Please submit a <u>separate</u> comment for each proposed class.

NOTE: This form must be used in all three rounds of comments by all commenters not submitting short-form comments directly through Regulations.gov, whether the commenter is supporting, opposing, or merely providing pertinent information about a proposed exemption.

When commenting on a proposed expansion to an existing exemption, you should focus your comments only on those issues relevant to the proposed expansion.

[ ] **Check here if multimedia evidence is being provided in connection with this comment.**

Commenters can provide relevant multimedia evidence to support their arguments. Please note that such evidence must be separately submitted in conformity with the Office's instructions for submitting multimedia evidence, available on the Copyright Office website at
copyright.gov/I 201/2024.

ITEM A.   COMMENTER INFORMATION

Identify the commenter and provide contact information for the commenter and/or the commenter's representatives, if any.

Commenter: Association of Equipment Manufacturers (AEM). AEM is the North American-based international trade association representing more than 1,000 companies and more than 200 product lines in the agriculture and construction-related industry sectors worldwide. The equipment manufacturing industry in the United States supports 2.3 million jobs and contributes $316 billion to the economy every year (www.aem.org).

Contact:

Kip Eideberg

Senior Vice President, Government and Industry Relations

Association of Equipment Manufacturers

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(202) 615-0096

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ITEM B. PROPOSED CLASS ADDRESSED

Identify the proposed exemption that the comment addresses by the number and name of the class set forth in the notice of proposed rulemaking (for example, "Proposed Class 1: Audiovisual Works-Noncommercial Videos").

Proposed Class 7: (Computer Programs-Vehicle Operational Data)

ITEM C. OVERVIEW

Provide a brief summary of the circumvention activity sought to be exempted or opposed and why.

A new exemption has been proposed by MEMA, The Vehicle Suppliers Association, that would allow "circumvention of technological protection measures on computer programs that are contained in and control the functioning of a lawfully acquired motorized land vehicle or marine vessel such as a personal automobile or boat, commercial vehicle or vessel, or mechanized agricultural vehicle or vessel to allow lawful vehicle owners and lessees, or those acting on their behalf, to access, store, and share vehicle operational data, including diagnostic and telematics data." AEM submits these comments in opposition to this new proposed Class 7 exemption (the **"Exemption").**

The proposed Exemption is not necessary because there are already existing lawful mechanisms in place for accessing telematics data, or diagnostics data, or both.

For example, some manufacturers of off-road vehicles or some data processing service providers already support customer authorization of collaborative third-parties:

> (a) to access certain telematics data services that are available via the Internet or cloud under applicable software-as-a-service (SaaS), end user license agreements, or other suitable commercial agreements, and/or

> (b) to access certain telematics data via an Application Programming Interface (API) in accordance with the ISO standard 15143-3 under developer contracts or other suitable commercial agreements, where the above customer authorization of collaborative third parties is provided in accordance with the applicable privacy regulations and data policies of such manufacturers of the off-road vehicles and/or data processing service providers.

Further, the existing 1201 exemption (37 CFR §201.40(b)(13)), which is proposed to be renewed, already allows circumvention of security features for diagnosis, repair and lawful modification of motorized land vehicles. The proposed Exemption would interfere with or be duplicative with the above existing lawful mechanisms that are compatible with privacy regulations and policies, among other reasons noted below. The proposed Exemption's use of the term, "operational data," is without any definition (i.e, limited to data specific to the owner's vehicle) or exclusions for trade secrets, proprietary information, or other information that would enable or assist in reverse engineering.

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

Describe the technological protection measure(s) that control access to the work and the relevant method(s) of circumvention. It would be most helpful to the Office if sufficient information is provided to allow the Office to understand the nature and basic operation of the relevant technologies, as well as how they are disabled or bypassed.

As an initial matter, MEMA appears to describe "vehicle operational data, including diagnostic and telematics data" as "the work" at issue here.

Specifically, MEMA seeks to allow circumvention of that technical protection measure(s) ("TPMs") that control access to electronic control units ("ECUs") that are contained in and control the functioning of motorized land vehicles, marine vessels, commercial vehicles or vessels, or mechanized agricultural vehicles or vessels. According to MEMA, the TPMs that control access to ECUs include challenge-response mechanisms, encryption, and disabled access ports on the circuitry itself.

Further, the MEMA petition relates to "automotive vehicles," "car owners," "consumers," "access to driving records," "parts that keep millions of vehicles on the road," and evaluating "the driving habits of new drivers using the family car" - in short, vehicles primarily designed to transport persons or property on public roads. The petition does not relate to off-road self-propelled equipment supplied by AEM members, nor should it apply to such equipment given the intent of the proposed Exemption and existing and pending legislation and regulations regarding this matter.

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

Comments should be directed at answering the following question: Are users of a copyrighted work adversely affected by the prohibition on circumvention in their ability to make noninfringing uses of a class of copyrighted works, or are users likely to be so adversely affected in the next three years? Commenters are encouraged to focus on the following elements:

- *Does the proposed class include at least some works protected by copyright?*

- *Are the uses at issue likely noninfringing under Title 17?*

- *Are users currently, or likely to be, adversely affected in their ability to make such noninfringing uses during the next three years?*

  - *Discussion of this element should include an evaluation of section 1201(a)(1)(C)'s five statutory factors: (i) the availability for use of copyrighted works; (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes; (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research; (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and (v) such*

other factors as the Librarian considers appropriate.

- *Is the statutory prohibition on circumventing access controls the cause of the adverse effects?*

This section should identify all statutory provisions, case law, and/or other legal authority the commenter wishes the Office to consider in connection with the proposed class. Commenters should also provide an evidentiary basis to support their arguments, including discussion or refutation of specific examples of adverse effects on noninfringing uses and, if available, relevant documentary and/or multimedia evidence.

Commenters should demonstrate, or refute, that the asserted adverse effects are real, tangible, and concrete, and not merely hypothetical, theoretical, or speculative-that is, they are not merely possible, but probable. This discussion should include an evaluation of section 1201(a)(1)(C)'s five statutory factors. For example, in analyzing the first statutory factor, commenters should examine whether there are any potential alternatives that permit the asserted noninfringing use(s) without the need for circumvention, and whether such potential alternatives are realistic options.

AEM provides selected comments with respect to the questions and elements identified by the USCO in its Long Comment Form.

Are users of a copyrighted work adversely affected by the prohibition on circumvention in their ability to make noninfringing uses of a class of copyrighted works, or are users likely to be so adversely affected in the next three years?

1. MEMA's proposed Exemption does not sufficiently define the class of copyrighted works for which the prohibition on circumvention may adversely affect their ability to make noninfringing uses.
   a. MEMA does not sufficiently define the vehicle operational data, telematics data, or diagnostics data at issue.
   b. MEMA does argue, however, that the proposed Exemption is "merely to retrieve the non-copyrightable data" and "[n]one of the data ... likely to [be] obtain[ed] under the proposed class 7 exemption would have been part of the copyrighted work."
   c. MEMA argues that any copying of the copyrightable elements (e.g., data structure, sequence, organization, or Uls and menu structures) and software are merely incidental to gaining access to and use of the data.
2. This proceeding concerns only TPMs that control access to "copyrighted works," and granting exemptions so that "users of a copyrighted work" are not adversely affected by the prohibition on circumvention. 17 U.S.C. § 1201(a)(l)(B). To the extent that the "work" at issue in the proposed Exemption is uncopyrightable data, as stated in 1(b) above, it is not properly the subject of this proceeding, or within the scope of the Library's statutory authority, and should be rejected.

Does the proposed class include at least some works protected by copyright?

1. MEMA's reference to "vehicle operational data," "telematics data," or "diagnostics data" at issue in its proposed Exemption does not sufficiently define a class of copyrighted works, or a class that contains copyrighted works. As noted above, MEMA's comments suggest that the class at issue is merely non-copyrightable data.

Is the statutory prohibition on circumventing access controls the cause of the adverse effects?

Commenters should demonstrate, or refute, that the asserted adverse effects are real, tangible, and concrete, and not merely hypothetical, theoretical, or speculative-that is, they are not merely possible, but probable. This discussion should include an evaluation of section 1201(a)(l)(C)'s five statutory factors. For example, in analyzing the first statutory factor, commenters should examine whether there are any potential alternatives that permit the asserted noninfringing use(s) without the need for circumvention, and whether such potential alternatives are realistic options.

1. The access controls currently in place are not causing the adverse effects claimed by proponents of the proposed Exemption, which are speculative in nature. Further, there exist alternatives to alleviate any harms without the need for circumvention, and which carefully balance access with requirements of other laws, such as the network of privacy regulations and requirements across the United States and around the world.
   a. There is a 1201 exemption (2021) for repair and diagnosis that already exists and is up for renewal, and its 2015 predecessor carved out telematics, and the 2018 and 2021 exemptions carved out "programs accessed through a separate subscription service;" therefore, the proposed Exemption appears to be redundant and cumulative with respect to the existing 1201 exemption that already covers what is necessary or essential for repair and diagnosis (and even lawful modification of a vehicle function, where the latter has safety risks).
   b. The proposed Exemption is not necessary because vehicle manufacturers already permit and enable third party connections to obtain vehicle data in a variety of contexts, including through SDKs and APIs.
      1. For example, there are industry standards for construction or road machinery under the ISO 15143-3 standard, for which AEM and the Association of Equipment Management Professionals (AEMP) were involved in promoting. Companies offer developers who want to use the ISO 15143-3 to integrate telematics data processing for mixed vehicle fleets.[1]

2. Enacting the proposed Exemption effectively puts the Copyright Office and the Library

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[1] *See, e.g.,* https://developer.deere.com/dev-docs/aemp; https://digital.cat.com/knowledge-hub/articles/iso-15143-3-aemp-20-api-developer-guide; https://www.developer.cnhindustrial.com/connectmachinedataapi; https://www.developer.cnhindustrial.com/home.

in the position of regulating material outside the scope of their statutory authority, and outside the scope of the 1201 exemption rulemaking process. Access to telematics software and data is not only subject to copyright protections. As currently understood, telematics data is also subject to privacy, contracts, end user licenses, trade secrets, and may constitute confidential information. Meanwhile, certain circumvention, which is related to diagnosis, repair or lawful modification for "a lawfully acquired motorized land vehicle," is already covered by the existing section 1201 exemption. In some jurisdictions, right-to- repair laws may relate to certain diagnostics data. The proposed Exemption would interfere with the above protections, existing exemption, and applicable law.

    a. The proposed Exemption raises significant privacy concerns because certain telematics software and data could constitute personal data or personal identification data. The collection and sharing of personal data is regulated by various state privacy and laws around the globe. The proposed Exemption raises serious privacy concerns that this rulemaking proceeding is not equipped to address. For example, how would the vehicle owner or vehicle manufacturer bind third-party circumventors, who plan to use the proposed Exemption, to a data processing and data security agreement to protect the personal data, or protect trade secrets, or other confidential information? The proposed Exemption's application to third parties presumably "acting on behalf of' vehicle owners raises privacy issues and creates challenges for vehicle manufacturers ability to comply with privacy law. The Office and the LOC should not become privacy regulators, or adopt a proposed Exemption that does not carefully balance privacy interests across the states and around the world.

    b. The proposed Exemption goes contrary to the trend of greater scrutiny of private data by enabling access to data without ensuring appropriate protections, and may result in harms for consumers and vehicle manufacturers.

    c. A vehicle manufacturer's efforts to comply with the patchwork of privacy laws could be frustrated by the proposed Exemption. Manufacturers draft their privacy policies governing vehicle data to comply with the various privacy laws, to which compliance with the proposed exemption would need to be added.

    d. The proposed exemption creates a new class of third parties to whom data may be shared, over whom the manufacturer may have no contractual privity, no control or insight and may not be able to adequately address in privacy policies and consents.

    e. The proposed exemption would raise new and challenging legal questions about the impact of the proposed Exemption on the vehicle manufacturer's privacy obligations under the various regimes.[2]

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[2] For example, state privacy laws generally require businesses to disclose the categories of third-parties that may receive personal information within their online privacy policies, as well as the categories of personal information that may be shared with those third-parties. *See, e.g.,* CAL. Crv. CODE§ 1798.130(a)(5) (B)(iv); CONN. GEN. STAT. § 42-520(c)(5); FLA. STAT.§ 501.71l(l)(e); H.B. 1181, 113th Gen. Assemb. (Tenn. 2023) § 2 [47-18-3204(c)(5)]; VA. CODE ANN. § 59. l-578(C)(5). Accordingly, it would be difficult for a business to draft an

f. Examples abound of unethical and illegal use of personal data in data collection, even if obtained with "consent" at the point of collection. Vehicle manufacturers should be entitled to vet who is permitted access to their systems and the underlying data. The proposed Exemption would undermine that ability to vet third parties and could hinder a manufacturer's ability to restrict the manner in which third parties may use personal information.

g. For example, this proposed Exemption may be in tension with state privacy laws that require businesses to place certain contractual obligations on third parties that process personal information.[3] The FTC also expects businesses to reasonably restrict the manner in which their third-party processors may use collected personal information.

h. Additionally, the Office and Library have recognized that there is no authority to adopt exemptions to the anti-trafficking provisions of 1201(a)(2) and 1201(b), and the proposed Exemption risks crossing this line to the extent that the exemption is not personal to vehicle owners, but also those "acting on their behalf' without limitation. The Office in the past has declined to recommend exemptions allowing circumvention on behalf of another because such exemptions may implicate the anti-trafficking provisions set forth in section 1201(a)(2) and (b), including offering circumvention services.[4] Although the Office has recommended a few exemptions that extend to third parties assisting the circumventing individual,[5] such exemptions have been limited to circumstances in which the Office appears to have found the third-party circumvention to be "merely ancillary," and not part of a circumvention service.[6] The present proposed Exemption is not so limited, and the Register has

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accurate privacy policy under state privacy law if the business does not have insight into the third parties with whom personal information may be shared. In addition, an inaccurate privacy policy may create a risk of deception under the FTC Act.

[3] *See, e.g.,* CAL. CIV. CODE§ 1798.lOO(d); Utah Laws, ch. 462, § 13-61-301; VA. CODE ANN. § 59.l-579(B).

[4] *See* U.S. COPYRIGHT OFF., SECTION 1201 OF TITLE 17 at 61 (2017) [hereinafter SECTION 1201 REPORT]; *see also* 2021 RECOMMENDATION, *supra* note 1, at 230; U.S. COPYRIGHT OFF., SECTION 1201 RULEMAKING: EIGHTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION 222-26 (2018) [hereinafter 2018 RECOMMENDATION]; U.S. COPYRIGHT OFF., SECTION 1201 RULEMAKING: SIXTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION 4-5, 246--47 (2015).

[5] For example, TDM exemptions in 37 C.F.R. § 201.40(b)(4), (5), which extend to students/staff circumventing "at the direction of [a] researcher"; the "medical devices" exemption in 20l.40(b)(7), which extends to circumvention "on behalf of a patient."

[6] The Office's discussion of the addition of "on behalf of' to the "medical devices" exemption is helpful in elucidating what appears to be a fine line between permissible, "merely ancillary" third-party assistance and prohibited trafficking: "The Register recommends removing the language requiring that circumvention be 'undertaken by a patient' and replacing it with a requirement that circumvention be done 'by or on behalf of a patient.' Although the anti-trafficking provisions in sections 1201(a)(2) and (b) prohibit the provision of circumvention 'service[s],' the Office has previously concluded that 'there is at least a plausible argument that some forms of third-party assistance involving circumvention will not rise to the level of a prohibited 'service' in all instances.' The Register is not, however, expressing any view as to whether particular examples of assistance do or do not constitute unlawful circumvention services, and she cautions that these exemptions do not affect liability under the anti-trafficking provisions." 2021 RECOMMENDATION, *supra* note 1, at 146 (citing 2018 RECOMMENDATION,

refused to extend an exemption to third parties in the context of software for similar reasons.[7]

DOCUMENTARY EVIDENCE

Commenters are encouraged to submit documentary evidence to support their arguments or illustrate pertinent points concerning the proposed exemption. Any such documentary evidence should be attached to this form and uploaded as one document through Regulations.gov.

NONE.

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supra note 4, at 224 ("Proponents [of expressly including third-party assistance in the vehicle repair exemption] respond that third-party repair services are not primarily designed or marketed for the purpose of circumvention; rather circumvention of TPMs is merely ancillary to those services.")); SECTION 1201 REPORT, *supra* note 4, at 59 ("Ultimately, the Office concludes that there is, at a minimum, substantial uncertainty as to whether there are types of third-party assistance that would fall outside the reach of the 'service' bar.").

[7] *See, e.g.,* 2021 RECOMMENDATION, *supra* note 1, at 230.