



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. BSA members are among the world’s most innovative companies, creating software solutions that spark the economy and improve modern life. With headquarters in Washington, D.C., 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 17: Jailbreaking—All Purpose Mobile Computing Devices.

The December 12, 2014 Notice of Proposed Rulemaking (“NPRM”) described this proposed class as permitting “the jailbreaking of all-purpose mobile computing devices to allow the devices to run lawfully acquired software that is otherwise prevented from running, or to remove unwanted preinstalled software from the device. The category ‘all-purpose mobile computing device’ includes all purpose non-phone devices (such as the Apple iPod touch) and all-purpose tablets (such as the Apple iPad or Google Nexus). The category does not include specialized devices such as e-book readers or handheld gaming devices, or laptop or desktop computers.” 79 Fed. Reg. 73,856, 73,867 (Dec. 12, 2014) (“NPRM”).¹

Item 3. Overview

The Copyright Office should recommend that the Librarian of Congress reject this proposed exemption. As was true in the last triennial proceeding, the proponents have not proffered a clearly defined class of works. Although they suggest that the exemption for “all-purpose mobile computing devices, such as tablets” will not apply to laptops, they offer no credible means to distinguish between tablets and laptops. Similarly, they claim to exclude devices “designed primarily for the consumption of media” from the scope of the exemption, but they fail to provide any workable definition of such “specialized devices.” Additionally, the

¹ As proposed by the Electronic Frontier Foundation (“EFF”), the language of the exemption would read: “Computer programs that enable all purpose mobile computing devices 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. ‘All-purpose mobile computing devices’ means non-phone devices sold with an operating system designed primarily for mobile use and not designed primarily for the consumption of media.”

Copyright Office should recommend the rejection of this proposed exemption because there are ample alternatives to circumvention: indeed, proponents concede that consumers may purchase all-purpose mobile devices that do not prevent installation of third-party software applications. Thus, the proponents have not met their burden of persuasion. See Recommendation of the Register of Copyrights, Section 1201 Rulemaking: Fifth Triennial Proceeding, at 79 (Oct. 12, 2012) (“2012 Recommendation”); Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies; Notice of Proposed Rulemaking and Request for Petitions, 79 Fed. Reg. 55,687, 55,689 (Sept. 17, 2014) (“2014 NOI”).²

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

As discussed further throughout this filing, EFF’s proposed class of works is ill-defined. Thus, it is not possible to identify all of the types of access controls that the proposed exemption would cover. However, EFF discusses several types of access controls that it wishes to undermine on pages 5-7 of its Class 17 Comments.

Item 5. Asserted Noninfringing Use(s)

The asserted noninfringing use at issue involves, according to EFF, “modify[ing] only a small portion of the firmware” on “all-purpose mobile computing devices” in order to install lawfully obtained software or to remove software, such as an operating system. EFF Class 17 Comment at 7. However, the scope of the uses that EFF seeks to engage in is unclear because EFF’s definition of “all-purpose mobile computing device” is amorphous. EFF defines the term to refer to “non-phone devices sold with an operating system designed primarily for mobile use and not designed primarily for the consumption of media.” Although EFF intends for this definition to include “tablets” (a term which is undefined), it suggests that laptops and personal computers as well as e-book readers and handheld gaming consoles are outside the scope of the proposed exemption. Upon closer examination, EFF’s arbitrary line drawing provides no principled basis by which to determine whether any particular device will be subject to the proposed exemption.

EFF labors to exclude laptop computers from the definition of “all-purpose mobile computing devices” for very obvious reasons: there are literally thousands of commercially available laptops that enable users to engage in the very noninfringing uses around which EFF’s petition is framed (i.e., installation of unapproved software) without the need for circumvention. As a consequence, the inclusion of laptops within the proposed class would be fatal to EFF’s petition. However, despite EFF’s best efforts, the petition fails to provide a meaningful basis by which to differentiate between “all-purpose mobile computing devices” and laptops. EFF initially attempts to distinguish “laptops” from “all-purpose mobile computing devices” by asserting that only the latter make use of an operating system that is “designed for mobile use.” However, all operating systems that are designed for use on laptops are arguably “designed primarily for mobile use.” See 2012 Recommendation at 78 (“[T]he definition of ‘personal mobile computing device’ may itself be susceptible to a wide array of interpretations, each of which could be subject to its own analysis in this proceeding.”). Indeed, the trend in personal computing is for distinctions that used to exist between tablets and laptops to disappear.³ Many laptops are sold

² 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.

³ This is true even with respect to differences in size. Some tablets and laptops have comparable screen sizes. Compare Samsung Galaxy Note Pro 12.2, <http://www.samsung.com/us/mobile/galaxy-tab/SM-P9000ZWFAR> (describing tablet with 12” screen) with MacBook Air, <https://www.apple.com/macbook-air/> (describing laptop with 11” – 13” screens).

with touch screens, cameras, and detachable keyboards.⁴ Likewise, “hybrid” tablets, such as the Microsoft Surface, are designed to run substantially the same operating systems and range of software that laptops traditionally run,⁵ and are advertised for their ability to “replace your laptop.”⁶ Moreover, some of the newest operating systems on the market are designed to make consumers’ experiences across all devices feel uniform and seamless.⁷ Given these realities, EFF’s assertion that “tablets are easily distinguishable from laptop and desktop PCs” is unfounded. Indeed, rather than a definition of “tablet” that clearly excludes laptops becoming “more attainable,” as the Register posited in 2012 that it might (2012 Recommendation at 79), the line between the two types of devices – to the extent one remains – has become even blurrier. The next three years will see an even further erosion of this already blurry distinction.⁸

Perhaps more problematically, EFF asserts that the “most important[]” distinction between laptops and “all-purpose mobile computing devices” is that laptops “do not, as yet, impose the sort of severe restrictions on which applications can be run, and what those applications can do.” Here, EFF tips its hand that what it seeks is an exemption that would authorize circumvention of TPMs to enable noninfringing uses that can already be carried out using laptops. In so doing, EFF concedes that tablets and laptops are comparable but for the fact that a limited sub-set of tablets make use of TPMs that restrict the loading of unauthorized software. EFF’s failure to identify even a single noninfringing use that users cannot already accomplish using laptops demonstrates unequivocally that alternatives to circumvention exist.⁹

EFF’s exclusion from the scope of the proposed exemption of devices that are “designed primarily for the consumption of media” also breaks down upon closer examination. All personal computers are arguably designed primarily for consuming media, such as websites, movies, music and videogames. Although EFF might be able to point to some specific devices that “do not come with general-purpose operating systems capable of running a large variety of application software,” that does not alter the fact that determining whether a device is “primarily designed for the consumption of media” is an impossible task. Thus, the proposed class of works lacks proper contours. See 2012 Recommendation at 78 (“[T]he record does not permit the Register to conduct the appropriate analysis with respect to the various types of devices that might fall within proponents’ broadly conceived ‘tablet’ category.”).

It is also unclear what a “non-phone” device means in EFF’s proposed definition. These days, virtually every mobile computing device, including laptops, can make phone calls, either

⁴ See Convertible Laptop Reviews, Ratings, and Pricing, Computer Shopper, <http://www.computershopper.com/laptops/convertible-laptops>.

⁵ See Supported Operating Systems for Surface Pro, Surface Pro 2, and Surface Pro 3, <https://support.microsoft.com/en-us/kb/2858199>.

⁶ See http://www.microsoftstore.com/store/msusa/en_US/pdp/Surface-Pro-3/productID.300190600.

⁷ Press Release, Microsoft, Windows 10 Developer Tooling Preview Now Available to Windows Insiders, Mar. 23, 2015, <http://blogs.windows.com/buildingapps/2015/03/23/windows-10-developer-tooling-preview-now-available-to-windows-insiders/> (“Windows 10 provides the ability to use a single UI that can adapt from small to large screens.”); Mikael Ricknäs, PC World, *Microsoft Releases Tools to Build Universal Windows 10 Apps*, Mar. 24, 2015 <http://www.pcworld.com/article/2901152/microsoft-hopes-to-drum-up-developer-interest-in-windows-10-with-visual-studio-preview.html> (“Developers who have signed up for Microsoft’s Windows Insiders program can start building so-called universal apps for PCs, tablets and smartphones and the Xbox game console using the Visual Studio 2015 preview tools for Windows 10.”).

⁸ Although EFF focuses its filing almost entirely on the murky distinction between tablets and laptops, it is important to note that Class 17 would apply to the much broader universe of “all-purpose mobile computing devices.”

⁹ EFF claims that “[m]odern mobile devices have many functions that most PCs don’t, such as a point-and-shoot camera, location awareness, a video recorder, and tilt-based input.” Although that may be true with respect to desktop computers, laptops are commonly equipped with hardware and software that enables such functionality.

through the cellular network, the data network (using applications such as Skype), or both. The phrase “non-phone” therefore would seem at best to fail to distinguish between laptops, tablets, and other mobile computing devices, and at worst to define a null set of devices.

Item 6. Asserted Adverse Effects

As EFF concedes, “Android allows a user to install application software from any source.” EFF Class 17 Comment at 6. As EFF also concedes, “tablets running Android made up about 67% of the market” in 2014. *Id.* at 5. Thus, consumers who want to install applications that may not run on other devices, such as iPads, have the option of purchasing devices that will enable such uses. Moreover, as discussed above in Item 5, the distinctions between laptops and tablets are largely insignificant for many brands of devices. Given that EFF concedes that there is no need for an exemption for laptops due to their open design, the lack of any meaningful sunlight between convertible laptops and tablets renders EFF’s purported adverse impacts illusory. The widespread availability of alternative devices negates any minor adverse impact being caused by the presence of access controls on other devices. See 2012 Recommendation at 8 (“If sufficient alternatives exist to permit the noninfringing use, there is no substantial adverse impact.”).

Perhaps recognizing that too many alternatives exist to justify an exemption related to installation of applications, EFF focuses much of its comments not on installing applications, but rather on switching operating systems. However, EFF also admits that Android device manufacturers “now provide straightforward means of jailbreaking their devices.” EFF Class 17 Comments at 22.¹⁰ Thus, users who want to purchase tablets and then switch operating systems have the means to do so. They can also purchase convertible laptops that allow for switching operating systems.¹¹

Item 7. Statutory Factors

EFF admits that “mobile devices, device firmware, and mobile applications of all kinds are enjoying a golden age.” EFF Class 17 Comments at 21. It is hard to deny that at least some of the credit for that success must be attributed to the use of access controls that protect the investments companies and individual developers make in these products. Indeed, EFF’s efforts to describe the great success and market penetration of Apple devices¹² merely show that many consumers prefer a reliable and secure platform that provides them with a more curated experience. A manufacturer of mobile devices may choose to curate a “closed ecosystem” in order to create a reliable, secure platform that ultimately leads to the vast proliferation of copyrighted content because users come to expect a good experience. The closed ecosystem allows the manufacturer to create a secure experience that avoids malware, unstable software, unsuitable content, a reliable battery life or other factors that combine to create a platform that consumers want to use to consume a plethora of copyrighted works, including apps, music, movies and television programs. Accordingly, the first statutory factor, the availability for use of copyrighted works, 17 U.S.C. § 1201(a)(1)(C)(i), disfavors granting an exemption.

In addition, as the Register concluded in 2012, “[n]either factor two, concerning nonprofit archival, preservation, and educational purposes, nor factor three, concerning the impact on

¹⁰ See also EFF Class 17 Comments, Statement of Dr. Jeremy Gillula, at 2, n.2 (“Google Nexus devices allow users root access without needing to first take advantage of a security vulnerability.”); EFF Class 17 Comments, Statement of James Wilcox, at 2 (“Some manufacturers have a ‘blessed’ method for rooting a limited set of their products. Others, like Google’s Nexus line of products, are specifically designed to allow this.”).

¹¹ EFF must also demonstrate that it is not possible to remove an operating system without first gaining access to it. In 2012, the Register concluded that proponents had not met their burden on this point. See 2012 Recommendation at 60.

¹² See EFF Class 17 Comments at 5 (stating 71% of tablet-based world-wide-web traffic is generated by iPad users).

criticism, comment, and the like, is impacted by the proposed exemption.” 2012 Recommendation at 77 (citing 17 U.S.C. § 1201(a)(1)(C)(ii)&(iii)). Although EFF concedes the former point, it argues that criticism and commentary are suppressed by access controls that prevent installation of software that “expresses political commentary.” EFF provides no support for this assertion. Regardless, as discussed above in Item 6, numerous devices undeniably are available that contain no restrictions on what types of political commentary software consumers want to access and utilize.

Finally, the fourth statutory factor, 17 U.S.C. § 1201(a)(1)(C)(iv), weighs against granting an exemption because circumvention of access controls on tablets increases application piracy.¹³ The value of operating systems designed to reduce piracy is harmed when that feature is eliminated.¹⁴

For all of these reasons, the Copyright Office should not recommend the creation of an exemption for proposed Class 17.

¹³ Christopher MacManus, *Pirated iOS App Store Installous Shuttters*, CNet.com, Dec. 31, 2012, <http://www.cnet.com/news/pirated-ios-app-store-installous-shuttters/> (“For many years, Installous offered complete access to thousands of paid iOS apps for free for anyone with a jailbroken iPhone, iPad, and iPod Touch. Think of it as being able to walk into a fancy department store, steal anything you want, and never get caught.”).

¹⁴ Cf. 2012 Recommendation at 49.