

Addendum to Petition for Extension of Current Exemption Under 17 U.S.C. § 1201

Computer programs that operate cellphones, tablets, mobile hotspots, or wearable devices (e.g., smartwatches), to allow connection of a used device to an alternative wireless network (“unlocking”)

July 28, 2017

Item 1. Submitter and Contact Information

Consumers Union Proposed Exemption for Mobile
Wireless Communications Device Unlocking

Submitter Information:

Consumers Union is the public policy and mobilization arm of Consumer Reports. Consumers Union is an expert, independent, nonprofit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. It conducts this work in the areas of telecommunications reform, health reform, food and product safety, financial reform, and other areas. Consumer Reports is the world’s largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit organization rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.

In previous triennial reviews, Consumers Union proposed an exemption to the anti-circumvention prohibition in section 1201 of the Digital Millennium Copyright Act (DMCA) for mobile phone and mobile wireless communications device unlocking, to enable consumers with used mobile devices to connect them to the wireless communications network of their choice. We wrote to Congress and the FCC in the spring of 2013 urging them to restore the exemption. We worked closely with the House and Senate in helping Congress enact the Unlocking Consumer Choice and Wireless Competition Act. And we supported renewal of the exemption in the most recent review, as we do now.

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Item 2. Brief Overview of Proposed Exemption

Consumers should have the right to maintain the useful life of their mobile phones and other mobile communications devices. In 2014, Congress reaffirmed this, by reinstating and strengthening the exemption protecting the right for owners of mobile phones to unlock them so they can be connected to different wireless networks.¹ At the same time, Congress also specifically directed the Registrar of Copyrights and the Librarian of Congress to consider “extend[ing] the exemption” to include other mobile wireless communications devices, such as tablets, along with mobile phones.² In the 2015 triennial review, the Register recommended and the Librarian adopted such an exemption once again -- for mobile wireless devices as well as for tablets, mobile hotspots, and wearable devices such as smartwatches.

Consumers Union supports extending the exemption so that consumers can continue to appropriately circumvent the “technological protections measures” controlling the software and firmware that lock those devices to particular wireless communications networks, as necessary to connect to a different network. Moreover, allowing access by another person at the direction of the owner of the device, as well as by the owner, ensures that more consumers are able to exercise this choice. As we noted in our Digital Testing Standard,³ when a consumer purchases a product, the consumer should obtain genuine ownership of the product and its parts, including the ability to make effective use of the product, and the ability to effectively resell it.⁴ The exemption better enables consumers to have this kind of ownership of their devices.

Consumers Union believes that extending the exemption for mobile phone handsets and for their functional equivalents – tablets, mobile hotspots, and wearable

¹ Unlocking Consumer Choice and Wireless Competition Act, Pub. L. No. 113-144 (Aug. 1, 2014).

² *Id.*, sec. 2(b).

³ The Digital Testing Standard (theDigitalStandard.org) was launched on March 6th, 2017 and is the result of a collaboration with our cybersecurity partners, Disconnect, Ranking Digital Rights, and the Cyber Independent Testing Lab. The Standard is designed to hold companies accountable and equip Consumer Reports and other organizations to test and rate products for how responsibly they handle our private data. This is a collaborative and open source effort. The Standard is designed to empower consumers to make informed choices about the connected products, apps, and services consumers use everyday.

⁴ *The Standard*, THE DIGITAL STANDARD, <https://www.thedigitalstandard.org/the-standard> (last visited July 20, 2018).

devices – also effectuates the intent of Congress in enacting the Unlocking Consumer Choice and Wireless Competition Act, consistent with the Copyright Office’s request that proposed wireless device exemptions “be made with an appropriate level of specificity.”⁵ The mobile devices included within the scope of this exemption involve essentially the same relationships between consumers, mobile device manufacturers and sellers, and wireless carriers, with essentially the same legal and evidentiary showings.⁶ (We understand that other parties will, as in the past, propose exemptions for other wireless devices; our focus on handset phones and their functional equivalents should not be taken to indicate that we oppose other exemptions.)

We believe the exemption as currently in effect can be extended as written. We also made some suggestions for clarification in the last triennial review, which we would re-submit if the Copyright Office and other interested parties are open to considering them.

Item 3. Copyrighted Works Sought to be Accessed

The exemption permits access to literary works in the form of computer programs, specifically software or firmware, located in a mobile wireless communications device, that enable voice and data connections between the device and a communications network. Whether or not these computer programs actually *are* copyright-protected in this respect – a question we addressed further in the last review’s public comment phase – we do not believe the prohibition on circumvention should apply so as to prevent connection of the devices to other wireless networks.

Item 4. Technological Protection Measure

Wireless carriers, with the help of mobile device manufacturers, create “technological protection measures” that control access to the underlying computer programs that enable devices to connect to wireless communications networks. As Consumers Union’s previous comments to the Copyright Office have explained, wireless carriers rely on many different technological protection measures to lock a mobile device to a particular network.⁷ The locks placed on wireless devices restrict consumers’ ability to access the underlying computer programs that enable connectivity between the device and wireless networks. Because consumers cannot access the underlying programs connecting their device to a particular network without circumventing the technological protection measures, they are unable to modify those

⁵ *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, Notice of Inquiry and Request for Petitions, 79 Fed. Reg. 55687, 55689 (Sept. 17, 2014) (2014 NOI).

⁶ *See id.*

⁷ Comments of Consumers Union at 5-7, 2012 Triennial Review (Dec. 1, 2011) (hereinafter “2012 CU Comments”).

programs and cannot connect to a different network than the one selected by the wireless carrier or device manufacturer.

Item 5. Noninfringing Uses

Circumventing the technological protection measures that lock mobile devices to particular wireless networks is noninfringing because it enables interoperability on multiple wireless networks, extending the life of a mobile device while allowing it to be used in ways that device manufacturers and carriers intended. Multiple legal theories support the conclusion that mobile device unlocking constitutes a noninfringing use.

First, in enacting the Unlocking Consumer Choice and Wireless Competition Act, Congress affirmed that this is a noninfringing use.⁸

Second, the Copyright Office has affirmed that this use is noninfringing under Section 117 of the Copyright Act – specifically, that “the making of modifications in the computer program in order to enable the mobile phone to operate on another network would be a noninfringing act under Section 117.”⁹ The same determination would hold true as to other mobile wireless communications devices.

Third, as Consumers Union has previously noted, the aspect of the computer program that connects a mobile device to a particular wireless network may not be protected under the Copyright Act.¹⁰ If so, engaging that aspect of the program would not be infringement.

Fourth, the record in prior exemption proceedings has shown that merely adding new information onto mobile devices to enable connections to other wireless networks is a noninfringing use. “Reflashing a handset does not change the underlying mobile phone software, but rather it merely changes underlying variables accessed by the program, variables intended by the software designer to be changed.”¹¹ Hence, in this respect, the underlying computer programs are not changed when owners connect their devices to other wireless networks, so there is no infringement.

However, as far as we are aware, no court has ruled on whether such programs are copyrightable, and some courts have held that circumvention of any technological protection measure is an independent violation of the Copyright Act regardless of whether there is copyright infringement.¹² And mobile phone unlockers have in the

⁸ Publ. L. No. 113-144, sec. 2(a), (c); see 2014 NOI at 75 Fed. Reg. 55689.

⁹ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43,825, 43,831 (July 27, 2010) (2010 Final Rule).

¹⁰ 2012 CU Comments at 8-10.

¹¹ Comments of Metro PCS Communications, Inc. at 8 (Dec. 2, 2008).

¹² See *MDY Industries, Inc. v. Blizzard Entertainment, Inc.*, 629 F.3d 928, 948 (9th Cir. 2010) (section 1201(a))

past been threatened with civil action and criminal prosecution. For these reasons, an exemption continues to be necessary to avoid the uncertainty of potential liability under Section 1201(a).

Item 6. Adverse Effects.

Allowing consumers to unlock their mobile devices would give them greater choices in the mobile device and wireless service marketplaces, while also spurring greater competition among both mobile device manufacturers and wireless carriers. When consumers can unlock their mobile devices, they are empowered to use their devices as they see fit, including taking them to a competing wireless network, reselling them to other consumers, or seeking lower bills from their current carriers. The adverse effects created by locking mobile devices to particular wireless networks are extensive because, among other things, they limit consumer choice throughout the otherwise useful life of the device, effectively shorten that useful life, lead to unnecessary electronic waste, and inhibit competition among wireless carriers and mobile device manufacturers to provide more choice to consumers.

This limit affects consumers both as they seek to acquire a mobile device, and as they seek to repurpose or transfer a mobile device they own to maintain its useful life. In both respects, it restricts consumer choice, imposes unnecessary costs, and leads to unnecessary waste. Unlocking allows a consumer to choose to keep using the device, with another carrier who is offering better or less expensive wireless service, or to resell or give it to someone else to use. Or, armed with these options, perhaps the consumer can negotiate renewed service on his or her current network on more favorable terms. Foreclosing these options to consumers, for mobile devices they own, deprives them of fundamental benefits of ownership.

In short, allowing consumers to unlock their mobile devices and use them lawfully as they see fit increases consumer choice. Empowering consumers with greater choice in the mobile device and wireless service marketplace will save them money, reduce waste, and spur competition among device makers and carriers alike – competition that was impeded by the locking of mobile devices to particular networks.

“creates a new anticircumvention right distinct from copyright infringement”).