

## **How Much Do You Care About Your Right-to-Repair?**

The two decade old Digital Millennium Copyright Act (“DMCA”) was intended to prevent circumvention of protective measures placed on copyrighted material such as movies and music. In the absence, or perhaps scant presence, of legislative updates, the same laws used to govern movies and music have been extended to new technologies brought by the internet age. To keep pace with emerging technology, section 1201 of the DMCA calls for triennial proceedings to determine the types of activity that are temporarily exempt from anti-circumvention laws. The proceedings are meant, in part, to prevent overreach of the DMCA into activities that should remain fair use.

At the same time, software is quickly becoming ubiquitous and more vulnerable to reverse engineering, necessitating intellectual property protection outside of trade secrecy. The issues of increasing importance is determining what types of protection will continue to be available to copyrighted software and how “impermissible circumvention” could affect the ability of those who are neither software copyright owners or licensees to tinker with copyrighted software associated with hardware.

In the seventh triennial section 1201 proceedings, interested parties have been given the opportunity to submit comments for consideration and participate in public hearings that were held by the United States Copyright Office earlier this year. In this article, we will discuss relevant copyright law and DMCA history, summarize some of the comments and concerns that have been submitted, and how the results may affect protection to copyright owners as well as non-licensed users.

### **The Exemption Proceedings**

In these rulemaking proceedings, the Library of Congress, upon recommendation of the Register of Copyrights, determines exemptions to prohibitions to circumvention in particular uses. The intent of the proceedings is to evaluate, on a case by case basis whether it is appropriate to apply DMCA restrictions to particular emerging technologies and the limited types of “innocent” uses that were outside the intended scope of the restrictions.

One controversial example is the exemption made for unlocking smart phones allowed in 2006, again in 2009, but then not renewed in 2012. A ruled exemption in one cycle, in the absence of any other lawmaking, may not hold in the very next cycle. Uncertainty in this respect has the effect of deterring activity that may otherwise be permissible especially when it comes to investing in relevant business ventures upon reliance on previous exemption cycles. In this example, the decision not to renew the exemption was repealed by Congress in 2014 by passing the Unlocking Consumer Choice and Wireless Competition Act (“Unlocking Act”). The need for the intervening legislation has further highlighted the uncertainty of the rulemaking process.

### **Expansion of Unlocking and Jailbreaking Devices**

In preparation for the seventh triennial section 1201 proceedings that took place earlier this year, many petitions were submitted to renew existing exemptions. Additionally, there were a number of proposals to broaden classes of exemptions. For example, the Institute of Scrap Recycling Industries (ISRI) has proposed extending the exemptions regarding circumvention of technological protection measures (“TPM”) for unlocking all computer programs without

enumerating categories of devices, such as the requirement that the device be “used,” and requiring that the wireless network be a “telecommunications network.” The extension proposed by ISRI would allow consumers the ease of switching carriers and other types of service providers on connected devices. For example, ISRI proposes the exemption should be extended to cover all wireless devices, such as security systems, farming equipment, and GPS trackers.

In another similar exemption class for “jailbreaking,” the Electronic Frontier Foundation (“EFF”) has proposed extending the jailbreaking exemption from “portable all-purpose mobile computing devices” to “general-purpose portable computing devices.” The effect of the change will allow users to use additional or alternative software on any general purpose device designed to be used at home or carried on the individual. For example, EFF suggests that the expansion cover voice assistant devices such as Amazon Echo to access streaming services, smartphones, tablets, personal computers, and other devices.

### **Expansion Diagnosis, Repair and Modification**

Similarly, a number of submissions have been made to expand the exemptions relating to diagnosis, repair, and modification of computer programs associated with motorized land vehicles to all devices such as “internet of things,” other vehicles, appliances, computers, toys, among others. For example, the broadening will allow consumers to modify the software of home appliances to repair or perhaps enhance the efficiency of the appliance. This means that consumers would not be required to use approved technicians to make such repairs and can tinker with their own devices, such as vehicles and appliances. The exemption is useful for customization of devices for more tech savvy consumers, but would be limited to the owner of the device rather than a third party technician.

With this limitation in mind, several petitions propose an extension of exemptions of repair to third parties working on behalf of an owner such as a car mechanic. iFixit is among the handful of proponents for the proposed class broadening to third parties. iFixit argues that consumers should be able to hire a technical service of their choice to return their devices to working order. Although reverse engineering and tinkering is involved, there is no intent to pirate or steal any of the underlying software. For example, a mechanic can modify the software of a tractor to enhance performance or to make a repair. As eBay expressed, car mechanics were traditionally able to increase the power of a car by using aftermarket parts or tuning of existing hardware in the car, however newer cars require tuning to be performed in the software. Moreover, the argument is that recalibration of software with the assistance of expert third party technicians should be fair use and within the rights of the device owner.

### **What The Outcome Could Mean For You**

In light of the uncertainty outlined above, as an owner of the intellectual property in software, it is important to enhance protective measures to make it more difficult for users to access and modify the software. A successful rejection of exemption could result in three years of anti-circumvention protection. However, the protection may be easily reversed in a subsequent triennial proceeding or intervening legislation, as we saw in the case of unlocking cell phones. If your software requires accessing other devices, such as a voice assistance device, the expansion of the exemptions described above could provide an answer to the question of legality that currently exists. In the meantime, we await the announcement regarding results of

the 1201 proceeding from the Librarian of Congress to ascertain the exemptions for the next three years.