

Comment by NYFU on Proposed Class of Works 4, Proposed by the Software Freedom Law Center, to be Exempt from the Prohibition on Circumvention of DRM under Paragraph 1201 of the Digital Millennium Copyright Act, for the 2012 Rule Making

Comment by

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Paragraph 1201 of the Digital Millennium Copyright Act grants to copyright holders a legal power to impair the right of ownership of a computer. Today Apple has, and soon, if we do not stop them, Microsoft will have, practical ownership of millions of computers used by millions of people in the United States of America. The iPhone and iPad are computers. They are simply more portable than most home computers of ten years ago, and they have at least one radio transceiver for communications. The most important legal underpinning of this large scale assault on our right to own a computer is Paragraph 1201 of the DMCA. 1201 makes it a crime to seize root from Apple on the iPhone and the iPad. Microsoft has announced that all home computers and all portable computers made by any large vendor will, starting this year, never be sold to the user who pays money for them, but rather must remain under the final control of Microsoft. The hardware and software system Microsoft intends to use to keep home users from getting root on the Microsoft box is Palladium. The name has been changed to "secure boot", but the system is the same old Palladium. Palladium is designed to keep root for Microsoft, and to stop you from grabbing root for yourself. Palladium is both hardware and software, and it is not easy to get root on a Palladiated box. If you were to get root on a Palladiated box, and the Englobulators were to arrest you, you would be charged under Paragraph 1201 of the DMCA. The penalties are severe and the cost of defense high.

The term of art "root" is here explained:

<http://www.linfo.org/root.html>
[Updated October 27, 2007]

<http://en.wikipedia.org/wiki/Superuser>
[page was last modified on 17 December 2011 at 22:23]

If you "have root" on a computer, you have full control of the computer. Not physical possession of the hardware, necessarily, but all operations of the machine, which are characteristic of a computer, are at your command.

"secure boot" is part of the Unified Extensible Firmware Interface standard. For an introduction to these see:

http://en.wikipedia.org/wiki/Unified_Extensible_Firmware_Interface
[page was last modified on 2 February 2012 at 12:10]

http://en.wikipedia.org/wiki/Secure_boot#Secure_boot
[page was last modified on 26 January 2012 at 22:31]

The present abuse which Paragraph 1201 of the DMCA underpins is this:

Apple is the owner of just about every iPhone and every iPad being carried about by individuals who paid money to Apple to carry the device out of the store. Except that Apple does not own the devices that have been modified so that the person who carries the device has root on the device. Those few devices are not owned by Apple.

The issue is not "the degree of openness of the iPad" nor is it even "whether Apple is being unfair to developers/those who carry an iPad". Today, most discussions in newspapers and magazines of such "issues" serve only to obscure the fact of the matter: Apple owns just about every iPad, and Apple intends to keep ownership of every iPad it can.

Apple owns most iPads in use, because Apple and only Apple has root on these iPads.

If granted, Exemption 4 would remove legal support for Apple keeping root on every iPad and every iPhone in use. Exemption 4 would restore our right to use computer hardware we own, within the limits of other laws. Exemption 4 would allow us to take full control of the iPad hardware we paid money for.

Exemption 4, the exemption proposed by the Software Freedom Law Center is summarized thus:

Computer programs that enable the installation and execution of lawfully obtained software on a personal computing device, where circumvention is performed by or at the request of the device's owner.

which summary is taken from

<http://www.copyright.gov/1201/2011/initial/>

The full text of the Software Freedom Law Center's argument for Exemption 4 is at:

<http://www.copyright.gov/1201/2011/initial/sflc.pdf>

For the argument in another format, and with comments and an explanation see:

<http://www.groklaw.net/article.php?story=20111203184859667>

<http://www.softwarefreedom.org/news/2011/dec/02/proposed-dmca-exemption/>

If Exemption 4 is granted, the Register of Copyrights will have declared that it is not a violation of the DMCA to buy a Dell, or Lenovo, home computer, and install a free operating system on the computer. Today, because most difficult to carry around home computers have no "effective access control technology" in them, you and I have a legal right to install and run whatever software we want on the hardware we buy.

If Exemption 4 is not granted, then later this year, when Palladium is inside every home computer "sold" by Dell and Lenovo, it will be a crime, under 1201, to install any operating system except for a Microsoft, or Microsoft sanctioned, operating system. In particular the installation of GNU/Linux, FreeBSD, Oberon, Emacs on the metal, FreeDOS, on any Palladiated machine will be a crime. And just about every Dell and every Lenovo machine sold will be Palladiated, with Microsoft holding all the keys.

In 2006, an exemption like Exemption 4 was proposed. New Yorkers for Fair Use submitted a reply comment in favor of a stronger version of the exemption:

http://www.copyright.gov/1201/2006/reply/10sultzberger_NYFU.pdf

Here is the final paragraph of that reply comment:

4. Our proposed exemption differs from some proposed exemptions in that our exemption is not aimed at preserving decades old textbook examples of fair use rights, such as the right to quote a work in argument, the right of parody, etc.. Rather, our exemption, if granted, would defend important personal property, that is, the home computer. The exemption would also defend privacy and free speech rights, because of the use of home computers to communicate using the world's Net. The dangers our exemption defends against cannot be classed as picayune inconveniences nor as negligible impairments of rights. Our exemption would help defend fundamental human rights.

Today the situation, and thus our argument, is the same, except that what was then mainly a possible future threat is now an present abuse. The Office of Copyright should not allow a fraudulent misuse of copyright law to deprive United States citizens of their right to own a computer. Exemption 4 should be granted.

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