

# ANTICIRCUMVENTION EXEMPTIONS

## THE HOW AND WHY OF EXEMPTIONS TO THE DMCA

The Library of Congress: It now means something to millions of teenagers. With all the hubbub surrounding the July 26 announcement of “Rules for Exemptions Regarding Circumvention of Access-Control Technologies” to the Digital Millennium Copyright Act by the Librarian of Congress, the reasoning behind the rules, the source of the authority to promulgate the exemptions, and the existence of prior exemptions have become lost. Admittedly, the news that a previously illicit activity, “jailbreaking” a phone, now has the stamp of government approval, is enough to make one forget about the whys and wherefores of how that came to be. The Librarian of Congress has never received so much press.

From whence does the authority to make the exemptions derive and why was that authority granted? Authorization originates in the Digital Millennium Copyright Act<sup>1</sup>, DMCA to its friends, which enacted Chapter 12 of the copyright law found in Title 17 of the US Code. Chapter 12 provides for “Copyright Protection and Management Systems,” making it illegal for anyone to circumvent the technological procedures put in place to prevent unauthorized access to or copying of copyrighted works. To ensure that this addition is not over-inclusive and onerous for those wishing to make non-infringing use of copyrighted work, a procedure for carving out exceptions was built into the DMCA. The procedure, as outlined in §1201(C), involves the Librarian of Congress, upon the recommendation of the Register of Copyrights, in consultation with the Assistant Secretary for Communications and Information of the Department of Commerce, determining every three years whether there are those adversely affected by the prohibition on circumvention. The Librarian will take under advisement: the availability for use of copyrighted works, availability for use for nonprofit archival, preservation, and educational purposes, the impact of the prohibition on the ability to criticize, comment, research, etc., the effect of circumvention on the market for or value of the work, and whatever else the Librarian deems pertinent.

The rulemaking procedure was set to begin 2 years after the implementation of the DMCA in 1998, then every 3 years thereafter. It follows, then, that classes of exemptions were published in 2000, 2003, and 2006. The latter were to expire in October of 2009, but the new set was not yet ready, so the October expiration date was stricken from the code. This week the [long?]-awaited classes of exemptions were announced by the Librarian. Headlines broadcast the most celebrated exemptions, numbers 2 and 3, pertaining to wireless phones, essentially allowing the phone owner to jailbreak it. What much of the public may not realize was there were four other exemptions. Though they received less attention, they are interesting nonetheless. These are the basics on the others: Exemption 1 – allowing circumvention of copy protection on DVDs to permit fair use for the purpose of criticism or comment in educational uses, documentary filmmaking, and noncommercial videos. Exemption 4 – good faith security investigation and testing of video games accessible on personal computers. Exemption 5 – allowing circumvention to use a computer program without the necessary dongle, where

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<sup>1</sup> Pub. L. No. 105-304, 112 Stat. 2860

the dongle is obsolete. Exemption 6 – evading access controls to allow enabling read-aloud or specialized text functions of ebooks, where all ebooks contain such controls.

For those interested in more of the background on Exemption 4, see the comment submitted by J. Alex Halderman, an Assistant Professor of Electrical Engineering and Computer Science at the University of Michigan.<sup>2</sup> In brief, he was a proponent of an exemption due to the harm caused by Sony's rootkit and Macrovisions's SafeDisc software. If you know what a dongle is, admittedly I didn't until a month ago, then you understand the reasoning behind Exemption 4. The comment submitted by Joseph Montoro Jr. highlights that reasoning.<sup>3</sup> This exemption was essentially in place in 2000, then renewed in 2003 and 2006. Similarly, Exemption 6 on ebooks has been in place since 2003. Other exemptions can also be found in closely-related prior incarnations, such as Exemption 3 in 2006, Exemption 4 in 2006, and Exemption 1 in 2006. I appreciate the fluidity of the law in this area, as it requires the flexibility to change along with technology. However, it seems to be somewhat inefficient to continue to propagate the same exemptions, that have already been established, every three years. For example, clearly, the dongle exception is necessary, and changes in technology will not alter that fact. Yet comments and responses must be fielded in its favor every three years, 2010 makes the fourth time the exemption appears. In light of wasted time and resources, it is unfortunate. On the other hand, in making sure our country is not stuck with anachronistic laws, the current system is doing fine.

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<sup>2</sup> <http://www.copyright.gov/1201/2008/comments/halderman-reid.pdf>

<sup>3</sup> <http://www.copyright.gov/1201/2008/comments/montoro-joseph.pdf>