



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
GENERAL COUNSEL

July 17, 2015

Jacqueline C. Charlesworth
General Counsel and Associate Register of Copyrights
United States Copyright Office, Library of Congress
101 Independence Avenue, S.E.
Washington, D.C. 20559-6000

Re: Section 1201 Rulemaking (Docket No. 2014-07)
Proposed Exemption for Vehicle Software
U.S. Environmental Protection Agency Views

VIA E-MAIL and FIRST CLASS MAIL

Dear Ms. Charlesworth:

Thank you for your May 12, 2015 letter to Avi S. Garbow, General Counsel of the U.S. Environmental Protection Agency ("Agency" or "EPA"), notifying him about the rulemaking the U.S. Copyright Office is conducting under the Digital Millennium Copyright Act ("DMCA") and inviting the Agency to submit its views. I am responding on behalf of the General Counsel and appreciate the opportunity to convey the Agency's concerns with the possible outcome of this rulemaking.

The DMCA prohibits persons from circumventing "technological protection measures" ("TPMs") that restrict access to copyrighted works. 17 U.S.C. § 1201(a). It also authorizes the Librarian of Congress, upon your office's recommendation, to exempt certain TPMs from this "anti-circumvention" provision to allow uses of the protected works that would not otherwise be copyright infringement. 17 U.S.C. § 1201(c). In this year's rulemaking, the latest in a series of triennial rulemakings your office conducts under section 1201(c)(1), you are considering whether the Librarian should exempt TPMs that control access to computer programs installed in cars, trucks and agricultural machinery. 79 Fed. Reg. 73856-72, Notice of proposed rulemaking (Dec. 12, 2014).

The notice of proposed rulemaking seeks comment on two classes of TPM protected computer programs installed on motor vehicles. The Agency is concerned that exempting those

TPMs from the DMCA’s anti-circumvention provision would enable actions that could slow or reverse gains made under the Clean Air Act (“CAA”).

Regulations adopted by EPA under sections 202 and 213 of the CAA, 42 U.S.C. §§ 7521 and 7547, are responsible for a significant reduction in harmful emissions from motor vehicles. Computer programs installed on motor vehicles, controlling engine operations and minimizing emissions under a variety of conditions, have been critical to achieving the reduction, now over 90 percent since the passage of the 1990 Clean Air Act amendments. One such computer program, the Electronic Control Module, continuously monitors the vehicle engine and emission control system and dictates, among other things, the engine’s fueling and timing strategies for purposes of complying with the CAA and its regulations. TPMs for Electronic Control Modules make it difficult for anyone other than the vehicle manufacturer to obtain access to the software.

The proposed exemptions would allow the owners of personal and commercial vehicles and of agricultural machinery, or persons acting on the owners’ behalf, to bypass TPMs restricting access to vehicle software “for purposes of lawful diagnosis and repair, or aftermarket personalization, modification or other improvement” (Proposed Class 21) and “for purposes of researching the security or safety of such vehicles” (Proposed Class 22). 79 Fed. Reg. at 73869. Exemption proponents¹ maintain that the exemptions will allow vehicle owners to “personalize, improve or repair” and to “tinker with”² their vehicles, farmers to modify the efficiency and functionality of agricultural machinery,³ and researchers to discover programming errors that pose safety risks or make a vehicle vulnerable to remote attackers⁴.

The purposes cited by proponents for these two classes of exemptions are reasonable – at least in the abstract -- but EPA predicts that the exemptions would allow users to modify that software for purposes other than those the proponents envision. Based on the information EPA has obtained in the context of enforcement activities, the majority of modifications to engine software are being performed to increase power and/or boost fuel economy. These kinds of modifications will often increase emissions from a vehicle engine, which would violate section 203(a) of the CAA, commonly known as the “tampering prohibition”.⁵

¹ In response to the Copyright Office’s Notice of Inquiry, 79 Fed. Reg. 55687 (Sept. 17, 2014), the Electronic Frontier Foundation (“EFF”) and the Intellectual Property & Technology Law Clinic of the University of Southern California (“USC”) submitted petitions to exempt vehicle software TPMs.

² Petition of EFF [Vehicle Software – Modification and Repair] at 2.

³ Petition of USC [Vehicle Software – Modification] at 3.

⁴ Petition of EFF [Vehicle Software – Safety Research] at 4,5.

⁵ Under Section 203(a)(3) of the CAA, it is a violation of federal law:

“for any person to remove or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this title prior to its sale and

EPA is also concerned that the exemptions would hinder its ability to enforce the tampering prohibition. Under section 203(a), the Agency has taken enforcement action against third-party vendors who sell or install equipment that can “bypass, defeat, or render inoperative” software designed to enable vehicles to comply with CAA regulations. EPA can curb this practice more effectively if circumventing TPMs remains prohibited under the DMCA.

The Agency also questions whether there is a real need for the exemptions. Car makers are already required to provide access for lawful diagnosis and repair.⁶ In EPA’s view, whether or not they are designed for this purpose, the TPMs prevent unlawful tampering of important motor vehicle software.

The DMCA lists a number of factors for the Librarian to consider in determining whether to exempt a TPM from the Act’s anti-circumvention provision. Those factors appear to have little bearing on whether the Librarian should grant the exemptions for vehicle software TPMs to allow for the uses identified in the December 12th Notice of proposed rulemaking. For example, neither exemption would advance the purposes for which the fair use exception has traditionally applied, 17 U.S.C. § 1201((a)(C)(iii), nor have any effect on the market for the software, 17 U.S.C. § 1201((a)(C)(iv), The exemption would, though, make it easier to enable wrongdoing under another statute, which your office properly views as another “factor that may be appropriate for the Librarian to consider in evaluating this exemption.” 79 Fed. Reg. at 73858.

For all of these reasons, EPA urges you not to recommend the exemptions described in Proposed Class 21 and Proposed Class 22. Any benefit in exempting motor vehicle TPMs, allowing lawful owners to make non-infringing uses of the underlying software, is exceeded by the risk that lawful owners could, intentionally or not, modify that software in a way that would increase emissions regulated under the CAA.

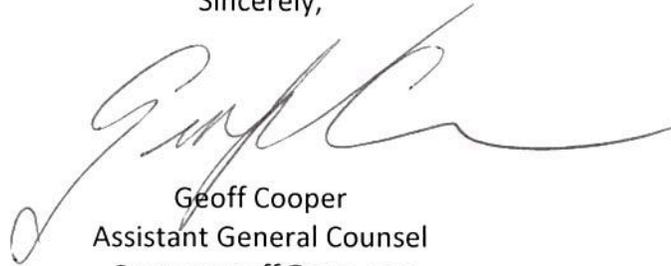
delivery to the ultimate purchaser, or for any person knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser; or for any person to manufacture or sell, or offer to sell, or install, any part or component intended for use with, or as part of, any motor vehicle or motor vehicle engine, where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this title, and where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use.”

42 U.S.C. § 7522(a).

⁶ 40 C.F.R. 86.1806-05(f). See also Memorandum of Understanding and Right to Repair Agreement, a nationwide agreement among automakers, after-market part suppliers, and auto repair businesses to provide necessary access to vehicle software for repair purposes.

We welcome the opportunity to speak directly with your office so we can provide more details regarding EPA's concerns. I will contact you to arrange that meeting with EPA experts on CAA vehicle emissions regulations. In the meantime, if you have any questions, please don't hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Geoff Cooper", written in a cursive style.

Geoff Cooper
Assistant General Counsel
Cooper.geoff@epa.gov
(202) 564-5451

cc: Avi S. Garbow, General Counsel, EPA
John B. Morris, Associate Director and Director of Internet Policy, NTIA
Annette Hebert, California Air Resources Board