

Darren Meyer, in support of DMCA Exemptions for:

- Jailbreaking of Tablet and Smartphone devices (5)
- Jailbreaking of Personal Computing devices (4)

General Summary

The DMCA's provisions against circumventing digital locks are designed to protect copyright-holders of creative works by providing legal penalties for people who seek to override protections those copyright-holders place upon digital copies of their works. The goal is to make it more difficult to produce illegal copies of illicit works.

The act of "jailbreaking" any device certainly circumvents digital locks. However, such circumvention is not done to enable illicit access to or copies of protected creative works. Rather, it is done to enable the production and use of *additional* creative works. For this reason, jailbreaking activities should be explicitly exempted from the DMCA restrictions against circumventing digital locks.

Class 5 - Tablet and Smartphone Devices

I support renewing the exemption for Jailbreaking Smartphones, and extending the exemption to include Tablet devices.

Smartphone devices have already received an exemption, which is now due for renewal. All of the reasons this exemption was originally granted remain valid, and the exemption should be extended. Additionally, the exemption for smartphones has enabled a robust marketplace for additional creative works (mostly in the form of software) that can only be provided on devices which have been jailbroken. The Cydia Store, a marketplace for software that runs on jailbroken iOS devices, alone has achieved \$10M in revenue as of April 2011 (<http://thenextweb.com/apple/2011/09/24/cydia-and-jailbreak-apps-the-ecosystem-developers-and-increasing-revenues/>). Given that Apple's revenue from it's official iOS AppStore and devices continues to grow, topping \$15B as of Q3 2011 (<http://images.apple.com/pr/pdf/fy11q3datasum.pdf>), it seems clear that this revenue is not being "stolen" from official app sales, but represents a separate market.

The function of copyright protection is, as the US Constitution (Article I, Section 8, Clause 8) states: "The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Failing to renew the exemption for smartphone devices would, rather than protecting the creators of jailbreak-only creative works, put their works into a state of questionable legal status as well as artificially limit the available market for them. This would run counter to the very purpose of copyright.

Regarding extending the exemption to Tablet devices, it is merely a logical step. Most common tablets use the same operating systems and basic hardware as modern smartphones, and the reasons to jailbreak them are the same. The only meaningful differences between a Tablet device and a Smartphone device are the device size and the lack of telephony components. In fact, the products are so similar that I and others use Tablet devices for telephony services through VOIP providers such as Skype, making the tablet functionally equivalent to a Smartphone.

Class 4 - Personal Computing Devices

I support a DMCA exemption for Jailbreaking of Personal Computing devices.

As personal computing devices begin to take cues from the Smartphone and Tablet markets (<http://gigaom.com/2010/10/20/back-to-the-mac-the-executive-summary/>), the importance of preserving a buyer's ability to use the computing devices they purchase in any legal way they see fit is becoming more important.

While it is certainly possible to argue that a jailbroken device may be used to simplify circumventing controls on other copyright-protected media, the primary purpose of jail breaking a device is not one of infringement but one of allowing additional, non-infringing creative works to be used. Most OS restrictions put in place by a manufacturer are for the purpose of controlling the buyer's access to additional creative works -- for example, by requiring that buyers only purchase media through an approved store. Jailbreaking such devices allows the buyer to have additional choice of outlets for additional creative works, which in turn makes creative works that the "approved store" may not carry available to a user base. This is in harmony with the copyright mandate to promote the progress of the useful arts.

Further, unlike Smartphone devices, which are most commonly purchased under a contract in which the cost of the device is subsidized through the cost of contracted services, most personal computing devices are purchased outright. Because of this, it is essential for the Copyright Office to protect the buyer's First Sale rights to do with the equipment -- which includes the operating system that comes with it -- as they wish, within constraints of law. Every argument for continuing the exemption for jail breaking Smartphone devices applies equally to other personal computing devices.