

# Copyright Alert

## New Exemptions from DMCA Anti-Circumvention Rules Primarily Impact Narrowly Circumscribed Uses and Industries

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### SUMMARY

Effective November 27, 2006, the Librarian of Congress announced the adoption of six exemptions to the Digital Millennium Copyright Act's ("DMCA") anti-circumvention provision, the exemptions to apply for the next three years. The announcement renewed three exemptions granted in prior rulemakings: computer programs protected by obsolete dongles; computer programs and video games distributed in obsolete formats; and eBooks with disabled read-aloud functions. In addition, three new classes of works received exemptions: audiovisual works in a university film archive; firmware on mobile telephone handsets; and sound recordings on CDs protected by access controls that create security vulnerabilities.

These exemptions will have significant impact primarily in the particular industries to which they pertain. Importantly, however, the new exemptions represent the first time that the Librarian has defined exemptions in terms of particular types of use and particular groups of circumventers—suggesting a potential for additional specialized exemptions in future years based on the nature of users and uses. See <http://www.copyright.gov/fedreg/2006/71fr68472.html> for the final rule.

### RULEMAKING BACKGROUND

The DMCA, enacted in 1998, prohibits *inter alia* the act of circumventing technological measures that effectively control access to copyrighted works. The prohibitions are qualified by several narrowly tailored statutory exceptions. In addition, the statute calls for the Register of Copyrights to conduct a triennial rulemaking to identify classes of copyrighted works for which noninfringing uses are likely to be adversely affected. Classes of works selected by the Register and approved by the Librarian of Congress are exempt from the DMCA's anti-circumvention provision during the subsequent three-year period.

In the most recent DMCA rulemaking, 74 classes of works were proposed for potential exemption. After publication of proposals and a period for replies, the Register held hearings on selected proposals in Washington, D.C. and Palo Alto, CA. After several months of consideration, the Register announced her recommendation for the exemption of six classes of works. Of these six, three received renewals of exemptions granted in prior rulemakings. The remaining three classes were granted exemptions for the first time.

### RENEWED EXEMPTIONS

**"Dongled" programs.** In the first DMCA rulemaking in 2000, the Librarian approved an exemption for computer programs protected by dongles that are obsolete and prevent access due to malfunction or damage. Dongles are hardware locks attached to a computer that prevent unauthorized access to software. Recognizing that dongles can prevent authorized access to licensed software if the dongles malfunction and replacements are unavailable, the Librarian renewed this exemption for a third term.

**Obsolete formatted programs and games.** In response to a proposal submitted by the Internet Archive, the Librarian renewed an exemption, first granted in 2003, for computer programs and video games distributed in obsolete formats that require the original media or hardware as a condition of access. This exemption, however, applies only when circumvention occurs for the purpose of preservation or archival reproduction of published digital works by a library or archive.

**eBooks for the blind.** The third renewed exemption, proposed by the American Federation for the Blind, comprises literary works distributed in eBook format. Access controls protecting such works can be circumvented, provided that all existing eBook or authorized digital text editions disable the book's read-aloud function or prevent screen readers from rendering the text in a specialized format, such as braille.

## NEW EXEMPTIONS

**Film studies compilations.** The first new exemption addresses the difficulty faced by film studies professors in excerpting films distributed on DVD. In response to the showing that enforcing the anti-circumvention bar would have an adverse impact on the academic community's noninfringing uses, the Librarian exempted audiovisual works held in a college or university film library when circumvention occurs in order to make compilations of film excerpts for classroom educational use.

**"Locked" cell phone handsets.** In addition, the Librarian ruled in favor of the Wireless Alliance, which sought to address the "locking" of cellular handsets, the widespread practice of preventing a handset from operating on competing providers' networks. The exemption allows the circumvention of firmware access controls on wireless telephone handsets, but solely when circumvention occurs in order to lawfully connect to a wireless communication network.

**Audio CD security issues.** Finally, an exemption was granted in response to a proposal submitted by Princeton University security researchers Professor Edward Felten and J. Alex Halderman. This exemption permits circumvention of technological measures that protect audio CDs if those measures create or exploit security flaws on personal computers. The exemption enables both security researchers and consumers to circumvent such measures in order to test, investigate, or correct security flaws or vulnerabilities, such as the rootkit distributed on Sony BMG CDs in 2005.

### IMPACT

Because the newly announced exemptions to the DMCA's anti-circumvention provision are narrow in their scope, their effects will likely be felt only in the specific industries they were intended to reach. Within those narrow confines, however, the exemptions are likely to influence the design and adoption of access controls over the next three years.

In the context of access controls on CDs, for example, both protection measure vendors and content owners should take additional steps to ensure that these controls do not introduce security threats onto the computers of consumers. In addition to the potential liability and negative publicity brought on by the discovery of such threats, the public will have significant latitude in removing or disabling these controls.

For cellular handset providers, the new exemption may force a rethinking of industry-wide practices if consumers are able to take advantage of the ability to remove the software that ties their handset to a particular network.

If so, providers may consider new technological controls, pricing structures, or contractual obligations to retain subscribers.

The scope of these exemptions, however, is limited. These six exemptions apply only to the DMCA's anti-circumvention provision. They do not immunize conduct from liability for copyright infringement after the access control is circumvented. They also do not extend to the DMCA's prohibition against *trafficking* in anti-circumvention devices. Distributing a tool that enables circumvention remains a violation of the DMCA regardless of the protection an act of circumvention may enjoy under an exemption.

Finally, the apparent increase in the Copyright Office's willingness to recommend exemptions is worthy of note. The six exemptions granted in the 2006 rulemaking outnumber the exemptions granted in either of the previous rulemakings. In addition, the Register of Copyrights for the first time defined exemptions in terms of particular types of use and particular groups of circumventers. If this trend continues, it may suggest a proliferation of highly specific temporary exemptions that benefit particular actors and industries.

For further information on copyright issues in the digital and online environments, please contact Laurence Pulgram, Chair of the Copyright Litigation Group, at 415.875.2390 ([lpulgram@fenwick.com](mailto:lpulgram@fenwick.com)), or Mitchell Zimmerman, Chair of the Firm's Copyright Group, at 650.335.7228 ([mzimmerman@fenwick.com](mailto:mzimmerman@fenwick.com)).

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