

Reply Comment Regarding a Proposed Exemption Under 17 U.S.C. 1201

Item 1. Commenter Information

eBay Inc., 2145 Hamilton Avenue, San Jose, CA 95125
Gazelle, Inc., 300 A Street, Boston, MA 02210

Of Counsel:
Robert S. Schwartz
Constantine Cannon LLP
1001 Pennsylvania Avenue, N.W.
Suite 1300N
Washington, D.C. 20004
202 204-3508
rschwartz@constantinecannon.com

Item 2. Proposed Class Addressed

Proposed Class 11: Unlocking – wireless telephone handsets.

Item 3. Reply Statement

Gazelle and eBay note that after the round of opposing comments there is nothing in the record that is inconsistent with the bulk unlocking exemption as petitioned for by ISRI and supported by eBay and Gazelle in their filed comments.

The only comment opposing the ISRI petition on which eBay and Gazelle filed supporting comments was filed by Tracfone. eBay and Gazelle note that the alternative formulation of an exemption that Tracfone indicated could be acceptable would in no way preclude or impair an exemption for bulk unlocking as petitioned for by ISRI. The language that Tracfone indicated would be acceptable as an alternative formulation to their request for denial is as follows:

Computer programs, in the form of firmware or software, that enable used wireless telephone handsets to connect to a different wireless telecommunications network than the network to which it was locked (the “Original Network”), but only if: (a) such unlocking is not for the purpose of profiting from any subsidy, discount, installment plan, lease, rebate or other incentive program (collectively, “Subsidy”) offered by the Original Network service provider; (b) all obligations to the Original Network service provider associated with the provision of the Subsidy have been satisfied or waived; and (c) such unlocking is not for any unlawful purpose, including, but not limited to, obtaining unauthorized access to a wireless network.

While it is up to petitioners to comment and the Register to determine whether this formulation is satisfactory,¹ eBay and Gazelle observe that such a formulation would be in no way inconsistent with the course of commerce for which they have supported exemption in their own comments:

Our businesses rely, directly or indirectly, on the purchase from consumers of telephone handsets that are sold as “locked” to a specific carrier network and that according to the terms on which their consumer owners acquired them are eligible to be “unlocked” so that they may be re-sold and connected to a different network.

The Tracfone proposed formulation appears to be carefully and specifically stated so as to avoid any suggestion that bulk unlocking of *eligible* phones would be outside the granted exemption. Accordingly, the only remaining issue for the Register appears to be whether ISRI and the other petitioners, as supplemented by the Comments filed by eBay / Gazelle and others, have presented proof necessary to support the exemption as requested by ISRI. It is evident that they have. Therefore Gazelle and eBay restate their support for the specific exemption petitioned for by ISRI:

Proposed Class: Computer programs, in the form of firmware or software, that enable wireless telephone handsets 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 handset, 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 handset to connect to a wireless telecommunications network when such connection is authorized by the operator of such network.

¹ eBay and Gazelle note that condition (a) appears redundant of the other requirements. Moreover, the question of whether *any* DMCA violation or copyright infringement occurs in the context of such unlocking, as raised by eBay and Gazelle and other commenters, persists.