

Comment Regarding a Proposed Exemption (Under 17 U.S.C. 1201)

Item 1. Commenter Information

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Item 2. Proposed Class Addressed

Proposed Class 16: Jailbreaking — wireless telephone handsets

Item 3. Rebuttal Regarding Proposed Exemption

The argument from the BSA essentially comes down to "Android". Despite our extensive arguments that this has little to do with the installation of applications (that the major use of jailbreaks is to modify system software to make extensive modifications to areas that normally cannot be touched by developers), the BSA pretends they do not understand, and decides to quote the EFF out of context on the ability to install arbitrary applications on Android devices. The next sentence makes it clear (with italics!) that jailbreaks aren't about installing arbitrary applications, but are about giving programs "more capabilities".

The BSA then points out that a some devices, those from a limited set of manufacturers, are able to be jailbroken "out of the box". They hand wave away arguments made in my earlier comments that the devices users actually want to purchase and thereby need to have jailbroken are the premier ones that "have the highest quality hardware, with the latest technology for their screens and their cameras"—and which are, almost arbitrarily, the ones that manufacturers always have decided to lock down (or are simply from the best manufacturers)—as "preferences" which are "not justifications for circumvention".

This is an argument that, because there might technically exist a single device that is "open", even if it is low quality, even if it is very expensive, even if it is not a device that fits in the user's hands or that is compatible with the user's other hardware, that this is sufficient argument that a user should have to buy that device in order to not be locked out of reasonable modifications to their own hardware. This is absurd: this argument is a "back door" to the DMCA exemption process, allowing a manufacturer to offer a device they know users would never purchase simply to claim an alternative technically exists.

Finally, as I have pointed out in my comments on class 17, it is not reasonable for the BSA to claim that the success of the App Store is in any way attributable to the iPhone being a locked down platform, given that for the majority of time the iPhone has been in existence the iPhone has been "de facto" open: every minor version of iOS—and even many entire models (due to low-level vulnerabilities in the bootloaders)—were broken since the iPhone was released, with the one exception of iOS 6.0 (which was, of course, eventually jailbroken, but not until the later release of iOS 6.1), until iOS 8.2 (which was released just two months ago, and which had a much shorter release cycle than every previous version of iOS, making it reasonable that it would have never gotten broken).