



## Long Comment Regarding a Proposed Exemption Under 17 U.S.C. 1201

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### Item 1. Commenter Information

This Comment is submitted on behalf of BSA | The Software Alliance (“BSA”), the leading advocate for the global software industry before governments and in the international marketplace. Its members are among the world’s most innovative companies, creating software solutions that spark the economy and improve modern life. With headquarters in Washington, DC, and operations in more than 60 countries around the world, BSA pioneers compliance programs that promote legal software use and advocates for public policies that foster technology innovation and drive growth in the digital economy.

### Item 2. Proposed Class Addressed

Proposed class 16: Jailbreaking—Wireless Telephone Handsets.

The December 12, 2014 Notice of Proposed Rulemaking (“NPRM”) described this proposed class as permitting “the jailbreaking of wireless telephone handsets to allow the devices to run lawfully acquired software that is otherwise prevented from running, or to remove unwanted preinstalled software from the device.” 79 Fed. Reg. 73,856, 73,867 (Dec. 12, 2014). As proposed by Electronic Frontier Foundation (“EFF”), the language of the exemption would read: “Computer programs that enable mobile telephone handsets to execute lawfully obtained software, where circumvention is accomplished for the sole purposes of enabling interoperability of such software with computer programs on the device or removing software from the device.”

### Item 3. Overview

BSA opposes this exemption. This proposal should be rejected because circumvention related to mobile phones is detrimental to the secure and trustworthy innovative platforms that mainstream consumers demand. The marketplace for smartphone applications has continued to mature since the last proceeding, and alternatives to circumvention exist. Congress intended the DMCA to protect the right of platform developers to choose how to design their systems. Congress also intended to protect the right of consumers and application developers to choose between competing platforms. Granting the proposed exemption would harm the market for and value of copyrighted works. Thus, the proponents have not met their burden of persuasion. See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Notice of Inquiry and Request for Petitions, 79 Fed. Reg. 55,687, 55,689 (Sept. 17, 2014) (“2014 NOI”).<sup>1</sup>

<sup>1</sup> The burden of coming forward with evidence in support of the proposed exemption, as well as the burden of persuasion that the exemption should be recognized on the narrow grounds authorized by the statute, must always remain with the proponent of an exemption. 2014 NOI at 55,689. This burden applies to both factual and legal issues.

#### **Item 4. Technological Protection Measure(s) and Method(s) of Circumvention**

In 2010 and 2012, the Register concluded that where a smartphone “requires authentication by cryptographic keys loaded into the bootloader which, in turn, authenticates the ...the integrity of the operating system[,] ... [t]his system of authentication and decryption meets the statutory definition of a technological measure that effectively controls access to a work because, in the ordinary course of its operation, the technological protection measure requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.” Recommendation of the Register of Copyrights in RM2008-8; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies 84 (June 11, 2010); Section 1201 Rulemaking: Fifth Triennial Proceeding, Recommendation of the Register of Copyrights 65 (Oct. 12, 2012) (“2012 Recommendation”).

#### **Item 6. Asserted Adverse Effects**

As EFF concedes, “Android devices, whether jailbroken or not, have long given users the ability to load application software from any source.” EFF Comment on Class 16 at 20. As EFF also concedes, “Android is installed on a majority of all smartphones.” *Id.* at 4. Thus, consumers who want to purchase mobile devices that run an operating system that allows installation of applications obtained from virtually anywhere on the Internet have the ability to do so. Given this alternative to devices that run operating systems designed to enable platform developers to curate the applications that devices will run, there is no adverse effect on consumers resulting from the use of access controls on some smartphones. See 2012 Recommendation at 8 (“If sufficient alternatives exist to permit the noninfringing use, there is no substantial adverse impact.”).

As EFF concedes, however, even when Android phones are originally shipped with some restrictions in place, manufacturers often are enabling consumers and developers to access bootloaders and experiment with their phones.<sup>2</sup> EFF Class 16 Comments at 20. Regardless, phones are available without the restrictions that EFF describes.<sup>3</sup> Accordingly, the proponents have not met their burden with respect to establishing a likely adverse effect caused by the use of access controls.

#### **Item 7. Statutory Factors**

17 U.S.C. § 1201(a)(1)(C)(i) instructs the Register to consider “the availability for use of copyrighted works” broadly and in historical context. In the mobile smartphone market, access controls have increased, rather than decreased, the availability of software applications designed for use on mobile phones.

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<sup>2</sup> For example, HTC has a website where developers can learn how to access bootloaders. See <http://www.htcdev.com/bootloader/> (“HTC is committed to listening to users and delivering customer satisfaction. We have heard your voice and starting now, we will allow our bootloader to be unlocked for 2011 models going forward.”). So does Motorola. See <https://motorola-global-portal.custhelp.com/app/standalone/bootloader/unlock-your-device-a/action/auth>.

<sup>3</sup> See, e.g., <https://www.htcdev.com/> (offering “Developer Editions” of popular HTC phones); <http://www.motorola.com/us/Motorola-Developers/motorola-developers.html#motorola-developers-multi-source-code> (offering “Developer Editions” of popular Motorola phones). Cydia’s comments in support of proposed Class 16, and others, admit that Google Nexus devices are available and open, but users supposedly do not buy them because other devices “have the highest quality hardware, with the latest technology for their screens and their cameras.” Cydia Class 16 Comments at 4. These types of preferences are not justifications for circumvention.

For example, BSA member Apple ignited the app revolution with the launch of the App Store in 2008. Since then, an entire industry has been built around app design and development.<sup>4</sup> In just six years, the iOS ecosystem has helped create 627,000 jobs in the U.S. alone. The App Store offers more than 1.4 million apps for iPhone, iPad and iPod touch users in 155 countries around the world, with more than 725,000 of these apps made for iPad. App Store customers can choose from an incredible range of apps in 24 categories, including games, social networking, photo & video, sports, health & fitness, travel, kids and many more.

In their normal operation, the platforms and devices designed by a variety of companies not only provide software developers and consumers with reliable ecosystems within which to offer innovative new products. Thus, these platforms and devices preserve the “market for and value of” legitimate software. See 17 U.S.C. § 1201(a)(1)(C)(iv).

Given these realities, and the statutory requirement that each request for an exemption be considered *de novo*, BSA urges the Register and the Librarian to revisit their prior conclusions regarding the purported benefits of jailbreaking.

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<sup>4</sup> See Press Release, Apple, Inc., *App Store Rings in 2015 with New Records*, Jan. 8, 2015, <https://www.apple.com/pr/library/2015/01/08App-Store-Rings-in-2015-with-New-Records.html>. See also Steve Ranger, *iOS Versus Android: Apple App Store Versus Google Play: Here Comes the Next Battle in the App Wars*, ZDNET.COM, Jan. 16, 2015, available at: <http://www.zdnet.com/article/ios-versus-android-apple-app-store-versus-google-play-here-comes-the-next-battle-in-the-app-wars/> (“There are some obvious reasons for Apple’s success. Quality control is one: by keeping a tight rein on both the smartphone hardware and the operating system, and vetting the apps before they are allowed into the store, Apple could create a roster of high-quality, well integrated apps.”).