

Cell Phone Users Catch a Break

By M. Scott Koller

The U.S. Copyright Office has announced an exemption to the Digital Millennium Copyright Act that will allow users to legally “jailbreak” their cell phones. This decision helps to settle a hotly disputed area of copyright law and provides consumers the freedom to decide what to do with the cell phones they have purchased.

At the center of this controversy is the popular Apple iPhone. Since 2007, there have been over 50 million iPhones sold worldwide. In addition, consumers have collectively downloaded and installed one of the 185,000 available applications an estimated four billion times. These numbers are even more impressive when you consider that the iPhone is sold for use only on AT&T’s wireless network and that Apple is notoriously restrictive on what types of applications can be installed. Developers of applications have to go through a rigorous screening process in order

to have their programs made available for sale on iTunes and approval is at the complete discretion of Apple. In the past, applications have been rejected for sexual or political content while others, such as the Google Voice App, were rejected because it duplicated the functionality of the iPhone itself. Some developers have been left in the dark without any explanation for the rejection of their application. The end result is that consumers are limited to applications on Apple’s pre-approved list. Like it or not, this business model has been widely popular despite criticism. To overcome these restrictions, some consumers have altered the iPhone operating system to allow for the installation of third party applications, a process known as jailbreaking. Third party applications can enable a wide range of features including video conferencing, turn by turn directions, Internet based phone calls (VOIP), and wireless tethering. The iPhone hardware is capable of performing each of these tasks, but Apple has disabled them.

Prior to the recent decision by the U.S. Copyright Office, Apple argued that jailbreaking was illegal because it violated the “anti-circumvention” provisions of the Digital Millennium Copyright Act, which prohibits circumventing, bypassing, or decrypting any technological barrier to accessing certain intellectual property. However, the U.S. Copyright Office rejected that argument finding that jailbreaking has minimal negative impact on Apple’s rights. Instead, the Copyright Office found that jailbreaking fell under the “fair use” exception to existing copyright law for the following reasons: First, the purpose of jailbreaking is to add functionality to the device owned by the person making the modification. This is private, noncommercial use. Second, the nature of the iPhone operating system is to run applications and jailbreaking merely enables the iPhone to run applications it would otherwise be capable of if Apple had not restricted their use. Although Apple is certainly capable of implementing those limitations, those restrictions have no basis in copyright law. Also, there is relatively minor change to the copyrighted work. Finally, jailbreaking an iPhone would have no effect on its overall market because one cannot jailbreak an iPhone without first acquiring one. Based on these factors, the U.S. Copyright Office exercised its powers under the Digital Millennium Copyright Act to create an exemption for jailbreaking by explicitly allowing “Computer programs that enable wireless telephone handsets to execute software applications, where circumvention is accomplished for the sole purpose of enabling interoperability of such applications, when they have been lawfully obtained, with computer programs on the telephone handset.” Building on the premise that jailbreaking is permissible under the Digital Millennium Copyright Act, a second exemption was added, allowing consumers to install software that “unlocks” their cell phone for use on a different wireless carrier. However, before Verizon customers start popping the champagne, keep in mind that there are additional technical hurdles to overcome. The iPhone was designed to run exclusively on GSM networks and is incompatible with Verizon’s CDMA network without significant hardware changes. For now, T-Mobile, which also runs on GSM networks, will likely be the primary beneficiary of this exemption.

Currently, there is an ongoing debate regarding the long-term effect of these exemptions. On one hand, jailbreaking allows the installation of applications without going through the iTunes store, where Apple earns a 30 percent commission. AT&T, who has seen record earnings based on its exclusive contract with Apple, will undoubtedly see a hit to its bottom line if consumers can use the iPhone on other wireless networks. On the other hand, Apple still has a number of ways to combat jailbreaking — the iPhone end-user license agreement and nearly every wireless



service contract forbids the use of jailbroken cell phones. In addition, the act of jailbreaking an iPhone will automatically void the warranty.

While the decision granting these exemptions is clearly a victory for consumer freedom, consumers should still be wary of jailbreaking their iPhone. While freed from Apple’s restrictive review process, application developers are also freed from Apple’s quality control procedures. Poorly written applications can cause the phone to crash or become unstable, and there will be no warranty to fall back on. Further, a software company such as Apple has the technical resources to continually update and change the iPhone operating system to thwart jailbreaking attempts. These tactics could turn your iPhone into an expensive paperweight.

Ultimately, the real value of this decision is the recognition that consumers have a certain level of freedom to hack, fiddle, or otherwise tinker with their cell phone however they want. iPhone owners can now decide for themselves what they want to do with their phone without potential legal repercussions under the Digital Millennium Copyright Act.



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