



**Petition for Proposed Exemption Under 17 U.S.C. § 1201
November 3, 2014**

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 advocacy division 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.

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 in previous triennial reviews. We wrote to Congress and the FCC in the spring of 2013 urging them to restore the exemption. And we worked closely with the House and Senate in helping Congress enact the Unlocking Consumer Choice and Wireless Competition Act.

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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. Congress recently 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 And 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 Consumers Union’s proposed exemption accordingly includes all hand-held mobile wireless devices that are used for essentially the same functions and in the same manner as wireless telephone handsets, including tablets. The proposed exemption will allow consumers to circumvent technological protections measures controlling software and firmware that lock those devices to particular wireless communications networks.

The class of devices we propose would include all hand-held mobile wireless devices used for two-way voice calls, for sending and receiving e-mail and text messages, for accessing information via the device’s Internet browser, or for transmitting and receiving data used by mobile device applications – in other words, functions for which a wireless telephone handset can now be used, through connection to a wireless communications network. Consumers Union believes that its proposed exemption for mobile phone handsets and their functional equivalents (*e.g.*, tablets) 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.”³ We anticipate that the mobile devices included within the scope of this exemption as proposed will involve essentially the same relationships between consumers, mobile device manufacturers and sellers, and wireless carriers, with essentially the same legal and evidentiary showings.⁴ We understand that other parties are likely to propose exemptions for other wireless devices; our focus on handset phones and their functional equivalents should not be taken to indicate that we believe such other exemptions are not appropriate.

To assist the Copyright Office in considering this exemption, Consumers Union proposes the exemption to read as follows:

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

² *Id.*, sec. 2(b).

³ *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).

⁴ *See id.*

Computer programs, in the form of firmware or software, that enable a mobile wireless communications device to connect to a wireless communications network, when circumvention is initiated by -

- (1) the owner of the device,
- (2) another person at the direction of the owner,
- (3) 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 the device to connect to other wireless communications networks, subject to the connection to any such other wireless communications network being authorized by the operator of such network.

The term “mobile wireless communications device” means (1) a wireless telephone handset, or (2) a hand-held mobile wireless device used for any of the same wireless communications functions, and using equivalent technology, as a wireless telephone handset.

Item 3. Copyrighted Works Sought to be Accessed

The proposed exemption seeks to access 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 are actually copyright-protected in this respect - a question we will address further in the 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.⁵ 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 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.⁶

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."⁷ 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.⁸ 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."⁹ 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.

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

⁶ Publ. L. No. 113-144, sec. 2(a), (c); *see* 2014 NOI at 75 Fed. Reg. 55689.

⁷ 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).

⁸ 2012 CU Comments at 8-10.

⁹ Comments of Metro PCS Communications, Inc. at 8 (Dec. 2, 2008).

However, as no court has ruled on whether such programs are copyrightable, and as 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,¹⁰ and as mobile phone unlockers have previously been threatened with civil action and criminal prosecution, an exemption is 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 life of the device, effectively shorten that life, lead to unnecessary electronic waste, and inhibit competition among wireless carriers and mobile device manufacturers.

The 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 the device and use it 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.

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 has been impeded by the locking of mobile devices to particular networks.

¹⁰ See *MDY Industries, Inc. v. Blizzard Entertainment, Inc.*, 629 F.3d 928, 948 (9th Cir. 2010) (section 1201(a) “creates a new anticircumvention right distinct from copyright infringement”).