



UNITED STATES COPYRIGHT OFFICE

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

ITEM A. COMMENTER INFORMATION

Consumer Technology Association*

1919 S. Eads Street, Arlington, VA 22202

Contact: Michael Petricone, Senior Vice President, Government Affairs
703-907-7544

mpetricone@cta.tech

Counsel: Robert S. Schwartz

Constantine Cannon LLP

1001 Pennsylvania Avenue, N.W. 1300N

Washington, D.C. 20004

202 204-3508

rschwartz@constantinecannon.com

*Some CTA auto manufacturer member companies do not endorse this position.

ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 7: Computer Programs – Repair

ITEM C. OVERVIEW

CTA, in concert with Auto Care Association, petitioned for a new and more useful exemption for independent repair and upgrade of motor vehicles. CTA and Auto Care argued that the Register should have accepted the NTIA's recommendation to exempt lawful user circumvention "by or at the request" of a vehicle owner.¹ CTA has also said, in comments on the Sixth Round outcomes, that the Class 21 exclusions for telematics / remote start and security interface modules and modifications to memory storage were unwarranted and, in the case of storage modification, contrary to copyright principles.² CTA in these Comments maintains its focus exclusively on the need to expand the renewed Sixth Round Class 21 exemption granted for

¹ The NTIA recommended an exemption for: "Computer programs embedded in motorized land vehicles or agricultural machinery, when circumvention is initiated by or at the request of the owner of the vehicle or machinery, in order to make repairs or modifications to the vehicle or machinery. This exemption does not obviate the need to comply with other applicable laws and regulations, such as those relating to vehicle safety or environmental protection."

² U.S. Copyright Office Docket No. 2015-8 Section 1201 Study: Notice of Inquiry and Request for Public Comment, Comments of the Consumer Technology Association, March 3, 2016 ("CTA NOI Comments") at 7 - 8.

motor vehicle repair and upgrade, so as to make it genuinely useful to the motor vehicle owners as heretofore defined in Sixth Round Class 21. CTA does *not* address other devices in these Comments.

In the interim between the Sixth Round and this one, the Register has acknowledged the real-world inadequacy of having confined exemptions for circumvention only to self-help by vehicle owners.³ The Register's June Report and this NPRM have suggested that a focus on the statutory language of "user," rather than strictly the "owner," can be useful in conforming practice to theory.⁴ The Register agrees in principle that exemptions for the necessary *acquisition* of tools for a lawful purpose may be warranted, but posits that granting such an exemption would verge too close to approving "trafficking."⁵ CTA welcomes the first insight, but has argued that the second concern is not warranted.⁶

Real-world considerations re vehicular software and firmware

The Register's focus on "user" rather than "owner" is particularly apt with respect to motor vehicles. In the Office Roundtable in which CTA counsel participated, there was widespread acknowledgement that vehicular software poses special real-world issues: (1) Software and firmware have replaced electro-mechanical systems as well as analog systems;⁷ (2) the *user's* concern is in maintaining or improving function rather than gaining access to or copying the work for any literary or other commercial purpose;⁸ (3) vehicle owners who are capable of making analog or electro-mechanical repairs or upgrades are generally not capable of software repair without expert assistance for which most experts must acquire specialized software tools.⁹

Acknowledging that, in the case of motor vehicles, an expert acting at the request and direction of a vehicle owner is the actual "user" who is circumventing a technical protection measure will be a major step toward making the Librarian's exemptions useful in the real world. In the case of automotive repair it is a step amply supported by the record that the Office has compiled since the Sixth Round. However, the Librarian will still fall short of making the exemption relevant to everyday practice unless the exemption also recognizes that the *acquisition* of a necessary tool is not "trafficking." The June Report also takes a step in this direction, noting that the Register's concern here is to avoid the appearance of "authorizing the *distribution* of circumvention tools."¹⁰ Retail experts who assist in auto repair are not engaged in the distribution of circumvention tools, so should not be prevented from acquiring them for a lawful purpose.

³ Section 1201 of Title 17, A Report of the Register of Copyrights, June 2017 ("June Report") at 61 - 62; U.S. Copyright Office, 37 CFR Part 201 [Docket No. 2017-10], Exemptions to Permit Circumvention of Access Controls on Copyrighted Works, Oct. 26, 2017 ("NPRM") at 42 - 43.

⁴ *Id.*

⁵ *Id.*

⁶ CTA NOI Comments" at 8 - 10.

⁷ May 20, 2016 Roundtable at 17 (Love), 20 - 21 (Besek), 28 - 29 (Schwartz), 39 - 41 (Perry).

⁸ *Id.* at 25 - 26 (Greenstein), 74 - 75 (Besek).

⁹ *Id.* at 27, 56 - 59 (Greenstein). *Cf.* Butler at 34 - 38.

¹⁰ June report at 60, *emph. added.*

It is up to neither the expert user nor the Librarian whether circumvention tools are available. As Professor Besek noted at the May 20, 2016 Roundtable, the DMCA did not grant the Librarian any authority over “trafficking.”¹¹ So it is simply unnecessary for the Librarian to exclude the *acquisition* of a tool for a lawful purpose. Even if acquiring and using a tool were considered “trafficking,” the Librarian would have no power to exempt it, so need not even discuss it.¹² At most, the Librarian might note, in the text of an exemption, that its own authority cannot be construed as extending to the *distribution* of circumvention tools.

To the extent the Librarian intends to include recommendations to the Congress, including relief modeled on the Unlocking Act, CTA agrees with the June Report’s suggestion¹³ that Section 1201 be clarified to assure that experts can obtain necessary tools for a lawful purpose.

With respect to telematics, there is ample evidence that this data, which is likely not subject to copyright,¹⁴ is essential to modern auto repair on behalf of users. Remote diagnostics, start, and security access by servicers and dealers, on behalf of the vehicle owner, has become an essential tool for vehicle users and anyone who would assist them.¹⁵ CTA recognizes that the availability to third parties of such data and related interfaces raises concerns that are outside the scope of this proceeding. But as the Register has recognized, a servicer acting at the request and direction of a vehicle owner and receiving information, at the direction of the owner, about the status and needs of the vehicle should not be considered a third party. Indeed, this expert stands closer to the owner than would anyone receiving the data without the owner’s specific knowledge and consent.

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

The extent to which automotive systems have been “locked down” by proprietary software as of 2015 was set forth comprehensively in EFF’s initial Comments in Docket No. 2014-07 and the Statements that accompanied it. As EFF and its experts and cited sources laid out, Technical Protection Measures (“TPMs”) take the form of

- “Challenge response mechanisms” that involve and require access codes, passwords, keys, or digital signatures;
- Encryption, which prevents any access at all to firmware or update files; and
- Disabled access to “ports” via which the contents of physical memory, hence data and data bases, can be extracted.

¹¹ May 20, 2016 Roundtable at 38 - 39.

¹² The June Report at n. 338 notes CTA counsel’s Roundtable argument that the Register should not be concerned that an exemption for a tool’s lawful *use* could impair a court in addressing trafficking where it occurs, because courts are aware that the Librarian was granted no power to impair a court finding of trafficking.

¹³ June Report at 59 - 60.

¹⁴ *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991)

¹⁵ Auto servicers have documented the importance of such data and why it is essential that they have access to it equal to that afforded franchised dealers. *See*, “Your Car. Your Data. Your Choice.” <https://yourcaryourdata.org/#homeIndustry>.

The lawful nature of vehicle user circumvention has been established.

EFF's experts and others who provided statements in support of the Class 21 petitions demonstrated to the satisfaction of the Register¹⁶ that:

- (1) Most of the circumvention necessary to overcome vehicular technical protection measures is for a purpose that does not violate copyright, and
- (2) Expert assistance, using tools, is necessary in order for a user to benefit from an exemption for such lawful use.

In keeping with the Register's renewal of the Sixth Round exemption and its overall more efficient approach to this Round, CTA sees no need to re-prove what was established to the Register's satisfaction in the last Round.

With respect to vehicles, an expert with tools applied upon request is a "user."

The exemption for autos, where the software in question is primarily functional in nature, provides an excellent case and context for expert assistance with tools. As the Statements incorporated in the 2015 EFF Comments illustrate, these tasks are highly technical and complex and rely on professional dedication and experience. Even attempting to understand the cited reference materials requires a sophisticated technical background.¹⁷

The acquisition of necessary software tools remains vital, notwithstanding progress that has been made in the availability of OEM repair tools to independent dealers and servicers. The cross-industry Memorandum of Understanding¹⁸ now provides access to OEM repair tools, as well as diagnostic tools, as of the 2018 model year. However, these tools remain strictly proprietary and brand-limited. Independent auto dealers, repair shops, and parts sellers and installers cannot apply essentially identical tools across brands; they must be licensed separately. Because independent dealers have no interest in otherwise commercializing this software, this requirement protects only the competitive primacy of franchised dealers, not the intellectual property of OEMs.¹⁹

Experts must acquire tools.

The remaining major issue on which CTA has focused is the exemption status of those users – expert retail servicers included – who *acquire* the necessary tools, and whether the *acquisition* of such tools should be equated with “trafficking.” There is sufficient evidence in the record, as

¹⁶ See Overview discussion.

¹⁷ See, e.g., the handbook developed by Open Garages, available at <http://opengarages.org/handbook/ebook/>.

¹⁸ Memorandum of Understanding, Jan. 25, 2014, http://www.nastf.org/files/public/OtherReference/MOU_SIGNED_1_15_14.pdf.

¹⁹ Even franchised dealers, when they sell used cars and service other brands, could and would need such tools and make lawful use of them.

cited specifically in the section above, supporting CTA's argument that acquisition is not trafficking:

- Where it is clear that copying of the software is not the objective it has not been necessary to limit the location at which circumvention occurs or to discuss the origin of the tools applied. Hence the 2006 Class 5 exemption for wireless handset unlocking required *only* that the circumvention be “for the sole purpose of lawfully connecting to a wireless telephone communication network.”²⁰
- Acquiring a tool for a specific intended lawful use, as the Register has now noted, is not the same as *distributing* one.
- Exemptions as granted by the Librarian are for, and limited to, the specific use set forth in the exemption.
- The Librarian has no authority to grant an exemption for trafficking but does have authority to grant an exemption for a lawful use. Cognizant of this, courts would remain able to address trafficking even if the Librarian *did* purport to grant an exemption for more than lawful use.
- The legislative history of both the DMCA and the Unlocking Act each confirm that acquiring a tool for purposes of *interoperability* is not trafficking. The House Commerce Committee said explicitly that retailer assistance in aid of interoperability would not violate the DMCA.²¹ The Senate Judiciary Committee said explicitly that nothing in the Unlocking Act was meant to convey any positive or negative inference with respect to the Librarian's authority.²²

Users, including those acting on owner request, are entitled to telematics data.

With respect to telematics, there are several bases for the Register to recommend that servicers acting at the request of the vehicle owner should face no DMCA liability: (1) The data is not copyrighted, so the Librarian can declare that circumvention raises no copyright or DMCA issue;²³ (2) The vehicle owner “owns” the data; (3) Even if copyrighted and the ownership of the data were unclear, the vehicle owner has a compelling interest in making fair use of it with the requested assistance of a servicer (independent or franchised) of the owner's choice.

²⁰ Recommendation of the Register of Copyrights in RM 2005-11; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, November 17, 2006, at 42.

²¹ See CTA NOI Comments at 4 - 6.

²² *Id.* at 10 and June Report at 59 – 60 and n. 327.

²³ See Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights at 13 – 15 and n. 66, citing similar outcomes in 2010 and 2003 Final Rules. (Oct. 2012).

Adding to an owned vehicle's storage capacity can violate neither copyright nor the DMCA.

As to “infotainment” systems, CTA repeats here the argument it made to the Register in CTA’s March 2016 NOI Comments, at 7 - 8:

As a matter of copyright law, the Office’s rationale is also directly contrary to the law as established by the Supreme Court in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984). The Supreme Court held in *Sony* that it is lawful to provide consumers with a device that can store both infringing and non-infringing content, so long as there are commercially significant non-infringing uses for the stored content. In the Class 21 exemption discussion, it was only agricultural equipment provider John Deere that even suggested, without proof, that circumvention could result in infringing material being *imported* into vehicle infotainment storage.²⁴ Hence the only copyright interest or concern that the Office could have had would be about a closed storage system becoming open to storing infringing content. It was clearly established in *Sony* that allowing such capacity into the marketplace is not copyright infringement, even where accomplished by a third party with a commercial interest.

Accordingly CTA believes the Librarian has the power to grant the exemption as petitioned for; to the extent the Register believes legislation is required to avoid doubt or to accomplish additional goals now endorsed by the Register, CTA hopes the appropriate recommendation will be included.

²⁴ No claim of inducement, contributory, or vicarious liability was made – indeed it would be comical to suggest that a *user* is capable of inducement with respect to his or her own vehicle’s radio. (fn. in 2016 Comments)