

Copyright Office Begins New DMCA Exemption Rulemaking

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Among other things, the Digital Millennium Copyright Act (DMCA) prohibits circumvention of technological measures that control access to copyrighted works. However, the DMCA requires the Copyright Office to periodically provide exemptions to this prohibition so as to allow persons to make noninfringing uses of certain works, where access to such works would otherwise require prohibited circumvention.

The DMCA provides that any such exemptions determined by the Copyright Office are valid for three years only, and a new rulemaking must be conducted every three years to determine whether to keep the existing exemptions and/or to add any new ones. The Copyright Office has just begun its fifth three-year rulemaking proceeding, soliciting comments on proposed exemptions for the next three years.

The fourth rulemaking proceeding became effective Aug. 6, 2010, and resulted in the following six exemptions:

1. Short clips of motion pictures on DVDs may be used by college professors and students for educational purposes, and by others in documentary films and noncommercial videos, even if such use requires circumvention of the Content Scrambling System (CSS) designed to prevent copying. Circumventing CSS would otherwise be considered circumvention of a technological measure designed to prohibit access to copyrighted works;
2. The second and most well-known exemption allows “jailbreaking” of smartphones to run third party applications. (Despite this exemption, “jailbreaking” may still void the cellphone warranty, if prohibited by the manufacturer.)
3. The third exemption allows cellphones to be used with different carriers or “networks” than the carrier who provided the cellphone, thereby circumventing a mobile phone lock, so long as the use is authorized by the *new* carrier. In other words, theft of service is not permitted;
4. There is a very limited exemption for video games, allowing circumvention “solely for the purpose of good faith testing for, investigating, or correcting security flaws.” Even then, such circumvention is permitted *only* if the information is used primarily to promote security and “in a manner that does not facilitate copyright infringement or a violation of applicable law”;
5. The fifth exemption allows access to lawfully obtained computer programs protected by security keys called “dongles” that are damaged, malfunctioning or obsolete; and
6. The last exemption allows circumvention by end users of e-book access controls that prevent enablement of the e-book’s read-aloud function or of “screen readers that render text into a specialized format.” This exemption allows blind and visually impaired individuals to receive the benefit of lawfully obtained e-books.

All of these exemptions will expire at the end of the current rulemaking proceeding unless commenters propose to maintain them and the Copyright Office agrees to do so. The Copyright Office is also soliciting proposals for any new exemptions. However, all proposals (whether to maintain existing exemptions or to create new ones) must be supported by evidence of “actual harm” resulting from the prohibition on circumvention, particularly harm based on first-hand knowledge rather than speculation or conjecture. As the existing exemptions demonstrate, they are very narrowly construed by the Copyright Office and all proposals will be considered de novo.

Anyone submitting a proposal must identify the technological measure that is the source of the problem and explain the noninfringing activity that is being prevented thereby. The proponent must also show why the access-protected copy of the work is needed and why alternate methods (including use of available copies in unprotected formats) will not suffice.

Note that this rulemaking does not pertain to circumvention of technological measures that protect the *rights* of a copyright owner, i.e., the right to copy, adapt, distribute, publicly perform or publicly display a copyrighted work. That is because any violation of those rights would be protected by fair use, if applicable. However, there is no corresponding fair use right applicable to mere *access* to a copyrighted work, since that prohibition was created by the DMCA.

Proposals for any exemptions (old or new) must be submitted to the Copyright Office by Dec. 1, 2011. At a later date, the Copyright Office will post and accept comments on these proposals (but will not accept any new proposals) for a 30-day period, followed by hearings in Washington, DC and possibly in California as well.

Let us know if you are interested in proposing an exemption or if you have any questions about this proceeding or the DMCA generally.

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