

## **Alliance for Automotive Innovation**

*Follow-up for Senate Transportation Committee*

*Considerations Regarding Over the Air Updates and Federal Laws*

*March 8, 2022*

Draft legislation before the Committee seeks to restrict the ability of vehicle manufacturers and distributors (collectively “OEMs”) to provide direct-to-consumer, over-the-air (“OTA”) upgrades to vehicle software create more problems—both practical and legal— than they purport to solve. If enacted, this legislation would impose significant burdens on consumers; deprive OEMs of their intellectual property rights in vehicle software and serve as a deterrent to future innovation by automakers, conflict with the Copyright Act, and run afoul of the Contract Clause and Takings Clause of the U.S. Constitution.

### **Practical Considerations**

First, OTA updates provide a safe, secure, and convenient means for customers to obtain routine software upgrades as well as important operational improvements. In today’s modern vehicles, software either controls or monitors nearly every important function. Historically, consumers were required to visit an authorized dealership to obtain periodic software updates or changes to the software. The frequency of such updates have increased as software has become more prevalent in vehicles. To meet this need, OEMs are now equipping most vehicles with telematics technology that facilitates the download a variety of vehicle software updates and upgrades and improvements without necessitating a trip to the dealer or otherwise inconveniencing the customer. Similar to updates, selling upgrades over the air offers a safe, convenient, and secure way to upgrade software on a vehicle. Consumers will expect to be able to have that level of ease and convenience in both updating and upgrading their vehicles’ software.

As anyone with a smartphone has experienced, manufacturers routinely and efficiently use wireless technology to update or improve operating systems and other embedded software programs. Imagine forcing a consumer to return to the Apple Store to update his or her iPhone instead of utilizing this seamless OTA technology every time a consumer wanted to install a new app. Forcing car and truck owners to return to their authorized dealers to have the same type of service performed is unnecessary and inefficient. Requiring OEMs to compensate dealers for updates that the OEMs provide directly OTA also injects unnecessary costs into the distribution system that will lead to increased costs and reduced services to consumers, and stifle continued investment in innovation.

### **Legal Considerations**

In addition to these practical consumer considerations, proposed legislation restricting the ability of OEMs to provide OTA updates implicates a variety of legal concerns. This proposed legislation directly undermines the purpose of (and would be preempted by) —the Copyright Act, 17 U.S.C. §§ 101 *et seq.* The Copyright Act protects constitutionally-guaranteed rights of OEMs in the computer software they install in motor vehicles. These property rights protect the significant investment of time and money made by OEMs as the developers of those programs and software. Just like rights afforded to the author of a novel, the Copyright Act vests absolute and exclusive control over the manner in which the software is disseminated, commercialized and updated to motor vehicle OEMs, as the owners and licensors of the software.

The rights of OEMs in embedded vehicle software are not diminished when the vehicle is transferred to a dealer, and subsequently resold to a consumer. The Copyright Act distinguishes between ownership of a copyright—and the exclusive rights provided under that copyright—and ownership of the physical object in which the copyrighted material is embodied. A law that

would require OEMs to use dealers to update OEM-owned and controlled software or requires an OEM to compensate its dealers when the OEM makes an OTA update or upgrade available directly to the consumer strips the OEM of its right to control the circumstances under which updates to the code are made. As a matter of policy, this legislation would deter OEMs from developing and providing OTA updates and upgrades to consumers and would serve as a powerful deterrent against further innovation in vehicle technology. As a matter of law, this legislation would be preempted by the federal Copyright Act because it purports to restrict the ability of OEMs to provide OTA updates to consumers.

This proposed legislation would run afoul of the Contracts Clause and Takings Clause of the U.S. Constitution. The Contracts Clause prohibits states from enacting any law that would substantially impair contractual relationships. OEMs have the right to freely decide the terms and condition under which they will sell the right to distribute OTA updates to dealers or consumers, including by choosing to give some or all OTA updates to consumers for free. The Takings Clause likewise prohibits the government from taking private property “for public use, without just compensation.” The Takings Clause applies not only to land and other tangible property, but also intangible intellectual property. OEMs have invested significant amounts of time, money, and effort into developing vehicle-installed software. The proposed legislation would amount to a law passed by the state to appropriate OEM intellectual property for the benefit of car dealers; if the proposed legislation were passed, OEMs would be entitled to compensation for the taking of their intellectual property.

### **Conclusion**

Proposed legislation aimed at restricting the ability of OEMs to offer direct-to-consumer OTA upgrades is bad for consumers, and deprives OEMs of their intellectual property rights.

This proposed legislation would be preempted by the federal Copyright Act and would run afoul of the Contract Clause and Takings Clause of the U.S. Constitution.