
Some New (and Some Rejected) Exemptions to the Digital Millennium Copyright Act

By Patrick J. Myers

The U.S. Copyright Office issued its exemptions to the Digital Millennium Copyright Act of 1998 ("DMCA") on October 26. The exemptions, effective as of Oct. 28, define the limited circumstances in which users are allowed to circumvent technology that prevents access to copyrighted works, e.g., content encryption schemes. The exemptions are reviewed and issued anew every three years, so what was allowable prior to the ruling may not be anymore, and new exemptions, primarily directed to assistive technologies for the blind, are available. Companies that relied on previous exemptions should take heed that many are no longer lawful, and the Copyright Office affirmatively denied the universal legality of jailbreaking devices.

Background

If copyrighted content can be thought of as an exclusive club, access control schemes are the bouncers. The bouncers allow only authorized users and programs into to the club. Whereas copyright infringement deals with what a person does in the club, the DMCA criminalizes sneaking past or removing the bouncers.

An important tenet of the DMCA is the allowance for exemptions—uses that the Copyright Office, based on the recommendations of the Register of Copyrights, establishes to allow the public to send the bouncers home for the night, provided the end use of the copyrighted content is non-infringing. The rulemaking process allows proponents of an exemption to make an affirmative case to the Register of Copyrights why the circumvention should be allowed for a particular class of works and why not allowing it will substantially adversely affect those uses in the next three years; mere inconvenience does not support an exemption. The process also provides opponents of the exemption an opportunity to explain why it should not be allowed and to demonstrate the harm that will occur if it is. No exemptions are carried over from one exemption period to the next—every exemption is examined as if it was being presented for the first time,

though the impact of previously exempted works may be relevant in deciding if a similar exemption should be granted.

New Exemptions to the DMCA

Literary Works Distributed Electronically – Assistive Technologies: This exemption allows blind people or those with "print disabilities" to work around circumvention measures on lawfully obtained copies of an electronic book ("eBook") for the purpose of enabling "read aloud" functionality in the eBook. The only catch is that the author must be paid for the work as he or she would be if the book had been purchased through other channels. This caveat though should not be an issue for any eBook that is purchased from an established eBook seller.

Motion Pictures and Other Audiovisual Works – Captioning and Descriptive Audio: This exemption allows users to circumvent access control mechanisms to access the playhead and time codes in a motion picture or audiovisual work so that assistive technologies can be developed to render descriptions of the visual portions of the content. The exemption was made so that visually or hearing impaired users can enjoy a lawfully obtained copy of the work.

Prior Exemptions That Have Been Altered

Wireless Telephone Handsets – Software Interoperability: This exemption is similar to a 2010 exemption. It allows users to circumvent access control schemes on cellular telephones for the purpose of executing lawfully obtained software programs that the cell phone provider has not provided. This is commonly known as "jailbreaking" a phone. Although the proponents requested that the class of works be extended to include tablet computers, this expansion was rejected. The Register declined recommending that tablets be included because the record presented by the proponents did not support creating a separate class of "tablets" that was exempt.

Wireless Telephone Handsets – Interoperability with Alternative Networks: This exemption is also similar to a 2010 exemption. It allows users to circumvent access control schemes for the purpose of "unlocking" a cell phone and using it on a network that it was not originally purchased for. For example, purchasing a phone at a T-Mobile store and then unlocking the phone so it may be used on AT&T's network after the customer's contract with T-Mobile has expired. The change in this exemption is that owners of legacy phones may still circumvent the control schemes to unlock previously purchased phones, but for phones purchased more than 90 days after the effective date of the exemption, the exemption does not apply. The cause for the change was the Register felt that sufficient alternatives to unlocking a locked phone exist now, whereas they did not in 2010.

Motion Picture Excerpts – Commentary, Criticism, and Educational Uses: This exemption is also similar to a 2010 exemption, but has been broadened. It allows users to excerpt portions of motion pictures, lawfully obtained on DVDs or online—the online aspect not being part of the 2010 exemption—where the use is for the purposes of commentary or criticism. Additionally, the use must also be: in noncommercial videos, in documentary films, in nonfiction eBooks offering film analysis, or in educational classes such as film studies or those that require close analysis of media excerpts.

Proposed Exemptions That Were Not Adopted

Literary Works in the Public Domain – Digital Access: This was not adopted simply because the DMCA is directed to preventing circumvention of access control schemes that protect copyrighted works and public domain works are not protected by copyright. Therefore, the Register concluded that the proposal was beyond the scope of the exemption rulemaking proceeding.

Video Game Consoles – Software Interoperability: This proposed exemption was similar to the cellular phone exemption, and would allow users to jailbreak their video game consoles. The Register determined that the proposed exemption did not meet the requisite showing that, absent the exemption, the inability to circumvent the access controls would have a substantial adverse impact on the ability to make non-infringing uses. Additionally, the opponents provided compelling evidence that allowing an exemption would diminish the value of, and impair the market for, the affected code because the game consoles would no longer be a secure platform for the development and distribution of legitimate content. Without the evidentiary proof from the proponents and the weighty harm provided by the opponents, the Register recommended not creating the requested exemption.

Personal Computing Devices – Software Interoperability: This proposed exemption, similar to the proposed exemption for jailbreaking video game consoles, was directed to allowing users to circumvent “application locks” and “Operating System locks” on personal computing devices—a broad class meant to cover almost any device: mobile phones, tablets, eBook readers, and more—so that the users could install alternative programs or operating systems on the personal computing device. The proponents—many of whom were also proponents of the video game console proposal—argued that the telephone exemption created by the 2010 rulemaking process supported this exemption. Additionally, they expressed concern that Microsoft’s announcement that it will require hardware manufacturers for Windows 8 to enable a secure boot system will prevent users from installing 3rd party applications or operating systems. While this secure boot system will prevent viruses from installing malicious code, the proponents argued it will also prevent users from lawfully and intentionally installing alternative operating systems on the new devices. The proponents, however, failed to present evidence showing the harm, instead relying primarily on speculation of harm. This showing was insufficient, and the Register recommended not adopting this exemption.

Motion Pictures and Others Works on DVDs and Other Media – Space Shifting: This proposed exemption was directed to allowing users to copy the content on lawfully obtained DVDs to other electronic devices that do not have a DVD player. To do this, the DVD’s Content Scramble System (CSS) would need to be circumvented to access the underlying content. The proponents failed to show the lack of an exemption was having an adverse impact on non-infringing uses. Indeed, the Register noted that a similar exemption was proposed in 2006 and in that rulemaking, it was discussed that space-shifting may not be a non-infringing use. The DVDCCA—who provides DVD’s CSS access controls and was an opponent of the exemption—supported this interpretation, and noted that consumers had not purchased the motion picture itself, but only a DVD of the motion picture. Furthermore, the proponents did not present any court ruling that supported the assertion that space shifting is a non-infringing use; the famous Sony Betamax case was presented, but the Register noted that case was about time-shifting, not space shifting. As a result, the Register recommended this exemption not be adopted.

Prior Exemptions That Are No Longer Available:

Because the exemptions to the DMCA are decided anew every three years, if an existing exemption is not proposed for a subsequent rulemaking, it lapses. Two such exemptions available as of 2010 are no longer lawful circumventions of access control mechanisms.

Video games accessible on a personal computer and protected by technological protection measures that control access to lawfully obtained works, when circumvention is accomplished solely for the purpose of good faith testing for, investigating, or correcting security flaws. This 2010 exemption allowed users to circumvent the access control mechanisms for the purpose of finding security flaws in the video game software. It was not considered in the 2012 rulemaking.

Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete. Some computer programs require that a piece of hardware be present, e.g., plugged into a USB port, when the program was running. If the software was unlawfully copied, the infringing user would not have the dongle and therefore could not run the software. The 2010 exemption allowed users to circumvent the access control schemes if the dongles that were required to run the software were no longer manufactured or available in the commercial marketplace. This exemption was not considered in the 2012 rulemaking.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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