

Charles Crain

Vice President,
Domestic Policy

Via email

July 31, 2024

Suzanne Wilson
General Counsel and Associate Register of Copyrights
United States Copyright Office
101 Independence Avenue SE
Washington, DC 20559-6000

Re: Docket No. 2023-5 – Summary of *Ex Parte* Meeting Regarding Section 1201
Exemptions to Prohibition Against Circumvention of Technological Measures
Protecting Copyrighted Works (Proposed Class 5 and Class 7)

Dear Ms. Wilson:

We write to summarize the July 24, 2024 *ex parte* meeting held between the National Association of Manufacturers (“NAM”) and representatives of the U.S. Copyright Office (the “Office”) regarding proposed Class 5 and Class 7 in the pending section 1201 rulemaking proceeding. In attendance at the meeting from the Office were Emily Chapuis, Brandy Karl, Nick Bartelt, Melinda Kern, and Isaac Klipstein. Charles Crain and Eugene Shestakov attended on behalf of the NAM, in addition to the NAM’s outside counsel Anna Chauvet and Laine Fisher from the firm Finnegan, Henderson, Farabow, Garrett & Dunner, LLP.

The NAM opened the meeting by explaining that it represents the needs of more than 14,000 manufacturers, including manufacturers of industrial equipment, motorized vehicles, and marine vessels that would be directly impacted if the proposed exemptions in Class 5 and Class 7 were to be adopted. The NAM views these proposed exemptions in the broader context of the so-called “right-to-repair” movement, which hinges on the false notion that owners do not have the ability to repair their own equipment. The NAM noted that Original Equipment Manufacturers already provide a wide range of resources and tools that allow consumers, commercial users, and third-party repair businesses to maintain, diagnose, and repair products, and that these proposed exemptions are thus unnecessary.

Counsel for the NAM then addressed specific concerns with the proposed exemptions in Class 5 and Class 7, noting that the exemptions’ proponents have failed to justify their adoption in at least two general ways: 1) the sparse record does not support adoption of either proposed exemption, and 2) in Class 5, some of the examples are misleading and based on factual inaccuracies.

First, counsel noted that, as the NAM testified during the public hearing, both proposed exemptions are overly broad and poorly defined, and the permitted uses under both proposed exemptions are unclear. Counsel stated that because basic key terms in the proposed Class 5 exemption are vague and overly broad, the exemption could potentially implicate a wide range of products that each operate very differently. Although proponents claim commonality exists between these products because the products in question are “commercial,” counsel maintained that the

mere fact these products are for commercial use does not mean that they operate in the same way, use the same TPMs, or have identical users and use-cases.

Similarly, for Class 7, counsel referenced the NAM's public hearing testimony about the vagueness of the proposed exemption, as it would allow for the circumvention of TPMs across a broad and abstract class that would include any lawfully acquired vehicle or vessel. Further, counsel emphasized that the proposed exemption does not specify the precise types of data that would be accessed, nor does it make clear what terms like "vehicle operational data" precisely cover.

For both Class 5 and Class 7, counsel for the NAM stated that proponents have not provided direct evidence about the specific TPMs that would be subject to the proposed exemptions, whether the TPMs used are the same throughout each class, or whether circumvention of those specific TPMs would allow for the proposed uses. For Class 7, counsel noted that the Office directly asked proponents in its Notice of Proposed Rulemaking—now issued more than nine months ago—to identify the relevant TPMs at issue,¹ which proponents still have not done.

On the issue of adverse effects, counsel maintained that proponents for Class 5 and Class 7 have failed to show adverse effects without the ability to circumvent, and that proponents have not provided examples of users even *desiring* to engage in circumvention as proposed. Counsel noted that even if the proponents were to now provide such an example, the Office has historically declined to recommend adoption of an exemption where the request was an "individual case" of "*de minimis impact*".²

Counsel also noted that the Office has historically declined to recommend adoption of proposed exemptions where the alleged adverse effects are merely speculative, as is the case here for both Class 5 and Class 7. Counsel then provided the following examples to show that historically, where the record lacks evidence sufficient to show adverse effects amounting to more than speculation, the Office has declined to recommend a proposed exemption.

1. In 2018, the Register declined to recommend expansion of the existing temporary exemption relating to massively open online courses because "the record lack[ed] examples sufficient to evaluate or recommend expansion" as proposed under the fair-use analysis.³ Specifically, in examining the alleged adverse effects and statutory factors for the proposed exemption, the Register found "little to suggest" that the intended users even desired to engage in the proposed activities, and that "the two proffered examples appear[ed] both *de minimis* and speculative."⁴
2. In 2018, the Register declined to recommend adoption of a proposed exemption to "to make noninfringing uses of audiovisual works that are subjected to High-bandwidth Digital Content Protection (HDCP)," as the Register found a lack of "a sufficient record of cognizable adverse effects."⁵ Not only was the record "too bare, especially on such a broad request," but the record failed "to show that adverse effects are not merely possible, but probable."⁶

¹ See Exemptions To Permit Circumvention of Access Controls on Copyrighted Works, 88 Fed. Reg. 72,013, 72,026 (Oct. 19, 2023) (asking proponents to "describ[e] *with specificity* the relevant TPMs" at issue) (emphasis added).

² See U.S. Copyright Office, Section 1201 Rulemaking: Seventh Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights 143 (2018) (declining to recommend proposed exemption).

³ *Id.* at 55.

⁴ *Id.* at 72.

⁵ *Id.* at 138.

⁶ *Id.*

3. In 2012, the Register declined to recommend adoption of a proposed exemption “to permit the circumvention of access controls on video game console computer code so that the consoles can be used with non-vendor-approved software that is lawfully acquired.” Under adverse impact, the Register stated that “proponents ha[d] offered no factual basis in support of their suggestion that users are having difficulty repairing their consoles as a result of Section 1201(a)(1),” and they “fail[ed] to document any actual instances of users seeking to make repairs.”⁷ The Register thus found “the repair concern . . . to be purely speculative.”⁸

In response to a question from the Office, counsel for the NAM stated that the above concerns regarding undefined, overly broad terms and sparse records consisting of speculative examples apply across all products potentially implicated by the proposed exemptions in Class 5 and Class 7.

Finally, counsel for the NAM noted a number of misleading and/or factually inaccurate statements made by proponents about certain products intended to be covered by Class 5.

1. Regarding programmable logic controllers (“PLCs”), counsel noted that, contrary to proponents’ assertions, PLCs are *not* generally required to be password protected. Rather, customers can opt out of password protection when the feature is prompted during the initial download. Additionally, customers are *not* forced to purchase a new PLC if they lose or forget their password, as numerous methods exist to assist in the recovery of a PLC password when it has been lost or forgotten. For example, counsel noted that Siemens’ customers may access the online Siemens Support Site and locate how to recover a password for the relevant product.⁹

In addition, counsel noted that PLC passwords are created by PLC customers. Vendors, when they are the PLC manufacturer’s direct customer, may create their own passwords. Counsel noted that the record does not include any examples of an end user *wanting* to circumvent a TPM to diagnose or repair a PLC.

2. Regarding construction equipment, counsel for the NAM identified some of proponents’ misleading characterizations regarding customers’ access to diagnostic and repair tools. For example, proponent Public Knowledge has previously stated that “*many* repairs” of Caterpillar equipment can only be made by dealers,¹⁰ making it seem like customers cannot make common repairs themselves. This is not true. Caterpillar makes available a software tool called Caterpillar Electronic Technician (“CAT ET”) to customers for diagnostics and repairs, which allows customers to diagnose and make repairs themselves for the vast majority of repairs.¹¹ Counsel for the NAM emphasized that proponents have failed to offer a single example of a customer desiring circumvention to make a repair because they were unable to do so by using a tool offered by the manufacturer.

Counsel also noted that for do-it-yourselfers, construction equipment manufacturers offer after-market parts, fluids, and digital and print versions of service manuals. They also

⁷ U.S. Copyright Office, Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights 47 (2012).

⁸ *Id.*

⁹ See, e.g., *Industry Online Support*, Siemens, <https://support.industry.siemens.com/cs/mdm/109815056?c=161012611083&t=1&s=lost%20password&lc=en-US> (last visited July 30, 2024) (providing instructions on how to reset a password for the Siemens Simatic Step 7/S7).

¹⁰ Public Knowledge Class 5 Initial Comment at 5 (emphasis added).

¹¹ *Caterpillar Electronic Technician (CAT ET) Overview*, Caterpillar, https://www.cat.com/en_US/by-industry/oil-and-gas/learning/program/caterpillar-electronic-technician-cat-et-overview.html (last visited July 28, 2024).

offer the convenience of online ordering, dealer pickup, or delivery to site with relatively simple-to-follow service instructions packaged with each part. One manufacturer even offers a mobile app for customers to order parts, access product guides, and obtain repair directions. Ultimately, manufacturers recognize that enabling customers to repair their own products—without compromising safety compliance or effectiveness—provides a competitive advantage by increasing customer satisfaction and brand loyalty. Manufacturers have thus invested significant resources in being able to offer diagnostic and repair tools, as well as manuals, product guides, and product service trainings, so that customers can rely on them to make repairs safely.

For all of the above reasons, the NAM asked the Office not to recommend adoption of the proposed exemptions in Class 5 and Class 7.

The NAM thanks the Office for its time and thoughtful attention to the issues presented by the proposed exemptions in Class 5 and Class 7. Should you have any follow-up questions, please let us know.

Sincerely,

A handwritten signature in black ink that reads "Charles F. Crain". The signature is written in a cursive style with a distinct dot above the letter 'i' in "Crain".

Charles Crain
Vice President, Domestic Policy