FSF Comments in Support of Exemptions to DMCA Anti-Circumvention Rules

Brett Smith

License Compliance Engineer, Free Software Foundation

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1 Introduction

The Free Software Foundation (FSF) is a registered 501(c)3 nonprofit organization based in Boston, Massachusetts. The FSF's mission is to encourage the development and distribution of free software: software that everyone is allowed to use, modify, and distribute as they see fit. We provide technical and informational resources to developers working on free software, and hold the copyright to over 200 such programs. Our work is primarily supported by individual donors: more than 4,000 gave to the FSF last year.

Free software has flourished on traditional desktop and server computer systems, where people are accustomed to installing whatever software they like, and the tools to do so are readily available. However, people should be able to install and run free software on all of their computing devices when they wish to do so. Unfortunately, devices designed to specialize in particular tasks, such as smartphones and video game consoles, are often encumbered with technical restrictions that unduly complicate the process.

Many free software developers are accustomed to working with hardware that seems uncooperative to them. Some find an enjoyable technical challenge in writing software for hardware with significant resource constraints, or incomplete or incorrect documentation from the vendor. That attitude changes when developers come face-to-face with technical restrictions on the device that may be protected from circumvention under the Digital Millennium Copyright Act (DMCA). In order to encourage the development and adoption of free software on all kinds of computing devices, we support exemptions for all of the following proposed classes of works:

- 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. (#3)

- 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. (#4)

- Computer programs that enable wireless telephone handsets ("smartphones") and tablets to execute lawfully obtained software applications, where circumvention is undertaken for the purpose of enabling interoperability of such applications with computer programs on the handset or tablet. (#5)

Digital Restrictions Management (DRM) on digital media such as music, movies, and ebooks also hamper free software adoption on traditional desktop systems. People who would like to start using free software typically own a collection of such media. They are often discouraged to find that they cannot view or play these works with free software, and many decide not to make the switch as a result. In order to foster free software adoption among people who possess DRM-encumbered media, we support an exemption for the following proposed class of work:

- Legally acquired digital media (motion pictures, sound recordings, and e-books) for personal use and for the purposes of making back-up copies, format shifting, access, and transfer. (#10B)

2   About free software

Computer users have free software when they're allowed to use that software for any purpose; to study and modify it; and to distribute copies to others, whether unchanged or modified. Because software developers hold exclusive rights to modify and reproduce their work under copyright law absent other arrangements, those who want their users to have these rights must take proactive legal measures to do so. These permissions are typically granted by means of a license.

There are many free software licenses that give users these permissions and are widely recognized by users and developers alike. The primary distinctions between them are different limited conditions placed on the activities of modification and distribution. The FSF publishes the GNU General Public License (GPL), which includes conditions designed to ensure that every user who acquires the software receives those same legal permissions, as well as the resources that are practically necessary to exercise them, such as software source code. In numerous surveys of free software projects, the GNU GPL consistently ranks as the most popular license, often by wide margins.

Free software puts users in full control over their computers—a power that becomes increasingly important as those computers play a role in ever more of our day-to-day activities. All too often, news stories have reported nonfree software behaving in ways that its users never wanted or anticipated: programs that send a user's contact list to a remote server without permission, automatic updates that remove desired features, and so on. By contrast, free software

users can study the software's functioning down to the finest detail, and make whatever changes they like.

In a world where software has so much sway over what we communicate, to whom, and how, people need free software in order to retain control over their own speech. When that communication is constrained by nonfree software, developers can limit it, and us, in ways that serve their interests over our own individual concerns and the larger public good. Free software is essential to a free society in this digital age.

3 Free software on restricted hardware

Free software developers are generally eager to support a wide variety of hardware. It shows in the results: whether you count components and peripherals for traditional computer systems, or standalone devices dedicated to a small selection of tasks, free software supports more hardware than any nonfree alternative. This work has been done in the face of numerous practical obstacles, including insufficient documentation and uncooperative or even antagonistic manufacturers. Today, people write free software for home network routers, tablets, smartphones, and video game consoles, among other computing devices.

These devices are just as important to their users as traditional desktop systems—and all signs suggest that they'll be responsible for proportionally more of people's computing in the future. That means the software running on these devices can exert just as much power over the user as traditional desktop programs. It's important for users to have free software on all their computers, no matter how capable, to retain control over them.

While free software developers have demonstrated both interest and ability to make programs that run on these devices, their manufacturers increasingly implement technical restrictions designed to prevent the device from running any unapproved software. Every Apple iPhone and iPad includes such measures[1]. Microsoft reportedly plans to require similar restrictions for Windows 8 devices based on ARM processors[2]. Sony previously permitted limited installations of free software on the PlayStation 3, and even advertised this feature as a way to help sales, but later revoked the capability with a firmware update[3]. Measures like these illustrate how nonfree software can enable its developers to exert additional control over users: an activity that used to be commonplace, installing software you choose on computers you own, is becoming increasingly difficult.

Users should be allowed to install whatever software they like on their devices. Unfortunately, free software developers are less likely to work on hardware

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[1]Randall Stross, "Want an iPhone? Beware the iHandcuffs", New York Times, January 14, 2007, `https://www.nytimes.com/2007/01/14/business/yourmoney/14digi.html`.

[2]Jon Brodkin, "Microsoft mandating Secure Boot on ARM, making [GNU/]Linux installs difficult", ars technica, January 16, 2012, `http://arstechnica.com/business/news/2012/01/microsoft-mandating-secure-boot-on-arm-making-linux-installs-difficult.ars`.

[3]Patrick Seybold, "PS3 Firmware (v3.21) Update", PlayStation Blog, March 28, 2010, `http://blog.us.playstation.com/2010/03/28/ps3-firmware-v3-21-update/`.

when doing so means they may face criminal penalties under the DMCA's anti-circumvention provisions. The Librarian of Congress can and should mitigate those concerns by providing exemptions for computer programs that enable this, as proposed in classes #3, #4, and #5.

4 Free software and DRM-encumbered media

Even with capable hardware, once a person decides they would like to use free software, they may face a number of practical obstacles to doing so. These difficulties often stem from lock-in effects created by software they have used in the past. Work files, digital media such as ebooks, music, and movies, and other data may be saved in formats which free software is not available to support.

In cases where digital media are DRM-encumbered, developers outside the United States have sometimes written free software that can read these files and help ease users' transition away from nonfree software. This software is written without help from, or coordination with, the industry groups that standardize the DRM. In order to take such a cooperative approach, free software developers would have to agree to keep secret some details about the DRM's implementation. That secrecy is mutually exclusive with the transparency and sharing that characterizes a free software project. Developers cannot both agree to keep some software source code out of the public eye, and make it available to users who wish to modify the software.

As a result of all this, users in the United States can't take advantage of free software that reads DRM-encumbered media. Courts have ruled that such programs qualify as anti-circumvention technologies under the criteria of 17 USC §1201(a)(2)[4], and thus cannot be used or distributed. These people only intend to use particular software on their computers—not to distribute the DRM-encumbered work. In these cases, the law does nothing to discourage unauthorized copying of digital media, but instead merely interferes with people's ability to use software they prefer. This was never an intended consequence of the law, and the Librarian of Congress should mitigate the effect by granting an exemption for proposed class #10B.

5 Conclusion

Computer users—all of us—have ample reasons to choose to use free software over nonfree alternatives. Those motivations ultimately stem from a desire to make sure that computers serve our own interests, both individually and as a society, rather than those of software developers. Technical restrictions on digital media files and, increasingly, newer computing devices hamper free software development and adoption. The criminal penalties for circumvention in the DMCA only enhance that chilling effect, despite the fact such activity is

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[4] *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 - Dist. Court, SD New York 2000

unrelated to unauthorized copying of copyrighted works and an unintended consequence of the law. We urge the Librarian of Congress to provide exemptions for the proposed classes of works #3, #4, #5, and #10B to remove unnecessary and unwarranted legal obstacles to free software development.