

Petition for Proposed Exemption Under 17 U.S.C. § 1201

*Note: This is a Word document that allows users to type into the spaces below.
Please submit a separate petition for each proposed exemption*

Item 1. Submitter and Contact Information

Clearly identify the submitter, and, if desired, provide a means for others to contact the submitter or an authorized representative of the submitter by email and/or telephone. (Parties should keep in mind that any private, confidential, or personally identifiable information appearing in this petition will be accessible to the public.)

Submitter: Competitive Carriers Association (“CCA”)

CCA is the nation’s leading association for competitive wireless providers and stakeholders across the United States. CCA’s membership includes more than 100 competitive wireless providers ranging from small, rural carriers serving fewer than 5,000 customers to regional and national providers serving millions of customers. The licensed service area of CCA’s carrier members covers more than 95 percent of the nation. CCA also represents approximately 200 associate members consisting of small businesses, vendors, and suppliers that serve carriers of all sizes.

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Item 2. Brief Overview of Proposed Exemption

Provide a brief statement describing the proposed exemption (ideally in one to three sentences), explaining the type of copyrighted work involved, the technological protection measure (“TPM”) (or access control) sought to be circumvented, and any limitations or conditions that would apply (e.g., a limitation to certain types of users or a requirement that the circumvention be for a certain purpose).

Because the wireless handset category consists of a broad category of consumer devices including basic handsets, feature phones, smartphones and phablets, CCA proposes the below exemption.¹

Computer programs, in the form of firmware, software, or data used by firmware or software, that enable wireless handsets to connect to a wireless network that offers

¹ CCA is filing four separate petitions addressing the following categories: (i) wireless handsets; (ii) all-purpose tablet computers; (iii) mobile hotspots and MiFi devices; and (iv) connected wearables, and consumer machines (the Internet of Things). For consistency and efficiency, however, these petitions, and other similar petitions, should be consolidated into a single “wireless device” proceeding, as they all involve computer programs used in devices that connect to a telecommunications and/or broadband network. Consumers do not distinguish among categories of connected devices, and having an exemption only applicable to a subset of wireless devices is likely to cause consumer confusion and frustration.

telecommunications and/or information services, when circumvention is initiated by the owner of the device, or by another person at the direction of the owner of the device, in order to connect to a wireless network that offers telecommunications and/or information services, and access to the network is authorized by the operator of the network.

Item 3. Copyrighted Works Sought to be Accessed

Identify the specific class, or category, of copyrighted works that the proponent wishes to access through circumvention. The works should reference a category of work referred to in section 102 of title 17 (e.g., literary works, audiovisual works, etc.). Unless the submitter seeks an exemption for the entire category in section 102, the description of works should be further refined to identify the particular subset of work to be subject to the exemption (e.g., e-books, computer programs, motion pictures) and, if applicable, by reference to the medium or device on which the works reside (e.g., motion pictures distributed on DVD).

CCA proposes that consumers should have access through circumvention to a subcategory of copyrighted works identified in 17 U.S.C. Section 102(a)(1): “literary works.” The specific subcategory is: “Computer programs, in the form of firmware, software, or data used by firmware or software, that enable wireless handsets to connect to a wireless network that offers telecommunications and/or information services.”

In House Report No. 94-1476, Congress made it clear that the Section 102(a) copyright category “literary works” includes computer programs: “The term ‘literary works’ . . . also includes . . . programs to the extent that they incorporate authorship in the programmer’s expression of original ideas, as distinguished from the ideas themselves.”² The firmware and software, and data used by firmware and software, contained on wireless handsets constitute the expression of original ideas, and not merely the ideas themselves. Accordingly, the proposed copyrighted work falls within a well-settled category of copyrighted works, as defined in Section 102 of Title 17.

Item 4. Technological Protection Measure

Describe the TPM that controls access to the work. The petition does not need to describe the specific technical details of the access control measure, but should provide sufficient information to allow the Office to understand the basic nature of the technological measure and why it prevents open access to the work (e.g., the encryption of motion pictures on DVD using the Content Scramble System or the cryptographic authentication protocol on a garage door opener).

CCA proposes to circumvent software or firmware locks on a wireless handset that prevent the handset from accessing the wireless network of the wireless handset owner’s choosing.

Wireless handsets are hardware or software-locked using a variety of methods, including service provider code (SPC) locking, system operator code (SOC) locking, band order locking and Subscriber Identity Module (SIM) locking or Universal Integrated Circuit Card (UICC) locking. These locking mechanisms bind the device to specific wireless networks and

² H.R. Rep. No. 94-1476 at 54.

prevent consumers from accessing the wireless network of their choice. Only by circumventing these various TPMs can a handset owner transfer the use of the handset to a network and provider of their choosing.

Item 5. Noninfringing Uses.

Identify the specific noninfringing uses of copyrighted works sought to be facilitated by circumvention (e.g., enabling accessibility for disabled users, copying a lawfully owned computer program for archival purposes, etc.), and the legal (statutory or doctrinal) basis or bases that support the view that the uses are or are likely noninfringing (e.g., because it is a fair use under section 107, it is a permissible use under section 117). Include a brief explanation of how, and by whom, the works will be used.

Consumers who unlock wireless handsets may engage in one or more of several noninfringing uses of the copyrighted software or firmware that resides on their wireless handset and permits it to connect to networks. Typically, the circumvention of the TPM allows an owner, who has fulfilled all obligations to the original provider, to operate the device on the network of a new, compatible wireless provider of their choosing. However, handsets are also unlocked by charitable organizations, who donate the phones for use or re-sell them to finance charitable works, or by environmental organizations who encourage the re-use or recycling of devices to keep toxic chemicals out of landfills.

Noninfringing use of these copyrighted works is supported under multiple legal theories, three of which are explained here. First, handset unlocking constitutes “fair use” under 17 U.S.C. Section 107. When most wireless handsets are unlocked, the device owner is simply changing the variables in certain memory locations and updating the preferred roaming list (PRL) to make the handset useable on the new network. Carriers regularly update the PRL on their customers’ handsets, so the original author of the copyrighted work intended these variables to be changed without constituting a copyright violation. Further, unlocking a wireless handset meets all four factors of the “fair use” test set forth in Section 107: (1) the purpose of the use is to allow the lawful owner of the handset to connect to a wireless network of their choice, a reasonable and noninfringing use; (2) the copyrighted work is intended to be changed in this manner and is necessary for the handset owner to derive any continued value from the copyrighted work; (3) the amount of the code used in an altered state is extremely small compared to the handset operating system as a whole; and (4) the market for and value of the copyrighted work actually increases, as it allows the handset to be transferred on the secondary market more easily and to a broader array of buyers.

Second, unlocking a wireless handset does not create an infringing “derivative work.” This is because, in most instances, unlocking a wireless handset does not change the underlying mobile wireless handset software, but rather it merely changes underlying variables accessed by the program. As discussed above, these variables are intended by the software designer to be changed, and their change, therefore, does not create an infringing derivative work. Instead, the software is merely being operated by the handset owners as intended.

Third, if a derivative work is, in fact, created, it falls within the exception set forth in 17 U.S.C. Section 117(a)(1). This subsection states that a derivative work may be created by the owner of a copyrighted work if the “new copy or adaptation is created as an essential step in the

utilization of the computer program in conjunction with a machine and that it is used in no other manner.” Since the changes being made to the copyright work are the same ones that need to be made by the underlying carrier in order for the handset to operate properly on its wireless network, such adaptations are inherently “essential step[s] in the utilization of the computer program in conjunction with [the device].” Indeed, in 2012, the Register agreed that unlocking was an “essential step” in the utilization of the device, finding again that “[m]odifications to the firmware or software on the phone may be necessary to make the device functional with another service and better serve the legitimate needs of the consumer.”³

Item 6. Adverse Effects.

Explain how the inability to circumvent the TPM has or is likely to have adverse effects on the proposed noninfringing uses (e.g., the TPM limits wireless connection to the network of the mobile carrier from which the cellphone was originally purchased or prevents an electronic book from being accessed by screen reading software for the blind). The description should include a brief explanation of the negative impact on uses of copyrighted works. The adverse effects can be current, or may be adverse effects that are likely to occur during the next three years, or both. While the petition must clearly and specifically identify the adverse effects of the TPM, it need not provide a full evidentiary basis for that claims .

The most clear, and most immediate, adverse effect that the TPMs that lock wireless handsets have is to prevent consumers from easily switching their handsets to the competing network of their choice. Although carriers may unlock under certain circumstances, owners should not be beholden to the carrier after completion of service agreement commitments. As the Senate has noted, there are also “circumstances in which additional avenues for unlocking may be preferable over attempting to unlock through the carrier.”⁴ Absent an exemption, TPMs used to lock handsets to a particular network will foreclose the ability to exercise preferable, and in some cases, the only, avenues to unlock devices. Since circumvention to connect to an alternative network would be a noninfringing use of the copyrighted work, consumers should have the freedom to unlock their handsets on their own or through an agent of their choosing.

While some carriers have “voluntary” unlocking policies, the exemption remains necessary in the event that incomplete or voluntary agreements to unlock devices fail to provide an owner the ability to unlock a handset. For example, original equipment manufacturers (OEMs) are not signatories to existing voluntary agreements and are not bound by the current voluntary agreement entered into by the nation’s five largest carriers.⁵ As NTIA noted in the last triennial review, and the voluntary agreement confirms, oftentimes carriers must have the necessary code or the ability to reasonably obtain it to unlock the device.⁶ Where a voluntary

³ 2012 Recommendation at 93.

⁴ Senate Report 113-212, available at <http://www.gpo.gov/fdsys/pkg/CRPT-113srpt212/html/CRPT-113srpt212.htm>.

⁵ See CTIA Consumer Code of Conduct § 12.

⁶ NTIA Reply Comments at 16, available at http://www.copyright.gov/1201/2012/2012_NTIA_Letter.pdf; CTIA Consumer Code of Conduct § 12.

agreement only requires that a carrier “initiate a request to the OEM to unlock the eligible device” it is possible for the carrier to comply with the agreement without the consumer ultimately unlocking his or her device. Additionally, carrier unlocking procedures may limit the number of times a device may be unlocked or permanently disable the unlock ability through carrier avenues.⁷

Where owners are unable to unlock a handset to connect to their network of choice, they may be forced to purchase a new handset. The owner may then lose contacts, personal information, and apps and other content, as well as significant investments made in peripheral items like chargers, headsets, batteries and cases.

After the previous handset unlocking exemption was allowed to expire, Congress saw sufficient current adverse effects, as well as the potential for adverse effects, to immediately reinstate and expand the exemption in the “Unlocking Consumer Choice and Wireless Competition Act.” Even with other voluntary unlocking policies in place, Congress saw sufficient harm in the marketplace to adopt legislation. Additionally, NTIA petitioned the FCC to commence a rulemaking to require carriers to unlock devices upon request. NTIA stated that a rule would “increase competition and enhance consumer welfare.” While the enactment of the Unlocking Consumer Choice and Wireless Competition Act foreclosed the need for rulemaking, not extending an exemption would have the adverse effects of decreased competition and consumer welfare.

Even President Obama, in a statement applauding Congress for passing the Unlocking Consumer Choice and Wireless Competition Act, referenced steps “to ensure copyright law does not undermine wireless competition,” including fixes “that make it clear: neither criminal law nor technological locks should prevent customers from switching carriers when they are no longer bound by a service agreement or other obligation.” Failure to grant an exemption would reinstate criminal penalties that may prevent consumers from switching carriers, a clear and immediate adverse effect.

The Copyright Office should heed the outcry from consumers, Congress and the Administration about the current and potential anti-consumer harms that failing to adopt a wireless handset unlocking exemption would bring, and adopt CCA’s proposed exemption.

⁷ See, e.g., AT&T Device Unlock Instructions at 1, available at <http://www.att.com/media/att/2014/support/pdf/ATTMobilityDeviceUnlockCodeInstructions.pdf>.