

Submission on behalf of ESA, MPA, and RIAA
Class 7: Computer Programs — Vehicle Operational Data

UNITED STATES COPYRIGHT OFFICE



Long Comment Regarding a Proposed Exemption Under 17 U.S.C. § 1201

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

ITEM A. COMMENTER INFORMATION

The Entertainment Software Association (“ESA”) is the United States trade association serving companies that publish computer and video games for video game consoles, handheld video game devices, personal computers, and the internet. It represents nearly all of the major video game publishers and major video game platform providers in the United States.

The Motion Picture Association, Inc. (“MPA”) is a trade association representing some of the world’s largest producers and distributors of motion pictures and other audiovisual entertainment for viewing in theaters, on prerecorded media, over broadcast TV, cable and satellite services, and on the internet. The MPA’s members are: Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc.

The Recording Industry Association of America, Inc. (“RIAA”) is a nonprofit trade organization that supports and promotes the creative and financial vitality of recorded music and the people and companies that create it in the United States. RIAA’s several hundred members—ranging from major American music companies with global reach to artist-owned labels and small businesses—make up the world’s most vibrant and innovative music community. RIAA’s members create, manufacture, and/or distribute the majority of all legitimate recorded music produced and sold in the United States. In supporting its members, RIAA works to protect the intellectual property and First Amendment rights of artists and music labels.

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ITEM B. PROPOSED CLASS ADDRESSED

Class 7: Computer Programs — Vehicle Operational Data

Privacy Act Advisory Statement: Required by the Privacy Act of 1974 (P.L. 93-579)

The authority for requesting this information is 17 U.S.C. §§ 1201(a)(1) and 705. Furnishing the requested information is voluntary. The principal use of the requested information is publication on the Copyright Office website and use by Copyright Office staff for purposes of the rulemaking proceeding conducted under 17 U.S.C. § 1201(a)(1). NOTE: No other advisory statement will be given in connection with this submission. Please keep this statement and refer to it if we communicate with you regarding this submission.

ITEM C. OVERVIEW

Petitioner MEMA, The Vehicle Suppliers Association (“MEMA”) seeks a new exemption,¹ which would permit “circumvention of technological protection measures [(“TPMs”)] 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.”²

ESA, MPA, and RIAA once again have not opposed renewal of the existing exemptions applicable to circumvention for purposes of repairing motorized land vehicles, smartphones, home appliances, or home systems. Petitioner’s proposed exemption, however, is vague and unbounded by practical limitations.

It would allow circumvention of access controls that protect computer programs and other content for the purpose of accessing, storing, and sharing vehicle operational data, including diagnostic and telematics data across a broad, abstract, and undefined class of any lawfully acquired vehicle or vessel. Petitioner does not specify what types of access controls can be circumvented and what types of data or other materials would be accessed. The Copyright Office and the Library of Congress have denied similar requests to expand the existing exemption in past cycles based on substantially the same information and evidence contained in the comments. They should do so again here.

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

Petitioner seeks abstract exemptions covering circumvention of *all* access controls³ to the electronic control units (“ECUs”)⁴ in any “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.”⁵ Petitioner’s proposed exemption would allow circumvention of

¹ The Notice of Proposed Rulemaking (“NPRM”) refers to this class as “Computer Programs –Vehicle Operational Data,” and characterizes the proposal as a request for a “new exemption,” but the proposal appears to expand the already existent exemption for the repair of vehicles. *See* 88 Fed. Reg. 72,013, 72,026 (Oct. 19, 2023), <https://www.govinfo.gov/content/pkg/FR-2023-10-19/pdf/2023-22949.pdf>.

² Motor & Equip. Mfrs. Ass’n (“MEMA”), Class 7 Petition at 2 (Feb. 1, 2024), <https://www.copyright.gov/1201/2024/petitions/proposed/New-Pet-MEMA.pdf> (“MEMA Class 7 Pet”).

³ There are several types of TPMs that restrict access to ECUs, and Petitioner seeks an exemption that covers all such measures, “including challenge-response mechanisms, encryption, and disabled access ports on the circuitry itself”. Motor & Equip. Mfrs. Ass’n (“MEMA”), Class 7 Comment at 2 (Feb. 1, 2024), <https://www.copyright.gov/1201/2024/comments/Class%207%20-%20Initial%20Comments%20-%20MEMA.pdf> (“MEMA Class 7 Comment”).

⁴ MEMA Class 7 Comment at 3.

⁵ The proposed class is unusually broad. MEMA Class 7 Comment at 1, the Specialty Equipment Market Association (SEMA) comment in support of Class 7 Pet. at 1 (“SEMA supports the proposed Class 7 exemption for circumvention of technological protection measures on computer programs to allow vehicle owners and lessees, or those acting on their behalf, to access, store, and share vehicle operational data, including diagnostic and telematics data.”).

access controls that protect computer programs to get access to vehicle operational data, across a broad, abstract, and undefined class of any lawfully acquired vehicle or vessel, expanding the class of vehicles covered by this exemption. This proposed exemption is overbroad and should be denied.

First, Section 1201(i) already contains an exemption allowing users to circumvent technological protection measures that collect personal data.⁶

Second, the Copyright Office and the Library of Congress have denied similar requests to expand the existing exemption to cover a broader class of vehicles in past cycles based on substantially the same information and evidence contained in the comments, and should do so again here.

In 2018, in the context of a proposed expansion of the repair exemption, proponents argued that vehicle owners’ “access to [that] data about [their] own driving or [their] own vehicle would be an obvious fair use,”⁷ and the Register, supported “accessing the telematics system and, if necessary, incidentally accessing entertainment systems, strictly for purposes of diagnosis, repair, and lawful modification of vehicle functions (compared to entertainment functions).”⁸ The Register, however, stated that “accessing such systems with the object of accessing entertainment or expressive content without authorization would tip the first factor heavily against fair use.”⁹ In the 2015 rulemaking procedure, the Register recommended, and the Librarian of Congress granted, an exemption allowing circumvention of access controls applied to ECUs in motor vehicles for the purpose of repairing the vehicles. 37 C.F.R. § 201.40(b)(6). However, the Register excluded from the scope of the exemption circumvention to access ECUs on in-vehicle entertainment systems. The Register concluded: “[t]here was insufficient evidence in the record to support a need for circumvention of the TPMs [technological protection measures] on these ECUs, especially when balanced against concerns about unauthorized access to the services and content they protect.”¹⁰ These conclusions should hold in this current rulemaking cycle.

The Copyright Office declined to include commercial and industrial devices and systems within the scope of the proposed repair class in the prior rulemaking cycles. In past cycles, the Copyright Office has concluded that access controls serve a critical anti-piracy purpose that is inevitably undermined by circumvention for the purpose of repair or modification. These access

⁶ 17 U.S.C. § 1201(i).

⁷ SECTION 1201 RULEMAKING: SEVENTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE ACTING REGISTER OF COPYRIGHTS, 196 (2018), https://cdn.loc.gov/copyright/1201/2018/2018_Section_1201_Acting_Registers_Recommendation.pdf (“2018 Rec.”).

⁸ *Id.*

⁹ *Id.*

¹⁰ SECTION 1201 RULEMAKING: SIXTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION: RECOMMENDATION OF THE REGISTER OF COPYRIGHTS, 246 (2015) (“2015 Rec.”), <https://cdn.loc.gov/copyright/1201/2015/registers-recommendation.pdf>.

controls also benefit consumers by ensuring the security, functionality and privacy protections built into commercial devices. The same holds true today.

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

The Copyright Office has already analyzed similar requests for extension of the “repair” exemption to cover, inter alia, a broader scope of devices and a broad category of access controls, and expressed concerns that are relevant to the current petition. As discussed above, in the 2015 and 2018 rulemaking cycle, the Copyright Office excluded from the scope of the “repair” exemption circumvention to access ECUs on in-vehicle entertainment systems. In the 2021 rulemaking cycle, the Copyright Office also declined to extend the exemption for a broader scope of devices, namely to commercial and industrial devices, finding that the record did not demonstrate that commercial and industrial devices shared the same common characteristics or that users of those devices were similarly situated to users of consumer products.¹¹ The Copyright Office also found that some of the users of commercial and industrial equipment had adequate alternatives to circumvention, and was concerned that the proposed circumvention would “contravene negotiated licensing terms between commercial actors, which might affect the analysis of potential market harm.”¹² In past rulemaking cycles, the Copyright Office has also recommended against a broadly worded exemption.¹³ The Copyright Office should recommend that the current proposals – which once again seek an exemption to circumvent an extremely broad category of access controls – be denied as they were in the past.

(i) Lawful Use Analysis

To establish a case for an exemption, a proponent must show at a minimum that uses affected by the prohibition on circumvention are or are likely to be noninfringing, and that as a result of a TPMs restricting access to a copyrighted work, there is an adverse impact on those uses. Petitioner, however, does not provide any support for its suggestion that “copying of protectable elements of the software” will be merely “incidental”. Because the scope of the proposed class is broad and undefined, and the type of access controls to be circumvented is similarly broad and undefined, it is unclear exactly what type of activities would ultimately fall within the proposed exemption.

In its Notice of Proposed Rulemaking, the Copyright Office encouraged proponents (i) to describe with specificity the relevant TPMs; (ii) to discuss whether their presence is adversely affecting noninfringing uses; (iii) to indicate whether eligible users may access such data through

¹¹ See SECTION 1201 RULEMAKING: EIGHTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS, 197-98 (2021), https://cdn.loc.gov/copyright/1201/2021/2021_Section_1201_Registers_Recommendation.pdf (“2021 Rec.”) (citing FTC, NIXING THE FIX: AN FTC REPORT TO CONGRESS ON REPAIR RESTRICTIONS at 51 (May 2021), https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repairrestrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf (“FTC Report”) (“When deciding the scope of expanded repair rights, policymakers should think about whether the rights should be limited to consumer goods or include capital items. Given the complexity and variation among products, it seems unlikely that there is a one-size fits all approach that will adequately address this issue.”)).

¹² See 2021 Rec. at 197-98.

¹³ See 2018 Rec. at 220.

alternate channels that do not require circumvention; and (iii) to set forth the legal basis for concluding that the proposed uses are likely to be noninfringing.¹⁴ Petitioner has not addressed existing alternate channels to access vehicle operational data that do not require circumvention. Neither did Petitioner provide any support for the statement that the proposed uses will likely be noninfringing.

Petitioner argues that TPMs and section 1201(a)(1)(A) stifle competition because the original equipment manufacturer has exclusive control over the data, which supposedly “makes it more difficult for owners and lessees to exercise genuine choice in the service and aftermarket parts markets, restricts access to driving records and vehicle logs that could be used to, for example, monitor or evaluate the driving habits of new drivers using the family car, create inefficiencies in vehicle repair and maintenance processes.”¹⁵ To the extent that driving records constitute driver’s personal data, users can get access to such data based on the current exemption and by statute.¹⁶ Furthermore, users can exercise their privacy rights to get access to such data by submitting a data portability request.¹⁷ Petitioner also claims that vehicle operational and telematics data is required for “personalizing or customizing...vehicles, such as [allowing] owners with disabilities [to enhance] accessibility; improving vehicle energy efficiency; changing audio settings; eliminating distracting software features or functions; and turning off or customizing self-driving and driver-assist technologies.”¹⁸ In each case, the types of access Petitioner describes and the functions that Petitioner seeks can be accessed by alternative, currently existing legal mechanisms without the need for circumvention. Moreover, any vehicle modifications, including those enhancing accessibility for owners with disabilities, are subject to the federal safety regulations. Federal law generally prohibits a manufacturer, distributor, dealer, rental company or motor vehicle repair business from knowingly disabling any part of a device or element of design installed on or in a motor vehicle in compliance with a Federal Motor Vehicle Safety Standard, and any changes to the accessibility of such equipment are part of the National Highway Traffic Safety Administration’s rulemaking effort.¹⁹

In fact, in the 2015 rulemaking cycle, MEMA, Petitioner for this proposed exemption, expressed a concern about the risks associated with allowing the circumvention of the TPMs in vehicles and requested the Copyright Office to refrain from creating any exemption that impacts the

¹⁴ NPRM, 88 Fed. Reg. at 72,026.

¹⁵ MEMA Class 7 Pet. at 3.

¹⁶ Section 1201(i) allows users to circumvent technological protection measures that collect personal data. *See* 17 U.S.C. § 1201(i).

¹⁷ U.S. state privacy laws grant consumers broad rights to control their data. *See* Olga Asucena Medina, *US States Leverage Existing Models Of Privacy Legislation*, INTERNATIONAL ASSOCIATION OF PRIVACY PROFESSIONALS (Sept. 13, 2023), <https://iapp.org/news/a/u-s-states-leverage-existing-models-of-privacy-legislation/> (All 13 state privacy laws provide consumers with the right to access and delete their personal data, in addition to a right to data portability.).

¹⁸ MEMA Class 7 Pet. at 3.

¹⁹ *NHTSA Finalizes Rule to Improve Auto Accessibility for People with Disabilities* (March 9, 2022), <https://www.nhtsa.gov/press-releases/nhtsa-finalizes-rule-improve-auto-accessibility-people-disabilities>.

software and TPMs in vehicles.²⁰ In the 2015 rulemaking cycle, MEMA argued that any change in the vehicle system could affect the security of the system. The TPMs “ensure that the vehicles meet federally mandated safety and emissions standards, including the Federal Motor Vehicle Safety Standards and fuel economy standards.” “The anti-circumvention provision of the Digital Millennium Copyright Act serves as another layer to protect the public from the safety issues that could arise from access to these systems.”²¹

Given the broad, undefined scope of the class for which the proposed exemption would apply, it is unclear if the proposed exemption would apply to devices and circumvention techniques that the Copyright Office has excluded in the past, such as circumvention to access ECUs on in-vehicle entertainment systems. There is no new evidence on this topic to support the proposed expansion.²²

(ii) 1201(a)(1)(C) Factors Analysis

As previously explained, Petitioner has failed to demonstrate that the uses affected by the prohibition on circumvention are or are likely to be noninfringing or that there is an adverse impact on those uses due to TPMs controlling access to a copyrighted work. Additionally, the factors outlined in Section 1201(a)(1)(C) do not favor an exemption.²³

Petitioner has addressed only the effect on the market for or value of the copyrighted work, relying mainly on the position of the Copyright Office in the 2015 rulemaking cycle, arguing that the market is not affected by the proposed exemption because “computer programs on the majority of ECUs are only meaningful in connection with the vehicle, ... the copies are generally sold only with the vehicle[.]”²⁴ Petitioner, however, fails to acknowledge that in its 2015 recommendations, the Copyright Office excluded access controls for telematics and entertainment systems from this exemption for the reason that “circumvention of access controls on entertainment and telematics ECUs could result in a diminution in the value of copyrighted works if those systems could no longer reliably protect the content made available through them.”²⁵ Proponents have not provided any evidence to justify revising this conclusion. In 2015, Petitioner supported a similar carve out exception for infotainment systems, cautioning “the Copyright Office against allowing circumvention of TPMs that protect against unauthorized

²⁰ Short Comment Regarding a Proposed Exemption of the Motor & Equipment Manufacturers Association (MEMA) in Class 21, Vehicle Software – Diagnosis, Repair or Modification, Docket No. 2014-07, https://cdn.loc.gov/copyright/1201/2015/reply-comments-050115/class%2021/ReplyComments_ShortForm_MEMA_Class21.pdf (last visited Feb. 19, 2024) (internal citations omitted) (“MEMA 2014 Short Comment”).

²¹ *Id.* at 1.

²² *See* 2018 Rec. at 219 (“to recommend an exemption, there must be a record that shows distinct, verifiable, and measureable adverse effects, or that such effects are likely to occur.”).

²³ The Section 1201(a)(1)(C) factors are (i) availability for use of copyrighted works, (ii) availability for use of works for nonprofit archival, preservation, and educational purposes, (iii) impact on criticism, comment, news reporting, teaching, scholarship, or research: (iv) effect of circumvention of technological measures on the market for or value of copyrighted works, and (v) other factors, such as environmental impact. *See* 2021 Rec. at 11.

²⁴ MEMA Class 7 Comment (citing 2015 Rec. at 235).

²⁵ *Id.* at 241.

copying and distribution of ... content that is provided via vehicle infotainment systems”²⁶ for the reason that “circumvention of vehicle entertainment systems could result in unauthorized piracy of copyrighted works and create security risks.”²⁷

Because this proposal is abstract and undefined, allowing the new proposed exemption would be inappropriate. If the Copyright Office, nevertheless, allows the exemption, it should be far narrower than proposed, focused on the factual record, and explicitly exclude any in-vehicle entertainment systems. To the extent that the new proposed exemption would apply to in-vehicle entertainment systems, ESA, MPA, and RIAA oppose the new exemption, and suggest that, if the Register concludes that any portion of the proposal should be granted, that it be limited as in previous rulemaking cycles to expressly exclude in-vehicle entertainment systems in the context of the repair exemption.²⁸

DOCUMENTARY EVIDENCE

We have included hyperlinks to webpages/documents within the body of this document. We are not submitting any other documentary evidence.

Respectfully submitted:

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²⁶ See MEMA 2014 Short Comment at 2.

²⁷ *Id.*

²⁸ See 2018 Rec. at 187.