February 15, 2018

Drafting Committee
Highly Automated Vehicles Act
Uniform Law Commission

     Re: Section 7(j) of the Highly Automated Vehicles Act

Dear Members of the Drafting Committee:

     The Electronic Frontier Foundation (EFF) appreciates the opportunity to comment on the meeting draft of the Highly Automated Vehicles Act (HAV Act). EFF is a non-profit, member-supported civil liberties organization working to protect digital rights. With more than 44,000 active donors and dues-paying members, EFF represents the interests of technology users in court cases and broader policy debates surrounding the application of law in the digital age. EFF is particularly concerned with ensuring that laws targeting new technologies are drafted and applied in a way that makes sense, to avoid unintended negative consequences for consumers and innovators.

     We are concerned about Section 7(j) of the meeting draft and urge the Committee to choose "Option 2"—*i.e.*, omit the provision. Section 7(j) provides that "[a] person that in willful or wanton disregard for the safety of persons *initiates, continues, or impairs* the automated operation of an automated vehicle commits reckless driving." This provision is intended to bring within the definition of reckless driving a "wide range" of egregious behavior, including malicious hacking, deploying an unsafe vehicle, deliberately failing to prevent a crash, and testing a moving vehicle by deliberately jumping in front of it.[1] But that is the very problem. This section tries to cover far too much behavior—including behavior that isn't actually about "driving" in the first place.

     All of the egregious behaviors mentioned in the meeting draft are more appropriately targeted either by existing laws or causes of action, or by other provisions of the HAV Act itself. Malicious hacking violates the federal Computer Fraud and Abuse Act,[2] as well as state computer crime statutes.[3] Deploying an unsafe vehicle would violate various provisions of the HAV Act.[4] An automated driving provider that deliberately failed to prevent a crash of a vehicle it was operating would, pursuant to section 7(d) of this Act, be liable just as a human driver under existing traffic laws.[5] Deliberately failing to prevent a crash could also, depending on the circumstances, violate tort

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[1] *See* HAV Act, § 7(j), n. 57.

[2] 18 U.S.C. § 1030.

[3] *See, e.g.,* Cal. Penal Code § 502.

[4] *See* HAV Act, §§ 5–6, 7(e). It also would have violated provisions of the AV Start Act, which has recently been placed on hold. *See* http://observer.com/2018/02/senate-self-driving-car-legislation-safety-concerns/.

[5] *See* HAV Act, § 7(d).

duties of care and product liability laws. Testing a moving vehicle by deliberately jumping in front of it would constitute reckless endangerment under state criminal laws if the behavior created a "substantial serious risk of injury to another person" (reckless endangerment in the second degree) or demonstrated "a depraved indifference to human life" (reckless endangerment in the first degree).[6]

The current draft of the HAV Act notes that "[b]ecause of the wide variation in the relationship between vehicle codes and criminal codes, adoption of this provision may require particular care."[7] But even with the utmost care, this provision's one-size-fits-all approach is unworkable. If an action, such as malicious hacking, would not constitute reckless driving for a non-automated vehicle, it should not constitute reckless driving for an automated one. And because we have laws specifically designed to target the conduct the Committee is concerned about, there is no need to try to force such a wide range of behavior, including behavior that isn't actually about driving, within a definition of reckless driving.

Section 7(j)'s broadly sweeping language also raises significant due process concerns. Due process requires that criminal statutes provide ample notice of what conduct is prohibited. *Connally v. Gen. Const. Co.*, 269 U.S. 385, 390 (1926). Vague laws that do not "provide explicit standards for those who apply them . . . impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." *Grayned v. Rockford*, 408 U.S. 104, 108–09 (1972). A criminal statute that fails to provide fair notice of what is criminal—or threatens arbitrary and discriminatory enforcement—is thus void for vagueness. *Skilling v. United States*, 561 U.S. 358, 412 (2010) (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). A law that covers everything from malicious hacking to jumping in front a moving vehicle is a textbook case of unconstitutional vagueness.

EFF urges the Committee to omit this provision. Section 7(j) is not needed to target the behaviors the Committee is concerned about; including it will make the Act needlessly problematic.

We thank the Committee for the opportunity to highlight our concern. If you have any questions, please contact Jamie Williams at (415) 436-9333 ext. 164 or jamie@eff.org.

Sincerely,

Jamie Williams
Staff Attorney

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[6] *See, e.g.,* N.Y. Penal Code §§ 120.20, 120.25.

[7] HAV Act, § 7(j), n. 57.