



The Vehicle Suppliers Association

**Comments of
MEMA, The Vehicle Suppliers Association
to the U.S. Copyright Office on a Proposed Exemption Under 17 U.S.C. § 1201
March 19, 2024**

ITEM A. COMMENTER INFORMATION

Commenter:

MEMA, The Vehicle Suppliers Association
1425 K Street, NW Suite 910
Washington, DC 20005

Contact:

Dan Jasnow
Julia Ambros
ArentFox Schiff LLP
1717 K Street, NW
Washington, DC 20006
dan.jasnow@afslaw.com
(212) 492-3302

ITEM B. PROPOSED CLASS ADDRESSED

Class 7 (Computer Programs— Vehicle Operational Data)

ITEM C. OVERVIEW

This is the second set of comments submitted on behalf of MEMA, The Vehicle Suppliers Association, during the ninth triennial Digital Millennium Copyright Act (“**DMCA**”) review. For additional information about MEMA and its support of the proposed Class 7 exemption, please see MEMA’s Long Form Comment dated December 22, 2023.

ITEM E. ASSERTED ADVERSE EFFECTS ON NON-INFRINGEMENT USE

Opponents of the proposed Class 7 exemption raise several concerns. The Alliance for Automotive Innovation (“**Auto Innovators**”), for example, argues that proponents have failed to adequately demonstrate that consumers have been adversely affected by the lack of such an exemption and that a less-restrictive exemption is not necessary because of the 2014 Memorandum of Understanding (“**MOU**”) and the Automotive Repair Data Sharing Commitment (“**Data Sharing Commitment**”) between original equipment manufacturers (“**OEMs**”) and representatives of the automotive aftermarket.¹ The Entertainment Software Association, the Motion Picture Association, Inc., and the Recording Industry Association of America, Inc., (together, the “**Joint Creators**”) argue that the proposed Class 7 exemption is too broad in scope and would allow infringement of copyrighted content accessed through in-vehicle entertainment systems.² The Association of Equipment Manufacturers (“**AEM**”) argues that the proposed Class 7 exemption would frustrate

¹ See Auto Innovators, Long Comment Regarding Proposed Class 7 (February 20, 2024).

² See Joint Creators, Long Comment Regarding Proposed Class 7 (February 20, 2024).



The Vehicle Suppliers Association

OEMs' efforts to comply with state privacy laws³ and the National Association of Manufacturers ("NAM") argues that the proposed Class 7 exemption would raise safety and environmental concerns.⁴ MEMA believes the above claims either lack support or can be alleviated with a narrowly-tailored drafting of the exemption. As the Federal Trade Commission (FTC) and the Department of Justice (DOJ) have stated in their joint comment in support of the proposed Class 7 exemption, the ability for consumers to access their own vehicle operational and telematics data would enhance aftermarket competition without increasing cybersecurity risks, and with minimal risk to copyrighted ECU software.⁵

i. Consumers continue to be adversely affected.

The cost of consumer car repairs, as well as the amount of time the average car spends at the shop, continues to soar as automobile technology rapidly advances.⁶ One repair shop proprietor told a spokesman for AAA Northeast that striking a deer with a vehicle can lead to roughly \$1,500 to \$2,000 more in repairs today than it did 15 years ago due to advances in technology.⁷ These cost increases can be attributed at least in part to the complexity of software-related repairs, which may require technicians to remove, repair, or replace one or more electronic control modules (the onboard hardware) and/or reprogram the software embedded in the physical ECUs, all of which translates directly into higher fees for parts and labor.

MEMA's members have also noted that software-related repairs, which may require independent technicians to request information from the OEMs and wait hours or sometimes days for a response, can be time-consuming and needlessly delay the repair process. These delays increase the amount of time the car is in the shop, which means a family is potentially without a car and forced to incur extra expenses on car rentals or public transportation.

Paired with lingering post-pandemic supply chain issues driving up costs and repair wait times, it has become imperative to mitigate inefficiencies that are driving up costs of ownership for the American car owner. Allowing consumers to access data about their own vehicle and driving history, while reducing the threat of litigation against independent technicians, is one step the Copyright Office can take to help streamline the auto repair process. The FTC and DOJ agree on this point, noting that "restricting access to non-copyrightable telematics data risks establishing a competitively harmful bottleneck by depriving users of the ability to share this data with aftermarket parts manufacturers, third-party maintenance and repair services, and other adjacent markets that would put such information to valuable commercial use."⁸

³ See AEM, Long Comment Regarding Proposed Class 7 (February 20, 2024).

⁴ See NAM, Long Comment Regarding Proposed Class 7 (February 20, 2024).

⁵ See FTC and DOJ, Long Comment Regarding Exemption to Permit Circumvention of Access Controls on Copyrighted Works with Docket No. COLC-2023-004 (March 14, 2024) ("**FTC-DOJ Joint Comment**").

⁶ GregIacurci. "Car Repair Costs Are up Almost 20% over the Past Year. Here Are 6 Reasons Why." CNBC, CNBC, 25 July 2023, www.cnbc.com/2023/07/25/car-repair-costs-are-up-almost-20percent-over-the-past-year-heres-why.html.

⁷ *Id.*

⁸ FTC-DOJ Joint Comment p.17.



The Vehicle Suppliers Association

When adopting the exemption codified at 37 CFR § 201.40(b)(13), which allows circumvention of access controls on certain motor vehicle software for diagnosis, repair or lawful modification of a vehicle function (the “**Repair Exemption**”), the Copyright Office recognized that technological protection measures and Section 1201(a)(1)(A) adversely affect the ability of vehicle owners and lessees, including those acting under their direction, to engage in diagnosis, repair, and lawful modification of their vehicles. The Repair Exemption, however, does not permit access to one’s own personal data for purposes of personalization or to streamline the repair process by providing shops with real-time access to vehicle data in advance of any potential malfunction. Permitting consumers to access real-time data about their own driving and vehicles will allow for consumers and auto-repair shops to anticipate needs before the car pulls into the shop. While American car owners struggle with repair cost increases averaging almost 20 percent year over year,⁹ the proposed Class 7 exemption “would provide more options for maintenance and repairs, enhancing aftermarket competition.”¹⁰

ii. The 2014 Memorandum of Understanding and subsequent Data Sharing Commitment do not solve the problem.

Auto Innovators argues, as they have during past triennial reviews with respect to the Repair Exemption, that the 2014 Memorandum of Understanding provides independent repair facilities and individual vehicle owners with access to the necessary diagnostic and repair tools.¹¹ Auto Innovators also points to the recent Data Sharing Commitment as an additional solution for consumers. These arguments are unpersuasive.

As an initial matter, neither the MOU nor the Data Sharing Commitment cover uses by consumers outside the scope of diagnosis and repair. Further, as the Copyright Office correctly concluded after the sixth triennial review, the MOU “cannot fully address the cited adverse impacts” stemming from the prohibition on circumvention.¹² For instance, not all OEMs are party to the MOU and Data Sharing Commitment and certain types of vehicles, such as mechanized agricultural vehicles, motorcycles and RVs, are not covered by the MOU or Data Sharing Commitment. With respect to the MOU, this fact was also noted in the record during the sixth triennial review.¹³

Moreover, as we have indicated in past triennial reviews concerning the Repair Exemption, rather than making it easier for consumers to have their vehicles repaired or modified, the MOU, in some ways, makes this task more difficult. For example, vehicles are typically sold embedded with all of the necessary software. If, after a malfunction, a mechanic determines that a part must be replaced, the MOU permits the OEMs to require the replacement part be re-programmed and to charge the associated programming fees, even where a hardware

⁹ See citation reference 6 above.

¹⁰ FTC-DOJ Joint Comment at 15.

¹¹ See Auto Innovators, Long Comment Regarding Proposed Class 7, at 3. (Feb. 12, 2018).

¹² U.S. Copyright Office, Section 1201 Rulemaking: Sixth Triennial Proceeding, Recommendation of the Register of Copyrights (“**2015 Recommendation**”) at 240 (Oct. 2015).

¹³ *Id.* at 225-26.



The Vehicle Suppliers Association

problem caused the malfunction and the existing software was fully operational. The proposed exemption enables consumers to access and—subject to the First Sale Doctrine—use their existing copies of software, thus avoiding the need to purchase duplicative copies as part of the repair process. The MOU is entirely silent on this issue and, as a result, enables OEMs to require consumers to purchase software every time they repair parts, even if the repairs are not caused by software issues.

For these reasons, the MOU and Data Sharing Commitment are insufficient to fully mitigate the adverse effects of the DMCA’s anti-circumvention provisions on consumers.

iii. The Copyright Office can and should limit the exemption to uses that comply with local and federal laws.

The Copyright Office demonstrated during previous triennial reviews that it is more than capable of carefully calibrating the temporary anti-circumvention exemptions to balance the sometimes-competing priorities of consumer safety; data privacy; environmental impacts; protection of valuable intellectual property; and, protection of consumer choice in the automotive aftermarket, which includes remanufactured goods. Opponents raise several concerns for the Copyright Office’s consideration, all of which MEMA believes are either unfounded or can be alleviated by way of a narrowly-tailored exemption.

Joint Creators fear that the proposed Class 7 exemption would allow consumers to infringe upon rightsholders of copyrighted content found in in-vehicle entertainment systems such as Sirius XM. This concern was also discussed extensively with respect to the Repair Exemption during the 2015 rulemaking. In order to address these concerns, the Copyright Office in drafting the Repair Exemption explicitly excluded the circumvention of technological protection measures to programs accessed through separate subscription services. A similar carve-out may be appropriate here as well.

NAM raises environmental and safety concerns that may be implicated as a consequence of consumers accessing their own data. Similar arguments were raised in past triennial rulemakings with respect to the Repair Exemption. The Copyright Office weighed these considerations and even consulted with the Department of Transportation and the Environmental Protection Agency before adopting the Repair Exemption, ultimately deciding to strike a balance between the competing considerations.¹⁴ The Copyright Office ensured the Repair Exemption provide expressly that “eligibility for this exemption is not a safe harbor from, or defense to, liability under other applicable laws, including without limitation regulations promulgated by the Department of Transportation or the Environmental Protection Agency”. In 2015 the Copyright Office also instituted a delay of twelve months before the Repair Exemption went into effect to allow other agencies with expertise in vehicle safety, environmental issues, and other relevant areas, an opportunity to consider and react to the new rule.¹⁵ MEMA believes that the Copyright Office can, as it did for the Repair Exemption, issue a narrowly-tailored exemption to allow access to one’s own vehicle operational and telematics data that remains faithful to existing law and regulations concerning the environment and traffic safety.

¹⁴ See 2015 Recommendation at 246.

¹⁵ *Id.* at 247.



The Vehicle Suppliers Association

AEM argues that the proposed Class 7 exemption will frustrate the ability of OEMs to comply with the patchwork of state privacy laws because the proposed exemption creates a new class of third parties with whom data may be shared. This contention ignores the fact that any consumer data accessed under the proposed Class 7 exemption will be accessed by either the consumers themselves or someone they themselves expressly authorize to use such data. Additionally, state privacy laws generally impose restrictions on data uses that are commercial in nature, whereas the possible uses of telematics and vehicle operational data under this proposed Class 7 exemption are largely non-commercial. As the DOJ and FTC indicated, “the proposed exemption would simply empower others by providing them access to their own vehicle operational data. It would not prevent a manufacturer from imposing a reasonable authentication measure that prevents access to the data by someone other than the owner or the owner’s authorized representative”.¹⁶ Therefore, MEMA believes that the proposed Class 7 exemption will not impede OEM’s ability to comply with data privacy laws and regulations.

iv. Conclusion

MEMA is confident that the Copyright Office can once again strike an appropriate balance between the rights of vehicle owners and the rights of intellectual property owners, as well as matters of public interest like environmental and safety considerations. As the FTC and DOJ have echoed, the proposed Class 7 exemption would allow car owners and lessees to utilize the uncopyrightable data they themselves have generated by driving and will allow consumers to benefit from the rapidly evolving automotive market in numerous non-commercial and non-infringing ways.

Dated: March 19, 2024

¹⁶ FTC-DOJ Comment at 16.