

Before the
U.S. COPYRIGHT OFFICE
Washington, DC 20554

In the Matter of)	
)	
)	
Proposed Exemption to Prohibition on)	Proposed Class 11: Unlocking – Wireless
Circumvention Under 47 U.S.C. § 1201)	Telephone Handsets
)	
)	

COMMENTS OF CONSUMERS UNION

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I. Commenting Party

Consumers Union is the public policy and advocacy 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 care 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 in previous triennial reviews to the anti-circumvention prohibition in section 1201 of the Digital Millennium Copyright Act (DMCA) for mobile phone and mobile wireless communications device unlocking. 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 ("Unlocking Act") to restore it.¹

II. Overview and Proposed Class Addressed

Consumers should have the right to use their mobile phones and other mobile devices on the wireless communications networks they choose. Given the right to unlock their devices, owners can continue to use the devices for as long as they continue to function, maintaining their useful life. For example, consumers should have the right to sell or give away their used devices, or new devices they receive as upgrades if they choose to continue using their old devices themselves. When consumers are allowed to make this full use of their mobile devices, the

¹ Unlocking Consumer Choice and Wireless Competition Act, Pub. L. No. 113-144, 128 Stat. 1751 (2014) ("Unlocking Act").

markets for both mobile devices and wireless networks are more efficient and more competitive, benefitting consumers in greater choice and lower costs. Moreover, allowing mobile device unlocking will reduce electronic waste, as consumers will no longer be forced to prematurely dispose of their devices.

Recognizing these benefits and others more fully described below, Consumers Union provides the following comments in support of its proposed exemption to allow owners to unlock their mobile devices. Specifically, Consumers Union proposes the following exemption:

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.

Notably, Consumers Union’s proposed exemption encompasses both mobile handsets and hand-held wireless devices, such as tablets, that are functionally equivalent. Consumers Union respects the Copyright Office’s decision to separate the proposed exemption into two separate proposals for (1) mobile handsets and (2) tablets, and is filing separate comments in support of both.² Given that mobile handsets and tablets rely on the same wireless communications

² See *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access*

networks and are locked to those networks by similar technology, however, the analysis and factual record supporting both proposals is essentially the same. Moreover, as evidenced by the fact that larger mobile handsets are being referred to as “phablets,” the market does not distinguish between these devices in the way previously supposed. In light of this, Consumers Union respectfully requests that the Copyright Office adopt the language above to cover both Proposed Class 11: Unlocking – Wireless Telephone Handsets and Proposed Class 12: Unlocking – All-Purpose Tablet Computers. Granting the same exemption as to both classes would reflect the current marketplace for both kinds of devices and conform to consumer expectations for how they are used.

Consumers Union’s proposed exemption should be granted because unlocking a mobile device is a non-infringing, legitimate activity that enables consumers to connect their devices to the wireless network they choose. The legal case for allowing circumvention of the technological protection measures to unlock mobile devices is strong. Congress explicitly granted mobile device owners the right to unlock them this past summer, ratifying that such activity is non-infringing. Additionally, as has been described before, the underlying software facilitating connectivity between a mobile device and wireless network may not even be copyrightable. Also, because connecting a phone to another network merely changes built-in variables in software and does not re-copy or change the underlying software itself, no copyrighted material is affected.

Not only is unlocking mobile devices non-infringing, the adverse effects of failing to grant the exemption to permit it are significant. The threat of DMCA liability discourages consumers from taking their devices to different networks – even after they have completed their contractual obligations with their original carrier. The DMCA even imposes potential felony

Control Technologies, 79 Fed. Reg. 73,856, 73,863 (Dec. 12, 2014) (“2014 Notice of Proposed Rulemaking”).

criminal fines and prison sentences on unlocking, even though unlocking does not facilitate copyright infringement in any way.

The Copyright Office's 2012 decision to sunset the unlocking exemption predictably led to a sharp plunge in the resale value for used phones, as the ability to legally place them back into useful service came under a dark legal cloud. Some carriers made it very difficult for consumers to unlock their phones. Deciding now not to extend and update this exemption would once again bring back this legal cloud. It would also put consumers at the mercy of carriers' voluntary unlocking policies. Those voluntary policies – which the carrier can change or rescind at will – are no substitute for a legal right to unlock. And as will be shown below, the current voluntary carrier policies fall short of providing consumers with the same kind of easy network switching that would be enabled by the exemption.

More broadly, failure to grant the unlocking exemption would also reduce healthy incentives for competition and innovation in the way mobile devices and wireless service are developed and offered for sale, as it becomes more difficult and costly for consumers to switch carriers and take advantage of more affordable choices.

A balancing of the DMCA's non-exclusive statutory factors further supports the exemption, as they tilt heavily in favor of granting consumers the right to unlock their mobile devices.

III. Technological Protection Measures and Methods of Circumvention

Wireless carriers rely on a number of different technological protection measures to restrict access to the underlying software that enables a mobile device to connect to a wireless network. Consumers cannot access this underlying software, which is arguably a copyrighted work, without circumventing the technological protection measures. Hence, a consumer cannot

engage the software to connect the device to a different wireless network without risking a violation of the Digital Millennium Copyright Act's anti-circumvention prohibitions.³

Although wireless carriers, usually with the aid of device manufacturers, employ several technologies to lock devices to particular networks, technological advances could create new measures that function in the same way. Thus, Consumers Union requests that the Copyright Office adopt a functional definition of the technological protection measures and their circumvention. The functional definition would encompass any technological protection measure that prohibits consumers from accessing the underlying software or firmware that enables devices to connect to particular wireless networks. Adopting a functional definition would ensure that the exemption is technology-neutral, avoiding a scenario in which the legality of unlocking the device would depend on the type of technological protection measure being used by the particular wireless carrier or device manufacturer.

Current technological protection measures used by wireless carriers include:⁴

A. SIM Locks

Many mobile devices are sold with a locked subscriber identity module card (SIM card). These cards store information used by a mobile device to identify and authenticate itself on a wireless network. The cards are often sold already inside the device, which usually has preinstalled software, known as a SIM lock, that prevents the device from recognizing non-native SIM cards. The SIM lock causes the device to reject any SIM card it has not been programmed to recognize, namely SIM cards that would connect to other wireless networks. SIM Locks frustrate the inherent efficiency of SIM cards, which were designed to allow device owners to easily remove and replace them to work with different wireless networks. For

³ 17 U.S.C. § 1201(a).

⁴ Consumers Union has provided nearly identical descriptions of these Technological Protection Measures in previous rulemakings. *See* Comments of Consumers Union at 5-7, 2012 Triennial Review (Dec. 1, 2011) ("2012 CU Comments").

example, swapping SIM cards is essential for international travelers to connect to local networks and pay non-roaming rates for service.

B. SPC Locks

Service Provider Code Locks (SPC Locks) are also preinstalled technological measures that limit access to the software that enables devices to connect to wireless networks using the CDMA standard. An SPC is a number generated from the mobile device's electronic serial number, using a service provider's algorithm. The only way to get around SPC Locks is by entering in the correct SPC. This renders mobile devices operating on the CDMA standard—technically capable of operating on any network using that standard—useless to connect to any network other than that of the device's original carrier.

C. SOC Locks

System Operator Code Locks (SOC Locks) are preinstalled software that prevents mobile devices from changing their SOC. SOC is a code number, associated with particular carriers, that prevent mobile devices from connecting to wireless networks not identified by the codes. SOC Locks prevent consumers from changing the underlying code on their device in order to connect it to a different wireless network than the device's original carrier.

D. Band Order Locks

Band Order Locks are firmware that restricts mobile devices to using the wireless communications radio frequencies controlled by a particular carrier. The Federal Communications Commission allocates a particular band of radio frequencies for mobile communications, then licenses individual service carriers to operate only on certain portions of that band. Although most mobile devices have the technology to operate across the entire mobile communications band, Band Order Locks restrict the devices to a much more limited frequency range. With the lock in place, the device cannot connect to other carriers.

E. Master Subscriber Locks

A master subscriber lock (“MSL”) is a technological measure that controls access to firmware, software, and other content on a mobile device. Devices sold for operation on Virgin Mobile’s network are preinstalled with this measure. A device locked in this way cannot be used to connect to any network other than that of the device’s original carrier.

Although the underlying Technological Protection Measures described above vary, they all act to artificially limit the usefulness of the device. In each case, circumvention involves bypassing the software or firmware lock that controls access to the software that connects to a wireless communications network. Once the lock is bypassed, the software controlling access to particular networks can be engaged, allowing the device to work on competing networks.

IV. In the Unlocking Act, Congress Permanently Broadened the Class of Consumers Who Could Unlock Their Devices Under Future DMCA Exemptions.

Although the Unlocking Consumer Choice and Wireless Competition Act did not create a permanent unlocking exemption, it did make permanent that the owner of the device has the right to initiate circumvention under any unlocking exemption the Librarian grants in the future. In doing so, Congress made a commonsense course correction to the Copyright Office’s narrower conception of who has the authority to unlock mobile devices. The most recent unlocking exemptions had given the right to unlock to the “owner of the copy of the computer program,”⁵ meaning that parties circumventing mobile handset locks had to own both the device and its underlying software. Carriers claimed that the consumer did not actually own the software, but merely had a license to it⁶ – creating a legal cloud over whether any consumer actually had the right to unlock, even when the exemption was in place.

⁵ 37 C.F.R. § 201.40(b)(3).

⁶ See *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 77 Fed. Reg. 65,260, 65,265 (Oct. 26, 2012) (“2012 Final Rule”) (“CTIA...cited agreements from several major carriers in an effort to demonstrate that the software on the mobile handsets is licensed, rather than sold, to a phone’s owner.”).

In passing the Unlocking Act, Congress permanently removed this uncertainty, stating explicitly in the Act that the owner of the mobile device has the right to take advantage of any unlocking exemption granted by the Librarian, regardless of whether the owner of the device is also considered to be the owner of the underlying software. The statute states that “circumvention . . . may be initiated by the owner of any such handset or other device.”⁷ The legislative history indicates that Congress regarded this as an important commonsense clarification. As the House Report states, “the language of the exemption adopted by the Librarian should have referred to the owner of the device, rather than the owner of the copy of the computer program since most computer programs are licensed, rather than sold.”⁸ To ensure that owners of devices could seek help in unlocking their devices if necessary, Congress also explicitly provided that any circumvention authorized in a future exemption could be initiated “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.”⁹

In the Notice of Inquiry starting this rulemaking, the Copyright Office recognized that the Unlocking Act makes this change permanent, stating that “circumvention under any future ‘unlocking’ exemption for wireless telephone handsets and other wireless devices adopted by the Librarian may be initiated by the persons Congress identified in the Unlocking Act.”¹⁰ Of course, in any future exemption, the Librarian may decide to authorize additional persons to initiate circumvention beyond those specified by Congress.

Congress recognized the benefits of permitting consumers to unlock their mobile devices. After appeals from the White House,¹¹ the FCC,¹² and directly from the American people,¹³

⁷ Unlocking Act, sec. 2(c)(2).

⁸ H.R. Rep. No. 113-356 at 8 (2014) (“House Report”) (Exhibit A).

⁹ Unlocking Act, sec. 2(c)(2).

¹⁰ *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 79 Fed. Reg. 55,687, 55,689 (Sept. 11, 2014) (“2014 Notice of Inquiry”).

¹¹ See David Edelman, *It’s Time to Legalize Cell Phone Unlocking*, The White House: We The

Congress passed the Unlocking Act in order to “protect consumers and promote competition in the wireless market.”¹⁴ As explained in more detail below, allowing consumers to unlock their mobile devices lowers artificial barriers that make it more difficult to switch wireless networks. When consumers are allowed to use their mobile devices on any network they choose, networks face greater competition, and device manufacturers must compete to convince customers to purchase new phones. Congress recognized that limiting the right to unlock to the owner of the underlying software, or denying consumers the ability to seek outside help with the mechanics of unlocking, would undercut the right. Congress specified who could unlock in order to ensure that the right would be effective.

V. Unlocking a Mobile Device is a Legitimate, Non-infringing Use

The Unlocking Act explicitly affirms that unlocking mobile devices is legitimate, non-infringing behavior. In reinstating the 2010 exemption,¹⁵ Congress explained that cell phone unlocking is legitimate and non-infringing, and has several pro-consumer benefits, including enabling interoperability on multiple wireless networks, increasing competition among wireless carriers, and extending the life and value of mobile devices. In addition, multiple legal theories discussed below further support Consumers Union’s position that circumventing these mobile device locks is non-infringing.

People (March 4, 2013), <https://petitions.whitehouse.gov/response/its-time-legalize-cell-phone-unlocking>.

¹² See Edward Wyatt, *FCC Backs Consumers in Unlocking of Cellphones*, N.Y. Times, March 5, 2014, at B1.

¹³ See *Make Unlocking Cell Phones Legal*, The White House: We The People (Jan. 24, 2013), <https://petitions.whitehouse.gov/petition/make-unlocking-cell-phones-legal/1g9KhZG7>.

¹⁴ S. Rep. No. 113-212 at 5 (2014) (“Senate Report”) (Exhibit B).

¹⁵ Unlocking Act, section 2(a).

A. Congress Affirmed that Unlocking Mobile Devices is Non-infringing

The Unlocking Act embodies Congress’s view that unlocking a mobile device to connect it to another wireless network is a legitimate, non-infringing use. The legislative history further confirms this view. The Senate Report explicitly states that “unlocking a cell phone to connect to a wireless network typically does not facilitate copyright infringement.”¹⁶ The same report also states that “unlocking . . . does not enable the device owner, or a third party on an owner’s behalf, to engage in other activities that infringe copyrighted works.”¹⁷ Likewise, the House Report describes consumers’ interest in unlocking a mobile device as “legitimate.”¹⁸

B. The Software Enabling Connectivity Between Mobile Devices and Wireless Networks is Not Copyrightable

As Consumers Union has noted in previous DMCA exemption rulemakings, the underlying software that facilitates connectivity between a mobile device and a wireless network likely falls outside the Copyright Act’s protection for expressive works. Section 102(b) sets the outer limit for what qualifies as protected works under the Copyright Act, stating that

[i]n no case does copyright protection . . . extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.¹⁹

This limitation, commonly called the idea/expression dichotomy, means that copyright protects only the expression of concepts and not the underlying ideas. Hence, the Supreme Court has held that functional or factual elements of a work are not copyrightable.²⁰ In the case of computer software, courts have held that both functional and expressive elements can be contained within software, and that some elements may not be protected by copyright.²¹

¹⁶ Senate Report at 6 (Exhibit B).

¹⁷ *Id.*

¹⁸ House Report at 3 (Exhibit A).

¹⁹ 17 U.S.C. § 102(b).

²⁰ *Baker v. Selden*, 101 U.S. 99, 102-04, (1879).

²¹ *See Computer Assocs. Int’l v. Altai*, 982 F.2d 693, 705 (2d Cir. 1992) (“those elements of a

The software that connects a mobile device to a wireless network is a “procedure, process, system [or] method of operation” under Section 102(b), and therefore falls outside of the Copyright Act’s protections. Moreover, because the software facilitates a function – connecting a device to a particular wireless network – a court would likely find that the software at issue is not copyrightable.

Of course, the fact that the software is not copyrightable does not render an exemption under the DMCA unnecessary. First, mobile device manufacturers and wireless carriers have not conceded this point, and the only way to get a definitive court ruling is to subject oneself to felony criminal prosecution. Moreover, even if the underlying software connecting a device to a wireless carrier is not copyrightable, courts have held that the mere act of circumventing is a violation of the DMCA.²² That is, without an exemption, individuals who circumvent technological protection measures to unlock their devices can be liable under the DMCA regardless of whether the underlying work is copyrightable. So a DMCA exemption is still necessary to protect consumers from inappropriate DMCA liability for unlocking.

C. Unlocking Mobile Devices Does Not Re-Copy or Modify the Underlying Software, Meaning That No Copyright Infringement Occurs

Consumers Union and others have also explained that allowing a mobile device to communicate with another wireless network is non-infringing because no copyrighted works are accessed or modified. Although mobile devices use software to connect to wireless networks,

computer program that are necessarily incidental to its function are . . . unprotectable.”); *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510, 1525 (9th Cir. 1992) (“many aspects of the program are not protected by copyright.”); *General Universal Sys. v. Lee*, 379 F.3d 131, 142 (5th Cir. 2004) (endorsing the abstraction-filtration-comparison test to determine which elements of a work are protected); *R.C. Olmstead, Inc. v. CU Interface, LLC*, 606 F.3d 262, 272 (6th Cir. 2010) (software developer failed to “identify those elements of the [allegedly infringing] software that are unique and original, rather than necessary to the function of any credit union software.”).

²² 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”).

the actual connection is facilitated by a string of electronic variables that function as a “key” to a particular wireless network.²³ When the consumer wants to use the phone on a different network, the key is switched, but the underlying software is left intact. So the computer program is not re-copied or modified when the device is connected to another wireless network, and there is no infringement.

VI. There Are Demonstrated Adverse Effects That Result When Individuals Cannot Unlock Their Mobile Devices

The fallout from the 2012 decision to sunset the unlocking exemption showed that prohibiting consumers from unlocking their mobile devices has significant adverse effects. The negative consequences of letting the unlocking exemption expire affected a large segment of the American public,²⁴ over 114,000 of whom made their frustration known by signing a petition asking the White House to take action.²⁵ The White House, the FCC, and Congress have all recognized the proven harms of the unlocking prohibition, and each took action to remove it.²⁶ Because consumers increasingly use tablets for the same functions as cell phones, the negative consequences of the prohibition on unlocking affect consumers’ use of both of these kinds of devices in essentially the same fashion. These adverse effects will resume and continue unless the proposed exemption is granted.

²³ See 2012 CU Comments at 14 (citing Comments of Metro PCS Communications, Inc. at 8 (Dec. 2, 2008)).

²⁴ As of January 2014, 90% of American adults have a cell phone; 58% have a smartphone; 32% own an e-reader; 42% own a tablet. See *Mobile Technology Fact Sheet*, Pew Research Internet Project (January 2014), <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet>.

²⁵ See Edelman, *supra* note 11, The White House: We The People (March 4, 2013), <https://petitions.whitehouse.gov/response/its-time-legalize-cell-phone-unlocking>.

²⁶ See *id.*; Wyatt, *supra* note 12; Unlocking Act.

A. Excessive Limitations On Unlocking Mobile Devices Inhibit Consumer Choice and Impede the Proper Competitive Functioning of the Market

The DMCA threatens consumers with felony criminal fines and imprisonment for unlocking their phones to connect to a different network – even when they are in compliance with their contractual duties to their current carrier. This significantly impedes consumers’ ability to move freely between carriers and to take their devices with them if they do. Accordingly, the prohibition on unlocking unfairly enriches carriers and device manufacturers at the expense of consumers, and interferes with competition and innovation in the wireless industry. Furthermore, banning unlocking limits consumer choice in the resale market. The proposed exemption would remove these obstructions to healthy competition, promote consumer choice and mobility, and help spur innovation in the wireless industry as a whole.

1. The Ban On Unlocking Prevents Customers From Moving Freely Between Carriers

Consumers should have a right to unlock their mobile devices without the specter of felony criminal fines and imprisonment under the DMCA. As Congress recognized, “because of the availability of civil or criminal sanctions under the DMCA, consumers with a legitimate interest in unlocking their wireless devices may be afraid to do so.”²⁷ FCC Commissioner Pai has also pointed out the severe market distorting effects of this severe legal disincentive to switch carriers: “In a free market, once a consumer’s contract expires, she should be able to take her device to another carrier. The government shouldn’t tilt the scales with legal penalties; it should leave the mobile marketplace alone.”²⁸ The potential penalties consumers face under the DMCA are particularly harsh in light of the fact the unlocking is legal in many parts of the

²⁷ Senate Report at 3 (Exhibit B).

²⁸ Ajit V. Pai, *Don’t Treat Consumers Like Criminals*, N.Y. Times, June 5, 2013, at A23 (Exhibit C).

world, and has in fact been recognized as legitimate by the White House,²⁹ Congress,³⁰ the FCC,³¹ and even the carriers themselves.

Additionally, the prohibition on unlocking artificially props up the “subsidy” business model, which itself limits consumer choice and mobility. Wireless carriers often attract new customers by offering discounts, or subsidies, on devices. To recoup this initial subsidy, carriers require customers to sign long-term service contracts, with high early termination fees, and they lock devices so that consumers cannot easily switch to another provider. By erecting costly barriers against switching wireless providers, carriers create customer “lock-in.”³² The DMCA prohibition on unlocking reinforces this customer lock-in by threatening consumers with felony prosecution if they take their mobile device with them to the new carrier to make the switch more affordable.

2. The Ban On Unlocking Stifles Competition and Innovation in the Wireless Industry

By preventing consumers from moving freely between carriers and taking their devices with them, the prohibition on unlocking reduces the incentives for carriers and device manufacturers to compete and innovate. Locking helps ensure that customers cannot easily be lured away by a competitor, which dampens competitive pressure on carriers to improve prices and terms of service.³³

²⁹ See Edelman, *supra* note 11.

³⁰ See Senate Report at 3 (Exhibit B); House Report at 3 (Exhibit A).

³¹ Wyatt, *supra* note 12.

³² See 2012 CU Comments, *supra* note 4, at 17-19.

³³ See Statement of George P. Slover Before House Committee on the Judiciary, Subcommittee on Courts Intellectual Property and the Internet, June 6, 2013 at 4 (“The lock benefits carriers, by propping up the long-term bundled contract. And it benefits mobile device manufacturers, by artificially inflating demand for new devices, through forced retirement of used ones. But for consumers, it means less competition, less choice, more expense, and more waste.”).

Restoring and expanding the exemption as proposed would facilitate consumer mobility by enabling consumers to keep using the same device if they want, thereby spurring competition and innovation among wireless carriers and device manufacturers.³⁴ Indeed, that is already beginning to happen. For example, T-Mobile has a “Bring Your Own Device Policy” that encourages users to unlock and bring their own devices with them to T-Mobile.³⁵ Carriers have also started experimenting with alternatives to the subsidy model, like no-annual-contract plans.³⁶ Similarly, enabling consumers to retain their old devices when they switch carriers would put healthy competitive pressure on device manufactures to continue innovating and improving quality, while keeping prices reasonably low, to entice customers to voluntarily buy the latest models.

3. The Ban On Unlocking Adversely Affects the Resale Market for Mobile Devices

A locked device is less valuable, because it is only useful on one network.³⁷ The Copyright Office asks whether the 2012 exemption “has had an adverse effect on the marketplace for the accessed copyrighted works.”³⁸ The market’s reaction to the 2012 order

³⁴ See, e.g., Senate Report at 4 (Exhibit B) (The exemption “promot[es] flexibility for consumers and enhanc[es] competition in the wireless market.”); Statement of George P. Slover Before House Committee on the Judiciary, Subcommittee on Courts Intellectual Property and the Internet, June 6, 2013 at 5.

³⁵ See T-Mobile Bring Your Own Phone, <http://www.t-mobile.com/bring-your-own-phone.html> (last visited Jan. 28, 2014).

³⁶ See, e.g., T-Mobile Simple Choice Plan, <http://www.t-mobile.com/cell-phone-plans/individual.html> (last visited Jan. 28, 2014).

³⁷ For example, Gazelle offers consumers \$350 for a locked AT&T phone and \$400 for an unlocked version. Anthony Scarsella, *What is a locked phone and why do carriers lock them?*, Gazelle.com (Jan. 29, 2014), <https://www.gazelle.com/thehorn/2014/01/29/what-is-a-locked-phone-and-why-do-carriers-lock-them/> (“You will get more cash for your unlocked phone compared to a phone locked to your carrier when you trade it in. An unlocked phone can be used – and sold – anywhere around the world, which increases the amount of money people are willing to pay for your used phone.”).

³⁸ 2014 Notice of Proposed Rulemaking, *supra* note 2, at 73,860.

closing the exemption demonstrated undoubtedly that the answer is yes – the inability to unlock a device significantly decreases its value on the resale market. According to one cellphone recycling company, “during the two years that cellphone unlocking was illegal, prices for phones that could not be unlocked dropped by about \$20 per unit.”³⁹

When circumvention is illegal, individuals are unable to unlock their devices and resell them or give them away to friends or family. It also means that consumers who purchase a phone or tablet on the resale market cannot have it connected to their network of choice. Congress explicitly recognized these adverse effects on consumers who seek to sell or give away devices, and on consumers who want to them, and restored the unlocking exemption to alleviate these harms.⁴⁰

B. Other Adverse Effects of the Ban On Unlocking Include Excessive Roaming Charges, Environmental Waste, and Harm to Recyclers

When consumers are not able to unlock their phones, they may be forced to pay exorbitant roaming charges imposed by their carrier when traveling abroad. In contrast, consumers with unlocked phones can simply purchase a much less expensive local SIM card to use while abroad. For example, an AT&T customer would pay \$1.50 per minute to place a call in Europe on a U.S.-based AT&T account, but with an unlocked phone a prepaid local SIM card would pay only \$0.30 per minute.⁴¹

³⁹ Kyle Wiens, *Opinion: Why Cellphone Unlocking Could Soon Be Illegal Once Again*, Wired (Dec. 9, 2014) <http://www.wired.com/2014/12/dmca-exemptions-cell-phone-unlocking/>. For example, AT&T made it harder to unlock its phones, and their value on the resale market dropped significantly. Whereas the previous year, a used AT&T iPhone was worth \$45 more than a used Verizon iPhone, an AT&T iPhone was worth \$20 less than the same Verizon version in 2013, because the AT&T version was much harder to unlock. See Thomas Gryta, *The Mystery of the iPhones that Won't Unlock*, Wall Street Journal, Nov. 13, 2013, available at <http://www.wsj.com/articles/SB10001424052702303559504579195881629809394> (Exhibit D).

⁴⁰ See House Report at 3 (Exhibit A).

⁴¹ Derek Khanna, *The Law Against Unlocking Cellphones is Anti-Consumer, Anti-Business, and Anti-Common Sense*, The Atlantic (Feb. 11, 2013) <http://www.theatlantic.com/business/archive/2013/02/the-law-against-unlocking-cellphones-is->

Additionally, by making it more difficult and less valuable for consumers to sell or give away their old devices, restrictions on unlocking turn perfectly functional equipment into environmental waste. The decrease in usefulness makes it more likely that consumers will simply discard their old devices, that they will end up gathering dust in a drawer, and eventually slowly deteriorating in a landfill.

Prohibiting mobile device unlocking also harms businesses and organizations that take old devices and refurbish them for reuse. Experience under the 2012 decision to sunset the exemption demonstrated that prohibiting unlocking damages businesses that perform unlocking services for consumers.⁴² These businesses contribute to a vibrant resale market for used devices, providing consumers with greater choices when shopping for devices and preventing the waste of functional equipment. The ability of these companies to provide this important service to consumers depends on unlocking being legal.

C. The Voluntary Carrier Unlocking Policies of Major Wireless Carriers Are No Substitute for the Legal Right to Unlock

Consumers ought to have a legal right to unlock their devices, and not have to depend on the continued good graces of their carrier for the privilege to do so. The carriers' current unlocking policies are voluntary, and can be revoked at any moment, as the carriers themselves admit.⁴³ Consumers are rightfully concerned with the precarious nature of this arrangement.

anti-consumer-anti-business-and-anti-common-sense/272894/ (Exhibit E).

⁴² See, e.g., Wiens, *supra* note 39 (discussing the harm to such businesses under the 2012 exemption).

⁴³ See, e.g., T-Mobile Unlocking Policy, <https://support.t-mobile.com/docs/DOC-1588> (last visited Jan. 28, 2015) (“...this policy is subject to T-Mobile’s Terms and Conditions of service and may change without notice”) (Exhibit F); Sprint Unlocking Policy, http://www.sprint.com/legal/unlocking_policy.html (last visited Jan. 28, 2015) (“This unlocking policy is subject to change at Sprint’s discretion without advance notice.”) (Exhibit G); AT&T Unlocking Policy, http://www.sprint.com/legal/unlocking_policy.html (last visited Jan. 28, 2015) (“AT&T further reserves the right to alter this unlocking policy at its discretion without advance notice.”) (Exhibit H).

After the 2012 decision to sunset the exemption, consumers had no choice but to go to their carriers if they wanted to unlock their devices, and some carriers made it very difficult if not impossible. For example, an AT&T customer described his frustration at being unable to unlock his iPhone despite his contract being up,⁴⁴ an experience shared by other AT&T customers according to other news stories.⁴⁵ The proposed exemption would ensure that consumers do not have to rely on their self-interested carrier to give its blessing as to whether and when they can unlock their devices.

Indeed, without a legal right, current carrier unlocking policies would still make it very inconvenient – and in some cases, impossible – to unlock. At least one major carrier’s unlocking policy is not in effective compliance with the terms of CTIA Unlocking Commitment.⁴⁶ Even those carrier policies that do comply are insufficient, because they impose conditions on unlocking that can make it very difficult in practice for consumers. All four major carriers require that certain conditions be met before they will unlock a customer’s device. For example, the carrier may require that the customer provide proof of purchase for the device,⁴⁷ or require that the account be in “good standing.”⁴⁸ Perhaps most onerous are device eligibility requirements that effectively mean certain devices are not authorized to be unlocked at all. Both

⁴⁴ Jeff John Roberts, *AT&T Is Holding My iPhone Hostage and Obama Doesn’t Care: Why the FCC Must Act on Locked Phones*, Gigaom.com, Nov. 19, 2013, available at <https://gigaom.com/2013/11/19/att-is-holding-my-iphone-hostage-and-obama-doesnt-care-why-the-fcc-must-act-on-locked-phones/> (describing one AT&T customer’s inability to unlock his iPhone even though his contract had ended).

⁴⁵ See, e.g., Gryta, *supra* note 40 (Exhibit D).

⁴⁶ Although the CTIA agreement requires carriers to unlock prepaid devices, Sprint does not currently do so though it states that it is “working on policies and procedures to unlock prepaid devices” and “will implement these new policies and procedures no later than February 11, 2015.” Sprint Unlocking Policy (Exhibit G). Other aspects of Sprint’s policy also arguably contradict the Unlocking Agreement.

⁴⁷ T-Mobile Unlocking Policy (Exhibit F).

⁴⁸ The unlocking policies of T-Mobile, Sprint, and Verizon all require that the account associated with the device be in “good standing” to be eligible for unlocking.

T-Mobile and AT&T impose device eligibility requirements,⁴⁹ and Sprint admits that it is actually incapable of unlocking several of its devices, including its iPhones.⁵⁰

Congress recognized the importance of an unlocking exemption for consumers who cannot, or do not wish to, unlock their devices through their carrier. For example, consumers who buy a used cell phone or tablet from an online stores or auction site “may not be able to work with, or even know, the original purchaser and/or network carrier to have the device unlocked by the original network carrier.”⁵¹ Additionally, some consumers may find it too difficult or inconvenient to unlock their devices under their carrier’s policy. Congress recognized this reality as well when enacting the Unlocking Act: “There are . . . circumstances in which additional avenues for unlocking may be preferable over attempting to unlock through the carrier.”⁵² For these consumers, requiring them to go back to the carrier to unlock devices may stop them from unlocking at all. By giving consumers the right to unlock independently of the carrier, the proposed exemption would address Congress’s concerns and ensure that all consumers have a right to unlock, not just a tenuous privilege dependent on the good graces of their carrier.

⁴⁹ For example, AT&T requires that the device be “designed for use on, and locked to, the AT&T network” (Exhibit H), and T-Mobile requires that the “device be a T-Mobile device” (Exhibit F).

⁵⁰ Sprint Unlocking Policy (Exhibit G) (“It is important to note that not all devices are capable of being unlocked, often because of the manufacturers' device designs, and that even for those devices capable of being unlocked, not all device functionality may be capable of being unlocked. Specifically, devices manufactured with a SIM slot within the past three years (including, but not limited to, all Apple iPhone devices), cannot be unlocked to accept a different domestic carrier's SIM for use on another domestic carrier's network. Sprint has no technological process available to do this.”).

⁵¹ House Report at 3 (Exhibit A).

⁵² Senate Report at 2 (Exhibit B).

VII. The Four Nonexclusive Statutory Factors Weigh in Favor of Granting an Exemption for Mobile Device Unlocking

The DMCA states that when considering proposed exemptions, the Copyright Office should examine (1) the availability for use of copyrighted works; (2) the availability for use of works for nonprofit archival, preservation, and educational purposes; (3) the impact that the prohibition on the circumvention of technological protection measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research; (4) the effect of circumvention of technological measures on the market for or value of copyrighted works; and (5) any other factor that may be appropriate for the Librarian to consider.⁵³

A balancing of the four nonexclusive factors weighs in favor of granting the proposed exemption, particularly in light of the demonstrated and likely adverse effects of the prohibition.

A. Availability for Use of Copyrighted Works

This factor weighs strongly in favor of granting the exemption. Although there are unlocked mobile devices available for sale, and although carriers will agree to unlock some devices under certain conditions, many consumers remain unable to receive the benefits of an unobstructed market for unlocked mobile devices. Unlocked mobile devices can be quite expensive, and the proposed exemption would increase the supply of unlocked devices available for sale and thus decrease their prices. Increased competition would drive down the prices of unlocked phones.⁵⁴ Additionally, as explained above, the carriers' voluntary and conditional unlocking policies are no substitute for a consumer right to unlock.⁵⁵ Therefore, neither the availability of some unlocked devices for sale nor the possibility of unlocking via carrier permission provides a viable alternative to a right to circumvention. The proposed exemption

⁵³ 17 U.S.C. §1201(a)(1)(C).

⁵⁴ See Molly Wood, *Dear America: Meet Unlocked Phones*, CNET (July 26, 2013), <http://www.cnet.com/news/dear-america-meet-unlocked-phones/> (“[A] little competition would probably be great for unlocked phone prices, which have been mysteriously stuck at about \$600 or \$650 since the introduction of the original Treo.”).

⁵⁵ See VI.C, *supra* p. 17-19.

would secure for consumers a lawful means of accessing and utilizing the underlying software that runs their lawfully purchased devices.

B. Availability of Works for Nonprofit Archival, Preservation, and Educational Purposes

This factor weighs strongly in favor of granting the exemption. Consumers increasingly use mobile devices as educational tools both in and out of the classroom. Mobile handsets and tablets give students access to educational apps, e-textbooks, and the Internet.⁵⁶ Schools are increasingly recognizing the potential of mobile devices as valuable teaching tools.⁵⁷ Furthermore, studies suggest that students appreciate the integration of mobile devices into the classroom. One study found that a substantial majority of U.S. students believe that use of mobile devices improves education, and would like to use them more in school for educational purposes.⁵⁸

However, as mobile devices become must-have educational tools, schools and families struggle with how to pay for them. Many schools have started experimenting with “Bring Your Own Device” policies, in which they encourage students to bring devices of their choice from home for use in the classroom.⁵⁹ Financially strapped schools and families may look to purchase

⁵⁶ See Gayle Bennet, *Tablets Rewrite the Classroom Rules*, USA Today (June 23, 2014), <http://www.usatoday.com/story/sponsor-story/dell/2014/04/28/dell-tablets-in-education/8420627/>.

⁵⁷ According to an initiative of Project Tomorrow, an education nonprofit, “between 41 percent and 66 percent of students in K-12 schools had access to mobile devices at home and in the classroom in 2013.” *Id.*

⁵⁸ *New Study Reveals U.S. Students Believe Strongly That Mobile Devices Will Improve Education*, Pearson (Apr. 29, 2013), <http://www.pearsoned.com/new-study-reveals-u-s-students-believe-strongly-that-mobile-devices-will-improve-education/#.VMe-r3aTqSU> (finding that 92 percent of students believe that mobile devices will change how students learn in the future and 69 percent would like to use them more in school).

⁵⁹ See, e.g., Donna George, *Schools move toward “Bring Your Own Device” policies to boost student tech use*, Washington Post (Sept. 14, 2014), <http://www.washingtonpost.com/local/education/stem/schools-move-toward-bring-your-own-device-practices-to-boost-student-tech-use/2014/09/14/4d1e3232-393e-11e4-9c9f->

less expensive used mobile devices instead of expensive new ones. As discussed above, the prohibition on unlocking has significant adverse effects on the resale market for used devices.⁶⁰ The proposed exemption would encourage a more vibrant and diverse resale market for used devices, providing schools and families with more choices when searching for less expensive options for educational use.

C. Impact That the Prohibition on the Circumvention of Technological Measures Applied to Copyrighted Works Has on Criticism, Comment, News Reporting, Teaching Scholarship, or Research

This factor weighs strongly in favor of granting the exemption. Consumers increasingly get their news from mobile devices.⁶¹ However, tablet and smartphone news consumers are typically more highly educated and earn higher wages.⁶² In this regard, prohibiting unlocking reinforces this digital divide, as lower-income consumers cannot as easily afford expensive full-price mobile devices to access digital news. As discussed above, the prohibition on unlocking adversely affects the resale market for mobile devices.⁶³ The proposed exemption would make it easier for more consumers to obtain a mobile device affordably and get the benefits of the digital news revolution.

Furthermore, mobile devices are valuable tools for news reporting. They enable journalists to capture and distribute information quickly on the go.⁶⁴ News reporters would

ebb47272e40e_story.html.

⁶⁰ See Section VI.A.3, *supra* p. 15-16.

⁶¹ Amy Mitchell, Tom Rosentiel, and Leah Christian, Pew Research Center's Project for Excellence in Journalism, *The State of the News Media 2012: An Annual Report on American Journalism* (finding that 27% of the American population now gets news on mobile devices; 51% of smartphone owners and 56% of tablet owners use their device for news).

(2012), available at

http://www.pewinternet.org/~media/Files/Reports/2010/PIP_Mobile_Access_2010.pdf.

⁶² *Id.*

⁶³ See Section VI.A.3, *supra* p. 15-16.

⁶⁴ See, e.g., Mark Memmott, "Chicago Sun Times" Fires Its Photographers, NPR (May 30,

likewise benefit from an increased range of affordable choices of mobile devices, which the proposed exemption would facilitate for the reasons discussed above.

D. Effect of Circumvention of Technological Measures on the Market for or Value of Copyrighted Works.

This factor weighs strongly in favor of granting the exemption. Experience under the 2012 decision to sunset the exemption demonstrates the negative effects that restrictions on unlocking have on the market for and value of used mobile phones. As discussed above, during the two-year period when unlocking was illegal, the price of locked phones on the resale market dropped significantly, because they were rightly perceived to be of limited usefulness.⁶⁵ Because more consumers are willing to purchase devices that they can unlock and connect to the carrier they choose, the right to unlock devices increases their value on the resale market. The adverse effects of letting the unlocking exemption expire in 2012 clearly demonstrated that technological protection measures that cannot be circumvented without risking criminal prosecution decrease the value of the devices.

VIII. Conclusion

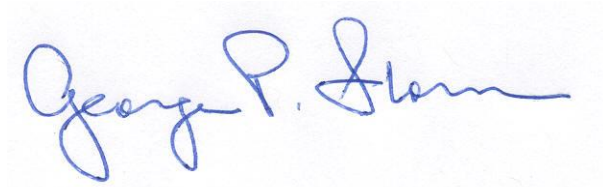
Giving consumers the right to unlock their mobile devices would create innovation in the wireless carrier and device marketplaces. Imposing DMCA civil and criminal liability on consumers who seek to use their devices on different wireless networks leads to customer lock-in, arbitrary forced purchases of new devices, and the consignment of useful equipment to the scrapheap. Allowing unlocking rebalances the market in favor of consumers, as they can more easily switch carriers and make choices based on value and service. As shown above, granting Consumers Union's proposed exemption is required under the DMCA, as the circumvention is

2013), <http://www.npr.org/blogs/thetwo-way/2013/05/30/187292393/chicago-sun-times-fires-its-photographers> (discussing the paper's firing of its entire photography staff and its decision to rely on its reporters to photograph news events with their smartphones).

⁶⁵ See Section VI.A.3, *supra* pp. 15-16.

non-infringing, the harms from prohibiting circumvention or casting a legal cloud over it are significant, and the nonexclusive statutory factors weigh in favor of the exemption. Consumers Union therefore respectfully requests that the Copyright Office recommend granting the mobile device exemption as proposed.

Respectfully submitted



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February 6, 2014

Exhibit A

113TH CONGRESS }
2d Session } HOUSE OF REPRESENTATIVES { REPORT
113-356

UNLOCKING CONSUMER CHOICE AND WIRELESS COMPETITION ACT

FEBRUARY 25, 2014.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

MINORITY AND ADDITIONAL VIEWS

[To accompany H.R. 1123]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1123) to promote consumer choice and wireless competition by permitting consumers to unlock mobile wireless devices, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The Amendment

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Unlocking Consumer Choice and Wireless Competition Act”.

SEC. 2. REPEAL OF EXISTING RULE AND ADDITIONAL RULEMAKING BY LIBRARIAN OF CONGRESS.

(a) REPEAL AND REPLACE.—Paragraph (3) of section 201.40(b) of title 37, Code of Federal Regulations, as amended and revised by the Librarian of Congress on October 28, 2012, pursuant to the Librarian’s authority under section 1201(a) of title 17, United States Code, shall have no force and effect, and such paragraph shall read, and shall be in effect, as such paragraph was in effect on July 27, 2010, subject to subsections (c) and (d).

(b) RULEMAKING.—Not later than 1 year after the date of the enactment of this Act, the Librarian of Congress, upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce and report and comment on his or her views in making such recommendation, shall determine, consistent with the requirements set forth under section 1201(a)(1) of title 17, United States Code, whether to extend the exemption for the class of works described in section 201.40(b)(3) of title 37, Code of Federal Regulations, as amended by subsection (a) of this section, to include any other category of wireless devices in addition to wireless telephone handsets.

(c) UNLOCKING AT DIRECTION OF PURCHASER OR FAMILY MEMBER.—With respect to paragraph (3) of section 201.40(b) of title 37, Code of Federal Regulations, as made effective by subsection (a) of this subsection, and with respect to any other category of wireless devices, in addition to wireless telephone handsets, with respect to which, as determined by the Librarian of Congress in a rulemaking conducted under subsection (b) or otherwise under section 1201(a)(1)(C) of title 17, United States Code, circumvention of a computer program by the owner of a copy of the program is permitted solely in order to connect to a wireless communications network when such connection is authorized by the operator of such network, in the case of a purchaser of such handset or device for personal use, such circumvention may be initiated by the purchaser, by a family member of such purchaser, or by another person at the direction of such purchaser or family member, for the sole use or benefit of such purchaser or family member.

(d) RULE OF CONSTRUCTION.—Nothing in this Act alters, or shall be construed to alter, the authority of the Librarian of Congress under section 1201(a)(1) of title 17, United States Code, including the authority, with respect to the applicable 3-year period, to modify or delete paragraph (3) of section 201.40(b) of title 37, Code of Federal Regulations, or modify or delete any category of wireless devices exempted under subsection (b) of this section.

Purpose and Summary

The legislation repeals an existing exemption made by the Librarian of Congress pursuant to Section 1201 of Title 17 concerning the circumvention of access control measures on cell phones, also known as “unlocking”, reinstates an earlier version of this exemption, directs the Librarian of Congress to undertake a new rulemaking for other cellular devices such as tablets with cellular connectivity, and permits unlocking to be initiated by the owner of a device or by an entity or person of their choosing under specific purposes for current or future exemptions related to wireless devices. The legislation is not intended to enable bulk unlocking by resellers.

Background and Need for the Legislation

The legislation repeals a current exemption in favor of reinstating an earlier exemption for which the Librarian of Congress

previously determined that an adequate record had been established. Rapid technological change in the cellular telephone industry, including consumer interest in more expensive smartphones, has resulted in a shift away from the earlier practice of consumers essentially disposing of their old cell phones after a few years of ownership. Especially for smartphones, consumers now use their cell phones for longer periods of time; reuse their devices upon upgrading by giving their older devices to family members; or sell their used devices in a growing marketplace for used phones and then using the proceeds from the sale to offset the cost of replacement devices. Since consumers with a legitimate interest in unlocking are unable to do so without risk of violating 17 U.S.C. §1201, the Committee has supported this legislation. Even with the recent industry announcement in December 2013 concerning unlocking, the legislation is needed to avoid the potential for criminal or civil sanctions for those who unlock cellphones for consumers.

Consumers seeking to own a cellphone without the initial upfront cost are more willing than ever to purchase a used cellphone, but may be prevented from using their newly acquired device on their network of choice since that device may be locked to a particular carrier. Since consumers may have acquired the used cellphone via an online store or auction site, they may not be able to work with, or even know, the original purchaser and/or network carrier to have the device unlocked by the original network carrier. Consumers seeking to switch network carriers may also need assistance unlocking their cellphones, either out of personal preference or an inability to enable the unlocking on their own. The Committee believes that consumers should be able to seek help from others such as relatives, neighbors, cellular providers and their agents, etc. . . . to effect the unlocking. The Committee does not support efforts to use this legislation for bulk unlocking. In these situations, the consumer must already be in possession of the cellular device in order to use this provision.

The Committee considered H.R. 1123 with a focus on individuals being granted the right to unlock, or seek assistance to unlock, their wireless devices. Such actions would be opposite not only the Committee's legislative intent, but also the specific statutory language adopted by the Committee. The Committee received testimony on, and is aware generally, of ongoing criminal enterprises in large cities that profitably steal large numbers of smartphones for resale after they are unlocked. This legislation would not enable such enterprises to avoid prosecution under the law for the underlying theft or for the circumvention.

The Committee also considered H.R. 1123 with a focus on the specific issue of unlocking wireless devices, rather than the broader issue of circumvention.

Hearings

The Committee's Subcommittee on Courts, Intellectual Property, and the Internet held a hearing on H.R. 1123 on June 6, 2013. Testimony was received from Michael Altschul, Senior Vice President and General Counsel, CTIA The Wireless Association; Steve Berry, CEO, Competitive Carriers Association; Steve Metalitz, Partner, Mitchell, Silberberg, and Knupp, LLP; and George Slover, Senior

Policy Counsel, Consumers Union. Additional material was submitted by Disruptive Innovation and the Library Copyright Alliance.

Committee Consideration

On July 31, 2013 the Committee met in open session and ordered the bill H.R. 1123 favorably reported with an amendment, by a voice vote, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that one rollcall vote occurred during the Committee's consideration of H.R. 1123—the Committee considered a 2nd degree amendment offered by Mr. Watt of North Carolina that would have limited the legal right to unlock a cell phone to the purchaser or a wireless communications network provider or its authorized agent or licensed vendor. The Watt amendment was defeated 8 to 17.

ROLLCALL NO 1

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, J. (WI)			
Mr. Coble (NC)		X	
Mr. Smith (TX)		X	
Mr. Chabot (OH)			
Mr. Bachus (AL)		X	
Mr. Issa (CA)		X	
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)			
Mr. Jordan (OH)		X	
Mr. Poe (TX)			
Mr. Chaffetz (UT)		X	
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Amodei (NV)			
Mr. Labrador (ID)			
Ms. Farenthold (TX)			
Mr. Hiding (NC)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Mr. Smith (MO)			
Mr. Conyers, J. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Mr. Scott (VA)	X		
Mr. Watt (NC)	X		
Ms. Lofgren (CA)		X	
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)			
Mr. Johnson (GA)	X		

ROLLCALL NO 1—Continued

	Ayes	Nays	Present
Mr. Perluisi (PR)			
Ms. Chu (CA)	X		
Mr. Deutch (FL)	X		
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)		X	
Mr. Garcia (FL)			
Mr. Jeffries (NY)	X		
Total	8	17	

There were two amendments adopted by voice vote: the underlying manager's amendment offered by Mr. Goodlatte of Virginia and the 2nd degree amendment offered by Mr. Chaffetz of Utah and Ms. Lofgren of California.

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1123, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 5, 2013.

Hon. BOB GOODLATTE, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1123, the "Unlocking Consumer Choice and Wireless Competition Act."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susan Willie, who can be reached at 226–2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 1123—Unlocking Consumer Choice and Wireless Competition Act.

As ordered reported by the House Committee on the Judiciary
on July 31, 2013.

CBO estimates that implementing H.R. 1123 would have no significant effect on discretionary spending over the 2014–2018 period. Enacting H.R. 1123 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 1123 would repeal a rule published in October 2012 by the Librarian of Congress (LOC) that would limit the ability of certain owners of wireless telephone handsets to “unlock” their phones, that is, to circumvent software protections that prevent the owner from connecting to a different wireless network. The bill would reinstate an earlier rule that provided broader authority to circumvent such software protections. H.R. 1123 also would direct the LOC to consider, within a year after enactment, whether to extend that broader authority to other categories of wireless devices in addition to smartphones. Based on information from the LOC, CBO expects that implementing the provisions of the bill would not have a significant effect on the agency’s workload.

H.R. 1123 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

H.R. 1123 would impose a private-sector mandate by eliminating an existing right of action for wireless carriers (and others)—who are currently able to pursue legal action against those who, without permission, circumvent the access controls on wireless telephone handsets sold after January 26, 2013. The cost of the mandate would be the forgone net value of settlements and damages in such cases. A search of the literature suggests that few, if any, of those types of lawsuits have been brought against individual consumers. Because such claims would probably be uncommon in the future and the damage awards allowed in such cases would be relatively small, CBO estimates that the cost of this mandate would be small and fall below the annual threshold established in UMRA for private-sector mandates (\$150 million in 2013, adjusted annually for inflation). If the Librarian of Congress decides to broaden the exemption allowed under the bill to cover other types of mobile devices, such an action would expand the limit of such rights of action. The cost of that expansion would depend on what devices the Librarian would include under the exemption. CBO has no basis to

estimate additional costs as they would depend on the regulatory actions taken by the Librarian.

The CBO staff contacts for this estimate are Susan Willie (for Federal costs), and Marin Burnett and Nathan Musick (for the private-sector impact). The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 1123 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 1123 specifically directs the Librarian of Congress to conduct one rule making proceeding within the meaning of 5 U.S.C. 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 1123 reinstates an earlier exemption to 17 U.S.C. 1201 to permit individuals to unlock their cell phones, creates a new rulemaking to determine if that exemption should be extended to other cellular devices, and enables others to legally provide technical assistance for the purpose of unlocking.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1123 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short title. Section 1 sets forth the short title of the bill as the “Unlocking Consumer Choice and Wireless Competition Act.”

Sec. 2. Repeal of Existing Rule and Additional Rulemaking by Librarian of Congress. Subsection 2(a) reinstates an exemption in paragraph (3) of section 201.40(b) of title 37, Code of Federal Regulations, that was in effect on July 27, 2010. This exemption was made pursuant to the authority of the Librarian of Congress as a part of his statutory authority under Section 1201(a). This exemption, set forth in paragraph (3) of section 201.40(b) of Title 37, Code of Federal Regulations states “(3) Computer programs, in the form of firmware or software, that enable used wireless telephone handsets to connect to a wireless telecommunications network, when circumvention is initiated by the owner of the copy of the computer program solely in order to connect to a wireless tele-

communications network and access to the network is authorized by the operator of the network.”

Subsection 2(b) creates an expedited process to determine whether or not the reinstated rule should cover other categories of wireless devices. The Committee added this provision to permit the Librarian of Congress to create parity among devices with cellular connectivity. Although the language of Subsection 2(b) does not limit the categories of devices that connect to wireless telecommunications networks to be considered, the Committee anticipates that this Subsection will be most relevant to computer tablet devices that have the ability to connect to wireless networks. The Committee expects robust debate among interested parties before the resulting Copyright Office rulemaking process concerning which additional categories of devices, if any, should be exempt from the 1201 anti-circumvention restrictions. Given the technical similarities among cellular connected devices, the Committee expects the Register of Copyrights and Librarian of Congress to either create a blanket exemption or no exemption in the future for all cellular devices.

Subsection 2(c) allows an act of unlocking to be initiated by the purchaser of a wireless telephone handset, by a family member of such person, or by another person at the direction of such purchaser or family member for the sole use or benefit of such purchaser or family member. This circumvention must be within the constraints of the exemption that had previously been granted by the Librarian of Congress, that are adopted by the Librarian based on the narrow additional rulemaking authorized by this legislation, or that may be adopted for the same purpose in subsequent proceedings under Section 1201(a)(1)(C). As reinstated, section 201.40(b)(3) of title 37, Code of Federal Regulations, allows such acts of circumvention to be initiated by the owner of the copy of the computer program on the phone that enables it to connect to a wireless telecommunications network, and then only when performed solely in order to connect to a wireless telecommunications network and such access is authorized by the operator of the network. For accuracy, the Committee notes that language of the exemption adopted by the Librarian should have referred to the owner of the device, rather than the owner of the copy of the computer program since most computer programs are licensed, rather than sold, although the Committee believes that the difference in language has no substantive effect. However, the Committee will change the language of this legislative provision accordingly in future actions.

As these limitations imply, the legislation does not grant the Librarian authority to authorize circumvention in any other context in which the Librarian may grant an exemption under Section 1201(a)(1)(C). The Committee understands that unlocking a handset to enable it to connect to the network of another carrier typically involves the simple entry of a code, and that doing so results in nothing more than enabling the phone to connect to another network. In reporting this legislation, the Committee notes the unique circumstances of the phone unlocking situation, including the fact that the circumvention that is authorized enables the purchaser only to connect his or her device to a wireless telephone network other than the one associated with the device when it was

purchased. Circumvention for unlocking does not compromise the security of the information on the phone, and it does not expose any copyrighted works present on the phone to increased risk of infringement. Legalization of circumvention that has such harmful effects is not the intent of this legislation and it would not be authorized by its provisions.

Nothing in this Act is intended to serve as a limitation on section 1201(a)(2) or section 1201(b), which remain critical to the effectiveness of Chapter 12 of Title 17 and are in no way altered or modified by the provisions of this legislation.

Section 2(d) contains a rule of construction to clarify the legislation's impact upon the Librarian's existing authority. Specifically, as a result of this legislation, the Librarian is not allowed to modify the usual 3-year cycle for its section 1201 rulemakings, to modify or delete existing exemptions, or to modify or delete exemptions created by subsection (b).

Minority Views

H.R. 1123, the "Unlocking Consumer Choice and Wireless Competition Act," as introduced, was a bipartisan, bicameral bill designed to restore consumers' ability to unlock their cell phones. We support this common sense proposal because it provides consumers with greater choice by allowing them to keep their existing cell phones if they choose to switch to a new cellular network provider. We also agree that individuals who are not technologically savvy should be allowed to obtain assistance with unlocking their cell phones.

Nonetheless, we believe that amendments adopted during the Judiciary Committee's markup of this legislation merit further attention. In particular, Congress should consider the possible unintended policy consequences of the following key changes made by the manager's amendment: (1) the expansion of the universe of persons authorized to unlock cell phones; (2) the imposition of the third party assistance requirement on any future exemptions involving the category of works that includes tablets; and (3) the potential impact on the Copyright Office rulemaking process. We submit these views to highlight these changes and identify issues of possible concern regarding the bill as reported.

We would also note that since the Committee's markup of H.R. 1123 on July 31, 2013, the five largest mobile carriers have agreed to allow cell phone unlocking after a consumer's service contract expires. Specifically, in December 2013, five major U.S. wireless companies entered into a voluntary commitment with the Federal Communications Commission that will make it easier for consumers to unlock their devices and switch from one carrier to another.¹ The adoption of these voluntary principles undoubtedly will assist consumers and may mitigate the need to rush legislation to the floor.

¹The five wireless companies are: AT&T, Sprint, T-Mobile, U.S. Cellular, and Verizon Wireless. Letter from Steve Largent, President & CEO, CTIA, to Thomas E. Wheeler, Chair, Federal Communications Commission *et al.* (Dec. 12, 2013), available at <http://www.fcc.gov/document/ctia-letter-carrier-unlocking-voluntary-agreement-fcc-statements>.

Exhibit B

UNLOCKING CONSUMER CHOICE AND WIRELESS COMPETITION ACT

JULY 17, 2014.—Ordered to be printed

Mr. LEAHY, from the Committee on the Judiciary,
submitted the following

R E P O R T

[To accompany S. 517]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the bill (S. 517), to promote consumer choice and wireless competition by permitting consumers to unlock mobile wireless devices, and for other purposes, having considered the same, reports favorably thereon, with an amendment, and recommends that the bill, as amended, do pass.

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I. BACKGROUND AND PURPOSE OF THE BILL

A. BACKGROUND

As of January 2014, 90% of American adults own a cell phone, 58% percent own a smartphone, and 40% own tablets.¹ Wireless devices like cell phones, smart phones, and tablets empower consumers, facilitating communication, education, work, and entertainment for Americans of all ages. Network carriers that operate voice and data networks often sell these devices in conjunction with

¹See *Mobile Technology Fact Sheet*, PEW RESEARCH INTERNET PROJECT (January 2014), <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet>.

service contracts, at a reduced cost in exchange for the consumer's agreement to use the carrier's voice or data plan for a predetermined period, often two years. Carriers typically place software on the device that prevents it from being used on another carrier's network.² This is often referred to as "locking" the device; efforts to alter this software are typically referred to as "unlocking" the device.

Consumers whose contracts with their original carrier have expired, or who have otherwise complied with the applicable contractual terms, may wish to continue using their old devices with new carriers who may offer better prices or better coverage. Alternatively, they may wish to give their old phone to a family member or friend or sell it to another consumer. Smart phones and tablets, for example, can cost many hundreds of dollars—sometimes more than \$500 each—and many consumers would like to choose which network they connect to without incurring the substantial cost of purchasing a brand new device. From 2006 until 2012, an exemption to the Digital Millennium Copyright Act (DMCA) expressly permitted cell phone users to "unlock" their cell phones when their contract expired, allowing them to connect to their chosen wireless network. The Unlocking Consumer Choice and Wireless Competition Act restores that exemption to promote consumer choice.

Some carriers, including the four largest national carriers, have established principles under which they will help consumers unlock their phones, and the Committee expects that most unlocking will continue to be done by wireless carriers at the request of their customers.³ There are, however, circumstances in which additional avenues for unlocking may be preferable over attempting to unlock through the carrier. For example, some carriers require customers to bring their devices to the carrier's physical store to have them unlocked.⁴ For those customers who do not live near the carrier's retail location—perhaps because they live in a rural area, because they have limited mobility, or because the device was a gift from a friend or family member who lives in another part of the country—this requirement may prevent them from being able to get their devices unlocked.

²See Consumer and Governmental Affairs Bureau, *Consumer Guide: Mobile Phone and Device Unlocking FAQ's*, FEDERAL COMMUNICATIONS COMMISSION (Feb. 24, 2014), <http://www.fcc.gov/device-unlocking-faq> ("Unless you purchased a phone or device specifically sold as 'unlocked' at the point of purchase, you should assume that it is locked to a specific service provider's network. This is true whether you purchase the device from a service provider, at a general retail outlet (in person or on the web), or through a third-party.").

³*Consumer Code for Wireless Service*, CTIA—The Wireless Association, <http://www.ctia.org/docs/default-source/default-document-library/ctia-consumer-code-for-wireless-service.pdf>; see also Letter from Steve Largent, President and CEO, CTIA—The Wireless Association, to Thomas E. Wheeler, FCC Chairman, and Mignon L. Clyburn, Jessica Rosenworcel, Ajit Pai, & Michael P. O'Reilly, FCC Comm'rs (Dec. 12, 2013), https://apps.fcc.gov/edocs_public/attachmatch/DOC-324664A1.pdf. The carriers that established the unlocking principles have agreed to fully implement them by early 2015. The principles do not address questions related to unlocking phones by third parties for bulk resale. See Letter from Senators Richard A. Blumenthal, Amy Klobuchar, Cory A. Booker, Mark R. Warner, and Edward J. Markey to Thomas E. Wheeler, FCC Chairman (April 29, 2014), www.blumenthal.senate.gov/download/letter-to-fcc-on-bulk-unlocking; Letter from Thomas E. Wheeler, FCC Chairman to Senator Richard A. Blumenthal (June 17, 2014), www.blumenthal.senate.gov/download/fcc-reply-to-bulk-unlocking-letter-from-sen-blumenthal.

⁴See Consumer and Governmental Affairs Bureau, *Consumer Guide: Mobile Phone and Device Unlocking FAQ's*, FEDERAL COMMUNICATIONS COMMISSION (Feb. 24, 2014), <http://www.fcc.gov/device-unlocking-faq> ("Contact your mobile wireless service provider. Devices can be unlocked with unlock codes or other software updates provided to you by your provider. Some providers will complete the unlocking process in-store, others will unlock your device remotely and automatically.").

While it is not particularly difficult for a tech-savvy phone owner to unlock her device independently, it is possible that those who unlock their own devices to connect to their chosen network may violate Section 1201(a)(1) of the DMCA, which prohibits the circumvention of technological measures that control access to copyrighted works.⁵ Because of the availability of civil or criminal sanctions under the DMCA, consumers with a legitimate interest in unlocking their wireless devices may be afraid to do so.

From 2006 until 2012, because of an exemption granted by the Librarian of Congress pursuant to Section 1201(a)(1) of the DMCA, consumers had a guarantee that they were not breaking any laws when they unlocked their own cell phones simply in order to connect to their chosen network. The DMCA gives the Librarian of Congress the authority to conduct a triennial review process through which it may grant exemptions to anti-circumvention measures in Section 1201(a)(1). Beginning in 2006, the Librarian granted an exemption that allowed users to unlock their own cell phones in order to connect to their chosen network, provided that the carrier authorized the connection. The Librarian's exemption was narrowly focused on cell phones, which were then the dominant mobile digital devices on the market. The exemption was also granted by the Librarian in 2010.⁶

In its 2012 rulemaking, the Librarian chose not to recognize an "unlocking" exemption for new cell phones purchased after January 26, 2013, finding that an adequate record had not been established pursuant to the Librarian's *de novo* review requirement.⁷ The Librarian's decision prompted a strong public reaction: a "We the People" petition on the White House website opposing the Librarian's decision garnered over 110,000 signatures.⁸ On March 4, 2013, in response to the "We the People" petition, the White House said that it would "support a range of approaches" to permitting mobile phone unlocking.⁹

On March 11, 2013, Senators Leahy, Grassley, Franken, Lee, Hatch, and Klobuchar introduced the bipartisan Unlocking Consumer Choice and Wireless Competition Act, S. 517, to restore the exemption for cell phone unlocking that had been in effect in previous years. Senators Thune and Whitehouse were also cosponsors. Chairman Goodlatte subsequently introduced identical legislation in the House of Representatives, and the House passed a modified version of the legislation in February 2014 (H.R. 1123).

B. PURPOSE OF THE LEGISLATION

The Unlocking Consumer Choice and Competition Act, S. 517, ensures that individual consumers are not prevented from

⁵ 17 U.S.C. 1201(a).

⁶ See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68472 (Nov. 27, 2006); Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43,825 (July 27, 2010).

⁷ See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65260 (Oct. 26, 2012); *id.* at 65266 ("[I]n light of carriers' current unlocking policies and the ready availability of new unlocked phones in the marketplace, the record did not support an exemption for newly purchased phones.")

⁸ Make Unlocking Cell Phones Legal, THE WHITE HOUSE: WE THE PEOPLE, <https://petitions.whitehouse.gov/petition/make-unlocking-cell-phones-legal/1g9KhZG7>.

⁹ R. David Edelman, *It's Time to Legalize Cell Phone Unlocking*, THE WHITE HOUSE: WE THE PEOPLE (March 4, 2013), <https://petitions.whitehouse.gov/response/its-time-legalize-cell-phone-unlocking>.

unlocking their phone for the legitimate purpose of connecting to a wireless network of their choice. While many network carriers already sell unlocked phones, or will unlock phones for consumers under the terms of their contracts, the Committee recognizes that many consumers want the ability to unlock their cell phones themselves—or receive assistance doing so—for purposes of connecting to a network of their choice. The exemption created by the Librarian of Congress from 2006–2012 permitted users to unlock their cell phones for this purpose without fear of penalties under the DMCA. The Unlocking Consumer Choice and Competition Act restores that exemption until the Librarian of Congress’ next triennial rulemaking under the DMCA, promoting flexibility for consumers and enhancing competition in the wireless market. A further provision instructs the Librarian of Congress to consider, during its next rulemaking, whether to allow unlocking for wireless devices other than cell phones, such as tablets.

The legislation provides two ways that cell phones may be unlocked, in addition to authorized unlocking by a device owner’s wireless carrier. First, it restores the Library of Congress’ 2010 exemption so that consumers may unlock their cell phones themselves in order to change carriers consistent with the terms of their contracts, provided that access to the chosen network is authorized. Second, the legislation ensures that cell phone owners who lack the technological understanding to unlock their phones can direct others to do the unlocking for them, solely to enable the owner or a family member to connect to a new wireless network.

Neither of the methods for unlocking recognized by the legislation excuses owners from compliance with applicable service agreements they may have with the wireless carriers that service their phones. Such agreements may, for example, require fulfillment of an applicable postpaid service contract, device financing plan, or payment of an applicable early termination fee. Moreover, nothing in the bill permits third parties to unlock devices independently of the device owner’s direction, or for a purpose other than allowing the owner or a family member to connect to a new wireless network. As the Librarian of Congress explained with respect to the scope of permissible commercial activity under the 2010 determination that is reinstated by the bill, “the designation of this class will not benefit those who engage in the type of commercial activity that is at the heart of the objections of opponents of the proposed class: the ‘bulk resellers’ who purchase new mobile phone handsets at subsidized prices and, without actually using them on the networks of the carriers who market those handsets, resell them for profit. The type of commercial activity that would be permitted would be the resale of used handsets after the owners of the handsets have used them and then given or sold them to somebody else, who then resells them just as a used bookstore sells used books.”¹⁰

The legislation also creates no new obligations for cell phone manufacturers or wireless carriers, such as how a carrier may choose to process unlocking requests or provide unlocking codes to third parties.

¹⁰ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43,825, 43,831–32 (July 27, 2010).

Section 2(b) of S. 517 instructs the Librarian of Congress to consider, as part of its next triennial rulemaking under the DMCA, whether to allow unlocking for wireless devices other than cell phones, such as tablets, many of which may also be locked by carriers. This instruction acknowledges the growing importance of tablets and the potential for consumer harm if used tablets cannot be taken to a network of the consumer's choice, while respecting the independence and judgment of the Librarian of Congress and the rulemaking process established under existing law for exemptions to the anti-circumvention prohibitions of the DMCA.

While there are larger ongoing debates about the scope and application of Section 1201 of the DMCA, as well as other aspects of phone unlocking, those issues are not addressed by the legislation, which makes no changes to Section 1201 of the DMCA. The bill respects the independence of the Library of Congress under existing law to conduct the triennial rulemakings set forth in Section 1201(a)(1) and does not alter the authority of the Librarian in future rulemakings. Instead, the legislation takes a narrow, targeted approach to protect consumers and promote competition in the wireless market by allowing consumers, and those acting at their direction, to transfer their phones to alternative providers as described in the bill.

II. HISTORY OF THE BILL AND COMMITTEE CONSIDERATION

On March 11, 2013, Senators Leahy and Grassley introduced the Unlocking Consumer Choice and Wireless Competition Act. Senators Franken, Hatch, Lee, and Klobuchar were original cosponsors. The bill was referred to the Committee on the Judiciary.

The bill was placed on the Committee's agenda on June 26, 2014. The Committee considered S. 517 on July 10, 2014. Senators Leahy and Grassley offered a substitute amendment which added a provision allowing consumers to seek help unlocking their devices from a third party. Senators Coons and Blumenthal were added as cosponsors of the bill during Committee consideration of the substitute amendment.

The substitute amendment was accepted by a voice vote without objection.

The Committee then voted to report the Unlocking Consumer Choice and Wireless Competition Act, with an amendment in the nature of a substitute, favorably to the Senate by voice vote.

III. SECTION-BY-SECTION SUMMARY OF THE BILL

Section 1—Short title

This section provides that the legislation may be cited as the "Unlocking Consumer Choice and Wireless Competition Act."

Section 2—Repeal of Existing Rule and Additional Rulemaking by Librarian of Congress

Subsection (a): This subsection repeals Paragraph (3) of 37 C.F.R. § 201.40, as amended and revised by the Librarian of Congress on October 28, 2012 and replaces that text with the equivalent para-

graph that was in effect on July 27, 2010.¹¹ In so doing, the subsection repeals the Library of Congress' 2012 cell phone unlocking exemption, and reinstates the exemption that was granted pursuant to the triennial rulemaking conducted by the Librarian of Congress in 2010. The exemption created by the bill will remain in effect until the Library of Congress conducts its next triennial rulemaking and reaches a new decision on whether or not the record supports such an exemption. This subsection does not alter any other section of the Librarian of Congress' 2010 or 2012 rulemakings, nor does it alter the authority of the Librarian of Congress in future rulemakings.

Subsection (b): This subsection directs the Librarian of Congress to consider, as part of its next regularly scheduled, triennial rulemaking, whether to extend an unlocking exemption to "other categor[ies] of wireless devices." The subsection instructs the Register of Copyrights to consult with the Assistant Secretary for Communications and Information at the Department of Commerce before presenting a recommendation on this matter to the Librarian of Congress, as is required under 17 U.S.C. § 1201(a)(1)(C). The Librarian's determination shall be conducted as a part of and subject to the applicable rules governing the Librarian's triennial rulemaking under 17 U.S.C. § 1201(a)(1).

Subsection (c): Some consumers may find it challenging to unlock their devices. Accordingly, Subsection (c) allows owners of mobile devices to seek help unlocking their devices from a third party, and provides that they will likewise be able to do so under any future exemption applied to other wireless devices under Subsection (b), or future unlocking exemptions granted by the Librarian of Congress as described in Subsection (c)(2). In authorizing consumers to seek unlocking assistance, the Committee notes the limited circumstances under which phone or mobile device unlocking will occur. Unlocking a cell phone or other wireless device enables the device owner to connect his or her device to a wireless telephone network of his or her choice, and does not enable the device owner, or a third party on an owner's behalf, to engage in other activities that infringe copyrighted works. Unlike many other situations where an exemption from the circumvention prohibition may be sought or granted, unlocking a cell phone to connect to a wireless network typically does not facilitate copyright infringement.

The "direction of the owner" extension is limited in scope. A person authorized by an exemption to unlock their wireless telephone handset or other wireless device may authorize a third party to unlock the device for them where: (1) the circumvention is done solely to connect to a wireless telecommunications network; (2) the person directing the act of circumvention is the owner of the device; (3) the person connecting to the new wireless network is either the owner of the device or a family member of the owner; and (4) access to the new wireless network is authorized by the operator of the network. This section does not authorize circumvention in order to enable other unauthorized or harmful actions, such as removing or impairing security features that limit access to personal data or by exposing copyrighted content in ways that enable copyright in-

¹¹ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43,825 (July 27, 2010).

fringement. Nor does the ability to seek help from a third party to unlock a device alter the contractual relationship between a consumer and that consumer's wireless carrier. Directing a third party to unlock his or her device does not excuse a consumer from complying with his or her contractual obligations in any underlying service agreement.

Subsection (d): This subsection sets forth two rules of construction to clarify and ensure that the legislation does not alter the scope of any party's rights under existing law, and that the legislation does not alter the authority of the Librarian of Congress under Section 1201(a)(1) to engage in the rulemaking process created by the DMCA. Nor does this bill affect the scope and applicability of other aspects of Section 1201, including the prohibitions of Sections 1201(a)(2) and 1201(b), which remain critical components of the DMCA.

Subsection (e): This subsection defines terms that appear in the legislation. The terms "commercial mobile data service" and "commercial mobile radio service" are intended to cover what are typically known as data plans and voice plans. The terms "wireless telephone handset" and "wireless device" mean a handset or other device that operates on a wireless telecommunications network." Smartphones and wireless-enabled tablets are two examples of the types of the devices that are covered by these respective definitions.

IV. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The Committee sets forth, with respect to the bill, S.517, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 17, 2014.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 517, the Unlocking Consumer Choice and Wireless Competition Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susan Willie.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

S. 517—Unlocking Consumer Choice and Wireless Competition Act.

CBO estimates that implementing S. 517 would have no significant effect on discretionary spending over the 2015–2019 period. Enacting S. 517 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

S. 517 would repeal a rule published in October 2012 by the Librarian of Congress (LOC) that limited the ability of certain owners of wireless telephone handsets to "unlock" their phones, that is, to circumvent software protections that prevent the owner from con-

necting to a different wireless network. The bill would reinstate an earlier rule that provided broader authority to circumvent such protections. S. 517 also would direct the LOC to consider whether to extend that broader authority to other categories of wireless devices in addition to smartphones. Based on information from the LOC, CBO estimates that implementing the provisions of the bill would not have a significant effect on the agency's workload.

S. 517 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

S. 517 would impose a private-sector mandate by eliminating an existing right of action for wireless carriers (and others), who are currently able to pursue legal action against those who, without permission, circumvent the access controls on certain wireless telephone handsets. The cost of the mandate would be the forgone net value of settlements and damages in such cases. A search of the literature suggests that few, if any, of those types of lawsuits have been brought against individual consumers. Because such claims would probably be uncommon in the future and the damage awards allowed in such cases would be relatively small, CBO estimates that the cost of this mandate would be small and fall below the annual threshold established in UMRA for private-sector mandate (\$152 million in 2014, adjusted annually for inflation). If the Librarian of Congress decides to broaden the exemption allowed under the bill to cover other types of mobile devices, such an action would eliminate additional rights of action. The cost of that expansion would depend on what devices the Librarian would include under the exemption and the forgone net value of settlements and damages. CBO has no basis to estimate the cost of such mandates as it would depend on the regulatory actions taken by the Librarian. On November 5, 2013, CBO transmitted a cost estimate for H.R. 1123, the Unlocking Consumer Choice and Wireless Competition Act, as ordered reported by the House Committee on the Judiciary on July 31, 2013. The provisions of both pieces of legislation are similar, as are the CBO cost estimates.

The CBO staff contacts for this estimate are Susan Willie (for federal costs) and Marin Burnett (for the private-sector impact). The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

V. REGULATORY IMPACT EVALUATION

In compliance with subsection (b) of paragraph 11 of rule XXVI of the Standing Rules of the Senate, it is hereby stated that the passage of S. 517 will require the Librarian of Congress to make a determination concerning an exemption for wireless devices other than cell phones during its next triennial rulemaking conducted pursuant to 17 U.S.C. 1201(a). The Committee finds that no significant regulatory impact will otherwise result from the enactment of S. 517.

VI. CONCLUSION

The Unlocking Consumer Choice and Wireless Competition Act will ensure that consumers will be able to take their cell phones

with them to the network of their choice after satisfying their contracts without violating the copyright laws.

VII. CHANGES TO EXISTING LAW MADE BY THE BILL, AS REPORTED

Pursuant to paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds no changes in existing law made by S. 517, as ordered reported.



Exhibit C

The New York Times

June 5, 2013

Don't Treat Consumers Like Criminals

By AJIT V. PAI

WASHINGTON — THE House Judiciary Committee will hold a much-needed [hearing](#) today on cellphone unlocking. At stake is whether wireless consumers can be prosecuted for what, not long ago, was considered a routine practice.

Before 2012, if you bought and paid for a cellphone, the government didn't prevent you from choosing your wireless carrier. Once your contract with your original carrier ended, you were free to "unlock" your phone — to make it usable on another wireless network — and switch to another carrier in order to get lower prices, faster service or better coverage.

No longer. Last October, the Library of Congress, which oversees the United States Copyright Office, [decided](#) that when a consumer unlocks her cellphone — a process that can be as straightforward as entering a code on the keypad — she may be violating the [Digital Millennium Copyright Act](#) of 1998. Essentially, the millions of Americans who try to take their phones with them when they switch wireless carriers are suddenly in the cross hairs of American copyright law. These consumers now face the prospect of harsh fines and even jail time.

The Library's decision was based on a desire to protect the intellectual property rights to the software that "locks" a cellphone to a particular network — software for which each cellphone owner could be considered a licensee. The Library also noted that some wireless carriers allow unlocking and that unlocked phones are often available from third-party providers.

But the decision — a heavy-handed and unnecessary intervention into the private marketplace — is a classic example of government overreach. It allows a wireless carrier to sue, under copyright law, a consumer who unlocks her phone even if that consumer has paid off her two-year contract with the carrier or never had a contract in the first place.

This isn't what the 1998 act was meant to do. That law was intended to prevent piracy. For example, it prohibits consumers from getting rid of digital protections to illicitly distribute a copyrighted song or movie on the Internet.

No one seriously believes that unlocking a cellphone to switch carriers is equivalent to piracy. Yet the Library's decision places the two on the same plane, with the same civil and criminal penalties. This isn't consistent with the spirit of the law, with the free market or with common sense.

So what's the right response? To borrow the tag line from AT&T's new commercials, "It's not complicated." Let's go back to the free market. Let's allow contract law — not copyright or criminal law — to govern the relationship between consumers and wireless carriers.

The free market for mobile devices and wireless service has been a dramatic success. As the Federal Communications Commission [reported](#) earlier this year, prices in the wireless market are down, and investment is up. More manufacturers are developing innovative mobile devices, and consumers are reaping the benefits.

Wireless carriers certainly don't need the federal government's help. Long before the Library's decision, they recognized that not many consumers wanted to spend upward of \$600 on a new smartphone. So they have given consumers another option: Sign a two-year contract, and they'll knock hundreds of dollars off the phone's price. For consumers who don't want to think about switching carriers every few months, that's a great deal. And no surprise, millions of consumers (including me) have bought cellphones this way.

But in a free market, once a consumer's contract expires, she should be able to take her device to another carrier. The government shouldn't tilt the scales with legal penalties; it should leave the mobile marketplace alone.

To restore a free market that benefits consumers, we should amend the 1998 act to allow consumers to take their mobile devices from one carrier to another without fear of criminal prosecution or civil fines. We should also make clear that those who help consumers unlock their phones and tablets won't be prosecuted either. And we should reiterate that contracts remain valid and enforceable. These fixes should be permanent, so that consumers, developers and wireless carriers don't have to worry about the law shifting on a whim.

In making these fixes, we should also avoid government overreach in the other direction. Some people want to leverage this controversy into something more than it is. They want the F.C.C. to take aggressive action — to void wireless-service contracts and to impose sweeping mandates on wireless carriers. Others want to overhaul copyright law entirely.

We should leave those larger debates for another day. More than 100,000 Americans [petitioned](#) the White House about the narrow issue of cellphone unlocking. The Obama

administration, to its credit, has called for a narrow legislative solution. Congress should follow suit by taking the hammer of copyright law out of the government's toolbox. Let the free market for wireless services and devices flourish. If the government gets out of the way, the wireless marketplace will continue to be an American success story.

Ajit V. Pai is a commissioner of the Federal Communications Commission.

Exhibit D



THE WALL STREET JOURNAL.

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TECHNOLOGY

The Mystery of the iPhones That Won't Unlock

Used-Phone Resellers Caught Off Guard and Wonder What AT&T Changed

By **THOMAS GRYTA**

Nov. 13, 2013 4:10 p.m. ET

Louis Ashner ran a brisk business buying used phones from Americans and reselling them in China. But one day in early October, it just stopped.

Mr. Ashner, who owns Side Street Technology Inc. in Baton Rouge, La., said he was suddenly unable to “unlock” AT&T Inc. versions of the iPhone in bulk so they could work on other networks.

He doesn't know the cause, but he knows the effect. No one in China wants an iPhone that only works on AT&T. His business collapsed and is in the process of closing its office and liquidating inventory at a loss.

“The market is gone,” Mr. Ashner said, who said he was on track for \$1 million in revenue this year. “We are closing up.”

Business owners throughout the U.S. used-smartphone market are reporting the same problem, and like Mr. Ashner none of them knows exactly what went



Phones like AT&T's that run on GSM have traded at a premium. *BLOOMBERG NEWS*

wrong.

Whatever changed, AT&T appears to be at the center of it. The carrier accounts for 48% of the iPhones now operating in the U.S., according to comScore, and the technology it uses is compatible with most of the world's networks.

That gives its phones the widest resale market.

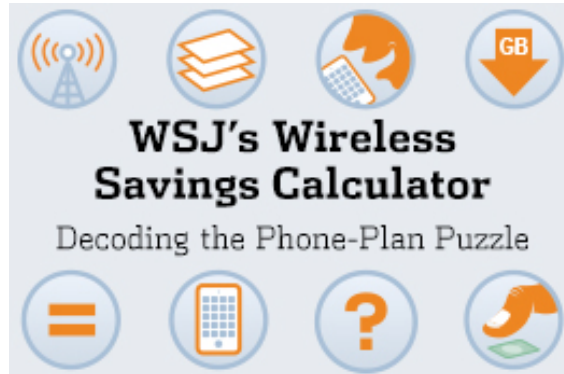
Wholesalers had long been able to get AT&T's iPhones unlocked on a mass scale by specialized services, many working out of Asia, for relatively little cost. That changed about a month ago, when people in the industry say AT&T suddenly made it harder to unlock phones on its network.

"AT&T was very lax for a long time in regards to mobile phone unlocking. If they said no, a third-party unlocker would be happy to unlock any AT&T iPhone or other device for a very decent price," said Will Strafach, who runs a Connecticut-based unlocking company called ChronicUnlocks. "AT&T is really taking action and coming down hard."

An AT&T spokeswoman said the company hasn't changed its policies for unlocking phones for individual customers, but wouldn't discuss the subject of bulk unlocking by third parties or whether it had made any changes there. An Apple Inc. spokeswoman declined to comment.

DECODING THE PHONE-PLAN PUZZLE

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In mid-October, AT&T did stop accepting unlocking requests over the phone and now requires that they be made online, a person familiar with the matter said. The process is only open to current and former customers, who must enter their email addresses and last four digits of their social security numbers, among other information, according to AT&T's website.

The mystery underscores how shadowy the used-phone market remains even as it enjoys explosive growth. Apple Inc., AT&T and others have leapt into the business this year as a way to help their customers trade up to newer models more quickly.

Those companies can unlock phones one at a time as their customers turn them in. But much of the business is still done by wholesalers, many of them small, for whom unlocking is a bigger hurdle.

Some simply sell the locked phones to buyers in Asia, where a separate industry of bulk unlockers has blossomed. Many people in the used phone business don't know exactly how it works. One wholesaler based in Hong Kong said her company would email a list of hundreds of phone identification numbers to a contact in China, and the phones would be quickly unlocked.

With the scarcity of mass unlocking, the price to unlock an AT&T iPhone has gone from \$1 or \$2 per device to as high as \$100 in just a month, according to people in the industry and companies that still offer the service.

Online device trade-in company EleGreen now advertises it will pay customers an extra \$40 if they bring in their phone already unlocked.

Buying and selling used smartphones is a straightforward process in much of the world, where devices can be used interchangeably on any number of networks. But in the U.S., smartphones often come "locked" to the selling carrier's network.

Hackers can unlock phones, but their work can often be reversed by carriers. The gold standard is the so-called factory unlock, where carriers or Apple make the change through their systems.

The locking is an outgrowth of the subsidy model for phone sales in the U.S. Carriers cover the bulk of the cost of devices like the iPhone then recover their outlay over two years via monthly service fees. Locking makes sure customers stick with the service until their obligation is cleared.

Carriers like AT&T and Sprint Corp. have long agreed to unlock phones once their customers complete their service agreements. Verizon Wireless phones generally come already unlocked.

The inability to unlock AT&T iPhones has turned the relative values of used iPhones upside down. For years, phones like AT&T's that run on GSM network technologies have traded at a premium, because they work on more networks around the world than phones used by Verizon Wireless and Sprint.

Last November, used-phone company Gazelle Inc. was offering \$205 for a iPhone 4s with 16 gigabytes of storage a year after its launch, compared with the \$160 it was offering for Verizon's version of the same phone. Now, for a similar, year-old iPhone 5, Gazelle offers \$230 for the AT&T model and \$250 for the Verizon model.

"When a carrier makes unlocking more difficult or more costly, it takes money out of the consumer's pocket and makes reselling phones more of a hassle for the consumer," Gazelle CEO Israel Ganot said.

—Daisuke Wakabayashi contributed to this article.

Write to Thomas Gryta at thomas.gryta@wsj.com

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Exhibit E

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The Law Against Unlocking Cellphones Is Anti-Consumer, Anti-Business, and Anti-Common Sense

By Derek Khanna

The legal argument -- and the business case -- against the rule making it illegal to take your phone to a different carrier



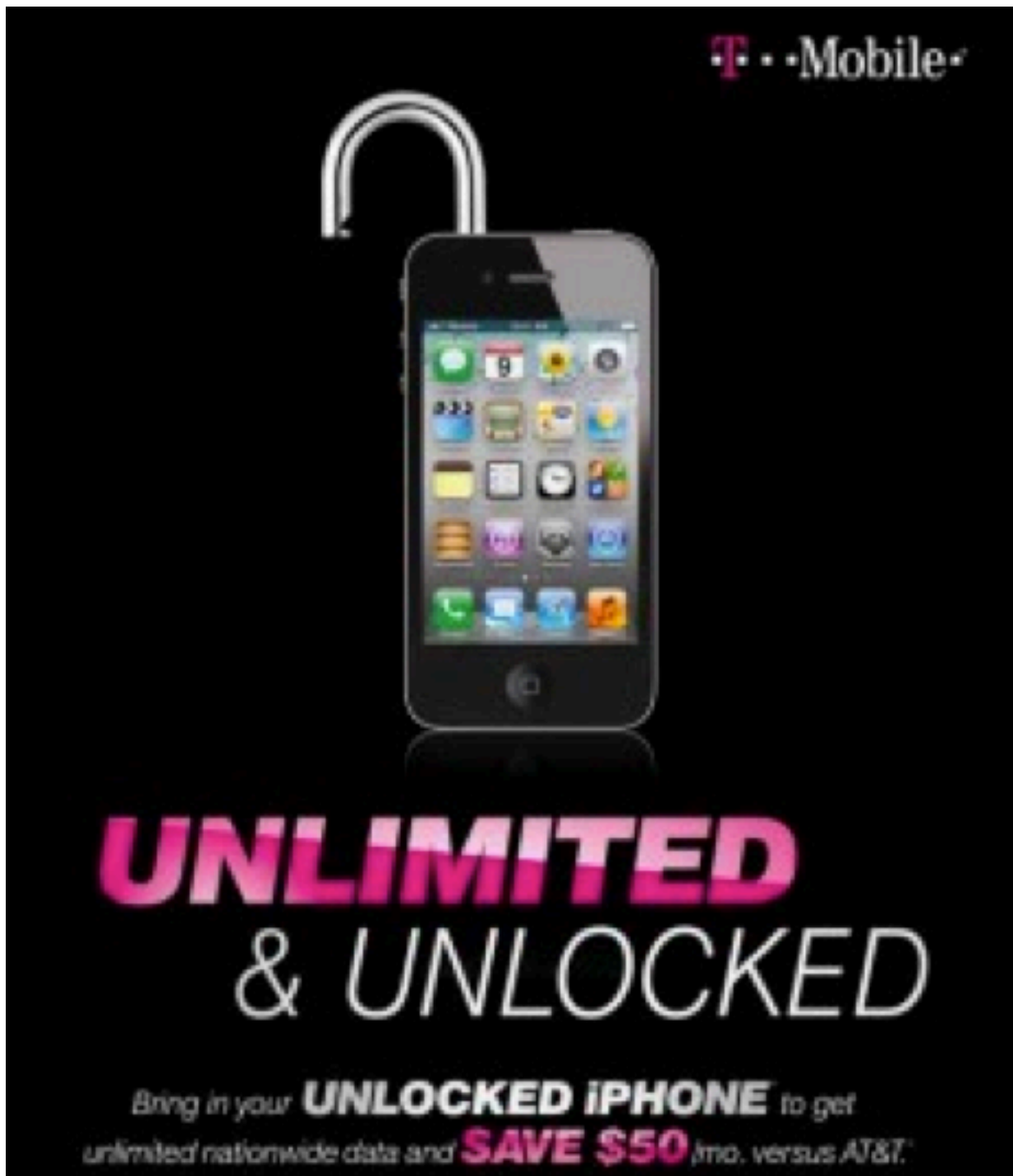
Reuters

Since I called the Librarian of Congress's decision against unlocking cell phones "[the most ridiculous law of 2013](#)," legal experts, techies, and other readers have written to tell me they, too, consider the restriction an outrageous violation of property rights. In particular, several people asked, "No one would really get into trouble for this. Right?"

Maybe not. But as I said, the real problem is not the danger that average people would get a \$500,000 fine and 5 years in jail. The problem is that 95% of the accused currently accept a plea deal and would accept almost anything to avoid risking such a stark penalty and that this stark penalty can be used by companies to scare average consumers from exercising their own property rights. For that reason, this restriction violates one of our most basic and fundamental of freedoms and represents an Orwellian invasion of our personal liberty.

The legal instrument that makes this activity illegal is the Digital Millennium Copyright Act of 1998, which contains a broad, vague section making it illegal to circumvent digital protection technology. The Librarian of Congress decided that the protection available to consumers through an exception as no longer necessary, therefore, presumably making this now illegal. Cellphone companies can now intimidate ordinary people who are forced to wonder who exactly owns the phone that they've legally purchased.

This isn't a debate about big business vs. little consumers. It's a story of crony-capitalism. (In fact, T-Mobile was asking their customers to unlock their phones until Saturday when this became illegal for new phones, as you can see in this image).

A T-Mobile advertisement featuring a black iPhone with a silver metal padlock hanging from its top. The phone's screen is on, displaying the iOS home screen with various app icons. The background is black. In the top right corner is the T-Mobile logo. Below the phone, the words "UNLIMITED & UNLOCKED" are written in large, bold, pink and white letters. At the bottom, a line of text reads: "Bring in your UNLOCKED iPhone to get unlimited nationwide data and SAVE \$50 /mo. versus AT&T."

T-Mobile

UNLIMITED
& UNLOCKED

Bring in your **UNLOCKED iPhone** to get
unlimited nationwide data and **SAVE \$50** /mo. versus AT&T.

THE DMCA vs. YOUR PHONE

The DMCA was initially set up to help stop piracy. So what, you might wonder, does piracy have to do with unlocking your phone? Very little. The law made it illegal to use technology to circumvent digital protection technology. The Librarian of Congress, who has power to grant exceptions to the law, has kept seemingly harmless activities illegal. For example, a court can shut down a blog or website simply for discussing the techniques and procedures on how to back up a DVD to your home PC (and they have done so). This is remarkable considering that in the Pentagon Papers case the Supreme Court ruled that a court

cannot order an injunction to prevent the release of classified documents unless under extraordinary circumstances in which the government can demonstrate "grave and irreparable danger" to the public interest. So, releasing classified documents: allowed. But discussing how to back-up DVDs and unlocking phones: illegal.

Some have argued that prohibiting unlocking phones is important to enforce contract law. But the DMCA is concerned with protecting copyrights. It has nothing to do with enforcing contract law. The law is being co-opted to serve the interests of one or two phone companies. And the contract argument is specious, even if you unlock your phone, you are still under contract with your cellphone provider, unlocking your phone has nothing to do with contract law and everything to do with basic property rights.

We must ask ourselves: "What specific limitations upon our personal freedom and liberty are we prepared to accept in the name of achieving the goal of protecting intellectual property?" Some limitations may be sound, and Congress should debate them on the record. Obviously, we do not have the right to copy books, movies and music and sell them. But other restrictions are invasive and have nothing to do with protecting intellectual property (like unlocking and jail-breaking your phone or adaptive technology for the blind to read). Restrictions upon the use of technology should receive strict legislative scrutiny because of its impact upon innovation and our personal freedom.

Congress's inaction in the face of the decision by the Librarian of Congress represents a dereliction of duty. It should pass a new law codifying that adaptive technology for the blind, backing up DVD's to your computer, and unlocking and jail breaking your phone are lawful activities regardless of the decisions of the Librarian of Congress.

Instead, Washington has removed a business model, hurt consumers and chosen winners and losers in a dynamic and emerging market. These decisions have a real impact on real people without the resources to hire lobbyists. Sina Khanifar ([@sinak](#)) is one of them, and he has even drafted a [White House petition to reverse the ruling by the Librarian of Congress](#). So far the petition has over 61,000 signatories.

Sina, now a co-founder at [OpenSignal](#), was challenged under the DMCA for unlocking phones while in college. Here's his story:

SINA'S STORY

In September 2005, I received a cease and desist letter from Motorola for selling software to unlock their cell phones.

The letter indicated that I was in breach of the Digital Millennium Copyright Act (DMCA) by circumventing protection measures in their phones, a crime that's punishable by up to 5 years in prison and half a million dollars in fines per incident. At the time, I was an undergraduate student studying Physics. The prospect of 5 years or more in prison was devastating.

A HUNGRY STUDENT

I started unlocking phones after a typical entrepreneurial experience: I had a problem and was forced to find a solution. I'd brought a cell phone from California to use while attending college in the UK, but quickly discovered that it wouldn't work with any British cell networks. The phone was locked. Strapped for cash and unable to pay for a new phone, I figured out how to change the Motorola firmware to unlock the device.

Realizing that others were likely having the same problem, I worked with a programmer to create an application that allowed people to quickly and easily unlock their Motorola phones and use them with any

carrier. After my first year of college ended in summer of 2004, I launched a website (Cell-Unlock.com) selling the software. It was a make-or-break moment for me personally. I was in a major financial crunch.

At first sales were slow, but during my second year at college Motorola released the extremely popular RAZR V3, and my website became a success.

It was then that I received Motorola's cease and desist letter. It claimed that I was in violation of the DMCA, a crime punishable by up to \$500,000 in fines and five years in jail per offense. I was 20 years old and terrified; my immediate reaction was to shut down the business.

I was preparing to do just that when I was introduced to [Jennifer Granick](#), founder of Stanford's Cyberlaw Clinic. She offered pro bono help, and worked with me to respond to Motorola's demands.

THE DMCA AND UNLOCKING

Motorola's cease and desist letter didn't claim that I was illegally distributing their copyrighted software. Instead, it claimed that I was "distributing software ... for the purpose of circumventing the protection measures" associated with their copyrighted software. There is a subtle but meaningful difference.

The DMCA includes anti-circumvention provisions that are intended to protect music and movie owners who want to distribute their work digitally, but are afraid of piracy. The provisions prohibit anyone from circumventing the locks that control access to copyrighted works. For example, DVDs are protected by a Digital Rights Management (DRM) system that attempts to prevent anyone from easily making copies of movies. The DMCA prohibits circumventing that type of protection system.

But unlocking a phone has nothing to do with copyright infringement, and using the DMCA to prosecute unlocking cell phones is not what the law was intended for. If Motorola's interpretation of the DMCA were valid, companies would be able to create simple software security mechanisms that legally prevent a customer from using a device in any way except that in which the manufacturer intended.

Jennifer helped me respond to Motorola by disputing their interpretation of the DMCA; thanks to her efforts, eventually Motorola decided that a college student wasn't worth pursuing. I was very lucky that they didn't decide to take the case to court.

THE BIGGEST PROBLEM WITH THE UNLOCKING LAW

In the year after helping me with my case, Jennifer Granick fought for an exemption from the DMCA for unlocking phones, and in November 2006 it was granted. That exemption was in place for 6 years, until the Library of Congress and the Copyright Office decided to remove it. As of January 26th, anyone unlocking a new cell phone or providing unlocking services unlocking phones once again risks up to five years in jail for each offense.

For consumers, the consequences of this are fewer choices and increased restrictions to freedoms we currently take for granted. If you're traveling abroad and want to use your current cell phone, you'll need to pay exorbitant roaming charges. As an example, AT&T charges customers \$1.50 per minute for calls and \$19.50 per megabyte consumed while traveling in Europe. Compare that with the \$0.30 per minute and \$0.20 per megabyte that you'd be charged in the UK with a prepaid SIM card and an unlocked phone, and it amounts to extortion.

Locking cell phones also prevents consumers from freely choosing their cell carrier. If you decide to change your network, say from AT&T to T-Mobile, the DMCA regulations mean that unless your carrier agrees to unlock your phone, you'll need to buy a new device. As a result, manufacturers like Motorola and Apple are keen to keep their devices locked so that they can sell more phones.

The CTIA, the trade association that represents the wireless industry, [claims](#) that the illegality of phone unlocking prevents "large scale phone trafficking operations" that involve unlocking carrier-subsidized phones and selling them abroad. But consumers who buy subsidized phones commit to two-year contracts with hefty early-termination fees (up to \$350 for most carriers). The carrier's subsidies are already contractually protected.

The decision to remove the exemption for unlocking phones is bad for consumers, and it's up to our elected officials to help defend consumer rights. Unfortunately, the Library of Congress and the Copyright Office are staffed by unelected officials who aren't directly beholden to voters.

I was fortunate that Motorola weren't more motivated and didn't take my case further. The company I started still exists, now run by my brother. With the unlocking exemption removed, it's only a matter of time before entrepreneurs and consumers are once again bullied by carriers and manufacturers seeking to protect their profits by constraining consumer choice. Next time around, a Verizon, AT&T, or Apple will likely take the case to court, and it's possible that someone will end up in jail."

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This article available online at:

<http://www.theatlantic.com/business/archive/2013/02/the-law-against-unlocking-cellphones-is-anti-consumer-anti-business-and-anti-common-sense/272894/>

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Exhibit F

T-Mobile.com > T-Mobile Support > Phones, Tablets & Devices > **SIM cards** > Documents

Unlock your mobile wireless device

Created by [tmo_alan](#) on Jun 27, 2011 1:37 PM. Last modified by [tmo_mikem](#) on Jan 12, 2015 8:03 AM.

Learn how to unlock your wireless mobile device for use on other carriers (formerly SIM Unlock).

We're committed to providing you with clear information about how to unlock your mobile wireless phones and tablets for use across different mobile carriers. Most mobile devices are programmed to prevent the device from operating with another wireless carriers network without first obtaining an unlock code.

Go to:

- [Device compatibility](#)
- [Unlock requirements](#)
- [Request an unlock](#)

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Device compatibility

It's important to understand that mobile carriers typically use different frequencies and technology to provide wireless network access. This means that not all phones and tablets are compatible between every mobile carrier – for more information about compatibility with T-Mobile's network please check [Bring Your Own Device](#). Even if your phone or tablet is compatible between carriers, some functionality of your device may not operate the same on a different mobile carrier's network. Please carefully review your device functionality with any new carriers' network to make sure that the services are operating as expected.

In order to obtain an unlock code for your mobile wireless phone or tablet you need to contact the mobile carrier or manufacturer who sold you the device. The original carrier or manufacturer can provide you with instructions and specific information on how to unlock the device for use with another mobile carrier. If you purchased your device from T-Mobile or if you have a T-Mobile authorized device please follow the steps outlined below to determine your eligibility to receive an unlocking code for your device.

Unlock requirements

We provide mobile device unlock codes free of charge within two business days (or provides further information about timing) for eligible devices.

Device eligibility is determined as follows:

- The device must be a T-Mobile device.
- The device must not be reported as lost, stolen or blocked to T-Mobile.
- The account associated with the device must be in good standing.
- You have requested no more than 2 mobile device unlock codes per line of service in the last 12 months.
- The device must satisfy all the Postpaid or Pay in Advance (Prepaid) Unlocking terms outlined below.
- You may need a non-T-Mobile and non-MetroPCS SIM card to insert in the phone.

Unlock Eligibility for Monthly Phones and Tablets

- The device must have been active on the T-Mobile network for at least 40 days on the requesting line.
- If the device is financed using T-Mobile's Equipment Installment Plan (EIP), all payments must be satisfied and the device must be paid in full.
- If the device is on an account that is under a service contract term, at least 18 consecutive monthly payments must have been made or the account has migrated to Simple Choice no contract rate plan.
- If the device is associated with a canceled account, the account balance must be zero, including all pending charges
- T-Mobile may request proof of purchase or additional information in its discretion and certain other exceptions may apply.

Unlock Eligibility for Pay in Advance (Prepaid) Phones and Tablets

- The device has been active on the T-Mobile network for more than 1 year on the requesting line.
- If the device has been active for less than 1 year on the requesting line, the Pay in Advance account associated with

the device must have had more than \$25 in refills for basic phones or \$100 in refills for smartphones or tablet since device first use date.

- The account must not be canceled and in good standing.
- T-Mobile may request proof of purchase or additional information in its discretion and certain other exceptions may apply.

Military and Other Exceptions: Deployed military personnel who are customers in good standing are eligible to have their devices unlocked upon provision of deployment papers. Exceptions to some or all requirements may apply in other circumstances for Business and Government Accounts. Please [contact us](#) for more details.

Request an unlock

If a device meets the eligibility requirements, contact [T-Mobile Customer Service](#) to request an unlock code, and steps to unlock your device. Keep in mind, this policy is subject to T-Mobile's Terms and Conditions of service and may change without notice. T-Mobile may deny any request for a mobile device unlock code at our sole discretion if the request is an effort to defraud the company.

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Related pages

- [Bring Your Own Device](#)
- [Mobile Device Unlock App](#)
- [Upgrade your device](#)
- [Upgrade FAQs](#)

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Exhibit G

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Community

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Legal / Regulatory & Consumer Resources

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Visitors Agreement

Copyright Notice

Social Contests and Promotions

Unlocking Policy

Signal Boosters

Electronic Billing Terms and Conditions

Secure Online Use

Unlock your Sprint device

Many Sprint phones or tablets ('devices') have been programmed with a master subsidy lock or 'MSL' that locks the device to certain operational parameters for use on Sprint's network and prevents the device from attempting to be activated on other carriers' networks. Sprint will provide any applicable MSL code, upon request, provided you have met the unlocking requirements provided below.

Not all Sprint devices have an MSL code or a locking function that can be unlocked by Sprint (e.g., Apple devices cannot be unlocked to accept another domestic carrier's SIM card). On certain devices, not all functionality may be unlocked (e.g., for some smartphone devices, Sprint may be able to unlock the CDMA/voice functionality of the device but unable to unlock the GSM/UMTS/LTE portion of the device). **Even if unlocked, Sprint devices will not necessarily work on another carrier's network.**

Whether an unlocked Sprint device can be used on another carrier's network is subject to that carrier's policies and network compatibilities. Even if a different carrier will activate a Sprint device on its network, Sprint does not make any guarantees as to a Sprint device's performance on another carrier's network or that any or all device features or functionalities will be fully or partially operational. Although a phone manufacturer may manufacture the same device model and name for different wireless carriers offering wireless service in the United States, Sprint devices are specifically designed to function on Sprint's network and Sprint's frequencies and technologies. Sprint generally will not be able to activate non-Sprint branded phones on its network, including devices purchased through Boost Mobile, Virgin Mobile or Assurance Wireless.

Requesting the Master Subsidy Lock code

Sprint will provide the MSL code on a Sprint device under the following circumstances:

- The person requesting the MSL code is an authenticated current or former Sprint customer or an individual owner who can provide the phone number or account number for the account last associated with the device.
- The account associated with the device is in good standing, including but not limited to:
 - Service Agreement or Installment Billing Agreement is fulfilled
 - Current Sprint customers still subject to an unfulfilled Service Agreement or Installment Billing Agreement can fulfill this requirement by paying the applicable early termination fee or "ETF" or the remaining device balance, respectively.
 - Sprint reserves the right to refrain from providing the MSL code until any ETF/installment billing payments have cleared any pending status.
 - The person requesting the MSL code may be required to call back into Sprint Customer Care once any ETF/installment billing payments have cleared any pending status.
- Payments are current.
- No write-off balance.
- Not associated with a phone sent to collections
- The device has not been reported as lost or stolen

If you meet the above requirements and would like to request the MSL code for your Sprint device, contact Sprint Customer Care by dialing *2 from your Sprint mobile device or call 888-211-4727.

Unlocking for international travel

Traveling abroad? Sprint customers traveling abroad for a short period of time can have their Sprint service provisioned to allow for international roaming. See sprint.com/international for full details.

Sprint customers remaining abroad for an extended period of time may want to try to use their Sprint device with a foreign carrier. For certain devices engineered to include a SIM slot, Sprint may be able to unlock the device's SIM slot in order for a foreign carrier's SIM card to be inserted. Sprint will unlock, or facilitate the unlock of, the SIM slot of an applicable device for international travel under the following circumstances:

- The person requesting the unlock is a current Sprint customer who can provide the phone number or account number for the account.
- The person requesting the unlock can authenticate as the Account Holder or an Authorized Contact
- If the account is an ASL account:
 - There is no unfulfilled Service Agreement associated with the line of service.
 - There is no outstanding Installment Billing Agreement balance associated with the device.
- The account is in good standing (including but not limited to: payments are current, no write-off balance, not associated with a phone sent to collections, etc.).
- The subscriber with which the device is associated has not previously unlocked another device within the past 12 months.
- The applicable device has been active on the associated line of service for at least 90 days.
- The device is currently active on a Sprint account.
- The device is capable of international SIM unlock.

Please note that unlocking the SIM slot does not allow for use with domestic (U.S.) SIMs. When using a foreign carrier's SIM it is important to note that all information, service and support must be provided by that carrier. You remain responsible for any charges to your Sprint account, as well as any charges from the foreign provider. Upon returning to the U.S., you may need to remove the foreign carrier's SIM to be able to acquire the Sprint network.

If you elect to use a foreign carrier's SIM in a locked device for use on international GSM networks, please contact Sprint Worldwide Care to unlock the device SIM slot. Sprint Worldwide Care can be reached via chat or email from sprint.com/swsupport or by calling 6s888-226-7212.

Unlocking for military personnel

Military personnel traveling abroad for a short period of time may wish to have their Sprint service provisioned to allow for international roaming. See sprint.com/international for full details.

Military personnel deployed overseas for extended periods of time may prefer to try to use their Sprint device with a foreign carrier. For certain devices engineered to include a SIM slot, Sprint may be able to unlock the device's SIM slot in order for a foreign carrier's SIM card to be inserted. Sprint will unlock, or facilitate the unlock of, the SIM slot of an applicable device under the following circumstances:

- The subscriber is an active member of a branch of the United States military
- The subscriber has been issued overseas deployment papers.
- The person requesting the unlock is a current Sprint customer who can provide the phone number or account number for the account.
- The person requesting the unlock can authenticate as the Account Holder or an Authorized Contact.
- The account is in good standing (including but not limited to: payments are current, no write-off balance, not associated with a phone sent to collections, etc.).
- The subscriber with which the device is associated has not previously unlocked another device within the past 12 months.
- The device is capable of international SIM unlock.

Please note that unlocking the SIM slot does not allow for use with domestic (U.S.) SIMs. When using a foreign carrier's SIM it is important to note that all information, service and support must be provided by that carrier. You remain responsible for any charges to your Sprint account, as well as any charges from the foreign carrier. Upon returning to the U.S., you may need to remove the foreign carrier's SIM to be able to acquire the Sprint network.

Military personnel deployed overseas can contact Sprint Worldwide Care to unlock the device SIM slot. Sprint Worldwide Care can be reached via chat or email from sprint.com/swwsupport or by calling 888-226-7212.

Important note

Sprint may refuse any unlock request that would result in an abuse of this policy or is part of an effort to defraud Sprint or its customers. This unlocking policy is subject to change at Sprint's discretion without advance notice.

Unlocking FAQs

What does it mean for my device to be 'locked'?

The term 'locked' means that either Sprint software or the manufacturers' device designs tie the device to Sprint's network, such that the device can only be used on Sprint's network.

Why does Sprint lock its devices?

Most Sprint devices are sold at a discounted price, often in exchange for a customer entering into a term service commitment, or pursuant to an installment billing agreement, which enables a customer to pay off the price of the device over a period of time. Locking software protects Sprint by ensuring that those discounted devices remain on Sprint's network until our customers have either fulfilled their term service commitment or their installment billing agreement.

How can I unlock my device?

For devices that qualify under Sprint's Unlocking Policy, Sprint will provide any applicable MSL code, and/or unlock the device, to the extent that a device is capable of being unlocked. Generally, to qualify under Sprint's Unlocking Policy, the device must be associated with an account in good standing and not be subject to an outstanding term service agreement or installment billing agreement.

I have the MSL code for my device. Does that mean that my device is unlocked?

The MSL code may be used to override operational parameters restricting the device to operating on Sprint's network; however, the MSL code alone will not enable certain devices to operate on a different carrier's network. Enabling a device to work on another carrier's network may necessitate the carrier or party attempting to unlock the device to address the firmware hardcoded into the device at the time the device was manufactured, which in turn requires extensive technological knowledge and skill. Whether another carrier is able to or will unlock a device is subject to that carrier's policies and practices.

I've been told by another carrier that Sprint needs to unlock my SIM slot in order to use my phone on the other carrier's network.

For eligible devices, Sprint will unlock the SIM slot, to the extent that a device SIM slot is capable of being unlocked. It is important to note that not all devices are capable of being unlocked, often because of the manufacturers' device designs, and that even for those devices capable of being unlocked, not all device functionality may be capable of being unlocked. **Specifically, devices manufactured with a SIM slot within the past three years (including, but not limited to, all Apple iPhone devices), cannot be unlocked to accept a different domestic carrier's SIM for use on another domestic carrier's network. Sprint has no technological process available to do this.** In accordance with Sprint's voluntary commitment contained within CTIA's Consumer Code for Wireless Service ("Unlocking Commitment"), Sprint is working to ensure that all devices developed and launched **on or after February 11, 2015**, are capable of being unlocked domestically.

If my device is unlocked, does that mean I will be able to use it with a different carrier?

Even if unlocked, Sprint devices will not necessarily work on another carrier's network. Whether an unlocked Sprint device can be used on another carrier's network is subject to that carrier's policies and network compatibilities. **Even if a different carrier will activate a Sprint device on its network, Sprint does not make any guarantees as to a Sprint device's performance on another carrier's network or that any or all device features or functionalities will be fully or partially operational.** Although a phone manufacturer may manufacture the same device model and name for different wireless carriers offering wireless service in the United States, Sprint devices are specifically designed to function on Sprint's network and Sprint's frequencies and technologies.

I have been told that my device is not capable of being unlocked and/or does not have a corresponding MSL code. What can I do?

Many devices that have been manufactured for Sprint simply are not capable of being unlocked, or will not have a corresponding MSL code. For example, Sprint-branded iPhones have been manufactured in a way that prevents them from being unlocked to allow the device to activate on a different carrier's network in the United States. This is because, prior to the development of the voluntary commitment contained in CTIA's Consumer Code for Wireless Service ("Unlocking Commitment") carriers were not required to, and many carriers did not, develop their devices to be capable of being unlocked. Sprint strongly encourages owners of such devices to consider Sprint's Buyback Program, which may enable them to trade in their old devices to receive an in-store credit toward the purchase of a new device or to receive an account credit. For more information, visit sprint.com/buyback. To help resolve this problem, Sprint has committed to ensure that all of its devices produced after February 11, 2015, are capable of being unlocked.

I am a former Sprint customer or was never a Sprint customer but have purchased a Sprint device from a third party other than Sprint. Can I get the MSL code?

For individuals owners who can provide the telephone number last associated with the device, Sprint may be able to provide the applicable MSL Code if the account associated with the device is in good standing (service or installment contract fulfilled, payments are current, no write-off balance, not associated with a phone sent to collections, phone not reported lost or stolen, etc.).

I see that Sprint has a separate unlocking policy for international travel. Why is that?

For Sprint customers traveling abroad for a short period of time, often their Sprint service can be provisioned to allow for international roaming. See sprint.com/international for full details. However, Sprint customers remaining overseas for extended periods of time may prefer to try to use their Sprint device to receive service from a foreign carrier. Certain newer devices have been engineered to include a SIM slot, which may be capable of being unlocked to allow a foreign carrier's SIM card to be inserted, thus allowing the device to be used on a foreign carrier's network. **Unlocking the international SIM slot will not allow the device to be used on another domestic carrier's network.**

The international unlock policy says that Account Spending Limit ('ASL') customers are not eligible to have their devices unlocked for international travel. Why is that and is there any way to get around that requirement?

Sprint's systems were originally hardcoded to restrict ASL customers from unlocking their devices for international travel, though Sprint is working to update its systems to allow ASL customers who have completed their Service Agreement or Installment Billing Agreement to unlock their devices for international travel and will have those updates in place by February 11, 2015, per the Unlocking Commitment. After 18 months of service and responsible payment, Sprint may remove your spending limit and you may then be eligible to have your device unlocked for international travel.

I am a member of the military and am set to be deployed overseas. Can I have my device unlocked for international travel?

Military personnel traveling abroad for a short period of time may wish to have their Sprint service provisioned to allow for international roaming. See sprint.com/international for full details. However, military personnel remaining overseas for extended periods of time may prefer to try to use their Sprint device with a foreign carrier. If you have a capable device, you may be eligible to have your device unlocked for international usage.

Sprint's unlocking policy appears to apply only to postpaid customers. I am a prepaid customer. Am I eligible to have my device unlocked?

Neither Sprint nor its prepaid affiliates (Virgin Mobile, Boost Mobile, and Assurance Wireless) currently unlock devices for prepaid customers. However, in accordance with the Unlocking Commitment, Sprint and its prepaid affiliates are working to create new policies and procedures in order to unlock prepaid devices, or to provide the information necessary to unlock the devices, after certain eligibility requirements to be established are met. Consistent with the Unlocking Commitment, Sprint and its prepaid affiliates will implement these new policies and procedures no later than February 11, 2015.

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Exhibit H

Consumer Device Unlock Portal

Are you a business customer? Switch to our [Business Portal \(http://www.att.com/bizdeviceunlock\)](http://www.att.com/bizdeviceunlock)

[Device Unlock Support](#) | [Check Your Unlock Status \(/deviceunlock/status.html\)](#)

Request to Unlock an AT&T Wireless Phone or Tablet

Your device is designed to work on the AT&T wireless network, and may require a device unlock to operate on another compatible wireless network.

AT&T can send you unlock instructions upon request, provided that we can reasonably obtain them from the manufacturer and that you meet the requirements below. You should receive a response within two business days.

Note: AT&T cannot unlock devices from other wireless carriers.

General Requirements for All Unlock Requests

- The device must be designed for use on, and locked to, the AT&T wireless network. (For help see [Device Unlock Support](#).)
- It must not be reported lost or stolen.
- It's not associated with fraudulent activity.
- All the device's service commitments and installment plans are completed, and all early termination fees are paid in full.
- The device is not currently active on a different AT&T customer's account.
- If you performed an early upgrade, you must wait the 14-day buyer's remorse period before you can request to unlock your previous device.

Postpaid Customers

- Your account must be active for at least 60 days, with no past due or unpaid balance.

Prepaid / GoPhone[®]

- The device must be active for at least six months of paid service.

Non-AT&T Mobility Customers

- You've never had an AT&T wireless account and you meet the General Requirements for unlock requests.

Deployed Military Personnel (Current AT&T Customers Only)

- Current AT&T customers who are active and deployed military personnel, and have provided deployment verification, need to meet all the General Requirements, except those related to the device's service commitments, installment plans and early termination fees.
- AT&T, at its sole discretion, may limit the number of devices military personnel can unlock.

Important:

AT&T reserves the right to deny any unlock request that it concludes would result in an abuse of this policy or is part of an effort to defraud AT&T or its customers. AT&T further reserves the right to alter this unlocking policy at its discretion without advance notice.

☐ I have read and agree to the eligibility requirements to unlock my device.

Continue

Exhibit I

Device Unlocking Policy

Postpay Device Unlocking Policy:

We do not lock most phones or tablets that are activated with our postpay service, either during or after the term of your service contract or Edge installment sales agreement.

We do not lock our 4G LTE devices, and no code is needed to program them for use with another carrier.

We do not lock our 3G devices, other than our Global Ready 3G phones, and the simple code to program such 3G devices for use with another carrier is either "000000" or "123456." If the user guide for your device does not provide instructions to access the programming menu, you can contact us at *611 from your Verizon Wireless phone, or (800)922-0204, for assistance.

The SIM cards used in our 3G Global Ready phones are locked. By the end of January, 2015, we will unlock those SIM cards at your request once you have fulfilled the term of your service contract or Edge installment sales agreement and your balance is current.

Prepaid Device Unlocking Policy:

We do not lock our 4G LTE Prepaid devices, and no code is needed to program them for use with another carrier.

We do not lock our 3G Prepaid devices, other than our 3G Phone-in-the-Box Prepaid phones, and the simple code to program such 3G Prepaid devices for use with another carrier is either "000000" or "123456." If the user guide for your device does not provide instructions to access the programming menu, you can contact us at *611 from your Verizon Wireless phone, or (888)294-6804, for assistance.

Our 3G Prepaid Phone-in-the-Box phones are restricted for use with our Prepaid service for six months after activation, and are locked to the Verizon Wireless network for 12 months after activation. After six months, the restriction to our Prepaid service is automatically removed. After 12 months, you can contact us at *611 from your Verizon Wireless Prepaid phone, or (888)294-6804, and we will provide you with the programming code so that you can unlock your phone. If the user guide for your phone does not provide instructions to access the programming menu, we can help you with that as well.

Unlocking policy for Deployed Military Personnel:

If you are a Verizon Wireless customer in good standing who is in the military and you are deployed, we will unlock your device, if necessary.

Postpay Devices

We do not lock our 4G LTE devices, and no code is needed to program them for use with another carrier.

We do not lock our 3G devices, other than our Global Ready 3G phones, and the simple code to program such 3G devices for use with another carrier is either "000000" or "123456." If the user guide for your device does not provide instructions to access the programming menu, you can contact us at *611 from your Verizon Wireless phone, or (800)922-0204, for assistance.

The SIM cards used in our 3G Global Ready phones are locked. We will unlock the SIM card for you if

you provide us with information from your military/blanket orders.

Prepaid Devices

We do not lock our Prepaid devices, other than our Phone-in-the-Box Prepaid phones, and the simple code to program such Prepaid devices for use with another carrier is either "000000" or "123456." If the user guide for your device does not provide instructions to access the programming menu, you can contact us at *611 from your Verizon Wireless phone, or (888)294-6804, for assistance.

Our Prepaid Phone-in-the-Box phones are restricted for use with our Prepaid service for six months after activation, and are locked to the Verizon Wireless network for 12 months after activation. We will remove the restriction and unlock the device if you provide us with information from your military/blanket orders.

PLEASE NOTE: Carriers typically use different frequencies and air interface technologies to provide wireless network access. Accordingly, a device that works on one carrier's network may not be technologically compatible with another carrier's network. "Unlocking" a device refers only to disabling software that would prevent a consumer from attempting to activate a device designed for one carrier's network on another carrier's network, even if that network is technologically compatible. In other words, "unlocking" a device will not necessarily make a device interoperable with other networks – a device designed for one network is not made technologically compatible with another network merely by "unlocking" it. Additionally, unlocking a device may enable some functionality of the device but not all (e.g., an unlocked device may support voice services but not data services when activated on a different network).