Defending Your Right to Hack Hardware

MAKE, DO IT YOURSELF, REVERSE ENGINEER, TAKE APART, AND TINKER

An increasingly active hobbyist community is figuring out how to make a range of devices more useful and open. They are learning how to install new software or make third-party parts, devices, and services work with proprietary high-tech products like video game consoles, printers, portable audio players, home entertainment devices, e-book readers, mobile phones, digital cameras, and even programmable calculators. And, oh yes, contending with restrictions on both cars and garage doors.

In 2010, phone jailbreaking became more mainstream, and the concept was applied to other sorts of devices—in part because of two cell-phone related Digital Millennium Copyright Act (DMCA) exemptions that EFF championed: one to clarify the legality of cell phone “jailbreaking”—software modifications that liberate iPhones and other handsets to run applications from sources other than those approved by the phone maker—and another to renew a 2006 rule exempting cell phone unlocking so handsets can be used with other telecommunications carriers.

In December, the Ninth Circuit reinforced the importance of this distinction, noting that violations of license agreements do not always amount to copyright infringement. Video game developer Blizzard had argued that the manufacturer of an add-on to World of Warcraft called Glider was secondarily liable for copyright infringement because it provided software that allowed users to play in unauthorized ways. Not so, said the appellate court, because there was no direct liability to begin with. The license term that forbade WoW players from using Glider was a covenant—a promise not to do something—rather than a condition—limiting the scope of the copyright license. And while violating “antibot” covenants (thou shall not play WoW on autopilot) might breach a contract, it does not violate any copyright—by contrast, creating a derivative work might.

This point may seem a bit arcane, but it’s crucial because it helps avoid a situation in which violating contracts and End User License Agreements (EULAs) could result in a copyright infringement lawsuit (with the heavy burden of statutory damages, attorney’s fees and low standards for injunctions) rather than just a simple breach of contract claim. As the court observed: Were we to hold otherwise, Blizzard—or any software copyright holder—could designate any disfavored conduct during software use as copyright infringement, by purporting to condition the license on the player’s abstention from the disfavored conduct. The rationale would be that because the conduct occurs while the player’s computer is copying the software code into RAM in order for it to run, the violation is copyright infringement. This would allow software copyright owners far greater rights than Congress has generally conferred on copyright owners. We can expect more litigation on this issue, as users and innovators fight back against the use of software license agreements to stifle innovation.

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