

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

In the Matter of)	
)	
)	
Proposed Exemption to Prohibition on)	Proposed Class 11: Unlocking —
Circumvention Under 17 U.S.C. § 1201)	Wireless Telephone Handsets
)	
)	

REPLY COMMENTS OF CONSUMERS UNION

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I. Introduction and Summary

These reply comments are respectfully submitted on behalf of Consumers Union, the policy and advocacy arm of Consumer Reports. We are 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. Consumers Union supports the following exemption that would encompass both mobile handsets and hand-held wireless devices, such as tablets, that are functionally equivalent:

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, or
- 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.

Consumers Union filed initial comments supporting both Proposed Class 11: Unlocking — Wireless Telephone Handsets and Proposed Class 12: Unlocking — All-Purpose Tablets because these devices are functionally equivalent for wireless communications purposes and are locked to wireless networks using similar technology.¹

¹ See Comments of Consumers Union, Docket No. 2014-7 at 2-3 (Consumers Union Comments).

Proponents have made a *prima facie* case that unlocking handsets is a non-infringing use that is adversely affected by the anti-circumvention prohibition in the absence of an exemption.² Only one party — TracFone Wireless — has filed comments opposing this exemption, and these reply comments respond to the arguments therein.³ TracFone says it supports a “pro-consumer” exemption for mobile handsets, but is concerned about a broad exemption that would allow illegal cellphone traffickers to abuse the provider’s subsidy scheme.⁴ Consumers Union has proposed just such a pro-consumer exemption. Consumers Union’s proposed exemption is based on the exemption reinstated by Congress in the Unlocking Act.⁵

Consumers Union’s proposed exemption more effectively provides the benefits to consumers that TracFone supports, without undermining effective legal protections against illegal bulk reselling of subsidized phones. TracFone’s proposed exemption would impose additional conditions and exclusions that would create unnecessary uncertainty, resulting in a chilling effect on the legitimate consumer-directed activity that TracFone says it supports.⁶ Consumers Union’s proposed exemption will leave in place effective protections against the potential abuses that concern the only opposing party.

None of TracFone’s arguments rebuts the *prima facie* showing Consumers Union and other proponents made in their initial comments that an exemption is warranted. Consumers

² No party has opposed our proposed exemption for unlocking all-purpose tablet computers, Proposed Class 12. We have made a *prima facie* case that unlocking tablets is a non-infringing use that is adversely affected by the anti-circumvention prohibition in the absence of an exemption, and we have separately filed brief reply comments asking that the Copyright Office grant that exemption.

³ Comments of TracFone Wireless, Docket No. 2014-7 (TracFone Comments). Only two parties opposed any of the other proposed unlocking exemptions, but, as these parties note, their concerns are not relevant to the proposed exemptions for unlocking either mobile handsets or tablets. *See* Comments of General Motors, Docket No. 2014-7; Comments of Alliance of Automobile Manufacturers, Docket No. 2014-7.

⁴ *See* TracFone Comments at 2-3.

⁵ *See* Unlocking Consumer Choice and Wireless Competition Act, Pub. L. No. 113-144, 128 Stat. 1751 (2014) (Unlocking Act).

⁶ *See* TracFone Comments at 3-4 (proposing an exemption that would allow unlocking “only if: (a) such unlocking is not for the purpose of profiting from any subsidy, discount, installment plan, lease, rebate or other incentive program (collectively, ‘Subsidy’) offered by the Original Network service provider; (b) all obligations to the Original Network service provider associated with the provision of the Subsidy have been satisfied or waived; and (c) such unlocking is not for any unlawful purpose, including, but not limited to, obtaining unauthorized access to a wireless network”).

Union and others demonstrated in their initial comments that circumventing technological protection measures to connect mobile handsets to another wireless network, with the network operator's authorization, is a legitimate, non-infringing activity that is adversely affected by the DMCA's anti-circumvention prohibition. Additionally, the statutory factors weigh in favor of granting the exemption. For these reasons, the Copyright Office should grant the exemption for Proposed Class 11: Unlocking — Wireless Telephone Handsets.

II. The Proposed Exemption Would Protect Consumers From Unwarranted Potential DMCA Liability While Still Appropriately Protecting the Interests of Parties Like TracFone.

TracFone expresses concern that the proposed exemption would remove the DMCA as a legal remedy to combat illegal phone trafficking, which it fears might leave it vulnerable to “subsidy thieves” who buy subsidized phones and unlock them en masse.⁷ However, copyright law protects only works of original authorship, not business models. Moreover, Consumers Union's proposed exemption would not leave TracFone exposed. There will still be ample legal protection against illegal phone trafficking.

A. Copyright Law Should Not Be Enlisted to Protect Wireless Carriers' Subsidy-Based Business Model.

TracFone's chief concern with the exemption for unlocking wireless handsets is that it would undercut its subsidy-based business model.⁸ But protecting business models is not the purpose of copyright law. The Copyright Office has noted that “the desire of wireless carriers to preserve an existing business model . . . has little if anything to do with protecting works of authorship.”⁹ This is all the more true here, where protecting the business model comes at the

⁷ See *id.* at 2-3 (“TracFone's DMCA lawsuits have been tremendously successful in stopping subsidy thieves from trafficking in TracFone handsets. Since 2005, TracFone has filed 85 lawsuits asserting DMCA claims against 208 traffickers . . .”).

⁸ See, e.g., *id.* at 2 (“TracFone opposes the lack of any protection against the proposed exemptions being exploited by handset traffickers and subsidy thieves who victimize American consumers and wireless providers.”).

⁹ *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 75 Fed. Reg. 43,825, 43,831 (Jul. 27, 2010) (*2010 Final Rule*) (granting an unlocking exemption “because there appear to be no *copyright-based* reasons why circumvention . . . should not be permitted”) (emphasis added).

expense of consumers who face possible civil and criminal penalties under the DMCA for engaging in activity that Congress has recognized as legitimate.

B. Consumers Union’s Proposed Exemption Would Not Leave Parties Like TracFone Vulnerable to Illegal Phone Trafficking.

TracFone and others already have ample legal tools to combat illegal bulk phone trafficking. The DMCA is not needed as an alternative to these other, more appropriate legal tools. TracFone has successfully sued illegal phone traffickers using a number of more conventional legal theories — including trademark infringement, contributory trademark infringement, unfair competition, breach of contract, tortious interference with a contractual right, conspiracy to induce breach of contract, civil conspiracy, and unjust enrichment, among others.¹⁰ At most, the DMCA has been a gratuitous add-on to other laws that more appropriately address illegal bulk phone trafficking. Using the DMCA is simply not necessary or appropriate for protecting the interests of TracFone and other wireless carriers in their business models.

Moreover, as Consumers Union noted in its initial comments, having the DMCA available for that unnecessary purpose causes concrete harm to consumers, by obstructing their legitimate unlocking activities.¹¹ TracFone claims that it “has not, and will not ever, pursue claims against legitimate consumers for unlocking phones.”¹² But, as Congress noted, “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.”¹³ In short, the DMCA creates a legal cloud over legitimate unlocking by consumers and is unnecessary for protecting the interests of parties like TracFone.

TracFone says it supports a “pro-consumer” exemption that would allow consumers “acting in good faith” to unlock their devices,¹⁴ but that it fears an “overbroad” exemption that

¹⁰ See, e.g., TracFone Comments at 6 n.8.

¹¹ See Consumers Union Comments at 13-14.

¹² TracFone Comments at 3.

¹³ S. Rep. No. 113-212 at 3 (2014); see also Consumers Union Comments at 13.

¹⁴ *Id.* at 3.

might enable phone traffickers.¹⁵ Consumers Union’s proposed exemption strikes the right balance in both protecting the rights of consumers and protecting parties like TracFone from illegal phone trafficking. The proposed exemption mirrors the Unlocking Act and enables consumers who own a handset, third parties at the direction of such a consumer, or wireless carriers acting at the direction of the consumer or of the other person acting at the consumer's direction, to unlock devices.¹⁶ The “subsidy thieves”¹⁷ or phone traffickers that concern TracFone are not included in the exemption.

TracFone’s proposed alternative exemption would condition unlocking on three additional showings: (1) unlocking is not done for the purpose of profiting from a subsidy; (2) all obligations to the original carrier have been waived or satisfied; and (3) unlocking is not for any unlawful purpose.¹⁸ While these additional conditions may be well-intentioned, requiring an individual consumer to meet them adds unnecessary uncertainty that will result in a chilling effect on legitimate consumer activity.

III. Proponents Have Demonstrated, and Congress Has Affirmed, That Unlocking to Connect to Another Wireless Network is Legitimate and Non-Infringing.

Consumers Union showed in its initial comments that unlocking a device to enable it to connect to another wireless network is legitimate and non-infringing, under multiple legal rationales.¹⁹ First is the fundamental fact that Congress affirmed this, in both the statutory text of the Unlocking Act and in its legislative history.²⁰ In addition, Consumers Union and other proponents also explained a number of other reasons, aside from the Unlocking Act, why unlocking is legitimate and non-infringing.²¹

¹⁵ *Id.* at 2.

¹⁶ *See* Consumers Union Comments at 2.

¹⁷ TracFone Comments at 2.

¹⁸ *See id.* at 3-4.

¹⁹ Consumers Union Comments at 9-12.

²⁰ *Id.* at 9-10.

²¹ *See, e.g., id.* at 10-12; Comments of Institute of Scrap Recycling Industries, Docket No. 2014-7 at 5-12 (ISRI Comments).

A. The Software that Locks a Device to a Particular Network is Not Copyrightable.

As Consumers Union and other proponents noted in their initial comments, the underlying software that facilitates connectivity between a mobile device and a wireless network is not copyrightable.²² Thus, even if certain methods of unlocking might create copies or derivative works, such activity still does not infringe upon any valid copyright.

B. Unlocking is Privileged Under Section 117 and Therefore Non-Infringing.

Consumers Union and other proponents have also shown that, to the extent that certain methods of unlocking may create a copy or derivative work of copyrighted material, this is privileged activity under section 117.²³ Section 117 allows the owner of a copy of a computer program “to make or authorize the making of another copy or adaptation . . . [if it is] created as an essential step in the utilization of the computer program in conjunction with a machine.”²⁴ One question that has arisen in some section 117 cases — whether the owner of the device is also the owner of the copy of the software inside the device — has been expressly rendered inapplicable to mobile device unlocking. The Unlocking Act explicitly authorizes owners of devices to initiate unlocking under any exemption that might be created, regardless of whether they are also considered the owners of the copy of the software.²⁵

Even though no longer relevant here, it is clear that the proponents of this exemption have satisfactorily shown that, in the words of the Copyright Office’s 2010 order, “a substantial portion of mobile phone owners also own the copies of the software on their phone.”²⁶ The Institute of Scrap Recycling Industries (ISRI) also demonstrated in its initial comments that a substantial number of mobile device owners own the underlying software that operates their

²² See Consumers Union Comments at 10-11 (“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.”); Comments of Gazelle and e-Bay, Docket No. 2014-7 at 2 (Gazelle and e-Bay Comments).

²³ See, e.g., ISRI Comments at 9-12.

²⁴ 17 U.S.C. § 117(a)(1).

²⁵ See Consumers Union Comments at 7-9; see also ISRI Comments at 12.

²⁶ 2010 Final Rule, 75 Fed. Reg. at 43,831.

devices, under both the *Vernor* test and the *Krause* test.²⁷ ISRI notes that the Second Circuit’s test in *Krause* is endorsed by *Nimmer on Copyright* as the “better view,”²⁸ and that “six of the seven *Krause* factors support the conclusion that a device’s owner also owns the software or firmware on that device.”²⁹ ISRI also notes that, even under the more restrictive *Vernor* standard,³⁰ “the licenses offered by the mobile carriers do not meet the three required criteria and the device owner should remain the owner of the software on that device.”³¹

C. Unlocking is Fair Use.

Finally, unlocking is fair use, and therefore non-infringing. TracFone focuses exclusively on the fourth fair use factor in section 107,³² but the Supreme Court has made clear that the fair use inquiry requires balancing of all four statutory factors.³³ And an analysis of all four factors here demonstrates that unlocking to connect to a network is fair use.³⁴ When consumers unlock their devices to connect them to another network, the use is transformative and noncommercial, and the allegedly copyrightable software is functional, so the scope of fair use is broad.³⁵ Indeed, even if the entire work is copied — as TracFone claims to be the case with some methods of unlocking³⁶ — the Supreme Court has held that it can still be fair use.³⁷

²⁷ ISRI Comments at 9-12; *Vernor v. Autodesk*, 621 F.3d 1102 (9th Cir. 2010); *Krause v. TitleServ, Inc.* 402 F.3d 119 (2d Cir. 2005).

²⁸ See ISRI Comments at 9-10 (citing Melville B. Nimmer, *Nimmer on Copyright* 2-8 § 8.08).

²⁹ *Id.* at 11.

³⁰ See *Vernor v. Autodesk*, 621 F.3d 1102, 1111 (9th Cir. 2010).

³¹ ISRI Comments at 11.

³² TracFone Comments at 10-11.

³³ See *Cambell v. Acuff-Rose Music*, 510 U.S. 569, 578 (1994) (“Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.”).

³⁴ ISRI Comments at 7-9.

³⁵ See, e.g., *Sega Enterprises Ltd. v. Accolade*, 977 F.2d 1510, 1524 (9th Cir. 1992) (noting that works with strong functional elements receive less protection under copyright law).

³⁶ TracFone Comments at 13.

³⁷ See *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 449-50 (1984) (“[T]he fact that the entire work is reproduced . . . does not end the fair use inquiry . . .”); see also *Sega Enterprises Ltd. v. Accolade*, 977 F.2d 1510, 1526-27 (9th Cir. 1992) (“The fact that an entire work was copied does not, however, preclude a finding of fair use.”).

Even the fourth factor by itself, if properly assessed, tilts in favor of a fair use finding. TracFone is in error in suggesting that the fourth factor should focus on the value of the software without regard to its function in the device containing it.³⁸ The software is useless in the marketplace without being connected to a phone. Proponents' initial comments showed how the value of the software and the phone decreases without an unlocking exemption.³⁹ Thus, the fourth factor tilts in favor of fair use, because the ability to unlock phones has a positive effect on their value. TracFone's analysis really focuses on the effect an exemption might have on its subsidy-based business model, not its effect on the value of the software.⁴⁰

IV. Consumers Have Been Harmed By Not Being Able to Unlock Their Devices.

TracFone suggests that proponents have “overstated” the adverse effects on “real-world” consumers.⁴¹ But we have described very concrete harms. For example, during the period when unlocking was illegal, after the exemption was allowed to expire in 2012, “prices for phones that could not be unlocked dropped by about \$20 per unit.”⁴² We also described how carriers made it very difficult, even impossible, for consumers to unlock after the exemption was allowed to expire.⁴³ We have in no sense overstated the harms to consumers.

A. Voluntary Carrier Unlocking Policies and the Availability of Some Unlocked Phones on the Market Do Not Replace the Need for an Exemption.

As Consumers Union and other proponents have explained in our initial comments,⁴⁴ voluntary unlocking policies are no substitute for a legal right to unlock. The voluntary policies are often unnecessarily cumbersome and uncertain in ways that the proposed exemption would

³⁸ TracFone Comments at 11.

³⁹ See Consumers Union Comments at 15-16 (describing the adverse effects of the prohibition on the resale market); ISRI Comments at 8 (“[T]he ability to lawfully unlock mobile devices likely increases the value of those devices (including the embedded software) because the owner gains the ability to switch to a preferred carrier and because the resale value of the device increases.”).

⁴⁰ See TracFone Comments at 12.

⁴¹ *Id.* at 13-14.

⁴² Consumers Union Comments at 15 (quoting Kyle Wiens, *Opinion: Why Cellphone Unlocking Could Soon Be Illegal Once Again*, *Wired* (Dec. 9, 2014)).

⁴³ *Id.* at 17-19.

⁴⁴ See *id.* at 17-20; ISRI Comments at 19-20; Gazelle and e-Bay Comments at 5.

not be.⁴⁵ Without an exemption, the availability of unlocked phones is far more limited and they are commensurately more expensive. The unlocked phone market is clearly not functioning efficiently, given that the price for new unlocked phones has remained stuck at approximately \$600 for the last several years.⁴⁶ As Consumers Union noted in its initial comments, having more unlocked phones on the market will lead to lower prices and benefit consumers.⁴⁷

B. The Specter of Liability Under the DMCA Inhibits Legitimate Unlocking by Consumers.

TracFone argues that proponents overstate the adverse effects of the prohibition to consumers because “the DMCA cases brought for phone unlocking have all been against traffickers, and not consumers.”⁴⁸ However, as discussed above and in Consumers Union’s initial comments, the civil and criminal fines imposed by the DMCA create a legal cloud over unlocking such that consumers with a legitimate interest in unlocking may be afraid to do so.⁴⁹ It is clear that this legal cloud has had a chilling effect on consumers. Indeed, this was a key reason Congress passed the Unlocking Act.⁵⁰ The fact that TracFone has not as of now brought a DMCA claim itself against a consumer cannot give consumers any assurance that it or any other carrier or handset manufacturer will not do so in the future. Thus, the only sufficient remedy for removing this legal uncertainty for consumers is an exemption.

V. The Statutory Factors Weigh in Favor of Granting the Proposed Exemption.

Consumers Union and other proponents demonstrated in our initial comments that the statutory factors tilt in favor of granting the proposed exemption.⁵¹ TracFone appears to agree that the factors weigh in favor of granting a pro-consumer exemption, though it argues that they

⁴⁵ See Consumers Union Comments at 17-20.

⁴⁶ *Id.* at 20.

⁴⁷ *Id.*

⁴⁸ TracFone Comments at 15.

⁴⁹ See *supra* I.B.1 at 4.

⁵⁰ S. Rep. No. 113-212 at 3 (2014) (“[B]ecause 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.”).

⁵¹ See, e.g., Consumers Union Comments at 19-23; ISRI Comments at 21-24.

weigh against granting a broad exemption permitting unlocking before the carrier has recovered its subsidy investment.⁵² Specifically, TracFone says factors (i) (availability for use of copyrighted works), (iv) (effect on market for or value of copyrighted works), and (v) (other appropriate factors) tilt against granting the proposed exemption. TracFone is essentially re-making arguments here that we have already addressed above.

First, the fact that there are already some unlocked phones on the market, and the fact that carriers are now willing to unlock phones under certain circumstances and conditions, are no substitute for giving consumers a legal right to unlock.⁵³

Second, the proposed exemption would have no adverse effect on the market for the underlying software. In fact, it would maintain the useful life of used handsets, and therefore the value of those handsets and the software on which they function. And it would diminish the value of new handsets — if at all — only as a result of market competition, to the extent that some consumers individually choose to use an unlocked used handset as a more affordable competitive choice.⁵⁴ As noted above and in our initial comments, TracFone and other carriers have other, more straightforward legal means to enforce service contracts.

And third, the proposed exemption will in no way “hamper innovation in the marketplace.”⁵⁵ To the contrary, by giving consumers more options for purchasing a handset separately from their purchase of wireless service, the exemption will encourage the pursuit of competition and innovation in the product and services markets independently as well as in tandem. There is likely to be more innovation, not less.⁵⁶ TracFone is again focusing primarily on its own subsidy-based business model, rather than on competition and innovation in the marketplace.

⁵² See TracFone Comments at 16-17.

⁵³ See Consumers Union Comments at 20; IV, *supra* p. 7.

⁵⁴ See Consumers Union Comments at 22-23; ISRI Comments at 22-23.

⁵⁵ TracFone Comments at 17.

⁵⁶ See Consumers Union Comments at 14-15.

VI. Conclusion

For the foregoing reasons, Consumers Union asks the Librarian of Congress to adopt its proposed exemption for mobile device unlocking.

Respectfully submitted,

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