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Copyright Ruling Allows Bypass of DVD, Smartphone Protection Mechanisms

On July 27, 2010, the Librarian of Congress, acting on the recommendation of the Copyright Office, exempted six classes of copyrighted works from a provision of the Digital Millennium Copyright Act (“DMCA”) that prohibits users from circumventing copyright protection mechanisms (e.g., DVD or iPhone® encryptions or “digital locks”).¹ The six exemptions will be effective for the next two years and will allow users to engage in the following activities: bypass DVD encryption for certain narrow educational/non-commercial purposes, “jailbreak” iPhones® or similar smartphone devices for personal use, unlock personal cell phones for use on another network, “crack” video game software access restrictions to investigate and correct software security flaws, bypass malfunctioning or broken hardware dongles to enable dongle-activated software to function, and circumvent text-to-speech restrictions on eBooks when no alternative read-aloud eBooks exist. Compared to the 2000, 2003, and 2006 DMCA exemptions, the 2010 DMCA Exemptions are broader and tend to favor end-users more so than copyright owners.

Title 17 U.S.C. § 1201(a) prohibits circumvention of access control technologies used by copyright owners to protect against copyright infringement (i.e., a digital lock or digital rights management (“DRM”) system that protects content on DVDs/CDs, smartphones, eBook readers, and other devices from unauthorized copying). Every three years, the DMCA requires the Register of Copyrights to conduct a public rulemaking review, consult with the Assistant Secretary of Communications and Information, and recommend to the Librarian of Congress classes of copyrighted works that should be exempted from the DMCA’s anti-circumvention provisions. The purpose of this review is to ensure that end-users can make non-infringing uses of copyrighted works that are similar or analogous to the uses that they had been able to make before the DMCA was adopted in 1998. Anti-circumvention exemptions can be granted to a class of copyrighted works if class users are, or are likely to be, adversely affected by being unable to make non-infringing uses of those particular classes of works. The Register of Copyrights conducted rulemaking reviews in 2000, 2003, 2006,² and most recently in 2009. The Register did not issue a recommendation, and the Librarian did not issue a final decision for the 2009 review year until July 2010.³

Summarized below are the six DMCA exemptions that go into effect today (July 27, 2010) and will remain in place until at least the 2012 rulemaking review.

1. “Short Portions” of DVD Movies for Educational/Noncommercial Use. The first exemption is a renewal and expansion of a 2006 exemption.⁴ This exemption allows any person to bypass the access

¹ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43,825, 43,838–39 (Library of Congress, Copyright Office July 27, 2010) (to be codified at 37 C.F.R. § 201.40) (hereinafter “2010 DMCA Exemptions”).

² Two exemptions were granted in 2000 (<http://www.copyright.gov/fedreg/2000/65fr64555.html>), four exemptions were granted in 2003 (<http://www.copyright.gov/fedreg/2003/68fr2011.html>), and six exemptions were granted in 2006 (<http://www.copyright.gov/fedreg/2006/71fr68472.html>). These prior exemptions have been superseded by the 2010 DMCA Exemptions. See 17 U.S.C. § 1201(a)(1)(D).

³ 2010 DMCA Exemptions at 43,826–27.

⁴ *Id.* at 43,827–28.

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restrictions on a DVD movie to copy a “short portion” of the movie for purposes of commentary or criticism in a documentary or noncommercial video. It also allows university film-and-media-studies students and professors to bypass DVD encryption to comment on or criticize short clips of a movie in an educational setting. The exemption does not apply to college students or professors generally (just film students and professors), and it does not extend to K–12 students or educators. The exemption also does not apply to any audiovisual work, such as a video game or a slide show; it only applies to DVD movies. Also, because many low-quality alternatives to bypassing a DVD’s encryption exist (e.g., video captures, etc.), “users must make a reasonable determination that heightened [DVD video] quality is necessary” to comment on or criticize the copyrighted movie before circumventing a DVD’s copy-protection scheme.

2. Smartphone “Jailbreaking.” The second exemption is new and allows users to “jailbreak” or “crack” their smartphones (e.g., iPhone[®], BlackBerry[®], etc.) for the purpose of running independently created applications not approved by the maker of the smartphone or the smartphone’s operating system.⁵ The Librarian found that “jailbreaking” a smartphone was fair use⁶ because “the purpose and character of the modification of the operating system is to engage in a private, noncommercial use intended to add functionality to a device owned by the person making the modification.” The Librarian also noted that enabling interoperability in a functional operating system is favored by copyright law, and “jailbreaking” a phone normally requires very little modification of the underlying copyrighted software (e.g., the unauthorized modification requires copying 1/160,000 of the iPhone[®] operating system). The Librarian also found that “jailbreaking” will not negatively impact the market for the copyrighted smartphone operating systems because an end-user must buy a smartphone with a copy of the software on it before the phone can be “jailbroken.”

3. Unlocking Cell Phones. The third exemption is a renewal of an exemption granted in 2006 that allows cell phone users to modify a phone’s embedded software or firmware to switch cellular networks (i.e., unlock the phone to transfer it from AT&T[®] to Verizon[®]).⁷ The Librarian granted this exemption based on a finding that most cell phone users are owners of a copy of the embedded software on their phones, and therefore should be allowed to make a new copy or adaptation of their cell phone software under the software-use exception found in § 117 of the Copyright Act. Significantly, this exemption does not allow third parties, such as cell phone recyclers, to sell unlocked phones without authorization from the copyright holder. This exemption also does not exempt an end-user from liability for breaching his or her contract with a cellular service provider by unlocking a phone.

4. DRM-Limited Video Games. The fourth exemption is a renewal and modification of an exemption granted in 2006.⁸ This exemption allows a user to circumvent the DRM software that protects many video games from unauthorized copying for the purpose of conducting computer-security research or correcting security vulnerabilities. The Librarian noted that DRM software has created computer-security vulnerabilities that have allowed attackers to compromise the security of more than one billion PCs. The Librarian thus found that it was fair use to circumvent DRM software to study the security implications of the DRM software itself and to correct any vulnerability discovered in the DRM software.

⁵ *Id.* at 43,828–30.

⁶ The Librarian did not find that this modification was permitted by the smartphone user’s contract with the operating system manufacturer (i.e., allowed by the iPhone[®] license agreement) or the software-use exception to the Copyright Act codified at § 117 that allows the owner of a copy of a software program to copy and modify that copy of the program for his or her own use. 2010 DMCA Exemptions at 43,829.

⁷ *Id.* at 43,830–32.

⁸ *Id.* at 43,832–33.

5. Software Protected by Hardware Dongles. The fifth exemption is a renewal of a 2006 exemption that permits a user to bypass a software lock that requires a hardware dongle when the dongle is broken or obsolete, and cannot be replaced easily.⁹ A hardware dongle acts like a key that unlocks a software program. Typically, a dongle connects to a computer's printer or USB port. If a hardware dongle cannot be bypassed when it becomes damaged or obsolete, and it cannot be replaced, users may be unable to run a software program that they lawfully purchased. This exemption notably does not apply when a dongle is made obsolete by an operating system upgrade or when new computer hardware no longer has a printer or USB port, if a replacement dongle can be purchased.

6. eBooks With Restricted Read-Aloud Functionality. The sixth exemption is a renewal of a 2006 exemption that allows users to bypass the DRM protection that stops an eBook from being read aloud (i.e., converting the text into speech) if the eBook content is not otherwise available in a format that can be read aloud.¹⁰ This exemption is significant because it appears to allow owners of eBook readers, such as Amazon.com's Kindle[®] or Sony's Reader[®], to bypass a publisher's restriction on the read-aloud function when the eBook is not available in a format that can be converted to speech.

Although the six exemptions summarized above authorize end-users to make new uses of products that contain copyright protection mechanisms, it is important to note that they do not apply to other provisions of the DMCA. For example, businesses still cannot market and sell devices or software programs that are primarily designed to circumvent access controls (i.e., copy-protection cracking devices or services).¹¹ There are several strategies that copyright owners and end-users can use to mitigate or take advantage of the 2010 DMCA Exemptions and, given the complexity of the exemptions and the underlying DMCA provisions, the exemptions should be carefully analyzed before business practices are altered to take advantage of the ruling.



If you have any questions about this development, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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⁹ *Id.* at 43,833–34.

¹⁰ *Id.* at 43,837–39.

¹¹ See 17 U.S.C. § 1202(a)(2) & (b)(1); 2010 DMCA Exemptions at 43,831 (noting that the exemptions do not authorize commercial cell phone recyclers to unlock and resell unlocked phones).