

This commitment will continue the viability of the automotive service industry and preclude the need for current legislation while we work on implementation. Moreover, successful implementation will eliminate the need for future state and federal legislation.

Manufacturers recognize the value of third-party providers of tools, service and training information and are committed to making available to information providers and tool companies the service and training information, tools and tool information. The National Automotive Service Task Force will continue to provide a forum for industry and aftermarket to resolve service information issues. We ask that the Subcommittee and its staff periodically review the progress being made toward the objectives above.

We believe this continues a long tradition of the independent repairer's important position in the automotive industry. It also demonstrates our mutual commitment to fair and open competition in the auto service industry and to consumer choice in seeking these services. Please feel free to call on our organizations if you have any questions.

Sincerely,



Josephine S. Cooper
President & CEO
Alliance of Automobile
Manufacturers, Inc.



Timothy C. MacCarthy
President & CEO
Association of International
Automobile Manufacturers, Inc.



Dan Frohlich
Chairman
Automotive Service Association

Automobile Makes:

Acura
Aston-Martin
Audi
BMW
Buick
Cadillac
Chevrolet
Chrysler
Dodge
Ford
GMC
Honda

Hyundai
Infiniti
Isuzu
Jaguar
Jeep
Kia
Land Rover
Lexus
Lincoln
Mazda
Mercedes-Benz
Mercury

Mitsubishi
Nissan
Oldsmobile
Pontiac
Saab
Saturn
Subaru
Suzuki
Toyota
Volvo
Volkswagen