

## **Petition for Proposed Exemption Under 17 U.S.C. § 1201**

*Note: This is a Word document that allows users to type into the spaces below.  
Please submit a separate petition for each proposed exemption*

### **Item 1. Submitter and Contact Information**

Mr. Maneesh Pangasa

### **Item 2. Brief Overview of Proposed Exemption**

I would like to request an exemption to the Digital Millennium Copyright Act for jail-breaking or rooting home video game consoles like Nintendo's Wii U, Sony's Play Station 4, Microsoft's Xbox One and home media devices like Apple TV which may in future gain the ability to natively play video games. During the last console cycle Sony provided console owners of the PS3 the option to install Linux on their PS3 systems called the "Other OS" feature until hackers found out how to hack the PS3 system to provide full root access for gamers removing restrictions on other parts of the PS3 (not relevant to Other OS feature) giving the users full access to modify functionality of the PS3 which enraged Sony and led them to file lawsuits against these hackers who merely hacked their own PS3 systems and then informed others online how to also do so for their own. Ultimately due to bad PR Sony got from the lawsuits they quietly settled these suits but placed a gag order on these individuals prohibiting them from using Sony devices in an unauthorized manner again in future and Sony removed the Other OS feature from the PS3 via a future software update which they required all PS3 users to install if they wanted to continue to have access to Sony's online services.

The removal of Other OS to make it harder for PS3 owners to hack their gaming consoles removed a useful feature for all PS3 users (even those who did not hack their systems). This and other anti-features like the removal of backwards compatibility cripple the user experience and thus harm consumers. PS3 owners who chose not to install the new updates could still play their disc-based media on their PlayStation 3 consoles but the systems would not permit access to online PlayStation services rendering them inoperable or useless for online gameplay. Nintendo systems continue to have region locks on them preventing users from accessing media they buy in one country in another they may be visiting.

PRIVACY ACT ADVISORY STATEMENT Required by the Privacy Act of 1974 (P.L. 93-579)  
The authority for requesting this information is 17 U.S.C. §§ 1201(a)(1) and 705. Furnishing the requested information is voluntary. The principal use of the requested information is publication on the Copyright Office website and use by Copyright Office staff for purposes of the rulemaking proceeding conducted pursuant to 17 U.S.C. § 1201(a)(1). NOTE: No other advisory statement will be given in connection with this application. Please keep this statement and refer to it if we communicate with you regarding this petition.

### **Item 3. Copyrighted Works Sought to be Accessed**

I therefore request an exemption to the Digital Millennium Copyright Act be granted for (class #3) home video game consoles both last generation and current generation systems like Nintendo's Wii, Sony's PlayStation 3, Microsoft's Xbox 360, Nintendo's Wii U, Microsoft's Xbox One, Sony's PlayStation 4 and home media receivers/relay devices like the Apple TV and Amazon's Fire TV plus Fire TV Stick to remove restrictions on those devices to make them more useful for consumers by giving them access to new features being withheld currently by manufacturers of these products.

### **Item 4. Technological Protection Measure**

Each of the companies named in this petition use draconian digital restrictions management technology (they call it digital rights management) to control the user experience and lock-in users of their platforms to the point it becomes difficult if not impossible to switch. Each of these companies is Defective by Design because they get to control how our devices work. Digital media stores using DRM primarily act as cloud lockers for digital media purchases and are only selling the user a license to access content which can be revoked at any time. Furthermore, they can change the terms of sale after the sale has occurred and require users to agree to updated end user licensing agreements that revoke user's freedoms.

In that regard digital media is only ever rented to the user. The Nintendo 3DS comes with Terms of Service (TOS) that should not be accepted. To enforce these terms, Nintendo uses Digital Restrictions Management (DRM) technology. Because of the Digital Millennium Copyright Act (DMCA), users are legally prohibited from modifying their devices to block Nintendo's

nastiness. This combination of legal and technological restrictions makes the Nintendo 3DS dubious, devious and defective.

**Item 5. Non-infringing Uses.**

Specific non-infringing uses can include the ability to run third party applications or software of the end-user's choice on their home consoles not available on these consoles application stores. This includes having the ability restored to run a third party operating system like Linux on their consoles and such operating systems having full access to the console's hardware and system software. Non-infringing uses could also include removing draconian region locks the industry says is designed to prevent illicit piracy in cases when the same content is not even offered abroad in other countries for sale.

**Item 6. Adverse Effects.**

Technologically speaking circumventing DRM restrictions is possible but legally speaking the uncertainty, and fear over violating copyrights is what is often holding technological advances and fair use rights back. Adverse effects from not extending these protections at the very least to tablets will result in this continuing to be a gray area for the consumer who will be confused and frustrated why I cannot root or jailbreak my tablet. If I can legally do so for my phone why I cannot do so with my tablet also.

Circumvention of digital restrictions management on any classes not covered by the Copyright Office can result in civil and/or criminal penalties. However, we have now reached a point in which copyright trumps fair use. The entertainment industry just a few short years ago tried to ram through Congress a one-sided Internet blacklist bill, which went down to defeat with the help of tech giants including Google. There are big companies invested in the status quo against fair use unfortunately who want to eliminate those protections and fight against maintaining and extending them. There are also patent and copyright trolls unfortunately who sue tech companies who implement their ideas in new products but never deliver these innovations themselves to market.

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Here are some of the nastier parts of Nintendo's DRM enforced Terms of Service (TOS) for the 3DS:

The Nintendo 3DS tracks all your activity and claims the use of your data - The Nintendo 3DS keeps track of every game you play, along with any data or information created while using the device. This includes personal data such as any name, address, or other information you enter; as well as "age, gender, geographic area, game play data, online status, Nintendo 3DS System serial number and device ID, device certificate information, cookies, Friend Codes, wireless access point information, Internet Protocol ('IP') address, and Media Access Control ('MAC') address" (to quote the Nintendo 3DS System Privacy Policy). Further, they collect all "User Content," which they define as all "[...] comments, messages, images, photos, movies, information, data and other content" (Chapter 6, Nintendo 3DS End User License Agreement).

By accepting this Agreement or using a Nintendo 3DS System or the Nintendo 3DS Service, you also grant to Nintendo a worldwide, royalty-free, irrevocable, perpetual, non-exclusive and fully sublicensable license to use, reproduce, modify, adapt, publish, translate, create derivative works from, distribute, perform and display your User Content in whole or in part and to incorporate your User Content in other works, in any form, media or technology now known or later developed, including for promotional or marketing purposes. (Chapter 1, Nintendo 3DS End User License Agreement)

Please note just how absurd this claim is when you consider something like the photos taken with the 3DS camera. Can you imagine Canon or Nikon claiming the right to use pictures taken by you with one of their cameras? Can you then imagine them calling you a criminal for modifying the software on the camera to keep them away from your pictures?

[The Nintendo 3DS will transmit your information to Nintendo](#)

The Nintendo 3DS will send the Activity Log to Nintendo when the wifi is connected. You agree that your Nintendo 3DS System will connect to the Internet and to Nintendo's servers—including in both Active Mode and Sleep Mode—for a variety of purposes, including to obtain system or User Content Restriction System updates, for diagnostic purposes, to transmit system log files as described in the Privacy Policy, or to receive Content. (Chapter 1, Nintendo 3DS End User License Agreement)

Nintendo can then choose to share your information and use it to target advertisements to you.

We also may share such information and any User Content you create with third parties. We may share your PII, Non-PII, and Aggregate Information with third parties to complete your transactions and provide you with advertising and other promotional materials on your Nintendo 3DS System. (Nintendo 3DS System Privacy Policy)

### Nintendo can update the 3DS without your knowledge and brick your device remotely

Nintendo states that they "may update or change the Nintendo 3DS System or the Nintendo 3DS Service in whole or in part, without notice to you." This includes "embedded software" — aka the firmware on your device (Chapter 6, Nintendo 3DS End User License Agreement).

Worst of all, Nintendo has claimed the right to use the information they collect from your device to judge if you are allowed to continue using it (emphasis added):

After the Nintendo 3DS menu is updated, any existing or future unauthorized technical modification of the hardware or software of your Nintendo 3DS System, or the use of an unauthorized device in connection with your system, will render the system permanently unplayable. Content deriving from the unauthorized modification of the hardware or software of your Nintendo 3DS system will be removed. Failure to accept the update may render games and new features unplayable. (Chapter 3, Nintendo 3DS End User License Agreement)

### Children and the 3DS

Children who use the 3DS are expected to know that they shouldn't share any "personally identifiable information" (PII), with their 3DS. That's right, children under 13 should not use their real names to create their game nickname, take pictures with the built-in camera, or participate in any number of ways the 3DS is set up to encourage. If they do, Nintendo claims the right to use their photos, give their information to 3rd-party companies, advertise to them, and more.

Children must not include any PII in their Nintendo 3DS System user name, Mii name, Mii profile information, in-game nicknames or other User Content. Children also must not disclose PII when communicating with other Nintendo 3DS System users or Nintendo through the Nintendo 3DS System wireless communication features. (Nintendo 3DS System Privacy Policy)

If children shouldn't use the device for what it is made for, then why is Nintendo marketing it toward children?

If you're still not convinced: Just look at the recent controversy over Nintendo's Wii U home video game console being reported on by the Electronic Frontier Foundation. One Wii U user noted that to be able to continue using the Wii U users have to always agree to abide by Nintendo's End User Licensing Agreement. Every time they update it you have to re-agree no matter how restrictive it becomes. With Sony's PlayStation 3 there was uproar over Sony releasing a software update removing its Other OS feature allowing Linux installations (removal was an anti-feature) because some hacker hacked the system to allow users full access to the PS3. The software update was mandatory for online access of PlayStation services but users could otherwise choose not to perform the update and just play their physical media on the PS3. However, Nintendo's changes with Wii U go a step further and require the user to agree to EULA changes or not have any access to the system. Users must also apply new software updates as they are released or lose access.