



Are You Allowed to Jailbreak Your Car? As of October 28, the Answer is Yes.

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As of last Friday, October 28, 2016, consumers are now authorized to bypass software protections and—to borrow a term from the wireless world—jailbreak their vehicles' electronic control units ("ECUs") for "diagnosis, repair, or modification." While tech-savvy consumers are applauding this exemption, vehicle manufacturers should carefully assess the accompanying legal risks and determine the steps necessary to limit any potential liability. This alert briefly discusses the impact of the exemption. If you would like assistance reviewing your relevant policies, or discussing steps you can take to limit your liability, please contact us.

ECUs control almost all of the main functions in modern automobiles, including engine operation, fuel efficiency, and braking. An ECU's operating code is protected intellectual property under the copyright law, and is also protected by technological protection measures ("TPMs") that prevent users from copying or tampering with the underlying software.

Last year, the Electronic Frontier Foundation (the "EFF") requested an exemption to the Digital Millennium Copyright Act ("DMCA") to circumvent TPMs protecting ECU computer programs, arguing an exemption was necessary to allow users to diagnose, repair, and modify their own vehicles. The EFF also argued for allowing consumers access to ECU software to address potentially harmful malfunctions and to counter the rise of vehicle hacking. Absent an exemption, according to the EFF, vehicle owners are required to take their cars to authorized repair shops or purchase expensive manufacturer-authorized tools for diagnosis and repair.

The National Telecommunications and Information Agency (the "NTIA") also supported the exemption because it would allow users to work on their own vehicles, but proposed a delay in implementation so relevant agencies could consider and prepare for the new rule. These agencies, the NTIA argued, could address concerns about the exemption in the exercise of their respective regulatory authorities.

Many from the automobile industry opposed the exemption, including the Association of Global Automakers, the Auto

Alliance, Eaton Corporation, GM, and the Motor & Equipment Manufacturers Association. They argued that the proposed exemption posed serious public health, safety, and environmental concerns. Users might, for example, circumvent automobile TPMs to avoid restrictions on vehicle emissions imposed by federal and state law. Industry opponents also expressed concerns about potential liability from consumers tampering with an automobile's ECU, resulting in personal injury or property damage. The Department of Transportation, the Environmental Protection Agency, and California's Air Resources Board also voiced concern about the potential impact of the requested exemption.

Despite this opposition, the proposed exemption was granted, giving users access to:

"Computer programs that are contained in and control the functioning of a motorized land vehicle such as a personal automobile, commercial motor vehicle, or mechanized agricultural vehicle, except for computer programs primarily designed for the control of telematics or entertainment systems for such vehicle, when circumvention is a necessary step undertaken by the authorized owner of the vehicle to allow the diagnosis, repair or lawful modification of a vehicle function; and where such circumvention does not constitute a violation of applicable law, including without limitation regulations promulgated by the Department of Transportation or the Environmental Protection Agency; and provided, however, that such circumvention is initiated no earlier than 12 months after the effective date of this regulation."

The Copyright Office responded to the potential safety and environmental concerns by limiting the exemption in a number of ways. First, the Copyright Office specifically excluded circumvention of programs designed to operate vehicle entertainment and telematics systems due to insufficient evidence demonstrating a need to access such ECUs, and out of concern that such circumvention might enable unauthorized access to creative or proprietary content. Second, the Copyright Office excluded circumvention by third



parties. Third, the Copyright Office excluded acts of circumvention that would violate any other law, including regulations promulgated by the Department of Transportation or the Environmental Protection Agency. Last, because of the concerns raised by several government agencies, the Copyright Office concluded that the exemption would not become operative until October 28, 2016, to provide any interested agencies an opportunity to consider and prepare for its implementation.

The exemption raises a number of products liability and intellectual property issues that might pose a high risk of litigation, especially because this is a new area of law. Please contact Buchalter to discuss these issues in greater detail.



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