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March 18, 2014

Comments of Consumers Union
To the U.S. Copyright Office
Software-Enabled Consumer Products Study
[Docket No. 2015-6]

Consumers Union, the policy and advocacy arm of Consumer Reports,[1] respectfully submits these reply comments in the above-referenced matter, to assist the Copyright Office in its consideration of the application of copyright law to software-enabled consumer products. Having had the opportunity to review and consider the initial comments submitted, we wish to highlight the following points:

As we indicated in our comments in the Copyright Office's other open proceeding, reassessing the operation of section 1201 of the Digital Millennium Copyright Act, we are concerned that inconsistent and unsettled application of copyright law to software that enables and governs, and restricts, the functioning of everyday consumer products in which it is embedded, threatens to cause far-reaching harm to fundamental consumer rights.

The reach of copyright law has expanded dramatically from its origins in response to the invention of the printing press. For many years, it applied only to books, stories in periodicals, and other original writings. As the technological means available for publishing and distributing compositions evolved, copyright came to apply over time to phonograph and other audio recordings, and then to film and other video recordings. But throughout this evolution, the limiting concept was still the written expression of spoken language, or close audio-visual equivalents.

With the arrival of computer technology, however, and the fateful decision to declare computer code to be a "language" for copyright purposes, the stage was set for the jarring collision we are now witnessing between this new frontier of copyright law and the core protections of a far more ancient body of law, property law. The right of consumers to own property was well-established back at least as far as the ancient civilizations of Rome, Athens, Israel, and Mesopotamia.

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

We recognize the value of copyright law in nurturing and protecting incentives for innovation, both generally and in particular with respect to computer software. At the same time, it is important that the monopoly rights conferred on creators by the copyright laws be kept appropriately contained, so they do not spill over into broader, unjustified and counterproductive restraints on competition and consumer choice, and do not undermine long-established, fundamental rights and expectations of consumers regarding their ownership and dominion over the products they have lawfully acquired. Beyond these immediate effects on consumer rights and expectations, broader innovation is impeded if a product's manufacturer is given inordinately sweeping power to control how it is used once it has been released into the marketplace.

While we agree with those who urge care in making significant changes to the bedrock of copyright law, we believe specific and discrete clarifications to address specific legal uncertainties that have arisen in this collision of copyright law and property law are warranted in order to preserve those long-established consumer rights and expectations, as more and more consumer products – from toys to household appliances to medical devices to cars and farm tractors – become part of the Internet of Things.

Essentially, those consumer rights and expectations should be as equivalent as possible with respect to software-enabled consumer products as they have been for products containing no software. A consumer who purchases a product or otherwise lawfully acquires it should own it, and be able to use it – as he or she sees fit. That also includes selling or giving the product to someone else, complete with all its parts and contents and accessories. It includes being able to tinker with the product, to customize it, to improve its utility or performance, to get it repaired, or to remove its parts and use them in some other product. And it includes being able to choose how to accomplish any of those, or who to enlist or hire for assistance. Just as a dress can be resold in a consignment shop, or given to a friend, or donated to a thrift store; or re-hemmed, or mended, or have its buttons removed and used on another dress, either by the owner herself, or by hiring a seamstress.

And as more products collect and store data as one of their core functions, or in connection with those functions, ownership should also include ownership of that data and the right to access it. Just as a consumer can store photographs and term papers and lists and letters in a trunk and is free to retrieve them at any time, or keep notes on a pad in the glove compartment of a vehicle.

There is perhaps a natural inclination for courts and policymakers to be intimidated by the complexities of computer and digital technology, and to give undue deference to industry claims that products containing this complex technology require different treatment, more under the control of the manufacturer or original inventor. That inclination should be resisted. There is no reason that consumers should have to surrender their rights just because products have become more technologically complex.

We recognize that some product changes can have serious implications for safety. Ensuring product safety has been a bedrock objective of Consumers Union's mission since its founding 80 years ago. But safety considerations should not be dragged into copyright law,

where they are more apt to be used as a pretext for blocking competition and consumer choice and undermining rights of ownership.

The consumer rights issues at stake here were illuminated further for Consumers Union through our experience in recent years advocating for the right for consumers to unlock their mobile phones, to enable them to be used for connection to a different wireless network, under contract with a different service provider. In our comments in the other open proceeding, we recounted our frustrations with the need to keep litigating and re-litigating the justifications for an legal exemption to the Digital Millennium Copyright Act's prohibitions on accessing the software in the mobile phone to accomplish that unlocking – to remove the legal cloud over the right to keep phone manufacturers and wireless providers from arbitrarily turning useful phones into worthless junk.

Ownership of Product Should Include Ownership of Contents

But in working to restore that right in Congress, we also had to deal with a hidden trap – that the right to unlock, in its most recent iteration, had not been granted to the consumer who owned the phone, but had instead been limited to "the owner of the copy of the computer program" inside the phone. This meant that, if we simply restored the right as it had most recently existed, the software creators and the phone manufacturers and the wireless service providers could have easily nullified the right. They could simply have slipped a sentence into the fine print of the standard-form contract that consumers are supposedly agreeing to when they click the "I agree" box as directed by the sales clerk. That sentence would state that they were retaining technical ownership of the technology inside the phone, specifying that the consumer was being granted only a "license" to use the technology. It would have come as a surprise to most consumers that the phone they purchased was not really a phone, but merely the shell of a phone.

We were able to get this hidden trap fixed in the legislation restoring the right to unlock, and to get it fixed permanently, so that the right to unlock is held by the owner of the phone. That's consistent with common-sense consumer expectations of what ownership means.

This same hidden trap is potentially lurking in all software-enabled consumer product sales, and we believe it should be clarified for all of them. If you buy the product, or otherwise lawfully acquire it, you own it, and that should mean owning not just the shell of the product, or its packaging, but its contents, what makes it function, and the fruits of its use. Those contents are yours to do with as you see fit. And when you resell or give away or donate the product to someone else, the ownership rights to the contents of the product stay with it unless, as in the case of personal data the product collects, you decide to remove that data and keep ownership.

That wouldn't mean, as some suggest, that owning the copy of the software inside the product means having an unlimited right to make copies of the software and use the software in in other products or sell it multiple times. There is an essential, categorical difference between owning a copy of the software inside your product, and owning a copyright interest in it. However, we do believe that the consumer should have the right to transfer that single copy of the software into a different product for use there, as long as the copy does not remain in (or is

no longer used in) the original product in which it was contained – just as a button may be removed from one dress and sewn onto another.

Nor would it mean, as some suggest, that a service agreement must always travel with the product. If someone sells or gives you an electric hair dryer, you still have to pay for electric power. But you do own the electric plug at the end of the cord, which enables you to interconnect to access the electric power; the same should be true for more technologically complex interfaces that enable the operation and interconnection desired by the consumer. In addition, whatever software updates and error correction patches are provided to the original purchaser of the product, whether pursuant to the sales agreement or pursuant to company policy, should be provided on the same terms to the person who acquires the product from the original purchaser. That's an essential element of full transferability of ownership of the product, a right inherent in ownership.

Simple Use of a Product Is Not Infringement

Another uncertainty in consumer rights that was illuminated in our efforts to restore the right to unlock mobile phones is how the law treats the fact that often the engagement of computer software in a product, simply in order to operate the product, technically entails copying the software, within the product, as part of its operation. In the context of crafting an exemption to the section 1201 prohibitions on access to software, this issue was resolved implicitly as part of the restoration of the right to unlock. But it needs to be resolved explicitly, and definitively, for all products. This is not "copying" in the infringement sense, and should not require the user of the product to obtain permission from the holder of the copyright in the software.

Addressing Uncertainty in the Law

These two principles – that a product includes its component parts and contents, and that being able to use the product is an inherent right of having lawfully acquired it – would seem beyond dispute. They are embodied in some of our earliest copyright law precedents, including the doctrines of fair use and first sale, and they have been recently reaffirmed in the specific context of computer software.[2] Congress has attempted to further clarify their applicability to computer software in section 117 of the Copyright Act, as amended on several occasions. And yet in the software world, they continue to be litigated and re-litigated, keeping them in legal limbo. It is time to make an effort to lay them to rest.

Making these two discrete clarifications, of what many believe to be well-established principles of copyright law, would go far toward addressing the concerns that have been voiced regarding the appropriate and balanced application of those principles to software-enabled consumer products, in the best interests of consumers, and in the best interests of competition and innovation, which benefits both consumers and the overall economy. Although in an ideal world, these clarifications might be accomplished in the courts, legislation may be warranted to accomplish it expeditiously. One possible approach for clarifying the issues surrounding

[2] *See, e.g.*, Kirtsaeng v. John Wiley & Sons, ___ U.S. __, 133 S. Ct. 1351 (2013); Adobe Systems v. Christenson, __ F.3d __ (9th Cir., Dec. 30, 2015); Krause v. Titleserv, 402 F.3d 119 (2d Cir. 2005); Chamberlain Group v. Skylink Technologies, 381 F.3d 1178 (Fed. Cir. 2004).

ownership and transferability of these consumer products, for example, is embodied in the You Own Devices Act, or YODA, H.R. 862.

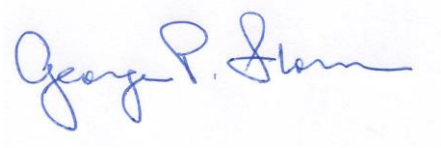
We urge the Copyright Office to help lead the way, with definitive statements in its report in this proceeding recommending these clarifications in the law.

Conclusion

As Internet of Things technology revolutionizes consumer products, the response of copyright law should not be, "Sorry, consumers, the world has changed fundamentally, products are now far more complex technologically, and consumers must now abandon their expectations of ownership as understood for many centuries." Instead, it should be, "Yes, the technological world may have changed, but the law still makes sense, and consumers still have essentially the same ownership rights as before."

There is no need to undermine or weaken copyright protections as they have historically applied, consistent with their mission. What is needed is some modest, common-sense clarification that the limits to their application also remain consistent, and that consumers continue to have the rights to exercise the incidents of ownership, dominion, and control over the products and services they have paid for or have otherwise lawfully acquired, as they have come to understand and rely on those rights based on centuries of experience.

Respectfully,



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