

## Short Comment Regarding a Proposed Exemption Under 17 U.S.C. 1201

### Item 1. Commenter Information

Consumer Electronics Association (“CEA”)  
Michael Petricone  
Senior Vice President, Government Affairs  
1919 S. Eads Street  
Arlington, VA 22202  
(703) 907-7544  
[mpetricone@ce.org](mailto:mpetricone@ce.org)

Of Counsel:  
Robert S. Schwartz  
Constantine Cannon LLP  
1001 Pennsylvania Avenue, N.W.  
Suite 1300N  
Washington, D.C. 20004  
202 204-3508  
[rschwartz@constantinecannon.com](mailto:rschwartz@constantinecannon.com)

**Date:** May 1, 2015

### Item 2. Proposed Class Addressed

**Proposed Class 21: Vehicle Software – *diagnosis, repair, or modification.***

### Item 3. Interest and Views of CEA

CEA is the principal U.S. trade association of the consumer electronics and information technologies industries. CEA’s more than 2,000 member companies lead the consumer electronics industry in the development, manufacturing, distribution, installation, and repair of audio, video, automotive aftermarket technologies, communications, information technology, multimedia, and accessory products, as well as related services, that are sold through consumer channels. Ranging from giant multi-national corporations to specialty niche companies, CEA members cumulatively generate more than \$208 billion in annual factory sales and employ tens of thousands of people in the United States.

CEA’s concern over the right to innovate has ranged from its support for Sony Corporation’s right to market the first consumer VCR to current issues pertaining to online expression and commerce. In particular, CEA members invested in the aftermarket for vehicular technology development, repair, replacement, and safety technology products and services have a vital concern in those markets being free of artificial constraints on entry and competition. With more than 250,000,000 registered vehicles on the road today in the United States, it is essential that

CEA member companies have access to vehicle software in order to develop and make available innovative solutions that support safe driving. Indeed, technology innovations developed in the aftermarket have in many cases resulted in significantly reducing driver fatalities.

Whether or not vehicle control and performance modification is always in line with public policy, CEA is concerned over the purported justifications given by opponents to this exemption that do not appear to advance any interest that is protectable under either copyright or the DMCA. Where no such interest exists, the Register has declared that no exemption is necessary;<sup>1</sup> where it is not clear that a court would agree, the Register has recommended the exemption.<sup>2</sup> Whether CEA or the Register believes that unbridled user tampering with vehicular automotive technology systems is wise or should be allowed under law is not at issue in this Section 1201 exemption proceeding. The only issue is whether copyright law or the DMCA should prevent users from acting in the ways petitioned for so as to be able to investigate, repair, restore, modify, or enhance the performance characteristics of their vehicles, or have such services performed at their direction. As opponents themselves point out, other laws more properly address such issues.

### The Proponents Have Met Their Burden

In the absence of any clear linkage of their concerns to any interest as copyright proprietors, opponents refer to the burden of proof incumbent on any advocate of an exemption, plus statements of concerns that may be well grounded but are immaterial to, or at best tangentially related to, copyright. The EFF and USC Clinic comments supporting the EFF petition appear well-documented. They provide a range of perspectives and walks of life illustrating the nature and user-perceived necessity of owner-directed vehicle analysis, repair, and modification. Legally, they illustrate that to the extent achieving access to ECU systems may encounter any protectable copyright interest,<sup>3</sup> the *fair use analysis* is in favor of the owner of the vehicle, and anyone performing service, repair, or replacement or other installation at the owner's direction. They also demonstrate that this use is protected and sheltered by 17 U.S.C. Section 117.

### Those Opposing This Exemption Have Not Identified Any Protectable Copyright Interest And Illustrate That Public Interest Concern Over These User Activities Is Already Addressed By Other Federal Statutes, As Well As By State And Local Law

General Motors lists, at 6, federal law provisions that properly address potential consequences of user-directed modification of vehicles:

- “[T]he Clean Air Act (“CAA”) prohibits “tampering” with vehicles or vehicle engines once they have been certified in a certain configuration by the Environmental Protection Agency for introduction into U.S. Commerce. \*\*\*

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<sup>1</sup> 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) (“2012 Determination”).

<sup>2</sup> *Id.* at 71.

<sup>3</sup> See *Lexmark v. Static Control Components*, 387 F. 3d 522 (6th Cir. 2004).

- [T]he Motor Vehicle Safety Act (“MVSA”) prohibits the introduction into U.S. commerce of vehicles that do not comply with the Federal Motor Vehicle Safety Standards, and prohibits manufacturers, dealers, distributors, or motor vehicle repair businesses from knowingly making inoperative any part of a device or element of design installed on or in a motor vehicle in compliance with an applicable motor vehicle standard.”<sup>4</sup>

John Deere, at 4, cites the same laws and regulations, saying (emphasis added):

- “Therefore, the Copyright office is respectfully requested to show *regulatory deference* to the other federal government agencies ... [and] to consult with other federal government agencies, including the EPA, as part of the rulemaking process ....”

These laws cited by opponents have nothing to do with copyright yet they epitomize the nature of the “fair use” objections interposed. The Auto Alliance observes at 7 – 8 that “make the car go faster” has nothing to do with “the canonical purposes” of the fair use doctrine. But *preventing* a car from going faster has nothing whatever to do with copyright or DMCA protection. The Auto Alliance admits at 9 that “there is no separate market for the computer programs at issue here ... [but] vehicle values may certainly be adversely affected by the uses which tinkerers wish to make ...” A recommendation against this exemption in order to stop a vehicle owner from degrading the resale value of her own car would appear to lack any basis in copyright or in the purpose of the DMCA.

The Auto Alliance at 10 borrows for double duty its *available alternatives* argument – the existence of an “MOU” affording some commercial opportunities to some repair shops – as weighing against fair use as well. The Section 1201 exemption final recommendation as made by the Register focuses on rights of the user, leading to a determination as to fair use factors. Separately, the Register weighs available alternatives. Even where the Register recommends against an exemption based on available alternatives, this has not precluded the Register from nevertheless finding that the fair use factors weigh in favor of a fair use determination.<sup>5</sup> As a matter of public policy, such determinations by the Register carry weight, so should be made independently.

Finally, the Auto Alliance candidly acknowledges at 10:

“While proponents are correct that ‘manufacturers have not put firmware restrictions on vehicles in order to protect a market for copies of the firmware,’ ... [t]hese restrictions are there for a compelling business and legal reason: to enable manufacturers to continue to produce cars that meet all regulatory requirements.”

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<sup>4</sup> CEA notes that additionally, states require vehicles to pass periodic inspections that unwise modifications could cause them to fail.

<sup>5</sup> *See, e.g.*, 2012 Determination at 97 – 100 (weighing the fair use factors to favor exemption but limiting the exemption based on available alternatives).

The drafters of the DMCA and current congressional leaders have not viewed Section 1201 as having such an expansive scope. In a 2014 oversight hearing of the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet, Rep. Marino opened the hearing on behalf of Subcommittee Chairman Coble, who had also chaired the subcommittee at the time of the DMCA's passage (emphasis added):

Some have raised concerns about how the DMCA has been *used by companies for purposes other than protecting copyrighted content*. Fortunately, courts have generally gotten it right in determining when digital locks are used for protecting content and when they are used to protect anti-competitive behavior. As everyone knows, Mr. Coble has not been a fan of those who abuse the legal system using our Nation's intellectual property laws whether they are copyright, patent or trademark laws. And I concur with him. So we'd like to hear more about ways to ensure that Chapter 12 is used to protect copyrighted works rather than printer cartridges and garage door openers as has been attempted before.<sup>6</sup>

Judiciary Committee Ranking Member Conyers said:

For example, some critics contend that copyright owners use Section 1201, as a tool to stifle competition and repeatedly cite the laser printer cartridge replacement and garage door opener cases in support of their contention. Fortunately, courts in both these cases ruled against the companies who had attempted to use Chapter 12 to inhibit competition.<sup>7</sup>

Judiciary Committee Chairman Goodlatte said:

As someone who was very active in negotiating all of the DMCA, I am not sure that anyone involved in the drafting would have anticipated some of the TPM uses that have been litigated in court. Such as replacement printer toner cartridges and garage door openers.<sup>8</sup>

### The Register Should Recommend On The Basis Of Copyright Protection Interests And Issues

The Association of Global Automakers observes at 2: “[A]utomotive software is unlike any other copyrighted work subject to such a proposed exemption.”<sup>9</sup> This is a reason why the petition should be granted, not denied; or the Register should recommend that no exemption is necessary. Opponents admit that TPM protection is not being asserted on behalf of the intrinsic value of any work, independent of its embedded function in operating a vehicle. Because the objections to this exemption are grounded in business and public policy concerns other than any

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<sup>6</sup> *Chapter 12 of Title 17: Hearing Before the Subcomm. On Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113<sup>th</sup> Cong. (2014), at 1 - 2.

<sup>7</sup> *Id.* at 4.

<sup>8</sup> *Id.* at 64. *See also* Rep. Farenthold at 77 – 78.

<sup>9</sup> CEA notes that other exemptions – indeed the majority in this round – are being sought for purposes other than protecting expressive works.

protectable copyright interest, the exemption should be declared unnecessary, or granted if the proponents have met their burden of proof.