

February 10, 2012

U.S. Copyright Office  
James Madison Memorial Building, Room LM- 401  
101 Independence Avenue SE.  
Washington, DC  
<http://www.regulations.gov>

**Re: Proposed Rule - Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies**

Dear Sir or Madam:

First and foremost, allow me to thank you for the opportunity to comment on the Notice of Proposed Rulemaking relating to the Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies. As a long-time home computer hobbyist and avid video gamer, as well as a public policy and law student, I am greatly interested in the proposed rule. In particular, I am concerned about exempting from the DMCA prohibition the following class:

3. Computer programs that enable lawfully acquired video game consoles to execute lawfully acquired software applications, where circumvention is undertaken for the purpose of enabling interoperability of such applications with computer programs on the gaming console. Proponent: The Electronic Frontier Foundation.

7886 Federal Register, Vol. 76, No. 244. 37 CFR Part 201, Docket No. RM 2011-7

I write to express my hearty support for exempting the proposed class from the circumvention prohibitions of the Digital Millennium Copyright Act (DMCA). For the reasons outlined below, I believed the proposed exception is necessary to preserve the rights of consumers, to promote innovation, and to ensure the vitality of the secondary game markets.

**Rights of Consumers**

While it is understandable, and commendable, that video console manufacturers have taken steps to curb the use of pirated games, certain restrictions stray too far and end up infringing on the rights of consumers to use their consoles in lawful ways, for lawful purposes. For example, as noted by the Electronic Frontier Foundation (EFF), Sony, maker of the PlayStation 3 (PS3) has, since 2010 has engaged in a concerted effort to thwart the ability of users to run alternate software on their purchased consoles.

The PS3, like most modern video game consoles, is essentially an inexpensive desktop computer. They are capable of performing all the same functions as a standard desktop computer, limited only by the restrictions placed on them by manufacturers. While these restrictions may reduce the ability to run pirated games on these systems, it severely curtails the ability of lawful consumers to run lawfully acquired software such as Linux-based operating systems and other

third-party applications. Allowing consumers to lawfully bypass such restrictions would greatly increase the usefulness of these consoles, along with their value to consumers.

### **Promoting Innovation**

Allowing consumers to bypass restrictions placed on their consoles by manufacturers, in addition to protecting the rights on consumers, would promote the innovation of independent third-party software developers. Such innovation has been the backbone of computer development since the 1980s, and has been a driver of economic growth.

Independent software developers have fueled every major technological development since the introduction of the Linux operating system in the 1980s. For example, it is well-known that the development of the leading worldwide operating system, Microsoft Windows, began as an independent development project. Software development has walked hand-in-hand with hardware development and has relied on the openness of such hardware. Imagine where technological development would be today if the makers of circuit boards had been able to prohibit Bill Gates and Steve Jobs from pioneering personal computing.

Allowing the exemption supported by the EFF in the proposed rule would allow independent developers to utilize the power of video game consoles to develop independent applications, thus fueling job creation, economic growth, and consumer choice. Console manufacturers should not be permitted to wield their concern over copyright piracy to stifle technological development.

### **Ensuring Market Vitality**

Finally, allowing circumvention would support the rights of consumers under the First Sale Doctrine. This well-established copyright doctrine limits the extent of control copyright holders are able to exert over their works once lawfully purchased by consumers. After the first sale of a copyrighted work, consumers are free to resell that work at their leisure. This doctrine has led to a thriving national industry in the secondary sales of copyrighted works, such as books, movies, music, and video games.

A recent report suggests that the next version of Microsoft's Xbox video will attempt to prevent users from running legally-purchased used video games.<sup>1</sup> This attempt appears to be motivated less by piracy concerns and more by the perception that used video game sales cut into the profit margins of developers.<sup>2</sup> If Microsoft does go ahead with these plans, they will seriously curtail the used video game market, along with the rights of consumers under the First Sale Doctrine.

When consumers are faced with such an attempt to curtail their legal rights through technological measures, it is understandable and, I would argue, proper for those consumers to seek technological countermeasures to allow them to pursue those rights. By exempting the proposed class from the prohibition on circumvention would allow users to proactively secure their own rights. In the absence of such protection, consumers will be left in a situation wherein it becomes

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<sup>1</sup> <http://www.wired.com/gamelifelife/2012/01/xbox-720-used-games/>

<sup>2</sup> The actual relationship between the sales of new and used games is much more complicated. <http://www.wired.com/gamelifelife/2010/08/used-games/>

illegal for them run legally purchased used video games on their legally purchased consoles. Such a situation would be in direct conflict with the First Sale Doctrine.

For the reasons outlined above, I heartily endorse the position taken by the EFF and support the exemption of the proposed class from the circumvention provisions of the DMCA suggested in the Proposed Rule. Thank you very much for the opportunity to have my opinions heard.

Sincerely,

C. Maxwell Solie