

**Before the  
UNITED STATES COPYRIGHT OFFICE  
Library of Congress**

Exemption to Prohibition on Circumvention of	)	Docket No. 2014-07
Copyright Protection Systems for Access	)	
Control Technologies	)	Proposed Class 21: Vehicle Software –
	)	Diagnosis, Repair, or Modification
	)	

**COMMENTS OF GENERAL MOTORS LLC**

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**TABLE OF CONTENTS**

	<b>Page</b>
<b>I. SUMMARY OF OPPOSITION TO THE PROPOSED EXEMPTION .....</b>	<b>1</b>
<b>II. INTRODUCTION.....</b>	<b>3</b>
A. GM’s Interest in this Rulemaking.....	3
B. The Purpose of TPMs in the Modern Car .....	4
<b>III. PROPONENTS HAVE FAILED TO MAKE OUT A <i>PRIMA FACIE</i> CASE IN SUPPORT OF THE PROPOSED EXEMPTION .....</b>	<b>8</b>
A. Exemption Proponents Have Failed to Establish that the Uses Affected by the Prohibition on Circumvention are Noninfringing.....	9
B. GM’s TPMs and the Prohibition on Circumvention Do Not Have a Substantial Adverse Impact.....	18
<b>IV. THE SECTION 1201(A)(1)(C) FACTORS WEIGH AGAINST GRANTING AN EXEMPTION.....</b>	<b>20</b>
A. The Availability for Use of Copyrighted Works .....	21
B. The Availability for Use of Works for Nonprofit Archival, Preservation, and Educational Purposes .....	21
C. The Impact That the Prohibition of the Circumvention of Technological Measures Applied to Copyrighted Works Has on Criticism, Comment, News Reporting, Teaching, Scholarship, or Research.....	22
D. The Effect of Circumvention of Technological Measures on the Market for or Value of Copyrighted Works.....	22
E. Such Other Factors as the Librarian Considers Appropriate.....	23
<b>V. CONCLUSION .....</b>	<b>24</b>

**Before the  
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Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies	) ) ) ) ) )	Docket No. 2014-07  Proposed Class 21: Vehicle Software – Diagnosis, Repair, or Modification
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**COMMENTS OF GENERAL MOTORS LLC**

**I. SUMMARY OF OPPOSITION TO THE PROPOSED EXEMPTION**

General Motors LLC (“GM”) respectfully submits these comments in response to the Notice of Proposed Rulemaking (“*NPRM*”) released by the United States Copyright Office (“Copyright Office”) in the above-captioned proceeding.<sup>1</sup> In the *NPRM*, the Copyright Office seeks comment on a number of proposed exemptions to the Digital Millennium Copyright Act’s (“DMCA’s”) prohibition against circumvention of technological protection measures (“TPMs”) that control access to copyrighted works.<sup>2</sup>

The Copyright Office should deny the proposed exemption for Class 21. The proposed exemption is overbroad, and the proponents have failed to establish a *prima facie* case that an exemption for Class 21 is or is likely to be noninfringing. The proponents have also failed to establish that the challenged TPMs are causing, or are likely to cause in the next three years, a substantial adverse impact on users. Because the proponents of the exemption have failed to meet their *prima facie* burden, the Copyright Office does not need to examine the relevant

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<sup>1</sup> Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, *Notice of Proposed Rulemaking*, 79 Fed. Reg. 73856 (Dec. 12, 2014) (“*NPRM*”).

<sup>2</sup> *NPRM*, 79 Fed. Reg. at 73856.

statutory factors; however, consideration of those factors also supports a decision to deny the proposed exemption. Importantly, the proposed exemption presents a host of potential safety, security and regulatory concerns that proponents have not fully considered. While proponents such as Electronic Frontier Foundation characterize the exemption as merely allowing the vehicle owners to “tinker” with their vehicles “in a decades-old tradition of mechanical curiosity and self-reliance,” if granted, the proposed exemption could introduce safety and security issues as well as facilitate violation of various laws designed specifically to regulate the modern car, including emissions, fuel economy, and vehicle safety regulations.<sup>3</sup>

*Proposed Class 21.* Various petitioners have submitted petitions and comments in support of an exemption for proposed class 21 which covers the following:<sup>4</sup>

COMPUTER PROGRAMS THAT CONTROL THE FUNCTIONING OF A MOTORIZED LAND VEHICLE, INCLUDING PERSONAL AUTOMOBILES, COMMERCIAL MOTOR VEHICLES, AND AGRICULTURAL MACHINERY, FOR PURPOSES OF LAWFUL DIAGNOSIS AND REPAIR, OR AFTERMARKET PERSONALIZATION, MODIFICATION, OR OTHER IMPROVEMENT. UNDER THE EXEMPTION AS PROPOSED, CIRCUMVENTION WOULD BE ALLOWED WHEN UNDERTAKEN BY OR ON BEHALF OF THE LAWFUL OWNER OF THE VEHICLE.<sup>5</sup>

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<sup>3</sup> Petition of Electronic Frontier Foundation at 1-2 (“EFF Petition”). See Long Comment of Electronic Frontier Foundation Regarding a Proposed Exemption at 3 (“EFF Comments”).

<sup>4</sup> In addition to EFF, Intellectual Property & Technology Law Clinic, University of Southern California seeks an exemption to allow diagnosis, repair or modification in relation to agricultural machinery; Farm Hack seeks an exemption to make farm tools and equipment more accessible, adaptable, and appropriate to small and medium scale sustainable agriculture systems; iFixit seeks an exemption to allow vehicle or farm machinery owners to be able to modify the software in the machines to improve performance, make repairs, or tweak parameters; the SAE International (formerly Society of Automotive Engineers) filed comments taking no position but offering to assist the Copyright Office in its inquiry; combined comments received through the Digital Right to Repair website generally expressed the view that Americans should have the unrestrained right to repair and modify their own vehicles; Jay Freeman seeks an exemption for third parties to create diagnosis and repair tools; and Scott Rogers supports an exemption to allow owners to repair their vehicles. See Long Comment of Intellectual Property & Technology Law Clinic, University of Southern California; Long Comment of iFixit; Short Comment of Farm Hack; Short Comment of iFixit; Short Comment of SAE International on behalf of the SAE International Dedicated Short Range Communication Standards Committee Regarding a Proposed Exemption; various Short Comments submitted through the Digital Right to Repair website; Short Comment of Jay Freeman; and Short Comment of Scott Rogers.

<sup>5</sup> NPRM at 73869.

Electronic Frontier Foundation (“EFF”) has set forth the most substantive comments, and GM focuses its response on these comments. EFF and the other petitioners are collectively referred to herein as “Proponents.”

EFF’s petition and comments in support of proposed class 21 broadly seek to allow vehicle owners or others, on their behalf, to circumvent TPMs to access the computer programs and underlying computer data used to control and analyze important/critical vehicle functions “including programs that modify the code or data stored in such a vehicle” and “compilations of data used in controlling or analyzing the functioning of such a vehicle ... for the purpose of lawful diagnosis, repair, aftermarket personalization, modification, or other improvement” (“Proposed Exemption”).<sup>6</sup> Automotive Electronic Control Units (“ECUs”) are designed to be operated as built by automobile manufacturers, and not to be modified or personalized through circumvention of the TPMs. ECUs control critical vehicle safety and security systems, including those related to engine functions, braking, speed, steering and airbags, many of which are required to comply with federal regulations.<sup>7</sup> Operating the ECUs as built is important to protect vehicle safety and security, and for compliance with regulations. The Proposed Exemption would permit circumvention of TPMs that are designed to prevent access to these ECUs.

For these reasons, the Copyright Office should deny the Proposed Exemption.

## **II. INTRODUCTION**

### **A. GM’s Interest in this Rulemaking**

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<sup>6</sup> See Petition of Electronic Frontier Foundation at 1 (“EFF Petition”). See Long Comment of Electronic Frontier Foundation Regarding a Proposed Exemption at 1 (“EFF Comments”).

<sup>7</sup> <http://www.ni.com/white-paper/3312/en/>

GM, its affiliates and their joint ventures manufacture vehicles in 30 countries, and the company is a leader in the world's largest and fastest-growing automotive markets. GM, its affiliates and their joint ventures sell vehicles under the Chevrolet, Cadillac, Baojun, Buick, GMC, Holden, Jiefang, Opel, Vauxhall and Wuling brands. OnStar, LLC ("OnStar") is an affiliate of GM that provides in-vehicle connected safety, security and mobility telematics solutions and advanced information technology, which are available on almost all of GM's U.S. vehicles. OnStar's suite of services include automatic crash response, stolen vehicle assistance, remote door unlock, turn-by-turn navigation, vehicle diagnostics, hands-free calling and 4G LTE wireless connectivity.<sup>8</sup>

GM urges the Copyright Office to carefully consider the risks to vehicle safety and security, as well as the challenges to the regulatory landscape for the modern car that may be created if the Proposed Exemption is granted. As detailed below, TPMs play a critical role in ensuring the safety, security and regulatory compliance of the modern car, and permitting circumvention of such TPMs has consequences in these areas.

## **B. The Purpose of TPMs in the Modern Car**

*The Role of TPMs in GM Vehicles and the Risks Presented by Circumvention.* Today's automobiles include, on average, 30 purpose-built ECUs with functions that range from controlling the radio to regulating vital engine and safety functions.<sup>9</sup> Many of these systems are critical to the safety and security of the vehicle and compliance with mandatory federal vehicle regulations. Automobile manufacturers ("OEMs") employ TPMs in vehicles to help protect

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<sup>8</sup> More information on GM and its affiliates, including OnStar, can be found at <http://www.gm.com>.

<sup>9</sup> See <http://www.nytimes.com/2010/02/05/technology/05electronics.html>; <http://spectrum.ieee.org/transportation/systems/this-car-runs-on-code>

them from tampering and hacking. The type of TPM used depends on the availability of evolving technology and the type of control system involved.<sup>10</sup>

The security that protects the software operating on a vehicle's ECU is ever more important in today's interconnected world. Vehicle ECUs are connected by networks that enable interaction between various systems, and, for telematics-equipped vehicles, various remote features. The software operating each ECU is carefully calibrated to ensure the safe and secure operation of the vehicle. In vehicles with connected telematics systems, ECUs are interconnected via vehicle networks, such as OnStar, and enable various remote features. For example, interconnected OnStar services include important security features such as Remote Door Lock, Remote Ignition Block, and Stolen Vehicle Slowdown.<sup>11</sup> GM engineers use TPMs to ensure these features are safe and secure.

With TPMs as part of systems protecting vehicle safety, regulatory compliance, and a subsequent owner's trust in the integrity of vehicle systems, it would be inappropriate to permit their circumvention. Circumvention of TPMs increases access to ECUs which in turn increases the risks to safety and security and other systems that consumers trust - the risks that TPMs were specifically designed to mitigate. Moreover, enabling modification of the telematics system, for example, reduces the protections on networks and systems with which the telematics system is designed to interface.

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<sup>10</sup> Examples of TPMs used by GM include seed/key access control mechanisms, firmware signing, and sensitive data encryption.

<sup>11</sup> Remote Door Unlock enables OnStar to open a vehicle's doors without a key. Remote Ignition Block allows OnStar to send a remote signal to block the engine of a vehicle that has been reported stolen from starting. Stolen Vehicle Slowdown sends a signal that gradually slows down a stolen vehicle, enabling police to apprehend the individual who stole it. See OnStar Services, *available at* <https://www.onstar.com/us/en/services/services.html>.

TPMs also ensure that vehicles meet federally mandated safety and emissions standards. For example, circumvention of certain emissions-oriented TPMs, such as seed/key access control mechanisms, could be a violation of federal law. Notably, the 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 (“EPA”) for introduction into U.S. commerce.<sup>12</sup> “Tampering” includes “rendering inoperative” integrated design elements to modify vehicle and/or engine performance without complying with emissions regulations.<sup>13</sup> In addition, the 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>14</sup>

Further, tampering with these systems would not be obvious to a subsequent owner or driver of a vehicle that has been tampered with. If a vehicle’s airbag systems, including any malfunction indicator lights, have been disabled (whether deliberately or inadvertently), a subsequent vehicle owner’s safety will be in jeopardy without warning. Further, if a vehicle’s emissions systems have been tampered with, a subsequent owner would have no way of knowing this has occurred. For tampering that the subsequent owner eventually discovers, manufacturer warranties do not cover the repair of damage caused by the tampering, placing the repair cost on the subsequent owner. For good cause, federal environmental and safety regulations regarding

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<sup>12</sup> 42 U.S.C. § 7522(a).

<sup>13</sup> *See* 42 U.S.C. § 7522(a).

<sup>14</sup> 49 U.S.C. §§ 30112(a)(1), 30122(b).

motor vehicles establish a well-recognized overall policy against allowing tampering with in-vehicle electronic systems designed for safety and emissions control.

*Alternatives to Circumvention of TPMs in GM Vehicles Are Currently Available.* Despite the foregoing, GM does not contend that individuals should not be able to diagnose and repair their cars where such diagnosis and repair does not create safety/security vulnerabilities or regulatory compliance issues. To the contrary, GM has endorsed the participation of the Alliance for Automobile Manufacturers with the Memorandum of Understanding and Right to Repair Agreement (“MOU/Agreement”) attached as Exhibit A.<sup>15</sup> Further, GM, itself, has agreed to comply with the MOU/Agreement as demonstrated in the Statement of Endorsement attached as Exhibit B. The MOU/Agreement incorporates the November 2013 right to repair legislation passed in Massachusetts which requires that automakers provide the same repair and diagnostic information to the automobile aftermarket as the industry provides to its dealers.

Additionally, GM and other OEMs, provide access to their diagnostic and technical information in order to facilitate repairs through subscription services, which do not require circumvention of TPMs.<sup>16</sup> This allows for the diagnosis of problems with aftermarket tools, and the ability to subscribe, for a nominal charge, to GM Service systems such as TIS2Web, where GM authentic software and calibration files can be downloaded for ECU updates. Therefore, customers can update software or calibrate their cars if new features are added to the vehicle and meet GM’s validation requirements. For example, a customer who wishes to update a vehicle with the most current software or fix a symptom addressed in a software update can download a new calibration and reprogram the vehicle to ensure proper system performance.

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<sup>15</sup> See e.g.

<http://www.globalautomakers.org/system/files/document/attachments/SignedR2RMOUAgreement.pdf>

<sup>16</sup> See <https://www.acdelcotds.com/acdelco/action/home>; <https://tis2web.service.gm.com/tis2web>

This could be done at a GM dealership, a third party dealership, an independent repair shop, or by customers themselves with a subscription and GM programming service tool which are all publicly available. Various other automotive manufacturers provide similar information to the public. For example, the website of The National Automotive Service Task Force (NASTF), a self-described “cooperative effort among the automotive service industry, the equipment and tool industry and automobile manufacturers to ensure that automotive service professionals employed outside the OEMs franchise system have the information, training, and tools needed to properly diagnose and repair today's high tech vehicles,” provides links to service webpages offered by various car manufacturers where users can subscribe to services that provide technical information necessary for the diagnosis and repair of vehicles from various manufacturers.<sup>17</sup>

In view of 1) Proponents’ failure to establish a *prima facie* case for the Proposed Exemption as detailed below; 2) the potential risks to vehicle safety and security; 3) the potential risks to the U.S. regulatory systems designed to protect vehicle safety and the environment; and 4) the potential risks to a subsequent vehicle owner’s assurance of vehicle integrity if the Proposed Exemption is granted, GM respectfully submits that the Proposed Exemption should be denied.

### **III. PROPONENTS HAVE FAILED TO MAKE OUT A *PRIMA FACIE* CASE IN SUPPORT OF THE PROPOSED EXEMPTION**

The Proponents have failed to meet the burden of establishing a *prima facie* case in support of the Proposed Exemption. Pursuant to 17 U.S.C. 1201(a)(1)(C), Proponents of an exemption from the prohibition on circumvention bear the burden of establishing that “persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition . . . in their ability to make non-infringing uses . . . of a

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<sup>17</sup> <http://www.nastf.org/i4a/pages/index.cfm?pageid=3282>

particular class of copyrighted works.”<sup>18</sup> Thus, to establish a *prima facie* case for the proposed class, Proponents must demonstrate that 1) the uses affected by the prohibition on circumvention are or are likely to be noninfringing and 2) the prohibition is causing, or in the next three years is likely to cause, a substantial adverse impact on those uses.<sup>19</sup> The Proponents “must prove by a preponderance of the evidence that the harm alleged is more likely than not.”<sup>20</sup>

**A. Exemption Proponents Have Failed to Establish that the Uses Affected by the Prohibition on Circumvention are Noninfringing.**

Neither EFF, nor the other Proponents, have demonstrated that the uses for which they seek an exemption are noninfringing under either under 17 U.S.C. § 117 or 17 U.S.C. § 107. Further, Proponents must demonstrate that the affected use is or is likely noninfringing, not merely *plausibly or conceivably* noninfringing and “there is no ‘rule of doubt’ favoring an exemption when it is unclear that a particular use is a fair use.”<sup>21</sup> Given this framework for evaluating whether the uses are affected and the broad category of uses covered by the Proposed Exemption, EFF has failed to establish that use of vehicle software for diagnosis, repair or modification is likely to be noninfringing.

*1. The Affected Uses Are Not Noninfringing Under 17 U.S.C. § 117*

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<sup>18</sup> Copyright Office, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, *Notice of Inquiry*, 79 Fed. Reg. 55687, 55689 (2014) (“2014 NOI”).

<sup>19</sup> Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies at 7 (Oct. 2012), *available at* [http://copyright.gov/1201/2012/Section\\_1201\\_Rulemaking\\_2012\\_Recommendation.pdf](http://copyright.gov/1201/2012/Section_1201_Rulemaking_2012_Recommendation.pdf) (“2012 Recommendation”).

<sup>20</sup> *Id.*; Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, *Notice of Inquiry*, 79 Fed. Reg. 55687, 55689 (2014) (“2014 NOI”) (citing Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies at 10 (2010), *available at* <http://www.copyright.gov/1201/2010/initialed-registers-recommendation-june-11-2010.pdf> (“2010 Recommendation”).

<sup>21</sup> *See* 2014 NOI at 55690 (citing 17 USC 1201(a)(1)(C)); 2010 Recommendation at 10; 2014 NOI at 55690 (citing 2012 Recommendation at 7).

17 U.S.C. § 117 permits “owners” of computer programs to make a copy of such computer program, if the copy is 1) created as an essential step in the utilization of the computer program in conjunction with a machine and used in no other manner, or 2) for archival purposes only and all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful. Here, Proponents have failed to demonstrate that vehicle owners are the owners of the computer programs in the vehicle or that the broad category of affected uses, which include diagnosis (which may require copying of the computer programs in question), repair and modification (both of which may require copying and creation of derivative works), fall within the narrow categories of use specified in Section 117.

(a) Proponents Have Failed to Demonstrate That Vehicle Owners “Own” the Computer Programs in Vehicles

Proponents incorrectly conflate ownership of a vehicle with ownership of the underlying computer software in a vehicle.<sup>22</sup> The Registrar has admitted that the state of the law regarding software ownership under Section 117 is unclear (or “murky” as conceded by EFF).<sup>23</sup> In fact, in the context of analyzing wireless handset software ownership under § 117, the Registrar went so far as to conclude that “the lack of certainty in the law makes it impossible for proponents to have established their case. . . .”<sup>24</sup> and that “[e]ven if proponents had submitted agreements to support a claim that wireless handset software is owned rather than licensed, the uncertain state of the law would still preclude the Registrar from developing conclusions sufficient to permit determination of the software ownership issue.”<sup>25</sup> Although we currently consider ownership of vehicle software instead of wireless handset software, the law’s ambiguity similarly renders it

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<sup>22</sup> See EFF Comments, 11-15.

<sup>23</sup> See 2012 Recommendation at 92; EFF Comments at 12.

<sup>24</sup> 2012 Recommendation at 92.

<sup>25</sup> *Id* at 92-93.

impossible for Proponents to establish that vehicle owners own the software in their vehicles (or even own a copy of the software rather than have a license), particularly where the law has not changed. Indeed, EFF relies on the *same* two cases considered in the 2012 Recommendation, *Krause v. Titleserv, Inc. and Vernor v. Autodesk Inc.*, when the Registrar concluded that the law was too uncertain to determine whether software was owned.<sup>26</sup> We briefly revisit these cases below.

In *Krause*, the court determined that formal title alone was not the sole consideration to establish ownership in a copy of a computer program, but instead considered several factors to determine whether “sufficient incidents of ownership” existed to establish ownership, including: 1) whether substantial consideration was paid for the copy, 2) whether the copy was created for the sole benefit of the purchasers, 3) whether the copy was customized to serve the purchaser’s use, 4) whether the copy was stored on property owned by the purchaser, 5) whether the creator reserved the right to repossess the copy, 6) whether the creator agreed that the purchaser has the right to possess and use the programs forever regardless of whether the relationship between the parties terminated, and 7) whether the purchaser was free to discard or destroy the copy anytime it wished.<sup>27</sup> The Court in *Vernor* held that “a software user is a licensee rather than an owner of a copy where the copyright owner 1) specifies that the user is granted a license, 2) significantly restricts the user’s ability to transfer the software, and 3) imposes notable use restrictions.”<sup>28</sup>

EFF cannot and does not demonstrate that vehicle owners own a copy of the computer software that controls a vehicle’s ECUs based on the *Krause* factors. Quite to the contrary, EFF itself has identified various license agreements that demonstrate vehicle manufacturers do not

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<sup>26</sup> *Krause v. Titleserv, Inc.* 402 F.3d 119, 124 (2nd Cir. 2005); *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1110-1111 (9<sup>th</sup> Cir. 2010).

<sup>27</sup> 2010 Recommendation at 126 (citing *Krause*, 402 F.3d at 124).

<sup>28</sup> *Vernor*, 621 F.3d at 1111.

sell copies of their software, but instead license the software in the cars they sell.<sup>29</sup> EFF points to a sole purchase agreement, Tesla’s Vehicle Purchase Agreement to arguably demonstrate that the owner of this car owns a copy of the software in the car because “they possess a copy of the software inside, and they retain the ability to transfer and dispose of the software freely along with the vehicle.”<sup>30</sup> However, in contrast to this one example, EFF itself points to five other examples of instances where car manufacturers license their software and place restrictions on *inter alia* the use, modification, adaptation, translation, and/or disassembly of the software in their vehicles.<sup>31</sup>

Thus, the record demonstrates that a vehicle owner does not own a copy of the relevant computer programs in the vehicle under *Vernor* as well. EFF attempts to distinguish *Vernor* by arguing that the software at issue was highly transferrable and valuable to any architect, while an ECU comes with the car, is included in the price of the car, and is therefore, more like the sale of goods.<sup>32</sup> However, this distinction is irrelevant to the question of whether vehicle owners own a copy of the software in the car under either the *Krause* or the *Vernor* factors. In view of the foregoing, the Proponents own evidence demonstrates that vehicle owners do not own the vehicle software at issue, and, thus, the affected uses cannot qualify as noninfringing under 17 U.S.C. § 117.

(b) Proponents Have Also Failed to Demonstrate That Copying or Adapting Computer Programs in Vehicles Is an Essential Step to Utilization of the Programs in the Vehicles

In addition to failing to demonstrate that vehicle owners are owners of the vehicle software, Proponents also fail to demonstrate that the creation of a copy or adaptation is “an

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<sup>29</sup> EFF Comments at 13-14.

<sup>30</sup> *Id.* at 13.

<sup>31</sup> *Id.* at 13-14.

<sup>32</sup> EFF Comments at 14.

*essential step* in the utilization of the computer program in conjunction with a machine and that it is used in no other manner.”<sup>33</sup>

EFF’s discussion of this element is limited, for good reason, and it cites *Krause* for the proposition that “a copy made for the express purpose of adding new features and capabilities that do not implicate a copyright holder’s rights qualifies as an essential step for the purposes of Section 117 protection” because the modifications made the “software helpful or worth using.”<sup>34</sup> First, EFF cannot demonstrate that the broad categories of diagnosis, repair, and modification in the proposed exemption are limited to merely adding new features and capabilities, and, further, EFF concedes that making copies of vehicle firmware “is not essential to using the vehicle software for routine driving purposes.”<sup>35</sup> Additionally, given the various safety, security and regulatory compliance issues implicated by the Proposed Exemption, the copying in this instance has the opposite effect from making the software helpful or worth using.

(c) Proponents Have Also Failed to Demonstrate that the Affected  
Uses are for Archival Purposes Only

Further, EFF has also failed to demonstrate that the Proposed Exemption is for uses limited to *archival purposes only* as required by 17 U.S.C. § 117(a)(2). Indeed, the safe harbor for archival uses provided by 17 U.S.C § 117(a)(2) is wholly unrelated to the affected uses under the exemption, namely uses for the purposes of diagnosis, repair, and modification. EFF unsuccessfully tries to equate allowing a third party to make a copy of a computer program “for car hobbyists who do not have the expertise to engage in firmware modification on their own”<sup>36</sup>

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<sup>33</sup> 17 U.S.C. § 117(a)(1)

<sup>34</sup> EFF Comments at 15 (citing *Krause*, 402 F.3d at 127).

<sup>35</sup> EFF Comments at 15.

<sup>36</sup> EFF Comments at 16.

or for “research done by those engaging in copying or adaptation to analyze vehicle firmware” with archival purposes. Such comparisons are simply unsupported by the law or the record.

2. *The Affected Uses in the Proposed Exemption Also Do Not Qualify As Fair Uses Under 17 U.S.C. § 107*

EFF also argues that circumvention for the purpose of copying and manipulating vehicle software in the course of diagnosis, repair, and modification is a fair use under 17 U.S.C. § 107. The Section 107 fair use analysis requires the consideration of four factors that on balance weigh against a finding that the affected uses are fair use : 1) the purpose and character of the use, 2) the nature of the copyrighted work, 3) the amount and substantiality of the portion used, and 4) the market for the copyrighted work.<sup>37</sup> For the reasons discussed below, Proponents have failed to demonstrate that the affected uses qualify as fair use.

(a) Purpose and Character of Use

The first fair use factor considers whether the proposed use is commercial in nature, and whether it is “transformative” in that it “adds something new, with a further purpose of different character, altering the first with new expression, meaning, or message.”<sup>38</sup> However, EFF does not explain how its use of the vehicle software for the purposes of diagnosis, repair, or modification is transformative. EFF claims that tinkerers are adding new functions or modifying existing functions. However, accessing and altering vehicle software to modify copyrighted software to perform the identical function as it previously did, albeit within different parameters

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<sup>37</sup> See 17 U.S.C. § 107; *Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596, 602 (9<sup>th</sup> Cir. 2000).

<sup>38</sup> 2010 Recommendation at 94-95; 2012 Recommendation at 41; 17 U.S.C. § 107(1).

or values, is not transformative. Moreover, to the extent that any modification merely constitutes an unauthorized derivative work, such use without more would not constitute a fair use.

EFF relies heavily on *Sega Enterprises LTD v. Accolade, Inc.* and *Sony Computer Entertainment, Inc. v. Connectix Corp.* to support the proposition that enabling interoperability and increasing the utility of hardware are fair uses.<sup>39</sup> However, it does not demonstrate how the narrow findings of fair use in those cases cover the broad categories of affected uses for the purpose of diagnosis, modification, and repair implicated by the Proposed Exemption. In *Sega* and *Sony*, the main inquiry was whether creating an intermediate copy of copyrighted software to determine the functional aspects of the software was fair use. In these cases, the Defendants created an intermediate copy of Plaintiffs' copyrighted software to determine the functional aspects of the software not protected by copyright in order to create their own creative product that would be compatible with the copyrighted work. Importantly, in neither case did the final product created by the Defendants contain or modify any of the Plaintiff's copyrighted work.

Unlike in *Sega* and *Sony*, the affected uses under the Proposed Exemption are not limited to creating copies to determine functional aspects of the vehicle computer software in order to create interoperable software where such interoperable software does not contain or modify any of the original vehicle software. Moreover, EFF does not clearly articulate the other manners in which it would use any vehicle software if the Librarian creates an exemption for this diagnosis, repair, and modification and failed to clearly answer the question set forth by the Librarian regarding "the extent to which any of the asserted noninfringing activities merely requires

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<sup>39</sup> See *Sega Enterprises LTD v. Accolade, Inc.*, 977 F.2d 1510, 1524 (9<sup>th</sup> Cir. 1992); *Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596, 602 (9<sup>th</sup> Cir. 2000).

examination or changing of variables or codes relied upon by the vehicle software, or instead requires copying or rewriting of the vehicle software.”<sup>40</sup>

(b) Nature of Copyrighted Work

Proponents seek access to computer software in a vehicle’s ECUs and EFF claims that the software must be copied in order to ascertain the functional aspects of the software. However, EFF again relies on cases where the Courts determined that attaining the functional aspects of the relevant software was necessary for the purpose of interoperability. Moreover, in each case, the party copying the work clearly indicated how reverse engineering copyrighted software allowed them to identify software code required for the purpose of interoperability. By contrast, even if computer programs contain functional noncopyrightable aspects, EFF has not provided a sufficient factual basis to establish that the affected uses only impact functional aspects of vehicle software.

To the contrary, the vehicle software in ECUs is a highly creative work designed by specialized engineers that have developed a delicate and precise interconnected control system within a vehicle, subject to a complex framework of safety and security needs, regulatory requirements, and quality, performance and reliability standards. This software is a result of years of research and development and a significant investment of resources by GM and other automotive manufacturers. Further, even if such software included in part certain functional elements, something which Proponents have not demonstrated, this does not obviate the need to protect the expressive aspects also encompassed in the work.

(c) Amount and Substantiality of Portion Used

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<sup>40</sup> 2014 NPRM at 73869.

Under this factor, courts consider how much of the work was copied. Even in *Sega* and *Sony*, where fair use was ultimately found, this third factor weighed in the copyright owner's favor where an entire work was copied.<sup>41</sup> EFF concedes that a tinkerer may use all the firmware within an ECU.<sup>42</sup> However, even where a small portion of a work is copied, its use will not be considered fair if that portion contains the essence or essential part of the copyrighted work.<sup>43</sup> In view of this, Proponents essentially concede that this factor weighs against a finding of fair use.

(d) Market for the Copyrighted Work

The final fair use factor considers whether the use threatens the potential market for, or value of, a copyrighted work.<sup>44</sup> Moreover, it addresses whether “unrestricted and widespread conduct of the sort engaged in by the defendant” would negatively impact the value of copyrighted works.<sup>45</sup> For the reasons set forth below, the answer is a resounding yes.

Safety is a primary factor motivating the purchasing decision of a potential vehicle owner. Vehicle safety and regulatory compliance are also critical factors for car manufacturers in the automotive industry. Therefore, the fact that vehicle firmware, which controls safety and regulatory compliance, is part of a car and not a standalone product does not eliminate the harm to a manufacturer's copyright interests if a vehicle owner is permitted to circumvent TPMs limiting access to such software. Allowing individuals to access and make modifications to vehicle software risks altering vehicle systems such that they no longer comply with federal regulatory requirements and weakening the complex safety and security framework carefully

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<sup>41</sup> See *Sony*, 203 F.3d at 606; *Sega*, F.2d 1510 at 1526.

<sup>42</sup> EFF Comments at 10.

<sup>43</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985)(copyright analysis considers an analysis of “the portion used in relation to the copyrighted work as a whole”)

<sup>44</sup> See 2012 Recommendation at 42.

<sup>45</sup> *Campbell v. Acuff Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

constructed by OEMs in each vehicle. Any adverse safety, performance or compliance issues that result from the affected uses will directly and negatively impact the value of the copyrighted work.

There is no “rule of doubt” favoring an exemption when it is unclear whether a particular use is noninfringing.<sup>46</sup> Here, lack of clarity abounds. In view of the foregoing, EFF has failed to set forth a *prima facie* case that the broad categories of diagnosis, repair and modification activities that could fall within the Proposed Exemption are noninfringing.

**B. GM’s TPMs and the Prohibition on Circumvention Do Not Have a Substantial Adverse Impact**

Even assuming *arguendo* that Proponents could demonstrate that the affected uses are noninfringing, Proponents have still failed to demonstrate that the prohibition on circumvention has a substantial adverse impact on those noninfringing uses. For this reason also, Proponents have failed to establish a *prima facie* case in support of the Proposed Exemption.

Proponents must demonstrate that the adverse effects caused by the prohibition on circumvention are having “distinct, verifiable, and measurable impacts” occurring in the marketplace, as an exemption “should not be based on *de minimis* impacts”<sup>47</sup> The main focus is on whether a “substantial diminution” of the availability of works for noninfringing uses is “actually occurring”.<sup>48</sup> In other words, the Proponents must demonstrate by a preponderance of

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<sup>46</sup> 2012 Recommendation at 7.

<sup>47</sup> 2014 NOI, 79 Fed. Reg. at 55690.

<sup>48</sup> 2014 NOI, 79 Fed. Reg. at 55690, citing Staff of House Comm. on the Judiciary, 105<sup>th</sup> Cong., *Section-by-Section Analysis of H.R. 2281 as passed by the United States House of Representatives on August 4, 1998* at 6 (Comm. Print. 1998) (“House Manager’s Report”).

the evidence that the probation on circumvention has or is likely to have a *substantial* adverse effect on noninfringing uses of a particular class of works.<sup>49</sup>

With respect to the proposed exemption for the purposes of diagnosis and repair, as discussed above, the auto industry's MOU/Agreement, and related legislation, provides a comprehensive alternative which will avoid any substantial adverse impact. Also, vehicle owners have alternative options that permit diagnosis and repair of their vehicles and these alternatives do not require circumvention of the TPMs that protect the deliberately calibrated software controlling a car's ECUs. The Registrar itself has acknowledged that no substantial adverse impact occurs where sufficient alternatives exist to permit the noninfringing uses.<sup>50</sup> Given the MOU/Agreement, the existence of right to repair legislation and the availability of tools and technical information to assist with the diagnosis and repair for vehicles that require maintenance, no *substantial* adverse impact can occur as a result of the prohibition on circumvention and EFF presents no evidence otherwise.

Further, EFF has not demonstrated that a significant number of individuals are interested in accessing the software controlling a vehicle's ECUs for the purposes of modification. EFF has provided anecdotal evidence from three researchers and hobbyists.<sup>51</sup> It also points to online blogs and message boards accessed by what appears to be a small community of hobbyists for support.<sup>52</sup> However, these declarations and online message boards hardly demonstrate that the

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<sup>49</sup> Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, *Final Rule*, 75 Fed. Reg. 43825, 43826 (2010) ("2010 Final Rule").

<sup>50</sup> 2012 Recommendation at 8 ("The Register and Librarian will, when appropriate, assess the alternatives that exist to accomplish the proposed noninfringing uses. Such evidence is relevant to the inquiry regarding whether the prohibition adversely affects the noninfringing use of the class of works. If sufficient alternatives exist to permit the noninfringing use, there is no substantial adverse impact.")

<sup>51</sup> See EFF Comments, Appendix A-C.

<sup>52</sup> See EFF Comments, FN 47, 49, 51, 83.

prohibition on circumvention of TPMs results in “distinct, verifiable, and measurable impacts” occurring in the marketplace, and not simply *de minimis* impacts.

EFF also claims that TPMs prevent innovation. However, EFF itself makes reference to the fact that a tuning company called Dinan has created an entirely new automotive ECU as opposed to circumventing a TPM to copy elements of a copyright computer program, which demonstrates that innovation continues despite the current prohibition, and, to the contrary, provides support for the proposition that the TPMs actually encourage innovation. Further, various other aftermarket ECUs, which comply with safety and regulatory requirements, are available for hobbyists and enthusiasts that can be used in place of hacking an OEMs TPM if individuals are looking to boost their power or tune their car in a manner not permitted by a factory installed ECU. When these changes are in aftermarket systems, they can be identified upon inspection, reducing the chance of a hidden change unknown to a subsequent vehicle owner.

In view of the foregoing, Proponents have failed to demonstrate sufficient harm to warrant granting an exemption for purposes of diagnosis, repair and modification.

#### **IV. THE SECTION 1201(A)(1)(C) FACTORS WEIGH AGAINST GRANTING AN EXEMPTION**

For the reasons discussed above, Proponents have failed to establish a *prima facie* case for the Proposed Exemption and, as such, it should be denied without consideration of the statutory factors, which include a) the availability for use of copyrighted works, b) the availability for use of works for nonprofit archival, preservation, and educational purposes, c) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research, d) the effect of circumvention of technological measures on the market for or value of

copyrighted works, and e) such other factors as the Librarian considers appropriate.<sup>53</sup>

Nonetheless, even consideration of the statutory factors under 17 U.S.C. §1201(a)(1)(C) support denying the Proposed Exemption. On balance, the negative ramifications likely to result if the exemption were granted outweigh any *de minimis* adverse effects resulting from the prohibition on circumvention for purposes of diagnosis, repair, or modification.

**A. The Availability for Use of Copyrighted Works**

This factor considers the prohibition's impact on the availability for use of the copyrighted works. The major considerations for this inquiry are whether the availability of the work in a protected format enhances or inhibits public use of the work, whether the protected work is available in other formats, and if so, whether such formats are sufficient to accommodate noninfringing uses.<sup>54</sup> EFF provides a handful of examples to demonstrate that the prohibition limits access to a vehicle's software, but fails to address the fact that alternative means of accessing vehicle software for its proposed diagnosis, repair, and modification exist. As noted above, there exist numerous alternatives to access the software for purposes of diagnosis, repair and modification, including, importantly alternatives pursuant to the MOU/Agreement and right to repair legislation. Accordingly, given the current availability of diagnostic tools, codes and software to diagnose and repair cars as well as alternatives to modification without circumventing TPMs, the current prohibition does not substantially impact the availability for use of the copyrighted works.

**B. The Availability for Use of Works for Nonprofit Archival, Preservation, and Educational Purposes**

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<sup>53</sup> 17 U.S.C. §1201(a)(1)(C)

<sup>54</sup> See 2012 Recommendation at 152 (citing 2010 Recommendation at 56).

As discussed above, the proposed exemption is unrelated to nonprofit archival, preservation or education purposes. Therefore, this factor does not weigh in favor of granting an exemption.

**C. The Impact That the Prohibition of the Circumvention of Technological Measures Applied to Copyrighted Works Has on Criticism, Comment, News Reporting, Teaching, Scholarship, or Research**

This factor should also weigh against granting the proposed exemption since use of the copyrighted work at issue for the purposes of diagnosis, repair, and modification would not affect criticism, comment, news reporting, teaching, scholarship or research.

**D. The Effect of Circumvention of Technological Measures on the Market for or Value of Copyrighted Works**

TPMs ensure that vehicles comply with regulatory requirements and that the copyrighted software controlling the safety features incorporated into a car's overall security strategy is not vulnerable to modification. Since hobbyists share many of their conquests, modifications, and workarounds, the Proposed Exemption is likely to encourage enthusiasts to publish information about how to circumvent TPMs and introduce modifications that could impact a vehicle's safety and security stability as well as regulatory compliance.<sup>55</sup> Numerous news articles report of concerns with vehicle security. A recent study by McKenzie & Company found that 43 percent of Americans are concerned about the potential for actors with malicious intent to hack into their Internet-connected car and manipulate critical safety features, such as the car's braking system.<sup>56</sup> However, even benign modifications have the potential to impact a car's safety and security

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<sup>55</sup> See e.g., Car Hacker's Handbook available at <http://opengarages.org/handbook/>, <http://boingboing.net/2014/07/16/car-hackers-handbook.html>; EFF Comments at 22. According to EFF, the Car Hacker's Handbook is an example of a set of instructions shared among hobbyists that a hobbyist might follow to make a modification or repair.)

<sup>56</sup> See McKinsey & Company, *Connected Car, Automotive Value Chain Unbound* at 11 (Sept. 2014) ("McKinsey Report").

features, and a variety of modifications are already being shared online. Accordingly, the value of the vehicle software will likely decrease as concern about vehicle safety grows, despite the fact that certain safety concerns could be the result of tinkering without realizing the ramifications of certain alternations to a vehicle's software. Increasing concerns about vehicle safety, successful operation of U.S. regulatory systems, a subsequent owner's trust in vehicle integrity and security introduced by a prior owner's tinkering or widespread publication of risky modifications that have not been approved or validated by OEMs are likely to have chilling effects on OEMs ability to invest resources in development of new ECU software, which it knows will be copied and modified without regard to its copyrighted nature or security and regulatory concerns.

**E. Such Other Factors as the Librarian Considers Appropriate**

In the current instance, cars are not like cell phones or computer programs run on a personal computer. Instead, the availability of vehicle software for use is contingent upon vehicles being safe and complying with regulatory requirements. Granting the exemption could have negative consequences in all of these areas, as described above.

OEMs are more likely to invest in new innovative and secure vehicle software with increased functionality if third parties are prevented from copying and modifying their copyrighted work. While so-called "tinkerers" and enthusiasts may wish to modify their vehicle software for personal needs, granting greater access to vehicle software for purposes of modification fails to consider the overall concerns surrounding regulatory compliance and safety and the overall impact on safety and the environment. Any vulnerabilities introduced by shared modifications among car enthusiasts create public safety risks and negatively affect the value of a car's original software, which will be blamed for any negative security implications, despite the

introduction of vulnerabilities by hobbyists. Thus, the current prohibition ensures the distribution of safe and secure vehicle software within an overall vehicle security strategy implemented by car manufacturers that does not restrict vehicle owners' ability to diagnose, modify or repair their cars.

## V. CONCLUSION

In view of the foregoing, Proponents have failed to demonstrate a *prima facie* case that the affected uses are noninfringing or that the prohibition is having a substantial adverse impact. Furthermore, Proponents have simply failed to consider the implications such an exemption will have on vehicle safety and security and regulatory compliance and the overall impact on safety, the environment, and a subsequent owner's trust in the integrity of a previously owned vehicle. When considering these various factors, GM respectfully submits that the Proposed Exemption should be denied.

Dated: March 27, 2015

Respectfully submitted,

By: /s/ Harry M. Lightsey III

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# **Exhibit A**



**AUTO ALLIANCE**  
DRIVING INNOVATION®

**AAIA**®  
**Automotive Aftermarket**  
Industry Association

**GlobalAutomakers** 

**CARE**  


## MEMORANDUM of UNDERSTANDING

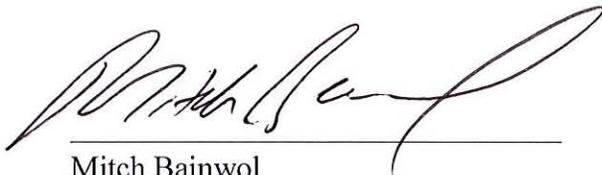
The Automotive Aftermarket Industry Association (“AAIA”), Coalition for Auto Repair Equality (“CARE”), Alliance of Automobile Manufacturers (“Alliance”) and Association of Global Automakers (“Global Automakers”) (“the Original Parties”) enter into this Memorandum of Understanding (MOU) on this Fifteenth (15th) day of January, 2014 and voluntarily agree as follows:

1. The Original Parties fully support this MOU and attached “Right to Repair” (R2R) agreement (“R2R Agreement”). Automobile manufacturer members of the Alliance and Global Automakers indicate their individual company’s agreement to comply with the MOU and R2R Agreement in all fifty (50) States and the District of Columbia through their individual letters of endorsement.
2. Until such time as the provisions of Section 2(c)(i) (common interface device) of the R2R Agreement have been fully implemented, with respect to model year 2018 and newer vehicles, for two years or January 2, 2019, whichever is earlier, and provided the OEMs comply with the MOU during this period, CARE and AAIA agree to continue to work with other Original Parties to fully implement the MOU and to oppose and not to fund or otherwise support, directly or indirectly, any new state R2R legislation.
3. The Original Parties agree to work to strongly encourage any new entrants to the U.S. automotive market or to R2R issues to become signatories to the MOU.
4. The Original Parties agree to work together to resolve any future or related R2R issues that might otherwise be the subject of state legislation and, subject to the mutual consent of the Original parties, amend the MOU and R2R Agreement to include these additional matters.
5. Once the Original Parties have signed on to the MOU, additional parties may join but any amendments or revisions to the terms of the MOU and R2R Agreement, triggered by admission of additional participants, shall require consent of the Original Parties.
6. The Original Parties agree to meet as needed and at least semi-annually, to assess how the MOU is operating, address operational concerns and discuss any other matters relevant to R2R or the MOU or future amendments or parties to the MOU. In the event that one of

the Original Parties concludes that, due to changed circumstances, the MOU or R2R Agreement may no longer be viable, that party shall, upon thirty (30) days written notice to the other three Original Parties, call a meeting to discuss the need for the MOU and R2R Agreement to continue.

7. The Original Parties agree that should a state(s) pass a law relating to issues covered by this MOU and R2R Agreement, after the effective date of the MOU and R2R Agreement, any automobile manufacturer member of the Alliance and Global Automakers may elect to withdraw its letter of endorsement for the MOU and R2R Agreement partially or entirely for the impacted state(s).

Signed on this 15<sup>th</sup> day of January, 2014:



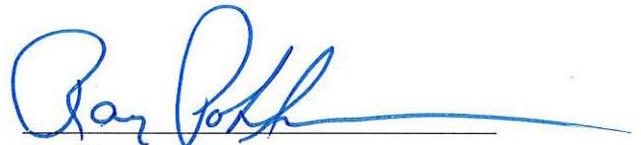
Mitch Bainwol  
President & CEO  
Alliance of Automobile Manufacturers



Michael Stanton  
President & CEO  
Association of Global Automakers



Kathleen Schmatz  
President & CEO  
Automotive Aftermarket Industry Association



Ray Pohlman  
President  
Coalition for Auto Repair Equality

## R2R AGREEMENT

**Section 1.** As used in this agreement, the following words shall, unless the context clearly indicates otherwise, have the following meanings:

**“Dealer”**, any person or business who, in the ordinary course of its business, is engaged in the business of selling or leasing new motor vehicles to consumers or other end users pursuant to a franchise agreement and who has obtained a license, as required under applicable law, and is engaged in the diagnosis, service, maintenance or repair of motor vehicles or motor vehicle engines pursuant to said franchise agreement.

**“Franchise agreement”**, a written arrangement for a definite or indefinite period in which a manufacturer or distributor grants to a motor vehicle dealer a license to use a trade name, service mark or related characteristic and in which there is a community of interest in the marketing of new motor vehicles or services related thereto at wholesale, retail, leasing or otherwise.

**“Fair and Reasonable Terms”** Provided that nothing in this MOU and R2R Agreement precludes an automaker and an owner or independent repair shop who is subject to the agreement from agreeing to the sale of information and tools on any other terms on which they agree, in determining whether a price is on “fair and reasonable terms,” consideration may be given to relevant factors, including, but not limited to, the following:

- (i) The net cost to the manufacturer’s franchised dealerships for similar information obtained from manufacturers, less any discounts, rebates, or other incentive programs.
- (ii) The cost to the manufacturer for preparing and distributing the information, excluding any research and development costs incurred in designing and implementing, upgrading or altering the onboard computer and its software or any other vehicle part or component. Amortized capital costs for the preparation and distribution of the information may be included.
- (iii) The price charged by other manufacturers for similar information.
- (iv) The price charged by manufacturers for similar information prior to the launch of manufacturer web sites.
- (v) The ability of aftermarket technicians or shops to afford the information.
- (vi) The means by which the information is distributed.
- (vii) The extent to which the information is used, which includes the number of users, and frequency, duration, and volume of use.
- (viii) Inflation.

**“Immobilizer system”**, an electronic device designed for the sole purpose of preventing the theft of a motor vehicle by preventing the motor vehicle in which it is installed from starting without the correct activation or authorization code.

**"Independent repair facility"**, a person or business that is not affiliated with a manufacturer or manufacturer's authorized dealer of motor vehicles, which is engaged in the diagnosis, service, maintenance or repair of motor vehicles or motor vehicle engines;

**"Manufacturer"**, any person or business engaged in the business of manufacturing or assembling new motor vehicles.

**"Dispute Resolution Panel (DRP)"**, a 5-person panel established by the Original Parties comprised of the following: one Alliance representative, Alliance member or Alliance designee, one Global Automakers representative, Global Automakers' manufacturer member or Global Automakers designee, two representatives of the independent vehicle repair industry to be selected and mutually agreed upon by AAIA and CARE, and one DRP Chair. The DRP Chair shall be an independent professional mediator with no affiliation to any of the Original Parties, shall be selected by unanimous consent of the Original Parties and shall be funded in equal amounts by each of the Original Parties. The Original Parties shall, at one of the two annual meetings, have an opportunity to revisit their respective representative or ask the Original Parties to revisit the person acting as DRP Chair.

**"Motor vehicle"**, any vehicle that is designed for transporting persons or property on a street or highway and that is certified by the manufacturer under all applicable federal safety and emissions standards and requirements for distribution and sale in the United States, but excluding (i) a motorcycle; (ii) a vehicle with a gross vehicle weight over 14,000 pounds; or (iii) a recreational vehicle or an auto home equipped for habitation.

**"Owner"**, a person or business who owns or leases a registered motor vehicle.

**"Trade secret"**, anything, tangible or intangible or electronically stored or kept, which constitutes, represents, evidences or records intellectual property including secret or confidentially held designs, processes, procedures, formulas, inventions, or improvements, or secret or confidentially held scientific, technical, merchandising, production, financial, business or management information, or anything within the definition of 18 U.S.C. § 1839(3).

## **Section 2.**

**(2)(a).** Except as provided in subsection (2)(e), for Model Year 2002 motor vehicles and thereafter, a manufacturer of motor vehicles sold in United States shall make available for purchase by owners of motor vehicles manufactured by such manufacturer and by independent repair facilities the same diagnostic and repair information, including repair technical updates, that such manufacturer makes available to its dealers through the manufacturer's internet-based diagnostic and repair information system or other electronically accessible manufacturer's repair information system. All content in any such manufacturer's repair information system shall be made available to owners and to independent repair facilities in the same form and manner and to the same extent as is made available to dealers utilizing such diagnostic and repair information system. Each manufacturer shall provide access to such manufacturer's diagnostic and repair information system for purchase by owners and independent repair facilities on a daily, monthly and yearly subscription basis and upon fair and reasonable terms.

**(2)(b)(i)** For Model Year 2002 motor vehicles and thereafter, each manufacturer of motor vehicles sold in the United States shall make available for purchase by owners and independent repair facilities all diagnostic repair tools incorporating the same diagnostic, repair and wireless capabilities that such manufacturer makes available to its dealers. Such tools shall incorporate the same functional repair capabilities that such manufacturer makes available to dealers. Each manufacturer shall offer such tools for sale to owners and to independent repair facilities upon fair and reasonable terms.

**(ii)** Each manufacturer shall provide diagnostic repair information to each aftermarket scan tool company and each third party service information provider with whom the manufacturer has appropriate licensing, contractual or confidentiality agreements for the sole purpose of building aftermarket diagnostic tools and third party service information publications and systems. Once a manufacturer makes such information available pursuant to this section, the manufacturer will have fully satisfied its obligations under this section and thereafter not be responsible for the content and functionality of aftermarket diagnostic tools or service information systems.

**(2)(c)(i)** Commencing in Model Year 2018, except as provided in subsection (2)(e), manufacturers of motor vehicles sold in the United States shall provide access to their onboard diagnostic and repair information system, as required under this section, using an off-the-shelf personal computer with sufficient memory, processor speed, connectivity and other capabilities as specified by the vehicle manufacturer and:

**(a)** a non-proprietary vehicle interface device that complies with the Society of Automotive Engineers SAE J2534, the International Standards Organizations ISO 22900 or any successor to SAE J2534 or ISO 22900 as may be accepted or published by the Society of Automotive Engineers or the International Standards Organizations; or,

**(b)** an on-board diagnostic and repair information system integrated and entirely self-contained within the vehicle including, but not limited to, service information systems integrated into an onboard display, or

**(c)** a system that provides direct access to on-board diagnostic and repair information through a non-proprietary vehicle interface such as Ethernet, Universal Serial Bus or Digital Versatile Disc. Each manufacturer shall provide access to the same on-board diagnostic and repair information available to their dealers, including technical updates to such on-board systems, through such non-proprietary interfaces as referenced in this paragraph. Nothing in this agreement shall be construed to require a dealer to use the non-proprietary vehicle interface (i.e., SAE J2534 or ISO 22900 vehicle interface device) specified in this subsection, nor shall this agreement be construed to prohibit a manufacturer from developing a proprietary vehicle diagnostic and reprogramming device, provided that the manufacturer also complies with Section 2(c)(i) and the manufacturer also makes this device available to independent repair facilities upon fair and reasonable terms, and otherwise complies with Section 2(a).

**(2)(c)(ii)** No manufacturer shall be prohibited from making proprietary tools available to dealers if such tools are for a specific specialized diagnostic or repair procedure developed for

the sole purpose of a customer service campaign meeting the requirements set out in 49 CFR 579.5, or performance of a specific technical service bulletin or recall after the vehicle was produced, and where original vehicle design was not originally intended for direct interface through the non-proprietary interface set out in (2)(c)(i). Provision of such proprietary tools under this paragraph shall not constitute a violation of this agreement even if such tools provide functions not available through the interface set forth in (2)(c)(i), provided such proprietary tools are also available to the aftermarket upon fair and reasonable terms. Nothing in this subsection (2)(c)(ii) authorizes manufacturers to exclusively develop proprietary tools, without a non-proprietary equivalent as set forth in (2)(c)(i), for diagnostic or repair procedures that fall outside the provisions of (2)(c)(ii) or to otherwise operate in a manner inconsistent with the requirements of (2)(c)(i).

**(2)(d)** Manufacturers of motor vehicles sold in the United States may exclude diagnostic, service and repair information necessary to reset an immobilizer system or security-related electronic modules from information provided to owners and independent repair facilities. If excluded under this paragraph, the information necessary to reset an immobilizer system or security-related electronic modules shall be obtained by owners and independent repair facilities through the secure data release model system as currently used by the National Automotive Service Task Force or other known, reliable and accepted systems.

**(2)(e)** With the exception of telematics diagnostic and repair information that is provided to dealers, necessary to diagnose and repair a customer's vehicle, and not otherwise available to an independent repair facility via the tools specified in 2(c)(i) above, nothing in this agreement shall apply to telematics services or any other remote or information service, diagnostic or otherwise, delivered to or derived from the vehicle by mobile communications; provided, however, that nothing in this agreement shall be construed to abrogate a telematics services or other contract that exists between a manufacturer or service provider, a motor vehicle owner, and/or a dealer. For purposes of this agreement, telematics services include but are not limited to automatic airbag deployment and crash notification, remote diagnostics, navigation, stolen vehicle location, remote door unlock, transmitting emergency and vehicle location information to public safety answering points as well as any other service integrating vehicle location technology and wireless communications. Nothing in this agreement shall require a manufacturer or a dealer to disclose to any person the identity of existing customers or customer lists.

**Section 3.** Nothing in this agreement shall be construed to require a manufacturer to divulge a trade secret.

**Section 4.** Notwithstanding any general or special law or any rule or regulation to the contrary, no provision in this agreement shall be read, interpreted or construed to abrogate, interfere with, contradict or alter the terms of any franchise agreement executed and in force between a dealer and a manufacturer including, but not limited to, the performance or provision of warranty or recall repair work by a dealer on behalf of a manufacturer pursuant to such franchise agreement.

**Section 5.** Nothing in this agreement shall be construed to require manufacturers or dealers to provide an owner or independent repair facility access to non-diagnostic and repair information

provided by a manufacturer to a dealer, or by a dealer to a manufacturer pursuant to the terms of a franchise agreement.

**Section 6.** If an independent repair facility or owner believes that a manufacturer has failed to provide the information or tool required by this MOU, he may challenge the manufacturer's actions by first notifying the manufacturer in writing. The manufacturer has thirty (30) days from the time it receives the reasonably clear and specific complaint to cure the failure, unless the parties otherwise agree. If the complainant is not satisfied, he has thirty (30) days to appeal the manufacturer's decision to the DRP. The DRP shall be convened by the Chair within thirty (30) days of receipt of the appeal of the manufacturer's decision. The DRP will attempt to reach agreement between the parties. If unsuccessful, the DRP shall convene and issue its decision. The decision must be issued within 30 days of receipt of the appeal of the manufacturer's decision, unless otherwise agreed to by the parties. The DRP decision shall be disseminated to the complainant, the manufacturer, and the Original Parties. If the manufacturer and complainant still cannot reach agreement, the complainant may take whatever legal measures are available to it.

# **Exhibit B**



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*Customer Care and Aftersales*

General Motors LLC  
300 Renaissance Center  
Detroit, Michigan 48265

February 4, 2014

STATEMENT OF ENDORSEMENT

General Motors (“GM”) is committed to providing the aftermarket, independent repairers and consumers with access to the tools and service information needed to efficiently diagnose and accurately repair motor vehicles. To this end and through this letter, GM today endorses the participation of the Alliance of Automobile Manufacturers and agrees to comply with the attached Memorandum of Understanding and Right to Repair Agreement (collectively, “MOU”). GM’s endorsement and agreement to comply with the MOU is conditioned on the understanding that:

- (1) GM has the right to withdraw from this endorsement and agreement to comply, in whole or in part, immediately upon notice from GM at any time,
- (2) this endorsement and agreement to comply and the MOU, individually or combined, do not create contractual rights or any legal remedies in any third party;
- (3) the in-vehicle information accessible from the onboard diagnostic and repair information system referenced in section (2)(c)(i) is limited to the in-vehicle information available to GM dealers using the diagnostic and repair information system referenced in section 2(a);
- (4) the information accessible in section 2(c)(i) is limited to the use of diagnostics and repair of the vehicle from which the information was accessed; and
- (5) the MOU is interpreted in a manner consistent with all governing laws and regulations.

GM believes that today’s commitment to this voluntary agreement in lieu of a patchwork of state right to repair laws best serves the interests of automakers, the aftermarket, independent repairers and consumers.

Sincerely,

A handwritten signature in black ink that reads "Joseph J. Fitzsimmons Jr." The signature is written in a cursive style and is positioned above a horizontal line.

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Joseph J. Fitzsimmons, Jr  
Executive Director, Global Aftersales  
Engineering & Service Operations