

# TRANSCRIPT OF PROCEEDINGS

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In the Matter of: )  
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SECTION 1201 PUBLIC HEARING: )  
PROPOSED CLASS 7: COMPUTER )  
PROGRAMS - VEHICLE OPERATIONAL )  
DATA )

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1           Finally, for those of you who are listening  
2           in, we do have a public participation session  
3           immediately following this session beginning at four  
4           o'clock, and I believe that you can still sign up to  
5           participate. You should do so very quickly at this  
6           point, and we'll hear from the public on issues that  
7           they want to raise based on the previous hearings.

8           We'll now turn to Class 7, and let's begin  
9           the introductions with the Copyright Office. Melinda.

10           MS. KERN: Hi. I'm Melinda Kern, and I am  
11           the Attorney Advisor with the Copyright Office.

12           MS. CHAPUIS: Mark, do you want to introduce  
13           yourself?

14           MR. GRAY: Hi everyone. My name is Mark  
15           Gray. I'm an Assistant General Counsel here in the  
16           Copyright Office's Office of General Counsel.

17           MS. CHAPUIS: Okay, and Issac?

18           MR. KLIPSTEIN: Hello. My name is Isaac  
19           Klipstein. I'm the Ringer Fellow.

20           MS. CHAPUIS: Great. We also have one of  
21           our colleagues from NTIA here.

22           MR. CHENEY: Good afternoon. My name is  
23           Stacy Cheney. I'm a senior attorney advisor in the  
24           Office of Chief Counsel at NTIA. Good to be with you.

25           MS. CHAPUIS: Thanks, Stacy. And let's do

1 introductions for our participants now, beginning with  
2 the proponents of the exemption? So let's begin with  
3 Auto Care Association.

4 MS. FOSHEE: Hi, I'm Lisa Foshee. I'm the  
5 senior vice president and general counsel of the Auto  
6 Care Association.

7 MR. GREENSTEIN: Good afternoon. My name is  
8 Seth Greenstein. I am with the law firm of  
9 Constantine Cannon, and I'm outside counsel to Auto  
10 Care.

11 MS. CHAPUIS: And MEMA?

12 MR. JASNOW: Dan Jasnow. I'm a partner at  
13 ArentFox Schiff, and we are here representing MEMA,  
14 the Vehicle Suppliers Association.

15 MS. CHAPUIS: Great. And iFixit?

16 MR. WIENS: I'm Kyle Wiens, the CEO of  
17 iFixit, representing the eight million fixers, fixing  
18 everything from cellphones to cars on iFixit.

19 MS. CHAPUIS: And the opponents, the Joint  
20 Creators.

21 MR. ENGLUND: Good afternoon. I'm Steve  
22 Englund of Jenner and Block, representing the  
23 Entertainment Software Association, the Motion Picture  
24 Association and the Recording Industry Association of  
25 America.

1 MS. CHAPUIS: Great, thank you, and Auto  
2 Innovators.

3 MR. HUMPHREY: Hi. I'm Mark Humphrey at  
4 Mitchell, Silberberg and Knupp, and I an outside  
5 counsel to the Alliance for Automotive Innovation or  
6 Auto Innovators.

7 MS. CHAPUIS: Okay. Did I get everyone?  
8 Great. Then I will turn it over to Melinda to begin  
9 the questions.

10 MS. KERN: Thank you so much, Emily. So  
11 just as a general road map for everyone, we're going  
12 to start with scope, meaning scope of the exemption,  
13 move on to non-infringing uses, carve-outs, TPMs and  
14 then adverse effects generally.

15 But I would like to propose my first  
16 question to the proponents. So the comments discuss  
17 both telematics data and vehicle operational data, but  
18 neither is defined. What specific types of data or  
19 different types of data does this proposed exemption  
20 cover?

21 The proposed class here pertains to vehicle  
22 operational data, but we're wondering also whether  
23 there was a definition for that as well. Thank you,  
24 and if you could please use the raise hand function to  
25 let me know. All right. Mr. Jasnow.

1           MR. JASNOW: Yes, thank you. So I'm happy  
2 to address that question, and I just want to say thank  
3 you to the Copyright Office for organizing this and  
4 for giving MEMA, as well as the other proponents, a  
5 chance to address the questions today.

6           So with respect to operational data, I would  
7 say it falls into a couple of different subcategories.  
8 But primarily what we're talking about is data that is  
9 generated pursuant to a vehicle owner or lessee's use  
10 of the vehicle.

11           So our position is that that data, that raw  
12 data is very unlikely to be protectable under  
13 copyright, but we acknowledge that it might be  
14 embedded within or we might need access to  
15 copyrightable, copyrighted software or copyrighted  
16 database schema in order to access either the raw or  
17 the somewhat organized data.

18           The subcategories of that would be things  
19 like vehicle performance data, which might be  
20 information about a vehicle's speed, acceleration,  
21 braking, fuel consumption, engine performance. It  
22 might relate to vehicle status data, which might be  
23 something like information about whether the vehicle's  
24 in motion, its current location, status of various  
25 vehicle systems like the engine or the brakes.

1           It might pertain to driver behavior data  
2           such as driving style, aggressiveness, cautiousness,  
3           and it might pertain to environmental data such as the  
4           road conditions or other environmental conditions that  
5           the vehicle is being operated in. Telematics data we,  
6           you know, overlaps to some degree, but it is data that  
7           is being conveyed from the vehicle to some remote  
8           cloud application or system. So anything that is  
9           potentially traveling between the vehicle and a third  
10          party cloud or a server.

11           MS. KERN: Mr. Wiens.

12           MR. WIENS: I would concur with what he just  
13          said. I would also include maintenance data,  
14          information on the tire pressure sensors, what's the,  
15          what's the list of codes that a car's just thrown,  
16          which ones have been reset. There's a whole wealth of  
17          service data that's also useful.

18           You can also think of information that you  
19          might want in a fleet management context. A lot of  
20          that is telematic data that can be sent to a fleet  
21          cloud. You might want it to aggregate. Service  
22          information is another.

23           MS. KERN: Thank you. I don't see any more  
24          hands, so I will ask just another follow-up question.  
25          Is the primary difference between the diagnosis of



1 repair and the proposed exemption erasing the purpose  
2 requirement? Mr. Jasnow, and if I'm pronouncing your  
3 last name wrong, please let me know.

4 MR. JASNOW: Nope, that's correct. So the  
5 -- what I would say is that the current -- the  
6 proposed exemption, the Class 7 exemption is a little  
7 bit beyond the scope of the existing exemption for  
8 diagnosis, repair or modification of the vehicle.

9 So what we are envisioning is a situation  
10 where a vehicle owner or a lessee, or an independent  
11 repair facility acting on their behalf, is getting  
12 access to their own data about the performance and  
13 operation of the vehicle, for things that go beyond  
14 the strict scope of repair.

15 And we talked about some of these things in  
16 our written submissions, but this might include, for  
17 example, taking steps to decrease cost and improve the  
18 efficiency of the vehicle owners or lessee's  
19 experience through the repair process.

20 So for example, if a vehicle owner or lessee  
21 wanted to share performance information about their  
22 vehicle with their preferred independent repair shop  
23 or an insurance company, for example, in a manner that  
24 would allow the insurance company or the repair shop  
25 to, you know, be able to identify when a particular

1 repair part is going to be needed, what particular  
2 repair part is going to be needed at a particular  
3 time.

4 Issues that might affect the timing of an  
5 oil change, the, you know, environmental factors that  
6 might affect the timing of an oil change, when  
7 something might be necessary, temperature, tire  
8 pressure, any of those things.

9 So that by providing that information, by me  
10 ,as my vehicle owner, being able to provide that to a  
11 third party who can offer me services, then  
12 potentially reduce the amount of time that a vehicle  
13 is in the shop, reduce the amount of time that a  
14 family is without a car because the car is in the  
15 garage, you know, reduce the cost of repairs because  
16 you're able to check things, you know, beforehand or  
17 you're able to prevent it from getting to a worse  
18 position than it might otherwise if you're not  
19 regularly recording information about the performance  
20 of the vehicle to an after-market specialist.

21 And in the insurance context, you know, it's  
22 things like partially what we've already seen, but  
23 where an insurance company might be able to get access  
24 to some of the vehicle operational data, performance  
25 data and say, you know, you've been, you've been a

1 really safe driver. We're going to offer you a better  
2 rate.

3 And then of course there's the example that  
4 we provided where, you know, maybe it's not repair at  
5 all but you want to be able to monitor the, you know,  
6 your new family, the new driver in your family, the 16  
7 year-old who's taking the car out.

8 Yes, there might be third party software  
9 options that are available to provide some of that,  
10 but we don't really think that's, you know, what the  
11 owner of the vehicle should have to rely on in order  
12 to, you know, avoid liability under the DMCA's anti-  
13 circumvention provisions.

14 So it's any of those things. It's related  
15 for sure to the repair, but it, but it goes beyond the  
16 scope of what we've -- what the Copyright Office has  
17 already approved.

18 MS. KERN: Thank you. Mr. Englund.

19 MR. ENGLUND: So when I first took a look at  
20 this proposal, my question was very similar to yours.  
21 What is this proposal trying to do beyond what the  
22 existing Exemption 13 does? For I searched the  
23 comments and found the comments are focused on repair.

24 So for example, the DOJ/FTC comments talk  
25 about having more options for repair. The MEMA reply

1 comments talk about repair costs and streamlining of  
2 repair, and the first 7/8ths of Mr. Jasnow's comments  
3 a moment ago was all about repair.

4 So I'm still kind of searching for what the  
5 purpose here is that isn't repair, despite Mr.  
6 Jasnow's comments a moment ago. But he did finally  
7 suggest at the end of his remarks parents tracking  
8 their kids' driving, and so maybe that's something  
9 that we can talk about as the purpose for this  
10 exemption.

11 But at the moment, it seems like there is  
12 just very little justification for having an  
13 additional exemption that is 95 percent about repair.

14 MS. KERN: Thank you. Mr. Humphrey.

15 MR. HUMPHREY: I would just concur with what  
16 Mr. Englund just said. My first thought upon seeing  
17 this was being struck by the lack of specific  
18 justification. You know, the NPRM specifically says  
19 that these concerns can't be hypothetical. They can't  
20 be -- they have to be based in some kind of  
21 evidentiary fact, and I haven't seen really anything.

22 I've seen a lot of theories on what could  
23 happen, statements about things that are happening.  
24 But you know, I don't see anything from a specific  
25 person who has actually had these difficulties. Now,

1 you know, if we do want to talk about a specific  
2 purpose like Mr. Englund just said, I think that's  
3 fine.

4 But the definition as it currently is in  
5 Auto Innovators' view is extremely broad. As we said  
6 in our comments, the definition of vehicle operational  
7 data could potentially cover data that relates to a  
8 vehicle's technical operation and performance,  
9 unrelated to a specific driver, which could  
10 potentially be protected as a trade secret.

11 MS. KERN: Thank you. I will pass it to my  
12 colleague, Isaac. Mr. Jasnow, I did see your hand up  
13 but I think Isaac does have a question towards you, so  
14 hopefully you can fold in your response.

15 MR. KLIPSTEIN: Yes. This is thematically  
16 quite similar. A lot of the discussion so far has  
17 been about the uses of data, and we were wondering  
18 whether the data itself might be different for these  
19 non-diagnostic and repair uses. Mr. Jasnow.

20 MR. JASNOW: Yeah. So certainly I think  
21 some of the data would be different, and the  
22 operational data is what I would focus on in that  
23 context. We're talking about data that relates  
24 specifically to the operation of the vehicle.

25 So things like speed, acceleration, status

1 of various systems, you know. There is for sure  
2 overlap in some of these categories, but you know,  
3 what we think that it's important to focus on is that  
4 this is all -- this is all data that is generated by  
5 the performance, by the operation of the vehicle by  
6 the owner or lessee, right?

7 So the OEMs have no claim to rights in that  
8 data. It's not data that existed in the vehicle at  
9 the time the vehicle left the lot. It's not data that  
10 was or is included in any copyright application filed  
11 by the OEMs. You know, with respect to the Joint  
12 Creators, the repair exemption already excludes, you  
13 know, circumvention in order to gain access to any  
14 vehicle entertainment or media systems.

15 We're totally happy with that kind of  
16 exclusion again. We see no reason for that, but you  
17 know, the data here that we're talking about is very  
18 clearly number one, not -- most likely not protectable  
19 in its raw form, and number two, it's -- you know,  
20 there's a very strong basis for the owner or lessee of  
21 the vehicle to claim ownership over that data.

22 And it's data that relates to how that owner  
23 or lessee is operating their vehicle. You know, the  
24 opponents have talked about we haven't provided, you  
25 know, sufficient justification for why we should need

1 this. I'd turn that around and say what justification  
2 are they providing for claiming that it should be  
3 behind a perpetual lockbox?

4 This is, I think, gets really to the heart  
5 of what these rulemaking proceedings are for, which is  
6 that we should not be using the anti-circumvention  
7 provisions as a way to lock up information about a  
8 vehicle owner or lessee's own data that is derived  
9 from their use of the vehicle, particularly when we  
10 are seeing an exponential growth in the amount of data  
11 that's being generated by these vehicles and the  
12 sophistication of the onboard control units.

13 You know, a complete transformation from a  
14 situation where a DIYer could come in and really  
15 understand what was going on with their vehicle, to a  
16 situation where, you know, that information is  
17 increasingly unobtainable, particularly unobtainable  
18 without threat of liability under the DMCA.

19 MR. KLIPSTEIN: Thank you. Mr. Wiens, you  
20 put your hand up?

21 MR. WIENS: I'll defer to Lisa first and  
22 then I'll make a comment.

23 MR. KLIPSTEIN: Go ahead, Ms. Foshee.

24 MS. FOSHEE: Oh thank you. I just wanted to  
25 add one point. It is, as everyone on this call knows,

1 the set of repair and diagnostic codes are a defined  
2 set, a defined language that communicates operational  
3 issues with the vehicles.

4 What the exemption does, as Dan has  
5 articulated, is broadens that and puts context around  
6 it, so that the owner of the vehicle can understand  
7 not only the particular diagnostic or repair code, but  
8 how that fits into the usage of the vehicle as they  
9 themselves are driving it or using it. And so it  
10 protects the owner of the vehicle who wants to  
11 understand the whole picture if you will, as opposed  
12 to just pulling a specific code off of the vehicle.  
13 Thank you.

14 MR. KLIPSTEIN: Mr. Wiens.

15 MR. WIENS: So the last time that I rented a  
16 car from Hertz, you go into the sound system and it  
17 had the contacts of the previous person who had sync'd  
18 their phone via Bluetooth, had all their contacts in  
19 there. A large part of what we've done over the years  
20 at iFixit is help folks that are refurbishing and  
21 reselling products, wipe data in the process of  
22 selling products.

23 Imagine you're selling a used car. What's  
24 the data on the car? I bought the car. I want to  
25 wipe the previous owner's data completely off the car



1 before I sell it to the next person, so they don't  
2 have data leakage. So we help companies that sell  
3 copy machines. They sell used copy machines.

4 Copy machines have a hard drive in them that  
5 has like all -- the previous 10,000 pages that you  
6 photocopied. It's very bad if that information is  
7 still on it when you resell the product. So there's  
8 many reasons why an owner might want to be able to  
9 inspect and see the data that's on there. If it's got  
10 the driving record of the last 10,000 miles, if I'm  
11 reselling a product, I'd want to be able to wipe that.

12 And on iFixit, we've done this with  
13 cellphones over the years, you have hundreds of  
14 individual wipe instructions that's very model-  
15 specific where you have to help people get in and  
16 remove the data from the cellphone before it gets sold  
17 to the next person. So we should be able to do the  
18 same thing for cars.

19 MR. KLIPSTEIN: Mr. Greenstein.

20 MR. GREENSTEIN: Thank you. So I think what  
21 you're hearing is that there's really kind of a Venn  
22 diagram here between the proposed exemption, the old  
23 exemption, certainly some of the data that is  
24 pertinent to the new exemption would include things  
25 that are sent by telematics that would be directly

1 relevant to fixing a particular problem with the  
2 vehicle.

3           However, there's also a lot of data that  
4 you're hearing about that is personal data as Kyle was  
5 just explaining, or data regarding driving habits that  
6 might have some implications in the future for use.  
7 It might have some implications for safety. It might  
8 be of interest, as Dan pointed out, to, or as Kyle  
9 pointed out, to the owner of the fleet or to a parent,  
10 or to an insurance company.

11           But importantly, as Kyle and Dan were  
12 pointing out, this is information and data that's  
13 owned by the consumer, and there really isn't a lot of  
14 justification here for a third party, even the vehicle  
15 manufacturer, to use technological means to lock it up  
16 and make it inaccessible to the owner of the data, or  
17 to those who the owner of the data would like to have  
18 access to it for promoting their own purposes.

19           MR. KLIPSTEIN: Mr. Englund.

20           MR. ENGLUND: Mr. Jasnow mentioned the Joint  
21 Creators and the current exemption language, about  
22 gaining access to the copyrighted works. While it's  
23 not specifically relevant to the Office's question,  
24 I'd like to simply underscore that, since it's  
25 probably the most important issue from my clients'

1 perspective, that currently the Exemption 13 has two  
2 aspects that are important for the protection of  
3 creative works, that the limitation that circumvention  
4 not be accomplished for purposes of gaining access to  
5 the copyrighted works, and also a carve-out for  
6 separate subscription services.

7 I think that the proponents have to varying  
8 degrees accepted both of those. So I hope that  
9 keeping them is not controversial. But it is the  
10 request of the Joint Creators that if the Office  
11 decides that there is a need for another exemption,  
12 that that language, both pieces, should be included.

13 MR. KLIPSTEIN: And Mr. Humphrey.

14 MR. HUMPHREY: I wanted to be clear about  
15 one thing first, so that there's no confusion. Auto  
16 Innovators do not oppose the renewal of the existing  
17 exemption. The issue is with this proposed exemption,  
18 and one thing that I think has been overlooked both in  
19 most of the comments and so far today is the fact that  
20 the auto industry has taken great steps to make this  
21 kind of data available through the Memorandum of  
22 Understanding from 2014 and the Data-Sharing  
23 Commitment that was entered into just last year.

24 And these agreements give access to a lot of  
25 the data that we're discussing, in particular the

1 data-sharing commitment provides access to telematics  
2 data that is provided to dealers, independent repair  
3 facilities are able to obtain that data through  
4 multiple means.

5           There are websites, for example, that  
6 functions as repositories of diagnostic data, provide  
7 the most up-to-date information available by the auto  
8 manufacturers. There are aftermarket scan tools that  
9 will allow third party companies to buy those. They  
10 can provide remote diagnostic support for independent  
11 businesses.

12           That could alleviate the concern about the  
13 inefficiency of repair, to the extent that's even  
14 something that we should be considering today, and  
15 that could eliminate the need to send the vehicle out  
16 to a dealer.

17           I would point out that one of the comments  
18 filed was by -- a joint filing by the FTC and the DOJ,  
19 and they actually spoke glowingly of the auto industry  
20 as a standard to aspire to, because of the lengths  
21 that the industry has gone to provide this kind of  
22 data to consumers and enable people to repair  
23 vehicles.

24           MR. KLIPSTEIN: Thank you, and I think last  
25 on this question for now, I'll go to Ms. Foshee.

1 MS. FOSHEE: Thank you. I just, if  
2 appropriate, wanted to respond to Mr. Humphrey on the  
3 MOU and the Data-Sharing Agreement. You know, it's  
4 obviously a topic that his organization and mine have  
5 debated fairly extensively over the last year.

6 But in terms of the 2014 MOU and the, what  
7 we call the ASA Pact or the Data-Sharing Agreement,  
8 there are multiple reasons that were articulated in  
9 MEMA's comments, and I'll reiterate here as to why  
10 those are not sufficient, either for the independent  
11 aftermarket or for consumers going forward, not the  
12 least of which is that they are voluntary. They are  
13 non-binding. There's no enforcement mechanism.

14 They don't cover many of the types of  
15 vehicles that are covered by this exemption or in fact  
16 all of the automakers. The 2014 MOU exempts  
17 telematics data. The ASA Pact or the Data-Sharing  
18 Agreement tries to window dress the inclusion of  
19 telematics, but it only includes telematics data that  
20 is not otherwise available via the OBD2 port in the  
21 car.

22 So you would in essence keep the consumers  
23 and the aftermarket in sort of wireline technology  
24 world, where you have to have the car in the garage  
25 and plug it in. Whereas the manufacturers and their

1 dealerships could move into this wireless diagnosis  
2 world, which is obviously where consumers would like  
3 to end up.

4 In addition, there was testimony about this  
5 in front of the Energy and Commerce Subcommittee, that  
6 ASA is in large part funded by the OEs. As it states  
7 on their website, most of the OEs are members of ASA.  
8 So it's really sort of an agreement with themselves.  
9 ASA represents less than two percent of the  
10 independent shops in the United States.

11 So you know, the folks in our membership and  
12 our industry and MEMA's, we don't view this as a  
13 viable solution going forward, and it really comes  
14 back to a fundamental question of if, if everyone is  
15 comfortable making all of this operational data and  
16 all of this repair data available via telematics and  
17 via OBD2, then let's just, you know, have this  
18 exemption and let's just codify that, and we can all  
19 move forward.

20 You know, but that's not been a solution  
21 that has been workable for them thus far. So I just  
22 wanted to make those points about the so-called  
23 agreements. Thank you.

24 MR. KLIPSTEIN: I'd like to invite my  
25 colleague from NTIA to ask a follow-up question, and

1 Mr. Humphrey I see your hand raised. We are going to  
2 try to get through our questions a little bit more  
3 quickly. So if you could say your comment, but Mr.  
4 Cheney.

5 MR. CHENEY: Yeah, thank you. Thank you  
6 Isaac, and I appreciate the conversation so far around  
7 the agreements. But I wanted to back up just a touch  
8 here, because there seems to be some, I think,  
9 confusion as we try to look at a potential overlap  
10 between those two exemptions, the proposed one and the  
11 old one.

12 Just a question and maybe Mr. Wiens can help  
13 us here a little bit. When you go through the process  
14 of using the first exemption, the Exemption 13 that  
15 currently exists and you gain access to the computer  
16 systems, is it the same process that you would use to  
17 gain access to the telematics?

18 In other words, once you've done it under  
19 13, wouldn't you also then have access to the  
20 information that's there? So really using the same  
21 exemption -- one exemption for access to both. Does  
22 that help?

23 MR. WIENS: Yes, that's a good question. It  
24 kind of depends on the vehicle. So in some cases yes,  
25 your point is valid. But I don't think that's the

1 case across all of them. Sometimes they're separate  
2 systems.

3 MR. CHENEY: And I guess just to follow up  
4 with that, does the first exemption allow us access to  
5 that telematics data already? Meaning if somebody  
6 were to go through that process in the first one,  
7 wouldn't they be able to access that telematics or  
8 other diagnostic data already?

9 MR. WIENS: Yeah. I don't have firsthand  
10 experience doing this recently, so I think we could  
11 probably look it up and get back to you.

12 MR. CHENEY: Mr. Englund.

13 MR. ENGLUND: Well, I'll just point out that  
14 a moment ago Mr. Wiens referred to different systems.  
15 But I think that that's not a distinction that is made  
16 in the regulations. I look at the proposed regulatory  
17 language and both existing Exemption 13 and the new  
18 proposed exemption both apply to software that  
19 controls vehicles.

20 So I believe it's the same software we're  
21 talking about, not a limitation I can find in  
22 Exemption 13 that says some systems and not others.  
23 So again, that looks like they're substantially  
24 overlapping to me.

25 MR. CHENEY: I'm not sure who was next. Ms.



1 Foshee I think, you show up first online.

2 MS. FOSHEE: Oh sure. I just wanted to, and  
3 I apologize if I misunderstood your question that you  
4 were asking Kyle. But with respect to access to  
5 telematics data, today the aftermarket, automotive  
6 aftermarket does not have access to wirelessly  
7 transmitted data to vehicles, you know. Tesla's the  
8 easiest walk around example.

9 But in all cases, this data is being  
10 transmitted wirelessly from the vehicles to the  
11 manufacturer servers, you know, sort of terabytes of  
12 data and the aftermarket does not access that, either  
13 operational data or repair maintenance data.

14 MR. CHENEY: I think just to clarify the  
15 question if I could, is once you've done, gone through  
16 the correction under the first one, under the first  
17 exemption that exists now, would you get, gain access  
18 to that telematics without having to have a different  
19 exemption?

20 In other words, going through the process of  
21 the current exemption, does it get, allow you to gain  
22 access to that data already?

23 MS. FOSHEE: Seth, you jump in here if I'm  
24 not understanding the question correctly, but I  
25 believe the answer to that is because we don't access

1 it telematically in the aftermarket or consumers can't  
2 access it, we haven't done it under the old exemption  
3 and we couldn't yet do it under the new exemption.

4 But I think the issue is that if you had the  
5 capability to access it via that transmission method,  
6 then you would be accessing it, you would be accessing  
7 different data sets. That goes back to the Venn  
8 diagram.

9 MR. GREENSTEIN: And if I can just jump in  
10 here really quickly, I think not having the exemption  
11 potentially creates a perverse incentive to making  
12 different systems, if they're not already different.

13 And so to the extent that the exemption  
14 would cover access to all of the data for these  
15 various lawful purposes, then it would guarantee that  
16 regardless of how it was protected, by what kind of  
17 technological protection measure, whether it was the  
18 same one or whether it was different ones, consumers  
19 and their authorized repair facilities and others will  
20 still have lawful access.

21 MR. GREENSTEIN: Thank you.

22 (Simultaneous discussion.)

23 MR. KLIPSTEIN: Can I just very quickly  
24 remind the panelists to please use the hand raise  
25 function? Thank you. Mr. Jasnow.

1           MR. JASNOW: So you know, I think the most  
2 critical point is that even if you can access that  
3 same data, consumers are currently restricted by the  
4 limited nature of the permissible uses under the  
5 existing exemption. So the existing exemption allows  
6 for circumvention for the purposes of diagnosis,  
7 repair or lawful modification of the vehicle.

8           Here, we have identified, you know,  
9 additional uses that we think that are lawful, that  
10 are essentially just allowing consumers to use their  
11 own data about their -- the way that they've operated  
12 the vehicle for purposes such as sharing information  
13 with an insurer or a repair technician or a dealership  
14 to reduce the amount of time that a vehicle might be  
15 in the shop, to learn about the driving habits of a  
16 new driver, to get a discount on insurance.

17           These are, these are uses that are, you  
18 know, we think very reasonable. There shouldn't be a  
19 reason that a consumer shouldn't be able to access the  
20 data for those purposes. It is their own data. It's  
21 not subject to copyright protection.

22           All we are asking for is to be able to  
23 circumvent and access some portion of copyrighted  
24 software, whether that's the database schema or some  
25 organized components of the database that might be

1 protectable, in order to access the consumer's own  
2 data for these broader purposes that are not within  
3 the scope of the current exemption.

4 MR. KLIPSTEIN: In the interest of time, I'm  
5 going to pass this to my colleague, Mark Gray.

6 MR. GRAY: Thank you very much Isaac, and  
7 yes Mr. Humphrey, I'm sorry a second time to skip you.  
8 As a quick reminder for you and for the other  
9 panelists today, obviously we started a few minutes  
10 late because of technical difficulties. We are  
11 scheduled to end at 3:45, but we can go a few minutes  
12 over. We do need to stop before the four o'clock  
13 audience participation section.

14 So in general, I would encourage people to  
15 try to limit responses to responses to only a few,  
16 just so that we can get through a long list of  
17 questions. I know people have a lot to say. As  
18 Melinda mentioned at the outset, we're going to go  
19 through non-infringing uses, adverse effects, TPMs.

20 I'm sure there will be opportunities to  
21 share your thoughts in the context of those questions.  
22 I wanted to ask one quick question and one a little  
23 bit more in-depth.

24 The first question is for the proponents.  
25 There was some discussion in the comments, I think

1 particularly sort of in the opposition and the reply  
2 about the definition of telematics. If I recall, one  
3 of the oppositions mentioned that in the 2015 cycle  
4 nine years ago, the discussion of telematics was  
5 really more focused on geolocation data and GPS data.

6 It sounds like from the discussion we've had  
7 so far that is not what the intended scope of the  
8 telematics definition is in the proposed exemption.  
9 Maybe Kyle or someone else, can you confirm that,  
10 whether that's the case?

11 MR. WIENS: I'll defer to some of the other  
12 folks.

13 MR. JASNOW: Happy to take that unless Lisa,  
14 you want to jump in?

15 MS. FOSHEE: No. Dan, why don't you do it  
16 and I can jump in if there's something else. Thank  
17 you.

18 MR. JASNOW: Yes. I do think that the  
19 telematics data goes, you know, beyond simply the  
20 geolocation data, and this is a reflection of the fact  
21 that, you know, especially since 2015, you know, the  
22 amount of data that is being collected and transmitted  
23 wirelessly from these vehicles has increased  
24 exponentially and will likely continue to increase  
25 exponentially.

1           We certainly would be open, just as we're  
2 open to a limitation on access to third party  
3 intellectual property or subscription services. You  
4 know, I think if there are concerns about access to  
5 telematics data that are related to safety or  
6 regulatory compliance, that's something that the  
7 Copyright Office has, you know, very effectively  
8 handled in the past.

9           Whether that's a temporary delay in the  
10 implementation of a new exemption to allow comments  
11 from, you know, NHTSA or other regulators, the EPA or,  
12 you know, expressly prohibiting any access to  
13 telematics data that might implicate or for purposes  
14 of circumventing vehicle safety or environmental  
15 compliance regulations.

16           Certainly that's, that would be something  
17 that I think MEMA would not oppose. We would welcome.  
18 We've already stated that in some of our comments.  
19 But yes, it does -- the telematics data does go beyond  
20 the scope of just geolocation information and it might  
21 include other things as well.

22           MR. GRAY: Great, thank you. That's a very  
23 helpful clarification. My next question is in the  
24 proposed exemption language, I believe the phrase you  
25 used was "access, store and share data." In the last

1 cycle, we had an exemption that was focused on  
2 extracting data from medical devices.

3 In the context of that, that was very  
4 clearly sort of an access, essentially reading the  
5 data but not modifying any of the data embedded on the  
6 device. Earlier today, Mr. Wiens talked about an  
7 example of modifying or deleting data, maybe data from  
8 a private previous user or consumer.

9 What are the -- how do you envision the  
10 scope of this? Is this simply reading data? Is this  
11 modifying data that exists on the vehicle? What are  
12 the intended use cases with respect to other, I guess,  
13 verbs? Ms. Foshee.

14 MS. FOSHEE: I think it could be all three.  
15 You have to read the data to know what's wrong with  
16 the car, and you have to send commands. In the case  
17 of repair, you have to send the command back to the  
18 car. So in a very simplistic example, if the car  
19 tells you that its tire is flat, you have to change  
20 the tire and then you have to send the command back to  
21 the car to say, to tell the ECU that you've put a new  
22 tire on the car and that they should accept that.

23 So it's not modifying the underlying  
24 operational software of the car, but it is talking to  
25 the car and saying please update tire from Tire A to

1 Tire B.

2 MR. GRAY: So that's helpful, but given that  
3 we have a current exemption on the books that allows  
4 for repair and maintenance of the vehicle, is that  
5 something that is -- it's not covered already by the  
6 current exemption for repair?

7 MS. FOSHEE: Fair. That's just a repair  
8 example, and you know, I'll let Dan and Kyle jump in  
9 too in terms of the operational data. But you know, I  
10 do think there could be use cases where in the parent  
11 controls, you know, you could see as smart as vehicles  
12 are now, that if you wanted to, you know, tell the car  
13 to do certain things operationally -- I actually  
14 withdraw that.

15 No, I think that Dan, if you've got an  
16 operational example where you would write to the car,  
17 please give it. But I can't think of one in terms of  
18 the straight repair of diagnostic context.

19 MR. JASNOW: Yeah. I, you know, I think the  
20 situations where you would need to delete or modify  
21 data would be limited. I think, you know, the example  
22 that Kyle provided is a good one, where you know,  
23 maybe if there's a transfer of ownership or end of a  
24 lease, you would want to have the ability to delete  
25 your own personal data from the vehicle before it gets



1 transferred to a third party.

2 I think for the most part, you know, the use  
3 cases that we've envisioned are having, being able to  
4 read that data, potentially being able to reorganize  
5 it, process it in a new way. So if it's raw data  
6 you're accessing, you have some ability to process it,  
7 and obviously to be able to share it with a third  
8 party of your choosing.

9 You know, I think also, you know, this -- it  
10 gets into a second issue, which is, you know, does the  
11 Copyright Office need to sort of reach that question.  
12 You know, our position is that this is data that is,  
13 that is owned by the consumer. It's their data. They  
14 have a right to do with it what they wish within, you  
15 know, existing parameters for regulatory compliance  
16 and safety considerations.

17 So you know, I'm not sure that the Copyright  
18 Office needs to make a final determination about that,  
19 unless you know, to the extent that there's a greater  
20 safety concern with deleting data, then you know, I  
21 think, you know, readability and being able to share  
22 are the two most sort of critical components. But I  
23 would defer to Kyle if he has other thoughts on that  
24 piece or if it can be cabined within, you know,  
25 certain specific use cases.

1 MR. GRAY: All right. Mr. Wiens.

2 MR. WIENS: Yeah. There's two common tools  
3 that are pretty widely used. One is a tool called  
4 comma.ai, and it is a -- you get an Android phone and  
5 you put it on your dash, and you actually augment the  
6 car with its open source self-driving feature.

7 So maybe you didn't pay for it or your car  
8 didn't come with self-driving, but a lot of these cars  
9 these days are driven by wire, and so comma.ai is able  
10 to get in. You could imagine how maybe the existing  
11 APIs they provide are sufficient to perform that  
12 operation, maybe not. The closer that that  
13 aftermarket mod can emulate the existing behavior,  
14 maybe it's, you know, writing of the same kind of log  
15 information that the car but natively to the  
16 telematics system, it would make sense.

17 Another tool that is very helpful to  
18 research if you want to get a feeling of what kind of  
19 data people are using and what they're using it for,  
20 it's called AutoPi, and this particular tool plugs in  
21 via our OBD port, and then it's got its own telematics  
22 feed.

23 So it's got a cellphone modem in it, and it  
24 takes the data that it can read off the OBD port and  
25 streams it to the cloud, and then you get a nice kind

1 of fleet interface with everything that's going on  
2 with the car.

3 It's relatively limited in what it can  
4 access, so you could imagine that there's a lot more  
5 telemetry and access inside the car than the AutoPi  
6 has natively, and they have a whole developer  
7 environment where you can build new apps on top of it.

8 So I think you really have to think about  
9 the car as a general purpose computer that is -- has  
10 all these transportation capabilities. What kinds of  
11 things would developers, would innovators like to be  
12 able to do? Now I realize you can't go as far as  
13 legalizing trafficking in tools, but at least it can  
14 start to be the beginning of an ecosystem where people  
15 can start monitoring their own equipment.

16 It is very common in the racing world. If  
17 you talk to anyone like doing racing motorcycles, they  
18 buy an off the shelf standard stock motorcycle, and  
19 then they make all their mods and modifications and  
20 everything to it. So there's a lot of situation where  
21 you'd say well, no one would ever do that to their  
22 vehicle.

23 Well, you start racing it and you're going  
24 to make every possible change that you can imagine to  
25 the vehicle before you race it.

1           MR. GRAY: Great, thank you. I'm going to  
2 hold here very quickly to see if anyone else wants to  
3 respond, and if Mr. Humphrey, if this is the chance, I  
4 will make sure to pause for you.

5           MR. HUMPHREY: Not quite there yet. Thanks.

6           MR. GRAY: All right. I will hand it back  
7 to Isaac.

8           MR. KLIPSTEIN: Yes, hello. We're hoping to  
9 move on from this question rather quickly, but the  
10 conversation so far and most of the filings focus very  
11 much on personal vehicles, whereas the exemption talks  
12 about both personal automobiles and commercial  
13 agricultural equipment and vessels.

14           Do these types of vehicles collect different  
15 types of data? Are there ways to collect the data  
16 that are significantly different that we need to  
17 consider for these different types of vehicles?

18           MR. JASNOW: If I can jump in? Oh Mark I  
19 see, if Mr. Humphrey wants to answer that one, I'll  
20 defer to him.

21           MR. HUMPHREY: Yeah, I'll be very brief. I  
22 can't give you any insight into anything other than  
23 personal automobiles, because I just wanted to make a  
24 point that Auto Innovators only deals with personal  
25 automobiles, and you know, who doesn't want to be

1 painted in the same brush as some of the other groups  
2 who have in the past been much more restrictive about  
3 the data that's been available than the auto industry  
4 has.

5 MR. KLIPSTEIN: Mr. Jasnow.

6 MR. JASNOW: Thanks. So I think we've seen,  
7 at least in the agriculture vehicle context, that the,  
8 you know, very similar issues apply, and certainly,  
9 you know, there's been a lot of litigation in the area  
10 with right to repair for agricultural vehicles in  
11 particular.

12 I don't think that there's, you know, major  
13 technological differences, although I think we --  
14 yeah. I think that it's very similar, and I would  
15 just point out that the scope of the proposed Class 7  
16 mirrors the scope of the exemption for the existing  
17 repair exemption.

18 MR. KLIPSTEIN: Mr. Wiens.

19 MR. WIENS: Conceptually farmers, it's the  
20 same type of information you could imagine. If you're  
21 building a soil density plot because you're tilling a  
22 field, that's very important information. So the  
23 equivalent of the Pi app I just told you, there's one  
24 called FarmMobile, and it's the same thing.

25 You plug it into the service port, the J-59

1 port on the vehicle and then it's got its own  
2 telematics feed, and feeds that data to the cloud. So  
3 the farmer can have access, because they don't  
4 natively have access to other information.

5 We can probably talk all day about the  
6 information that farmers care about that's on the  
7 tractors, but it is a very, very hot topic in the ag  
8 community.

9 MR. KLIPSTEIN: Mr. Englund.

10 MR. ENGLUND: Yes. Harken back to my  
11 earlier remarks, it's still not clear to me that there  
12 is very much to this proposed exemption that is  
13 distinct from existing Exemption 13. But to the  
14 extent that this really does serve a distinct purpose,  
15 it seems like you need to base it on a record.

16 And so it's really notable that in prior  
17 proceedings that added agricultural vehicles and  
18 maritime vehicles, that there was a real record about  
19 those things. And Mr. Wiens' comments a moment ago  
20 about tractors is the first thing I've seen on the  
21 record of this proceeding that addresses those  
22 vehicles.

23 And so if the purpose of this exemption is  
24 to allow parents to track new drivers, then somebody's  
25 got to talk about why that's important for boats and

1 tractors, as well as for automobiles. And so I think  
2 this is the question of what this purpose, this  
3 exemption serves is very relevant to what vehicles it  
4 ought to cover.

5 MR. KLIPSTEIN: Thank you. I'll pass this  
6 over to my colleague Melinda Kern.

7 MS. Kern: Thank you. So now we're going to  
8 start asking some questions on non-infringing uses,  
9 and I will direct my next question to both the  
10 proponents and opponents. But I wanted to know along  
11 the lines of what we were just talking about, is the  
12 fair use analysis different for the use of data from  
13 personal vehicles and vessels, as compared to the  
14 commercial vehicles and vessels?

15 And just to be clear, I'm not asking for a  
16 four factor analysis. Mr. Jasnow, you can go ahead.

17 MR. JASNOW: Great, thank you. I think that  
18 fundamentally, you know, with respect to -- well I  
19 would say at the outset, you know, there's always  
20 going to be a difference when you're talking about a  
21 commercial vehicle versus a personal vehicle.

22 But I think that with respect to the  
23 fundamental issues that we're talking about here,  
24 they're basically the same, which is that the data  
25 that we are talking about accessing, sharing, using is

1 data that is owned by the vehicle owner or lessee.

2 Whether that's a personal vehicle or a  
3 commercial vehicle, in the commercial context it's  
4 data that's owned by the fleet or by the fleet owner  
5 or by the independent operator of a heavy duty  
6 vehicle, and they have a right to use that data for  
7 lawful purposes.

8 So the fair use analysis has to focus, I  
9 think in that case on what is, what is the reason that  
10 we need access to the copyrighted components, if any,  
11 that are integral to our access to the unprotected  
12 data that is generated by the vehicle owner or lessee.

13 So our use of -- our access to the  
14 copyrighted components of this are going to be  
15 minimal, regardless of whether it's a personal vehicle  
16 or a commercial vehicle, and it's only as a means of  
17 either accessing, storing, sharing or understanding  
18 the raw data that's been processed through the vehicle  
19 operation.

20 So you know, while there might be different  
21 use cases with respect to a commercial vehicle or a  
22 personal vehicle, the fair use questions have to focus  
23 on the minimal, I think, extent to which we're  
24 implicating the copyrighted software in the vehicle in  
25 order to access that uncopyrighted data that is owned



1 by the vehicle owner.

2 MS. KERN: Thank you. Mr. Greenstein.

3 MR. GREENSTEIN: Thank you. I know you  
4 don't want a full four factor analysis, but I think  
5 Factor 4 is still very relevant here because there's  
6 no independent market for the data. The data is owned  
7 by the individual that owns the car and operates the  
8 car.

9 To the extent that there is an effective  
10 market, it's a market that is not with respect to  
11 anything copyrightable. It's with respect to the  
12 repair or convoyed services, for example, which don't  
13 have any relation to the market for the copyrighted  
14 work itself. They're really additional services that  
15 are not related to the copyrighted data or to the  
16 software itself that is protecting them.

17 MS. KERN: Thank you. Mr. Humphrey.

18 MR. HUMPHREY: With respect to fair use, all  
19 I would point out is a point that we made in our  
20 opposition comment, which is that many courts have  
21 explicitly treated fair use as independent of and  
22 inapplicable to an anti-circumvention limitation,  
23 because they have noted that 1201 clearly and simply  
24 clarifies that the DMCA is supposed to target  
25 circumvention of digital walls around copyrighted

1 material, as well as trafficking in circumvention  
2 tools.

3 It doesn't concern itself with the use of  
4 those materials after the circumvention has occurred,  
5 and in particular courts have recognized that Congress  
6 did not intend fair use to be a defense to a Section  
7 1201 claim, because the purpose of the section is to  
8 prohibit even non-infringing circumvention and  
9 trafficking in circumvention devices.

10 MS. KERN: Thank you very much, and not  
11 seeing any other hands, I will pass it back to Mark  
12 Gray.

13 MR. GRAY: Great. My next question is for  
14 Mr. Englund, though certainly if anyone else wants to  
15 respond, please feel free.

16 In the Joint Creators' comment for this  
17 class, one of the things you mentioned was that in  
18 2018, when the Office had been looking at an exemption  
19 for telematics data, we had found that there was no  
20 showing of likely non-infringing fair use.

21 And as you noted, part of that was because  
22 the class at the time was intermixed with access to  
23 telematics data, as well as some incidental access to  
24 entertainment systems. If we designed a -- if we  
25 designed this class or narrowed this class in such a

1 way that we were only dealing with operational  
2 telematics data and there was no incursion onto  
3 entertainment systems, do your concerns about fair use  
4 still remain, or are they just simply modified to some  
5 degree?

6 MR. ENGLUND: So my clients' principal  
7 interest here is served by preserving the limitations  
8 in the current Exemption 13, which is why they did not  
9 oppose renewal of Exemption 13. So that is a  
10 limitation for the purpose of gaining access to other  
11 works, and the carveout for separate subscription  
12 services.

13 So you know, to the extent your question  
14 goes beyond that, I think maybe Mr. Humphrey should  
15 address the fair use analysis.

16 MR. HUMPHREY: I would just reiterate what I  
17 said, which is that we do not believe that fair use is  
18 a proper analysis under these circumstances, based on  
19 what multiple courts have said over the years,  
20 including in the *Universal City Studios* cases in the  
21 early 2000's.

22 To the extent we are going to talk about  
23 fair use, all I would point out is that, you know, the  
24 broad and I think unclear nature of what is being  
25 sought here in terms of the data has an effect on

1 this, because there are circumstances where even raw  
2 data, the selection and arrangement of that data could  
3 be copyrightable under, for instance, the *Feist*  
4 standard.

5 But we're just simply not sure what exactly  
6 is being sought here based on the exemption as it's  
7 written, and the information that's been given so far.  
8 I will say I agree with Mr. Englund, that I am  
9 starting to hear certain things for the first time  
10 here in this, in these hearings today.

11 So this is evidence that hasn't been  
12 presented up until now, and like I said before, a lot  
13 of what I am hearing is hypothetical, a lot of  
14 statements that consumers should be able to do  
15 something. Whether or not somebody agrees with that,  
16 I don't think that's within the spirit of what is  
17 required here.

18 MR. GRAY: Great. I think Mr. Cheney would  
19 like to ask a question.

20 MR. CHENEY: Yeah. So just to follow up  
21 with some of the things that have been talked about a  
22 little bit already. We talked about three terms,  
23 access, store and share and we're talking about non-  
24 infringing uses. I'm wondering if, and I'm hearing  
25 some of the conversation around this is that how we're

1 going to use this data is part of this non-infringing  
2 use conversation.

3 Is the term, and it's not used in your  
4 current proposed exemption. Would the term "analysis"  
5 be part of that? It seems like that that would be  
6 something that you're sort of leaning towards as use  
7 of this data once you gain access to it. Is that a  
8 term that might be helpful in potentially crafting an  
9 exemption here? Feel free, Mr. Wiens or others, to  
10 answer.

11 MR. WIENS: I think that makes sense.  
12 Certainly a lot of what you see, you know. You build  
13 dashboards to see what's going on.

14 MR. JASNOW: Yeah. I would agree.

15 MR. CHENEY: Part of that question would be  
16 then who would be doing the analysis, right, because  
17 that's not been very clear as we've tried to build out  
18 this record here, and figure out what you're asking  
19 for. Who would be doing that analysis?

20 Would it be the driver themselves or who  
21 would they perhaps share it with as part of your  
22 example or your language is using "share"? What, who  
23 would be doing that analysis might be helpful here.  
24 Sorry, Mr. Jasnow. I have you first on my screen.

25 MR. JASNOW: Thank you. So I think that

1 that analysis could be done by the consumer  
2 themselves, the owner or lessee of the vehicle. It  
3 could be done by an insurance company that is granted  
4 access to a particular vehicle's information by the  
5 owner or lessee.

6 It could be an independent repair shop who  
7 similarly is granted access by a specific owner or  
8 lessee, and who says, you know, I would like you to  
9 keep track of, you know, certainly performance  
10 information about my vehicle, so that we can optimize  
11 the maintenance of the vehicle.

12 Which, and I do think that goes beyond just  
13 -- we're not talking about the strict repair context.  
14 We're talking about a situation where, you know, the  
15 repair shop can say hey, I see that it's likely this  
16 part is going to be, need to be replaced in the next  
17 six months. I'm going to order that now, so that this  
18 vehicle doesn't have to be in the shop for two weeks.

19 Which we do see as, as an additional benefit  
20 to the consumer that is above and beyond strict  
21 diagnosis, repair or modification. It's something  
22 that allows really for optimization of the performance  
23 and maintenance of the vehicle.

24 So it could be any of those things. The way  
25 that we've phrased it, I think in our written

1 materials is that it, the vehicle owner or lessee  
2 would be the one granting access. So it would be that  
3 individual accessing and analyzing the data or  
4 somebody acting at their behalf.

5 MR. CHENEY: Thank you. Mr. Wiens, please.

6 MR. WIENS: I was quoted my car insurance  
7 this morning, and they offered me \$100 discount if I  
8 would install an app on my phone that gave them  
9 persistent location access, so they could see where  
10 I'm driving. I was just thinking the whole time like  
11 what a stupid way of doing this. Like what if I'm in  
12 the car and Stacy's driving?

13 I'm really going to get dinged, right? Like  
14 they don't know. So like obviously you would want to  
15 take the telematics data, and you'd want to take that  
16 and feed it directly to them. So I think that's a  
17 very good example of who would be doing the analysis.  
18 Fleet owners, you know. I have a business, I have a  
19 whole bunch of employees driving, and I want to see  
20 how they drive and what their performance is. That  
21 would make perfect sense.

22 So there's a lot of the cases where you're  
23 going to be wanting to do that kind of analysis.

24 MR. CHENEY: And so I think this points out,  
25 if I may, I'm trying to get where they're going here,

1 is this analysis is more than just repair, but it's  
2 overall not just diagnosis, which kind of covers the  
3 previous, but it's beyond that, and I think that's  
4 what you're trying to get at.

5 It's what the difference is here. I don't  
6 want to put words in your mouth, but is that correct  
7 then?

8 MR. WIENS: Correct. Yeah, I mean it's all  
9 -- I mean you have where have I been, what have I been  
10 doing, what speeds. There's a lot of reasons that you  
11 would want to do that that are not repair-related.

12 MR. CHENEY: All right. I think back to  
13 Isaac then.

14 MR. KLIPSTEIN: Yes, thank you. Briefly,  
15 the current diagnosis and repair exemption has  
16 specific language saying that the exemption doesn't  
17 provide a safe harbor or a defense to liability under  
18 other laws, including those promulgated by the  
19 Department of Transportation and the Environmental  
20 Protection Agency.

21 Are the opponents and proponents comfortable  
22 with that language? Are there other laws that  
23 specifically need to be taken into -- laws or  
24 regulations that specifically need to be taken into  
25 account in the regulatory language? Mr. Jasnow.



1           MR. JASNOW: Yeah. MEMA would certainly  
2 support that identical language. We noted that in one  
3 of our written sets of comments. So yeah, no  
4 objection. I don't think there are any other laws  
5 that need to be addressed.

6           I would just point out that when the repair  
7 exemption was first passed, they did -- the Copyright  
8 Office did delay for a year or two years, I can't  
9 remember, with the implementation of it to give other  
10 regulatory agencies an opportunity to comment. Again,  
11 we'd have no objection to something like that, and  
12 that at least, you know, provides a fail safe for  
13 other agencies to, you know, identify potential  
14 issues.

15           But I think, you know, we've been through a  
16 very similar process, and I think the existing  
17 language is probably, probably sufficient.

18           MR. KLIPSTEIN: Ms. Foshee.

19           MS. FOSHEE: Auto Care concurs with MEMA on  
20 that point.

21           MR. KLIPSTEIN: And Mr. Humphrey.

22           MR. HUMPHREY: And I'll just reiterate  
23 again, that Auto Innovators does not oppose renewal of  
24 the current exemption.

25           MR. KLIPSTEIN: Excellent, thank you. I

1 believe that I will be passing this to Mark.

2 MR. GRAY: Thank you very much. So in the  
3 comments for this class, MEMA mentioned that there are  
4 a number of different types of TPMs that restrict  
5 access to the ECUs in vehicles. I think you provided  
6 some examples, challenge response mechanisms,  
7 encryption, disabled ports, circuitry.

8 As we're thinking about the scope of this  
9 class and commonalities within this class, how similar  
10 are the TPMs protecting vehicle data across different  
11 types of vehicles? Obviously in both the sort of  
12 personal/ commercial vehicle distinction we spoke  
13 about earlier, but just generally in, you know,  
14 different specific vehicles, brands, etcetera.

15 MR. JASNOW: So I can't speak in detail to  
16 different brands and what their, you know, different  
17 TPMs look like. There are, there's significant  
18 variation in terms of what mechanisms brands  
19 implement, and I think even across the same vehicles  
20 you might have different mechanisms.

21 You know, there are, yeah. I think there's  
22 significant variation in that. I don't know if Kyle  
23 -- Kyle might have more experience with the, you know,  
24 the technical side of that.

25 MR. WIENS: The specific question is how are

1 they different between different vehicles?

2 MR. GRAY: Are they similar, or how similar  
3 or different are they across vehicles and vehicle  
4 categories?

5 MR. WIENS: They're different, because this  
6 is what's so frustrating about this world is everyone  
7 decides they're going to invent some, you know, their  
8 own boutique system, and I mean often they have  
9 vulnerabilities. But yeah, you have to develop and  
10 exploit that's unique for each vehicle.

11 I mean for a while, Volvo wasn't encrypting  
12 their ECUs, so it was, didn't require circumvention  
13 and then they started doing it and you do, and it  
14 depends on which version. Mazda had a vulnerability  
15 that was easy to exploit, and then at some point they  
16 patch it and then you have to develop a new, a new  
17 exploit. So yeah, it's very difficult for vehicle.  
18 Tesla tends to be the most sophisticated of all of  
19 them.

20 MR. GRAY: Thank you. I believe Melinda is  
21 next. Sorry, Mr. Humphrey.

22 MR. HUMPHREY: Just briefly, I wanted to say  
23 again, you know, one of the points we made in our  
24 opposition comment was that the TPMs are not  
25 specifically identified. The reference that you

1 mentioned about challenge response mechanisms and  
2 encryption, you know, those are references to prior  
3 triennial rulemakings and things that were discussed  
4 there.

5           There's nothing identified now as to what  
6 these TPMs would actually be. All we know is that  
7 they're seeking the ability to circumvent TPMs that  
8 restrict access. We don't know what the exact TPMs  
9 are.

10           MR. GRAY: And Mr. Englund.

11           MR. ENGLUND: Just to put a little more  
12 gloss on Mr. Humphrey's comment a moment ago, it  
13 really is striking when you go back and look at the  
14 records from 2015, 2018 and 2021, which I assume the  
15 Office has. But if you haven't, I really encourage  
16 it.

17           There, there was a great deal of information  
18 about the specific TPMs that were involved and the  
19 extensions to different classes of vehicles, all very  
20 richly supported. Here, I think early in this panel  
21 Mr. Jasnow said that it might be necessary to  
22 circumvent the TPMs on software to access the data. I  
23 heard somebody else say that a little more recently.

24           We don't really even understand what the  
25 need is. You don't have much of a record here on what

1 the need is to circumvent TPMs on software to access  
2 data. Maybe it is, that the software encrypts the  
3 data and you need to remove the TPMs on the software  
4 to decrypt the data.

5 But we haven't heard that, because the  
6 record in this proceeding is really notably thin as  
7 compared to prior proceedings that have addressed  
8 motor vehicles.

9 MR. GRAY: Great, thank you. I think  
10 actually I'm going to ask another quick follow-up  
11 question, and this I think is generally for Mr.  
12 Englund and Mr. Humphrey.

13 As we think about the scope of this  
14 exemption and maybe some of the, you know, intended or  
15 unintended consequences, can you talk a little bit  
16 about some of the concerns and sort of the negative  
17 possible outcomes you have in mind that you're  
18 concerned about if we granted an exemption of some  
19 sort for this class? Mr. Humphrey.

20 MR. HUMPHREY: How much time do we have  
21 left? In all seriousness, I do have a few. One of  
22 them that I will mention, the Government  
23 Accountability Office, Government Accountability  
24 Office, excuse me, recently did a report on vehicle  
25 repair I believe on March 21st.

1           One of the things they found in that is that  
2           there are potential cybersecurity risks of sharing  
3           access to vehicle data, including telematics data. It  
4           gave examples of hackers being able to exploit  
5           vulnerabilities in systems to gain access to vehicle  
6           data. This includes location data and to control  
7           critical vehicle systems like steering.

8           They also demonstrated that hackers could  
9           exploit vulnerabilities in a telematics system to  
10          compromise multiple vehicles simultaneously. In  
11          addition to that, I know that the FTC recently raised  
12          some issues about the ability of victims of domestic  
13          violence to be tracked by some of these technologies,  
14          and the concerns that the FTC had about automakers  
15          stopping that from happening.

16          That's another potential issue with this,  
17          and also I mentioned earlier the idea of, you know, a  
18          broad exemption allowing access to certain things  
19          within these systems that could be protected as trade  
20          secrets, allowing -- allowing anybody potentially  
21          access to that.

22          And I think another one that I would just  
23          point out, and it's not really necessarily a negative  
24          I would say, but -- well, it is negative. But what I  
25          mean is, you know, these hearings are supposed to be

1 focused on copyright concerns, and a lot of what we're  
2 hearing is about inefficiencies. It's about things  
3 costing more, it's about not being able to do what  
4 consumers think they should be able to do.

5 Those aren't the sorts of issues that these  
6 proceedings are concerned with, and we see no reason  
7 to change or rather grant an exemption to the DMCA  
8 based on what we're hearing.

9 MR. GRAY: Thank you. Mr. Englund.

10 MR. ENGLUND: As I said earlier, my client's  
11 most obvious and direct concerns are with respect to  
12 their creative works, and those are addressed by  
13 including a new exemption if you decide one is  
14 warranted, the same protective language for other  
15 works that appears in current Exemption 13.

16 But they also do care about the integrity of  
17 the 1201 process. We think that Section 1201 is very  
18 important to the protection of creative works, and it  
19 is important that there be robust protection for  
20 circumvention of TPMs that are applied to copyrighted  
21 work. So we do think it's important that the Office  
22 vigorously apply the standards that have been  
23 developed over the course of the last eight  
24 proceedings, to analysis of this proposed exemption.

25 So in that regard, I'll reiterate my

1 concerns that it still isn't clear to me that this  
2 exemption serves a purpose that is meaningfully  
3 distinct from Class 13 or current Exemption 13, and  
4 that proponents have put forth the kind of record that  
5 has historically been necessary to justify an  
6 exemption.

7 MR. GRAY: Thank you. Ms. Foshee.

8 MS. FOSHEE: Thank you. Just quickly I  
9 wanted to point out, and I'm sure that folks have read  
10 the GAO study. But to the extent that those  
11 cybersecurity or issues were mentioned, those are  
12 existing issues from the automakers themselves, not  
13 from the aftermarket or from consumers trying to use  
14 or, you know, understand their vehicles through their  
15 operational data.

16 MR. GRAY: Great, thank you. Isaac.

17 (Pause.)

18 MR. KLIPSTEIN: Yes. So just on that point,  
19 that there seems to be, you know, concern regarding  
20 safety and privacy with accessing data. But the  
21 Department of Justice Antitrust Division and the FTC  
22 have stated that they haven't seen any additional data  
23 that supports the manufacturers' safety and privacy  
24 justifications.

25 Are you able to provide some concrete



1 examples with regard to safety and privacy as it  
2 relates to accessing that data?

3 MR. HUMPHREY: Well, what I would say is  
4 that one of the issues that really strikes me here is  
5 if we're going to allow broad access to this data and  
6 allow users to potentially authorize others to use it,  
7 there are concerns about personal data I think getting  
8 out there. If someone were to give it to a certain  
9 company, what would happen to that data, how it would  
10 be used. That's definitely a concern.

11 I think that one of the concerns that Auto  
12 Innovators and others have dealt with is that there  
13 are a lot of laws that are trying to be passed in  
14 certain states that would grant access to personal  
15 data. A lot of times they tend to be very focused --  
16 well, not focused. They tend to really be about  
17 monetization of personal data.

18 They cloak themselves in right to repair  
19 language, but in our experience we found that that is  
20 one of the things that is often sought by those. And  
21 there's a concern here that when you have a broad  
22 exemption like this, that people who look to get that  
23 kind of data could potentially hit the jackpot, for  
24 lack of a better term. So that is, that is certainly  
25 one concern that there is.

1 MR. KLIPSTEIN: Ms. Foshee.

2 MS. FOSHEE: Yes, thank you. I just in  
3 response to that, Mr. Humphrey's comment, I mean I  
4 think if I understand your comment right, it means  
5 that the auto manufacturers can monetize the personal  
6 data off the vehicles, which is what they're doing  
7 today.

8 But that your concern that a consumer might  
9 use their own data to monetize it, and that seems to  
10 have the paradigm backwards, in terms of who should  
11 have control over where their data goes. So I'd just  
12 make that point.

13 MR. HUMPHREY: I would just say that the  
14 concern really relates to what the consumer decides to  
15 give to a third party.

16 MR. KLIPSTEIN: Mr. Cheney from NTIA, do you  
17 have a question here?

18 MR. CHENEY: Yeah, thank you. I have just a  
19 question, and this follows up with similar to what  
20 we've been talking about, and this is a quote from the  
21 FTC/DOJ letter. "TPMs can undermine research into  
22 vehicle operation, safety, driver behavior and other  
23 valuable areas of inquiry."

24 I'm just wondering about folks' reaction to  
25 that as a, as part of this conversation of the sharing

1 and use of this data once it's accessed. What are  
2 folks' thoughts on that?

3 MR. HUMPHREY: Yeah. I just -- there's --  
4 actually it follows up on some points that I wanted to  
5 make earlier. In that same GAO report, some of the  
6 statistics in there stated that some of the findings  
7 from the independent repair shops generally have  
8 access to what they need to make repairs.

9 The vast majority of the repair stakeholders  
10 interviewed by the GAO said that they don't currently  
11 need telematics data for repairs. I would reiterate  
12 what I said earlier about the Memorandum of  
13 Understanding and the Data-Sharing Commitment, and to  
14 respond to one of Ms. Foshee's points that she made  
15 that I couldn't earlier, you know, if the answer is  
16 that the MOU and the data-sharing commitment need to  
17 be codified under federal law, I think the auto  
18 industry doesn't have -- or at least Auto Innovators  
19 doesn't have an issue with that.

20 You know, the auto industry has gone out of  
21 its way to provide access to the sort of data, and  
22 again I'll reiterate that the DOJ/FTC report  
23 specifically says that the auto industry is probably  
24 leading the way in this.

25 And the other thing that I would say is that

1 we mentioned third party apps and services that allow  
2 access to this data. I think it was kind of given the  
3 back of the hand, but I don't think it can be ignored,  
4 that these apps that we mentioned in our opposition  
5 comment, certain websites and things of that nature,  
6 tools that can be purchased, they allow access to this  
7 kind of data.

8 It's out there. It can be acquired, and you  
9 know, the lack of really addressing that in any of the  
10 written comments beyond in the reply I think is just  
11 very telling.

12 MR. CHENEY: Ms. Foshee.

13 MS. FOSHEE: Yes. I'll just point out a  
14 couple of factual things, and then I know we're  
15 running out of time. But the Auto Care Association  
16 recently released a survey that we conducted of  
17 independent shops, that showed that nationwide 84  
18 percent of independent shops consider access to this  
19 data in this sphere, you know, their number one issue,  
20 and that half of the shops, over half of the shops who  
21 responded to the survey send up to five vehicles per  
22 month to dealerships because of vehicle data  
23 restrictions, because they can't fix them.

24 So I think, I think that's the first point,  
25 and then you know, we would be happy to continue to

1 talk about the codification of, you know, the MOU and  
2 that's obviously good news for us. But I do think  
3 these are real issues that real people and real shops  
4 are dealing with, and the survey demonstrates that.

5 MR. KLIPSTEIN: We'll go to Mr. Jasnow next,  
6 but I just want to tag that in the last five minutes,  
7 we're interested in hearing any broader thoughts  
8 quickly about the alternatives that the various  
9 parties have introduced in their submissions. Mr.  
10 Jasnow.

11 MR. JASNOW: Yeah, thank you. I was just  
12 going to say in response to Mr. Cheney's question  
13 about the research piece, there is an existing  
14 exemption for good faith security research that, you  
15 know, I think, you know, some of what DOJ and FTC have  
16 identified would allow.

17 But I do think it's a really important point  
18 to emphasize, that the FTC and DOJ have said on the  
19 record that they think this is a very valid exemption,  
20 that it's necessary to restore the balance between the  
21 rights owners in this case and the rights of the  
22 owners and lessees who are ultimately the data owners  
23 from the vehicle.

24 You know that, that is ultimately the core  
25 reason for these rulemakings. It's to ensure that

1       these TPMs do not create sort of a permanent lockbox  
2       and prevent access to the public to make lawful, non-  
3       infringing uses of copyrighted works. We're talking  
4       about here access to copyrighted works in the form of  
5       software, organized database schema, that only allow  
6       for the user to make lawful use of their vehicle data.

7                I think what we're hearing from the Auto  
8       Innovators is that, you know, it's okay for it to be  
9       out there. It's okay for it to be available through  
10      third party mobile applications, it's okay for it to  
11      be out there if it's through the MOU. But it's okay  
12      for it to be out there and shared if it's the OEMs who  
13      are sharing it through, you know, commercial  
14      agreements.

15               But if it's giving access or lifting the  
16      threat of litigation against consumers if they choose  
17      to share it with a third party of their choice at  
18      their own direction, that's where we're going to stop  
19      it.

20               So I think, you know, that just doesn't  
21      pass, you know I think basic common sense, and it's --  
22      the Copyright Office has been, you know, delegated the  
23      authority to make sure that this balance remains  
24      stable between copyright owners and the consumers.

25               I think this is a perfect, would be a

1 perfect use of that authority.

2 MR. KLIPSTEIN: Thank you. I see a few more  
3 hands. Please keep your response to around 30 seconds  
4 or less. Mr. Englund.

5 MR. ENGLUND: I'd like to just briefly  
6 respond to a comment Ms. Foshee made a moment ago,  
7 giving an example, I believe, of independent repair  
8 operations referring repairs to dealers because of an  
9 inability to access data.

10 And I think if anything qualifies for the  
11 current exemption, it is an independent dealer trying  
12 to repair. So I'm not quite sure what's going on  
13 there. Maybe it's an inability to rely on the current  
14 exemption, not due to legal reasons but due to  
15 technological or capability reasons.

16 But it seems like that's repair if anything  
17 is repair, and so isn't a reason to grant a new  
18 exemption.

19 MR. KLIPSTEIN: Thank you. Mr. Wiens.

20 MR. WIENS: Part of the challenge there is  
21 we don't have the tools. So if you grant the tool  
22 trafficking exemption, then I think you'll see that  
23 challenge go away. Maybe we'll have to wait for  
24 Congress to do that one. If you look at the vehicle  
25 manufacturers, increasingly we're seeing more and more

1 of these cars made in China. BYD is now the fastest-  
2 growing electric vehicle manufacturer in the world.

3 And as a vehicle owner, I would be very  
4 concerned about my driving patterns, driving data  
5 going back to a Chinese manufacturer. So being able  
6 to like manage and control and delete, modify the data  
7 that I own on my vehicle, where I may not trust the  
8 OEM, is going to be an increasing factor, I think, and  
9 maybe it's -- maybe I'm in the U.S. Maybe it's a car  
10 elsewhere.

11 But this is certainly something that I think  
12 you're going to see increasing concern about. Do we  
13 really trust the OEM with the data? I certainly  
14 don't.

15 MR. KLIPSTEIN: Mr. Humphrey.

16 MR. HUMPHREY: I'd just like to point out  
17 that what Mr. Wiens is raising is really a privacy  
18 issue, and it's not something that we should be  
19 concerned with here. We're supposed to be concerned  
20 with copyright concerns.

21 MR. KLIPSTEIN: Mr. Greenstein, and then  
22 we're going to -- and then I'll pass it to Ms. Wilson.

23 MR. GREENSTEIN: All right, thank you.  
24 Super briefly, what we're talking about here and what  
25 we are concerned with, and the Copyright Office knows



1 this better than anybody, it's we're concerned with  
2 non-infringing uses. And certainly to the extent  
3 we're talking about potential fair uses, we're talking  
4 about uses of data that is not copyrightable to begin  
5 with.

6 To the extent we're talking about issues of  
7 privacy or safety or security, all of those things are  
8 non-infringing uses that are explicitly contemplated  
9 within the scope of this proceeding.

10 MR. KLIPSTEIN: Thank you. I'll pass to Ms.  
11 Wilson.

12 MS. WILSON: Thank you so much, and I just  
13 want to thank everyone who's been on any of the  
14 sessions so far. This has been really, I think, a  
15 great 1201 set of hearings, and thank you for this  
16 group in particular. A very active discussion, which  
17 helps us, so we really appreciate it.

18 I know that we have about five minutes  
19 before the public participation session. So I think  
20 we will probably be logging off to give everyone,  
21 particularly on our side a quick break, and then for  
22 anyone who has signed up for public participation,  
23 we'll be coming back.

24 //

25 (Whereupon, at 3:55 p.m., the conference in

1 the above-entitled matter was concluded.)  
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CERTIFICATE

CASE TITLE: Proposed Class 7: Computer Programs -  
Vehicle Operational Data  
HEARING DATE: April 18, 2024  
LOCATION: Washington, D.C.

I hereby certify that the proceedings and  
evidence are contained fully and accurately on the  
tapes and notes reported by me at the hearing in the  
above case before the U.S. Copyright Office.

Date: 4/22/24



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