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## **Keywords**

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by Jess Robinson

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*Editor's note: The following blog post was published on [www.ipbrief.net](http://www.ipbrief.net) on April 13th, 2011.*

Up until a few days ago, computer hacker George Hotz was facing a lawsuit for having created a digital tool that “jailbreaks” a Playstation 3, i.e., provides unauthorized access to its copyrighted firmware. Sony’s charge against him was for having violated section 1201(a) of the Digital Millennium Copyright Act (DMCA), which prohibits the circumvention of copyright protections in digital media. Among other things, jailbreaking a PS3 allows users to run home-brewed software and, in general, free the videogame system’s powerful computer from its packaged, limited uses. Jailbreaking sounds reasonable when you describe it like this, but it’s illegal under the DMCA, except for a few exceptions- most notably with the iPhone. Things are never as simple as they might seem, but it’s unintuitive why a consumer shouldn’t be able to tinker and hack into devices they legally purchased, or why doing so is illegal on a PS3 but not on an iPhone. Here’s a shot at reconciling all of this.

I don’t own a PS3, but I can understand the appeal of jailbreaking an iPhone. There’s a huge app store built into the iPhone package deal, but Apple’s business model makes sure that only approved apps are available to consumers like me. If I wanted an app that Apple didn’t want me to have, tough luck. Jailbreaking my iPhone would allow me to customize my phone to a much greater degree and afford me other benefits too. On the other hand, it would void the phone’s warranty, and until recently could land me in court too. I totally understand why going against Apple’s conditions of use would void the warranty, but it seems strange how breaking Apple’s rules used to actually be *illegal*. In a way, it’s ironic how companies like Apple are streamlining their products and the powers at be *criminalize* unauthorized customization.

The Electronic Frontier Foundation’s Fred von Lohmann made an interesting but flawed analogy comparing electronic devices like iPhones and PS3s with cars. According to him, users should be able to modify their toys and gadgets just like a car owner can pop the hood and tinker with an engine. Though appealing, the analogy overlooks or ignores fundamental differences between physical and digital products. Unlike with a car engine, the operating

systems that run an iPhone or PS3 are copyrighted by the gadgets’ respective companies. I attribute it to the manipulability of digital information, but for whatever reason, the 1s and 0s under the hood of an electronic device are more protected than the specific way that a car manufacturer has built an engine under the hood of a car. I think the argument goes that greater protections are afforded because someone like George Hotz can crack into Sony’s PS3 source code, manipulate the information, and then turn around and sell it at marginal or no costs.

Especially if hackers like George Hotz aren’t selling manipulated code, are criminal sanctions warranted just for jailbreaking/modding a computer to increase its utility? It’s hard to say, but the DMCA’s latest exemptions to section 1201 are interesting because they limit the protection afforded to copyrighted computer operating systems. In the exemptions’ very specific circumstances, jailbreaking/ hacking is legal when done for fair use and when non-manipulative means are unavailable. By allowing jailbreaking even in very limited contexts, I’d say that the powers at be are ever so slightly attacking business models that purposely handicap products in order to create a demand for later versions with slightly enhanced features.

While the legality of jailbreaking for iPhones gives some a reason to celebrate, PS3 hackers shouldn’t assume that they too should be able to legally customize their videogame systems. A few exceptions to the illegality of jailbreaking doesn’t mean section 1201 of the DMCA is going away; jailbreaking a PS3 is still illegal because it infringes on copyrighted material- a work product- owned by Sony.

Does it mean anything that Sony dropped its suit against George Hotz in exchange for him promising not to hack anything Sony-branded ever again? Well, everything means *something*, but it doesn’t mean that Sony’s getting away with something or that it doesn’t have a legitimate interest in protecting its work product. At best it might mean that the public doesn’t *think* the work product should be protected quite so much. Maybe the forces of economics will take it from there and swing the pendulum more towards Hotz.