

Before the

**U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS**

**In the matter of exemption to prohibition on circumvention
of copyright protection systems for access control technologies**

Docket No. RM 2014-07

**Submitted on behalf of Petitioner Institute of Scrap Recycling Industries, Inc.
by Juelsgaard Intellectual Property & Innovation Clinic, Stanford Law School**

The Juelsgaard Intellectual Property & Innovation Clinic, on behalf of the Institute of the Institute of Scrap Recycling Industries, Inc., submits the following petition in response to the Copyright Office’s Notice of Inquiry and Request for Petitions (“NOI”)¹ and respectfully asks the Librarian of Congress to exempt the following class of works from 17 U.S.C. § 1201(a)(1)’s prohibition on the circumvention of access control technologies for the period 2015-2018:

***Proposed Class:** Computer programs, in the form of firmware or software, that enable all-purpose tablet computers to connect to a wireless telecommunications network, when circumvention, including individual and bulk circumvention for used devices, is initiated by the owner of any such tablet, by another person at the direction of the owner, or by a provider of a commercial mobile radio service or a commercial mobile data service at the direction of such owner or other person, solely in order to enable such owner, family member of such owner, or subsequent owner or purchaser of such tablet to connect to a wireless telecommunications network when such connection is authorized by the operator of such network.*

I. Submitter and Contact Information

This petition is submitted on behalf of the Institute of Scrap Recycling Industries, Inc. (“ISRI” or “Petitioner”). ISRI is a Washington, DC-based trade association representing more than 1,600 for-profit companies—ranging from small, family-owned businesses to large, multi-national corporations—operating at more than 3,500 facilities in the United States and 34 countries worldwide. Various ISRI members purchase or otherwise lawfully acquire cell phones, tablet computers, and other electronic devices and seek to make the best possible use of them through resale or recycling.

Petitioner may be contacted through the above-identified counsel.

II. Brief Overview of Proposed Exemption

Petitioner seeks an exemption to the DMCA’s prohibition against circumvention of technological measures that control access to computer programs that enable all-purpose tablet computers (“tablets”) to connect to wireless communications networks—a process commonly referred to as “unlocking.”² These computer programs can be used, reprogrammed, adapted or replaced to allow

¹ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 79 Fed. Reg. 55687 (September 17, 2014) [hereinafter NOI].

² This petition seeks an exemption for all-purpose tablet computers. Petitioner is submitting a separate, nearly-identical petition for an exemption for wireless telephone handsets out of an abundance of caution, given the NOI’s direction that

the tablet to connect to a different provider's network but, like mobile phones, such tablets typically contain a technological measure that prevents access to these programs and thereby “lock” the device onto an initial provider’s network and prevent it from being connected to another network.

Without a 1201 exemption, owners of tablets, including consumers, family members, and legitimate resellers and recyclers, are substantially impaired in their ability to make a variety of noninfringing uses. Resellers are unable to engage in noninfringing individual or bulk unlocking of devices, consumers are denied the use of their devices on the network of their choice and denied the benefits of choosing or selling used devices, consumers have more difficulty using their devices when they travel, and competition between new and used devices and between networks is reduced.

In each of the last three 1201 rulemakings, the Register has recommended and the Librarian has approved exemptions for phone unlocking, though each has been increasingly narrow. Earlier this year, after public outcry regarding the 2012 exemption, Congress enacted the Unlocking Consumer Choice and Wireless Competition Act (“Unlocking Act”),³ which repealed that exemption, substituted the 2010 exemption, and directed the Librarian to consider proposals for cell phone and other device unlocking as part of this current rulemaking.⁴ More importantly, the Act expressly directed the Librarian to consider whether to extend the unlocking exemption “to include any other category of wireless devices in addition to wireless telephone handsets.”⁵ The White House response to the We The People unlocking petition also concluded that the ability of consumers to lawfully unlock their cell phones “should also apply to tablets, which are increasingly similar to smart phones.” The Unlocking Act also specified, and made permanent, that the handset circumvention it restored, as well as future unlocking exemptions for phones, tablets or other devices, may be initiated by “the owner of the handset or device, by another person at the direction of the owner, or by a provider of commercial mobile radio or data services to enable such owner or a family member to connect to a wireless network when authorized by the network operator.”⁶

Petitioner’s requested exemption for tablets is substantially similar to that specified by Congress for phones in the Unlocking Act. Circumvention by the owner of a tablet or by another person at the direction of the owner includes by resellers of used tablets engaging in individual or bulk circumvention for the purpose of unlocking those tablets so they can then be connected to the wireless network chosen by the subsequent owner, whether that owner is a purchaser or other recipient. To avoid doubt on this point, the proposed class requested in this petition explicitly notes that the circumvention permitted includes individual and bulk circumvention of used devices in order to enable the owner, and subsequent owners or purchasers to connect to a network of their choice although Petitioner believes this authority is already fully encompassed by the language specified in the Unlocking Act.

The White House petition response concluded that being able to use a mobile device on another network is “crucial for protecting consumer choice” and stressed that this ability is “*particularly*

petitions focus on “specific categories of devices.” NOI at 55692. However, Petitioner believes that the substance of the noninfringing uses, adverse effects, and other components of the requests for exemptions for both categories of devices are substantially similar and could properly be combined in the NPRM.

³ Pub. L. No. 113-144, 128 Stat. 1751 (Aug. 1, 2014) [hereinafter *Unlocking Act*]. See NOI at 55689 n. 8 (“Congress enacted the Unlocking Act after public calls for a broader exemption than that provided in the 2012 rule.”)

⁴ *Unlocking Act* § 2(a); see NOI at 55688-89.

⁵ *Unlocking Act* §§ 2(B); see NOI at 55689.

⁶ *Unlocking Act* §§ 2(a), (c); see NOI at 55688.

important for secondhand or other mobile devices that you might buy or receive as a gift, and want to activate on the wireless network that meets your needs—even if it isn't the one on which the device was first activated. All consumers deserve that flexibility."⁷ Congress, for its part, contemplated that the exemption it restored would include bulk unlocking of used devices. In the final wording of the version of the Unlocking Act that became law, negotiators removed language from the House bill that might have been read as expressing skepticism regarding bulk unlocking⁸ and replaced that language with a general savings clause that contained no suggestion of precluding bulk unlocking by resellers.⁹ Ensuring that any new unlocking exemption permits legitimate resellers and recyclers to unlock, individually or in bulk, lawfully acquired wireless devices for the benefit of consumers and their businesses is essential.

III. Copyrighted Works Sought To Be Accessed

This petition seeks a limited exemption for computer programs, in the form of firmware or software, that enable all-purpose tablet computers to connect to a wireless telecommunications network. Computer programs are considered "literary works" under 17 U.S.C. § 102.

IV. Technological Protection Measure

As the Register has recognized in each of the last three rulemakings, and as continues to be the case, computer programs, in the form of software or firmware, that enable handsets to connect to a wireless telecommunications network typically are protected by a technological measure or "lock" embedded in the phone's firmware or software and prevent the phone's owner from gaining access to the settings that connect the phone and thereby prevent unlocking the device for purposes of connecting to another wireless telecommunications network.¹⁰ Similar technological measures prevent access to computer programs that enable tablets to connect to wireless networks.

V. Noninfringing Uses

Software or firmware on a tablet that enables the device to connect to a wireless telecommunications network will be used for the non-copyright purpose of connecting that device to a network other than the original network, with the permission of the new network provider. As the Register has consistently determined in its previous rulemakings, and as Congress plainly concluded in the Unlocking Act, using such software or firmware on a telephone handset to unlock that device is noninfringing. Unlocking tablet computers is similarly noninfringing.

⁷ *Official White House Response to "It's Time to Legalize Cell Phone Unlocking"*, available at <https://petitions.whitehouse.gov/response/its-time-legalize-cell-phone-unlocking> (emphasis added)

⁸ See Unlocking Consumer Choice and Wireless Competition Act, H.R. 1123 § 2(c)(2), 113th Cong. (2014) ("Nothing in this subsection shall be construed in any rulemaking commenced on or after the date of enactment to permit the unlocking of wireless handsets or other wireless devices, for the purpose of bulk resale, . . ."). *But see* 160 Cong. Rec., H1910 (daily ed. Feb. 25, 2014) (in colloquy on House floor just before passage of H.R. 1123, the bill's sponsor, Rep. Goodlatte, stated, "this legislation is not intended to impair unlocking related to family plans consisting of a small number of handsets *or of used phones by legitimate recyclers or resellers.*") (emphasis added).

⁹ *Unlocking Act* § (d)(1) ("Except as expressly provided herein, nothing in this Act shall be construed to alter the scope of any party's right under existing law.")

¹⁰ See, e.g., 2010 Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43825, 43830 (July 27, 2010) [hereinafter 2010 Final Rule].

First, accessing a device’s software or firmware for the purpose of enabling connection to a wireless network is not a use that ordinarily infringes or implicates copyright in the first instance. The software or firmware modifications necessary to unlock a device are generally noninfringing. As the Register recognized in 2010, “the elimination and insertion of codes or digits, or completely reflashing a phone, cannot be considered an infringement of the computer program controlling the device.”¹¹ Instead, the Register correctly recognized that “the primary purpose of the locks is to keep consumers bound to their existing networks, rather than to protect the rights of copyright owners in their capacity as copyright owners. . . . Because there appear to be no copyright-based reasons why circumvention under these circumstances should not be permitted, the Register recommends that the Librarian designate a class of works similar to the class designated in 2006. The designated classes, both [2006 and 2009], simply reflect a conclusion that unlocking a mobile phone to be used on another wireless network does not ordinarily constitute copyright infringement and that Section 1201(a)(1), a statute intended to protect copyright interests, should not be used to prevent mobile phone owners from engaging in such noninfringing activity.”¹²

Second, accessing and using the software and firmware as requested here is permitted by 17 U.S.C. § 117.¹³ To the extent that modifying or reprogramming firmware might be construed as making an adaptation of a work, 17 U.S.C. § 117(a)(1) specifically permits the owner of a copy of a program to make such a copy or adaptation if it is created “as an essential step in the utilization of the computer program in conjunction with a machine.”¹⁴

VI. Adverse Effects

ISRI members purchase or acquire donated cell phones, tablets, and other electronic devices no longer needed by their original owners, and try to make the best possible use of them through resale or recycling. For newer devices, this generally means reselling the device domestically to those who do not want or cannot afford the latest models. Older devices that may not be saleable within the U.S. market can often still be sold internationally, maximizing value and extending the device’s useful life, and often putting tablets in the hands of those who could not otherwise afford them.

Tablet owners, whether they are individual consumers or resellers, suffer adverse effects from the inability to lawfully circumvent the technological measures protecting the software and firmware in their lawfully acquired wireless devices because a tablet locked to a particular carrier has less value to everyone involved—the original purchaser, the reseller, and the potential secondary purchaser—than does an unlocked tablet. These adverse impacts are felt not only by those who have already purchased tablets, but also by those who will purchase tablets and then seek to resell them during the three years before the next rulemaking.

The inability to lawfully and predictably unlock mobile devices hurts resellers and reduces the overall economic value and profitability of the U.S. used tablet market, reducing domestic job creation. It

¹¹ See 2010 Recommendation of the Register of Copyrights at 134 (June 11, 2010).

¹² *Id.* at 152-153. The 2006 Rule similarly found that a user who unlocks a wireless handset is not “engaging in copyright infringement or in an activity that in any way implicates copyright infringement or the interests of the copyright holder,” and that “the access controls do not appear to actually be deployed in order to protect the interests of the copyright owner or the value or integrity of the copyrighted work; rather, they are used by wireless carriers to limit the ability of subscribers to switch to other carriers, a business decision that has nothing whatsoever to do with the interests protected by copyright.” 2006 Final Rule, 71 Fed. Reg. 68472, 68476 (Nov. 20, 2006).

¹³ As the Register noted again in 2012, at least “some subset of wireless customers” own the software on their devices. 2012 Recommendation of the Register of Copyrights at 93 (October 2012).

¹⁴ See, e.g., 2010 Final Rule, 75 Fed. Reg. 43825, 43831 (July 27, 2010).

also creates an economic disadvantage for domestic resellers, as foreign resellers are able to lawfully unlock these devices. Tablets for resale in the U.S. can be offered to a far smaller audience if they are restricted to the carrier on which the tablet was originally used. When tablets can be unlocked before resale, the additional value is passed on, in part, to the original tablet purchaser, who can often receive payment from the reseller for his or her used tablet.

Mobile device users are also harmed by recyclers not being able efficiently to unlock tablets. Domestic consumers, particularly customers of smaller or regional carriers, will have fewer tablet choices if they must buy a used tablet originally sold for use on their carrier. Indeed, smaller carriers often serve domestic markets not reached by the major carriers and often cannot get access to the newest, most desirable tablets due to exclusivity deals. Resale of used, unlocked tablets may be the *only* way for their customers to use them. A consumer who wants to resell his or her device (either directly or through a recycler) will also receive a lower price if the tablet remains limited to a single carrier. Consumers wishing to buy used devices will have fewer choices and pay higher prices because they will more often be restricted to tablets originally sold for their carrier.

Carrier involvement in unlocking tablets does not obviate these adverse effects, and often exacerbates them. Electronics recyclers are often simply denied permission or unlocking codes by the original carrier. As a result, the business model and viability of a reseller are unpredictable and overly dependent on the whims of carriers. This greatly reduces the value of used tablets and decreases certainty about that value to consumers and recyclers alike. Even where carriers do not outright block reuse of the tablet, their involvement can inject delays into the process and slow the ability of a reseller to place a used tablet back into the market. Because older handsets are less desirable and lose value over time, tablets that cannot be quickly unlocked, perhaps in bulk, by resellers become less valuable to the original purchaser, the reseller, and the potential re-user.

Voluntary unlocking commitments made by some mobile carriers¹⁵ do not alleviate these adverse impacts, as the terms are limited to individual owners and/or carriers' customers and former customers. Even if recyclers eventually receive permission to unlock tablets, carriers often charge fees to perform the unlocking, and the process creates delay and increases complexity. These delays, fees, and added complexity lower the value of consumers' purchased devices, make used devices less affordable, and reduce the viability of resellers and secondary markets. Voluntary agreements also do not apply to or alleviate the impact on corporate customers, who own a large percentage of used devices that move into the secondary market, and often require bulk unlocking for hundreds, even thousands of used devices during a single corporate refresh.

Recyclers are best positioned to efficiently unlock the tablets they lawfully acquire both from individuals and in bulk from corporate and public enterprise customers. Section 1201's ban on circumvention substantially harms recyclers and consumers and lowers the value to consumers of their purchased tablets while raising the cost of reusing those tablets through a secondary market. Without the ability to lawfully circumvent technological measures preventing the unlocking of these tablets, recyclers cannot efficiently and economically recover and process these devices.

¹⁵ See, e.g., CTIA - The Wireless Association, *Letter re Carrier Unlocking Voluntary Commitment* (Dec. 12, 2013), available at <http://www.ctia.org/docs/default-source/fcc-filings/ctia-letter-on-unlocking.pdf>.