AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

UNLOCKING CONSUMER CHOICE AND WIRELESS COMPETITION ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS, INTELLECTUAL PROPERTY,
AND THE INTERNET

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

ON

H.R. 1123

JUNE 6, 2013

Serial No. 113–27

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE
81–346 PDF WASHINGTON : 2013

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

BOB GOODLATTE, Virginia, *Chairman*

F. JAMES SENSENBRENNER, JR., Wisconsin
HOWARD COBLE, North Carolina
LAMAR SMITH, Texas
STEVE CHABOT, Ohio
SPENCER BACHUS, Alabama
DARRELL E. ISSA, California
J. RANDY FORBES, Virginia
STEVE KING, Iowa
TRENT FRANKS, Arizona
LOUIE GOHMERT, Texas
JIM JORDAN, Ohio
TED POE, Texas
JASON CHAFFETZ, Utah
TOM MARINO, Pennsylvania
TREY GOWDY, South Carolina
MARK AMODEI, Nevada
RAÚL LABRADOR, Idaho
BLAKE FARENTHOLD, Texas
GEORGE HOLDING, North Carolina
DOUG COLLINS, Georgia
RON DeSANTIS, Florida
JASON T. SMITH, Missouri

JOHN CONYERS, JR., Michigan
JERROLD NADLER, New York
ROBERT C. "BOBBY" SCOTT, Virginia
MELVIN L. WATT, North Carolina
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
STEVE COHEN, Tennessee
HENRY C. "HANK" JOHNSON, JR., Georgia
PEDRO R. PIERLUISI, Puerto Rico
JUDY CHU, California
TED DEUTCH, Florida
LUIS V. GUTIERREZ, Illinois
KAREN BASS, California
CEDRIC RICHMOND, Louisiana
SUZAN DelBENE, Washington
JOE GARCIA, Florida
HAKEEM JEFFRIES, New York

SHELLEY HUSBAND, *Chief of Staff & General Counsel*
PERRY APELBAUM, *Minority Staff Director & Chief Counsel*

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

HOWARD COBLE, North Carolina, *Chairman*
TOM MARINO, Pennsylvania, *Vice-Chairman*

F. JAMES SENSENBRENNER, JR., Wisconsin
LAMAR SMITH, Texas
STEVE CHABOT, Ohio
DARRELL E. ISSA, California
TED POE, Texas
JASON CHAFFETZ, Utah
MARK AMODEI, Nevada
BLAKE FARENTHOLD, Texas
GEORGE HOLDING, North Carolina
DOUG COLLINS, Georgia
RON DeSANTIS, Florida
[Vacant]

MELVIN L. WATT, North Carolina
JOHN CONYERS, JR., Michigan
HENRY C. "HANK" JOHNSON, JR., Georgia
JUDY CHU, California
TED DEUTCH, Florida
KAREN BASS, California
CEDRIC RICHMOND, Louisiana
SUZAN DelBENE, Washington
HAKEEM JEFFRIES, New York
JERROLD NADLER, New York
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas

JOE KEELEY, *Chief Counsel*
STEPHANIE MOORE, *Minority Counsel*

CONTENTS

JUNE 6, 2013

Page

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

UNLOCKING CONSUMER CHOICE AND WIRELESS COMPETITION ACT

THURSDAY, JUNE 6, 2013

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 10 a.m., in room 2141, Rayburn Office Building, the Honorable Tom Marino (Vice-Chairman of the Subcommittee) presiding.

Present: Representatives Coble, Goodlatte, Marino, Chabot, Chaffetz, Holding, Watt, Conyers, Johnson, Chu, Deutch, Bass, DelBene, and Lofgren.

Staff present: (Majority) Joe Keeley, Chief Counsel; Olivia Lee, Clerk; and (Minority) Stephanie Moore, Minority Counsel.

Mr. MARINO. Good morning. I want to call the Subcommittee hearing to order. The Subcommittee on Courts, Intellectual Property, and the Internet will come to order.

Without objection, the Chair is authorized to declare a recess of the Subcommittee at any time, and that is going to happen very, very shortly because we are going to be called to vote here probably not much after 10 o'clock.

I want to welcome all of the witnesses here today. Thank you so much for being here.

I think that my friend and Ranking Member and I can get our opening statements in, and then we will see where we go from there. So if you would allow me to give my opening statement and then the Ranking Member, Congressman Watt.

I would like to begin this hearing by thanking the Members, witnesses, and people in the gallery for joining us today for this important hearing.

This morning we will hear testimony on H.R. 1123, the "Unlocking Consumer Choice and Wireless Competition Act," introduced by Chairman Goodlatte, Ranking Member Conyers, Subcommittee Chairman Coble, and Subcommittee Ranking Member Congressman Watt.

The bipartisan legislation restores the ability of Americans to legally unlock their cell phones, an important consumer issue. As everyone knows, cell phones have become universal devices that are relied upon by Americans to communicate with family, conduct

business, and stay in touch with friends. Although cell phone companies have subsidized the purchase of a cell phone through lower upfront costs, should be able to ensure that consumers meet the terms of their contract, providing consumers with an easy way to switch to a cellular provider of their choosing is important to ensuring a competitive marketplace. H.R. 1123 reinstates an earlier exemption for consumers to be able to switch their cellular providers by unlocking their phones.

H.R. 1123 also directs the Register to look at other similar wireless devices, such as tablets, to determine whether an exemption is warranted there as well.

Testifying before the Subcommittee this morning are four participants in the 2012 section 1201 Copyright Office rulemaking. Each brings a unique perspective to this issue, and the Subcommittee appreciates their making the time available to appear today.

Finally, I recognize that there are other sections in interest that may be surfacing throughout the hearing, and a few Members and some of the audience may want to hear those issues as well. I am sure these issues will be among many raised during the Committee's comprehensive review of our Nation's copyright laws.

Again, I thank everyone for being here today and I look forward to hearing your testimony.

Then I hand it over to the Ranking Member, Congressman Watt.

[The bill, H.R. 1123, follows:]

I

113TH CONGRESS
1ST SESSION

H. R. 1123

To promote consumer choice and wireless competition by permitting consumers to unlock mobile wireless devices, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 13, 2013

Mr. GOODLATTE (for himself, Mr. CONYERS, Mr. COBLE, Mr. WATT, Mr. POE of Texas, and Ms. DELBENE) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To promote consumer choice and wireless competition by permitting consumers to unlock mobile wireless devices, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

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 his 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.

(b) RULEMAKING.—Not later than 1 year after the date of 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), to include any other category of wireless devices in addition to wireless telephone handsets.

(c) 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.

○

Mr. WATT. Thank you, Mr. Chairman, and thank you for being here substituting for our Chairman from North Carolina, Mr. Coble. I hope he is well.

I am not quite as prepared, I would have to say, as I usually am for hearings of this kind, primarily not because of my circumstances but there was an explosion down the street right across from my staff person's house, and she could not quite get out to get my opening statement to me. So I am struggling a little bit this morning because I am reading an opening statement that I have not had as much opportunity to edit and review, as I normally do. So forgive me.

It did not go unnoticed to me, though, that because of the explosion across from her house, the very first sentence in the opening statement has the word "explosion" in it. [Laughter.]

Maybe she was a little distracted too. So that is a good segue into the statement, however.

It says individual cell phone use worldwide has exploded over the past decade. In the United States, the Pew Research Center estimates, as of last month, 91 percent of adults in this country own a cell phone. Moreover, the increasing popularity of smart phones that enable consumers to access a variety of services and perform multiple functions from a single device heightens the importance of public policy surrounding cell phone use.

The relevant policy choices, in turn, involve a web of communications, competition, and copyright law. Current law prohibits the circumvention of access controls that protect copyrighted works. Because software contained in cell phones is often protected by copyright law, an exemption is required to legally circumvent those protections measures. Because Congress understood that in the field of technology, there are, quote, unknown unknowns, and also to comply with our treaty obligations of the 1998 Digital Millennium Copyright Act, required a multiple review called the 1201 proceeding to provide a process to determine whether exemptions to the prohibition against circumvention were warranted for various categories of works, that task was assigned to the Copyright Office and the Librarian of Congress.

We appreciate the hard work and dedication of the Copyright Office and the Librarian of Congress in this most recent 1201 rulemaking, the fifth since passage of the DMCA. Our hearing today is not designed to call into question any aspect of that critically important process but instead to explore the specific policy issue of cell phone unlocking, which could not be fully addressed through the limited 1201 rulemaking proceeding.

The 1201 proceeding concluded that, for phone purchases prior to January 26, 2013, owners could unlock their phones to use on another network without fear of penalty. For all phones purchased after that date, however, the Librarian of Congress concluded that due to changes in the marketplace, namely the widespread availability of unlocked phones, and based on the evidence submitted in the proceeding, an exemption was not warranted. In other words, consumers would not be permitted to bypass access controls that protect copyrighted works because their choices in the market had expanded. Over 14,000 people signed a petition criticizing the decision and demanding that unlocking be exempt from the prohibition.

I am a cosponsor of H.R. 1123 because I support providing consumers the freedom to use their cell phones on another network after their contracts have expired even though I am a strong supporter of protecting copyrights. I do so without prejudice to the various business models of wireless carriers, including those that provide locked phones at deeply subsidized rates. I believe that practice allows many in the underserved community access to quality cell phones that they otherwise would not have. It also enhances competition. However, because not all consumers are world travelers and may be unaware of whether a phone is or is not unlocked, I believe that providing the exemption to phones purchased beyond January 26 will expand consumer options even further beyond what the changing market already provides.

But I also support a process that routinely evaluates the options and technological advancements available to consumers to ensure a healthy, competitive marketplace and also protects copyrights. While it is important that we not be tone deaf to the voices of a significant number of American citizens, it is equally important that we not allow a fraction of the millions of cell phone users to drive policy outcomes or upend the process mandated by the DMCA.

The cell phone unlocking debate raises important issues of consumer protection and choice. Although these issues also implicate broader copyright law, we should not react reflexively on the basis of one of many issues considered in the 1201 proceedings. Cell phone unlocking merits more immediate attention and should be considered separate and apart from our ongoing copyright review work. I believe H.R. 1123 is the appropriate response to the issue at hand but that we need to continue to work on the other issues involved.

Mr. Chairman, I will submit my full opening statement for the record and I welcome the witnesses and yield back.

Mr. MARINO. Without objection, thank you, Congressman Watt.

[The prepared statement of Mr. Watt follows:]

Statement of Ranking Member Melvin L. Watt

House Judiciary Subcommittee on Courts, Intellectual Property and the Internet

Hearing on H.R. 1123, the "Unlocking Consumer Choice and Wireless Competition Act"

June 6, 2013

Thank you, Mr. Chairman.

Individual cell phone use worldwide has exploded over the past decade. In the United States the Pew Research Center estimates that, as of last month, 91 percent of adults in this country own a cell phone. Moreover, the increasing popularity of smartphones that enable consumers to access a variety of services and perform multiple functions from a single device heightens the importance of public policy surrounding cell phone use. The relevant policy choices, in turn, involve a web of communications, competition, and copyright law.

Current law prohibits the circumvention of access controls that protect copyrighted works. Because software contained in cell phones is often protected by copyright law, an exemption is required to legally circumvent those protection measures. Because Congress understood that in the field of technology, there are "unknown unknowns," and also to comply with our treaty obligations, the 1998 Digital Millennium Copyright Act (DMCA) required a triennial review – called the 1201 (twelve-O-one) proceeding – to provide a process to determine whether exemptions to the prohibition against circumvention were warranted for various categories of works.

That task was assigned to the Copyright Office and the Librarian of Congress. We appreciate the hard work and dedication of the Copyright Office and Librarian of Congress in the most recent 1201 rulemaking, the fifth since passage of the DMCA. Our hearing today is not designed to call into question

any aspect of that process, but instead to explore the specific policy issue of cell phone unlocking which could not be fully addressed through the limited 1201 rulemaking proceeding.

The 1201 proceeding concluded that for phones purchased prior to January 26, 2013 owners could unlock their phones to use on another network without fear of criminal penalty. For all phones purchased after that date, however, the Librarian of Congress concluded that due to changes in the marketplace, namely the widespread availability of unlocked phones, and based on the evidence submitted in the proceeding, an exemption was not warranted. In other words, consumers would not be permitted to bypass access controls that protect copyrighted works because their choices in the market had expanded.

Over 114,000 people signed a petition criticizing the decision and demanding that unlocking be exempted from the

prohibition. I am a cosponsor of H.R. 1123 because I support providing consumers the freedom to use their cell phones on another network after their contracts have expired. I do so without prejudice to the various business models of wireless carriers, including those that provide locked phones at deeply subsidized rates. I believe that practice allows many individuals in underserved communities access to quality cell phones that they otherwise would not have. It also enhances competition. However, because not all consumers are world travelers, and may be unaware of whether a phone is or is not unlocked, I believe that providing the exemption to phones purchased beyond January 26, will expand consumer options even further beyond what the changing market already provides.

But I also support a process that routinely evaluates the options and technological advancements available to consumers to ensure a healthy competitive marketplace and also protects

copyrights. While it is important that we not be tone deaf to the voices of a significant number of American citizens, it is equally important that we not allow a fraction of the millions of cell phone users to drive policy outcomes or upend the process mandated by the DMCA. The cell phone unlocking debate raises important issues of consumer protection and choice. Although these issues also implicate broader copyright law, we should not react reflexively on the basis of one of many issues considered in the 1201 proceedings. Cell phone unlocking merits more immediate attention and should be considered separate and apart from our ongoing copyright review work. I believe H.R. 1123 is the appropriate response to the issue at hand.

Mr. Chairman, I will submit my full opening statement for the record, welcome the witnesses and yield back.

Mr. MARINO. I now recognize the full Committee Chairman, Mr. Goodlatte of Virginia, for his opening statement.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Three months ago, I introduced H.R. 1123, the "Unlocking Consumer Choice and Wireless Competition Act," to ensure that consumers continue to be able to unlock their cell phones. Americans

who have completed their phone contracts or have purchased a used phone want to be able to use their device on their network of choice. They have made that preference loud and clear, and Congress has listened. H.R. 1123 restores the previous authority for cell phone unlocking and adds a new rulemaking process for related wireless devices such as tablets and other cellular connected devices.

The witnesses today have indicated their support of unlocking. I recognize that there are some who would prefer a longer exemption. However, in the interest of helping consumers today and not running afoul of several of our Nation's free trade agreements, H.R. 1123 reinstates an exemption for cell phone unlocking until the next rulemaking process.

I have often spoken about the need to protect the creator and how theft of their works affects not just that creator but our Nation's economy as a whole. An important part of helping creators is to enable them to protect their works from theft in the first place by using technological protection measures. I believe that section 1201 is an important tool that helps creators protect their works from theft.

However, an important safeguard, the triennial rulemaking process, was built into section 1201 to recognize when technological protection measures might adversely affect noninfringing uses of copyrighted works. The Register's authority to recommend an exemption is limited by the record that is presented to her by proponents of any exemption. In prior rulemakings, the record was sufficient to justify an exemption for cell phone unlocking. That was not the case in 2012, leaving it to Congress to determine if such an exemption was warranted. Today we will hear from several witnesses, all of whom participated in the 2012 rulemaking, who do feel such an exemption is warranted.

I also recognize that some may prefer changes to the underlying statutory language of section 1201. Whether or not such changes would have the support of this Committee is a question for another day. I have already announced a comprehensive review of our Nation's copyright law, and there will, no doubt, be a future opportunity for interested parties to discuss section 1201 in more detail.

I also look forward to hearing the testimony of our witnesses.

And, Mr. Chairman, I yield back. Thank you.

Mr. MARINO. Thank you, Chairman Goodlatte.

I now recognize the full Committee Ranking Member, Congressman Conyers of Michigan, for his opening statement.

Mr. CONYERS. Thank you, Mr. Chairman.

I am a cosponsor of the bill and I ask unanimous consent to insert my statement into the record.

Mr. MARINO. Without objection.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, Ranking Member, Committee on the Judiciary, and Member, Subcommittee on Courts, Intellectual Property, and the Internet

I am a cosponsor of H.R. 1123, the "Unlocking Consumer Choice and Wireless Competition Act," because it would restore the ability of consumers to unlock their mobile phones so that they can readily switch from one wireless carrier to another.

There are several reasons why this flexibility that is the heart of this legislation is critical.

First and foremost, this bipartisan legislation enhances consumer choice and competition in the cell phone market.

Unlocked phones should remain affordable and consumer choice should not come at too high a price.

H.R. 1123 ensures that consumers will be able to unlock their cell phones without risking criminal or other penalties.

In addition, this bill would enable consumers to take advantage of lower rates if they decide to switch carriers.

Another reason why I support this legislation is that it effectuates a balanced approach.

For example, the White House and the Federal Communications Commission have both urged Congress to overturn the decision by the Librarian of the Congress.

I believe this bill addresses these concerns in an appropriate manner that reinstates the previous exemption by repealing the October 2012 change and reinstating the 2010 exemption.

In addition, H.R. 1123 directs the Copyright Office to determine whether similar treatment should be given to other wireless devices.

In the past two triennial rulemaking proceedings pursuant to section 1201 of the Digital Millennium Copyright Act (DMCA), the Librarian of Congress included an exemption for unlocking wireless handsets. Unfortunately, the Librarian of Congress did not renew this exemption in October 2012.

Although the Copyright Office argues that cell phone makers offer a range of unlocked phones on the market and consumers no longer need an exemption to unlock their phones, I want to hear the views of our witnesses today about this matter.

Finally, I support this bill because it will help ensure competition in the wireless marketplace, which ultimately will benefit consumers.

The ability of consumers to be able to transfer their cell phone services to different wireless carriers will encourage market innovation and provide incentives for the industry to develop less expensive products.

Although unlocked mobile devices have become more widely available for purchase, the exemption is still warranted because some cell phones sold by carriers are permanently locked.

Additionally, many unlocking policies contain restrictions and may not apply to all of a wireless carrier's cell phones.

This bill provides us with a meaningful opportunity to help consumers by leveling the opportunity for competition.

Accordingly, I urge my colleagues to support this legislation and I look forward to hearing from our witnesses today.

Mr. MARINO. That is it? There is some time, Congressman. There is some time if you want to make a statement.

Mr. CONYERS. Well, that is all right. It has all been said only three times so far. [Laughter.]

Mr. MARINO. I have never known you not to take advantage of what we said and then just really put us in our place.

Mr. WATT. That is because his Ranking Member and his Chair are so eloquent. [Laughter.]

Mr. MARINO. Thank you, Chairman.

Without objection——

Mr. WATT. And coincidentally I agree with him. [Laughter.]

Mr. MARINO. Without objection, other Members' opening statements will be made part of the record.

At this time, I am going to call a recess. We must go vote. We have, I think, five or six votes. It could be anywhere from 20 to 30 minutes. So I apologize but we will be back and relax. Thank you. A recess is called.

[Recess.]

Mr. MARINO. The Subcommittee on Intellectual Property will come to order.

Thank you so very much for your patience, both our witnesses and our audience. I did fail to mention to you that I gave you congressional time, 20 minutes. Reality, you just multiply that by 2.

We have a very distinguished panel today. I will be swearing in our witnesses before introducing them. If you would please all rise and raise your right hand.

[Witnesses sworn.]

Mr. MARINO. Please let the record reflect that the witnesses have answered in the affirmative, and you may be seated, gentlemen, thank you.

Each of the witnesses' written statements will be entered into the record in its entirety.

I ask that each witness summarize his testimony in 5 minutes or less, and I will politely tap the gavel if you are going over the 5 minutes. To help you stay within the time, there is a time light on your table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony. When the light turns red, it signals that the witness' 5 minutes have expired.

Our first witness today is Mr. Steven Berry, President and Chief Executive Officer of the Competitive Carriers Association. Prior to joining CCA, Mr. Berry was Managing Director of Government Affairs at Merrill Lynch and also held positions at the National Cable and Telecommunications Association and at CTIA. Mr. Berry received his J.D. from George Mason University Law School and his B.A. from Emory and Henry College.

Our second witness is Mr. Altschul, Senior Vice President and General Counsel at CTIA—The Wireless Association. Mr. Altschul joined CTIA in 1990 after having served with the Antitrust Division of the United States Department of Justice for 10 years. And I served with Justice myself. Mr. Altschul received his law degree from New York University School of Law and his B.A. from Colgate University. Welcome.

Our third witness is Mr. George Slover, Senior Policy Counsel at Consumers Union where he oversees telecommunications antitrust and competition policy issues. Mr. Slover has 3 decades of Federal service in all three branches of Government, including 9 years here at the House Judiciary Committee. Mr. Slover received his J.D. from the University of Texas Law School and B.A. from Vanderbilt University. It is a pleasure to have you back.

Our fourth and final witness is Steve Metalitz, Partner at the Washington, D.C. office of Mitchell Silberberg & Knupp LLP, where he counsels clients on domestic and international copyright issues. Mr. Metalitz—Metalitz—I will get it right, sir, just give me

a couple times. I apologize—previously served as General Counsel to Information Industry Association and as Chief Counsel of the Senate Judiciary Committee on Patents, Copyright, and Trademark. He received his J.D. from Georgetown University Law Center and his B.A. from the University of Chicago.

Welcome to you all, and we will start with Mr. Berry for his opening statement. Thank you, sir.

TESTIMONY OF STEVEN K. BERRY, PRESIDENT AND CHIEF EXECUTIVE OFFICER, COMPETITIVE CARRIERS ASSOCIATION

Mr. BERRY. Thank you. Thank you, Mr. Chairman, Ranking Member Watt, and Members of the Subcommittee. Thank you for inviting me to testify and thank you for your work to ensure that all consumers can unlock their wireless device.

I am here today on behalf of the Competitive Carriers Association, the Nation's leading association of competitive wireless carriers with over 100 carrier members ranging from small, rural providers to regional and national providers serving millions of customers. We also represent almost 200 associate members, small businesses, vendors, and suppliers that support the wireless ecosystem and employer constituents.

We support the Committee's efforts to remove the barriers to competition. Accordingly, we support H.R. 1123, the "Unlocking Consumer Choice and Wireless Competition Act."

CCA supports unlocking for every consumer that has met the terms and conditions of their contract and/or service agreement. A consumer who wishes to switch carriers should be allowed to do so if they have met their carrier commitments.

Unlocking is particularly important for rural and regional small carriers that lack the scale to gain access to the latest and most iconic devices directly from the equipment manufacturer which, in turn, prevents millions of consumers, your constituents, from accessing the latest devices.

Competitive carriers face many challenges gaining access to the resources necessary to provide mobile broadband service, including interoperable spectrum, interconnection, and roaming relationships and, of course, devices. In an industry where the largest two carriers control critical inputs, unlocking devices and unlocking provides one small, but very important, opportunity for the competitive carriers to distinguish themselves in the marketplace and provide innovative services and rate plans to customers that do not wish to give up previously purchased devices, applications, or the associated content on those devices.

I commend your work on H.R. 1123 as a positive first step to restore the previous exemption. The Librarian of Congress, or the LOC, should have extended the exemption in the first place as NTIA had recommended and as CCA testified in support of continued exemption. The Librarian just got it wrong. Even the FCC Commissioner Ajit Pai today, in the New York Times article, indicated he was puzzled by the decision and supported the unlocking process before the Committee.

I also strongly support the bill's direction to the LOC to revisit the determination to extend the exemption to other wireless devices. Consumers do not differentiate between a handset and what

is a device, and neither should the Library of Congress. Long gone are the days when handsets were used for only voice calls, and in an all-IP world, there will no longer be a difference between voice and data. There are many forms of smart phones now, devices, tablets, and even phablets. Further blurring the difference between a handset and a wireless device and the potential for consumer confusion is real.

We support the Goodlatte-Leahy bicameral bill as an immediate fix to correct the Librarian of Congress' poor decision. CCA welcomes continued discussion on ways authorized unlocking will continue to promote consumer choice. The Committee must remain vigilant, for there are other ways that devices may be impaired, including technologically designing devices with particular specifications in order to permanently lock the device, making it nonoperable with other carriers just because you can, configuring devices so that even when unlocked, the device may only work on a particular carrier's network, and potential for software updates that might relock and unlock the device.

Finally, while Congress must move forward to enact the H.R. 1123 with full haste, I would also offer some recommendations for further conversation, such as including the consumer's agent in the exemption. Consumers should not have to be a virtual MacGyver in order to unlock their handsets. Consider shifting the burden of proof in the statute to the opponent and adding a presumption to extend the existing exemption unless shown otherwise. Lastly, the exemption should also change "telecommunications network" to "communications network." Consumers do not differentiate between types of access. Neither should policy.

Mr. Chairman, CCA supports your work and encourages swift passage of H.R. 1123, and I welcome your questions. Thank you.

[The prepared statement of Mr. Berry follows:]

Prepared Statement of Steven K. Berry, President and Chief Executive Officer, Competitive Carriers Association

Chairman Coble, Ranking Member Watt, and members of the Subcommittee, thank you for inviting me to testify and for your work to allow consumers to unlock wireless devices. I am here today on behalf of Competitive Carriers Association, the nation's leading association of competitive wireless carriers, with over 100 carrier members ranging from small, rural providers serving fewer than 5,000 customers to regional and national providers serving millions of customers. We also represent almost 200 Associate Members – small businesses, vendors, and suppliers that serve carriers of all sizes and employ your constituents. The entire mobile ecosystem serving consumers is dependent on vibrant competition in the wireless industry at all levels. We support policymakers' efforts to remove barriers to competition, and accordingly support H.R. 1123, the "Unlocking Consumer Choice and Wireless Competition Act."

In two of the three most recent triennial rulemaking proceedings pursuant to 17 U.S.C. § 1201, part of the 1998 Digital Millennium Copyright Act, the Copyright Office included an exemption for unlocking wireless handsets to connect to a wireless telecommunications network. Most recently, the Librarian of Congress, at the recommendation of the Register of Copyrights, declined to renew this exemption, against the recommendation of the National Telecommunications and Information Administration (NTIA), an agency of the U.S. Department of Commerce, and the testimony of CCA, among others.

This decision affects any wireless handset purchased after January 26, 2013, and since that time, there has been an outcry of support for this popular exemption, especially from consumers. Over 110,000 individuals signed a "We the People" petition asking the White House to intervene to support consumers' rights to unlock their wireless phones. In response, the White House stated its public support for unlocking. Additionally, there has been bipartisan support for unlocking both in Congress and at the Federal Communications Commission (FCC), where both Chairman Julius Genachowski and

Commissioner Ajit Pai released statements supporting legislation to overturn the Copyright Office's decision.

Several members of Congress have introduced legislation to restore the rights of consumers to unlock their wireless handsets, including members of this Committee. We commend these efforts and support allowing consumers the ability to take the device of their choosing to the network that best fits their needs and desires. CCA urges swift passage and enactment of H.R. 1123, and encourages the Committee to continue these efforts in its ongoing broader consideration of updates to copyright law to reflect the changes in technologies since 1998. As NTIA recommended, "an exemption continues to be necessary to permit consumers affected by access controls to unlock their phones," and the immediate enactment of H.R. 1123 provides this much needed relief.

Unlocking Devices Supports Competition and Consumer Choice

The previous exemption that gave consumers the right to unlock their devices is an example of a pro-consumer, pro-competition policy decision. There are great consumer and societal benefits of unlocking. For example, consumers will have access to a broader range of devices at lower costs, providing greater numbers of Americans with the opportunity to connect and experience education, employment, social engagement, and public safety benefits of access to mobile networks. Also, Americans travelling internationally can use an unlocked device with a local SIM card to remain connected while travelling, particularly when abroad for extended periods where roaming is not a viable alternative. Further, unlocking provides increased device donation opportunities for soldiers, battered women's shelters, and low-income, under-privileged, and disabled communities. Finally, unlocking will extend the useful life of wireless devices, resulting in a positive and undeniable environmental impact.

CCA supports unlocking for every consumer that has met the terms and conditions of their contract and/or service agreement. A consumer who wishes to switch carriers should be allowed to do so if they have met their carrier commitments.

The market reality under the exemption was to give consumers pro-competitive choices to select the carrier of their choosing without losing access to their iconic devices. For example this past January, while the exemption was in place, T-Mobile CEO John Legere noted that T-Mobile had nearly two million iPhones operating on its network, even before it began selling the device. This may not have been possible absent the unlocking exemption, and those two-plus million customers may still be unnecessarily tied to a less desirable network.

While opponents to an unlocking exemption have argued that unlocking supports bulk reselling, in reality, eliminating the ability to unlock a device is neither sufficient nor necessary to prevent bulk resale. Despite successful lawsuits brought against bulk resellers, the practice continues to be a problem in the industry. And opponents have an arsenal of other remedies to combat bulk reselling, including trademark infringement, breach of contract, copyright infringement, tortious interference, conspiracy, and unjust enrichment. Lastly, the Copyright Office in the past has referenced the fact that it does not believe that the previous exemption allows for bulk unlocking.

Unlocking is particularly important for rural, regional, and smaller carriers that lack scope and scale to gain access to the latest, most iconic devices directly from the equipment manufacturer, which, in turn, prevents millions of consumers – your constituents – from accessing the latest devices. Competitive carriers face many challenges gaining access to the inputs necessary to provide mobile broadband service, including interoperable spectrum, networks through interconnection and roaming at reasonable terms and conditions, and devices. In an industry where the largest two carriers control access to these inputs, unlocking provides one small, but important, opportunity for competitive

carriers to provide service to consumers who wish to enjoy innovative services and rate plans, but do not wish to give up previously purchased devices, applications, and associated content.

Under the triennial review process, the burden of proof for extending an existing exemption rests on the proponents of the exemption. However, it is important that previous decisions to approve and extend the unlocking exemption do have precedential value. The Register's recommendation, and the Librarian of Congress' determination not to extend the exemption, found that there is a wide array of unlocked phones available (for new phones), and that no new harms have arisen during the previous period where unlocking was exempted. The fact that new harms do not arise because an exemption has been in place should not merit ending the previous exemption, just as controlling a disease does not merit eliminating immunization. Absent a significant change in circumstances given the harmful effects of allowing the unlocking exemption to expire, the Copyright Office should presume that the exemption remains valid, and opponents should have to prove otherwise. Such an approach would be consistent with the Copyright Act and would minimize uncertainty for users of wireless devices in the future. In fact, the Register of Copyrights has previously found that, where similar facts are presented, as was the case during the most recent triennial review, the Register is likely to reach a similar conclusion with respect to the renewal of a particular exemption. H.R. 1123 recognizes the merits for previous exemptions, similar to the NTIA statement that "proponents have presented a *prima facie* case that 'the prohibition on circumvention has had an adverse effect on non-infringing uses of firmware on wireless telephone handsets,'" and therefore recommends extending the unlocking exemption.

Unlocked devices are increasingly available as a result, at least in part, of the Copyright exemption, not in spite of it. CCA joins with NTIA in "commend[ing] the decisions of certain wireless companies to provide an alternative to circumvention and encourages others to follow suit." Still, this does not eliminate the need for the exemption, and the expiration of the unlocking exemption threatens to eliminate progress towards enhanced consumer opportunities.

The Unlocking Exemption Should Include All Wireless Devices

H.R. 1123 not only reinstates the previous exemption, it also appropriately directs the Librarian of Congress to revisit its determination regarding whether to extend the exemption to include other wireless devices. Consistent with the White House's recommendation, NTIA's guidance, Commissioner Pai's statement, and CCA's petition and previous testimony, the Librarian of Congress should adjust its exemption to cover wireless devices broadly in addition to handsets specifically.

As the wireless operators continue their network evolution to 4G LTE, the distinction between voice and data services continues to blur. Consistent with the broader telecommunications industry transition to all Internet Protocol (IP) networks, voice sessions are increasingly treated the same as data – video, email, and other means of transmission. The unlocking exemption should not discriminate which devices are eligible based on the functionality of the device. Importantly, excluding more advanced devices from the exemption will increase costs and barriers to entry while decreasing adoption for the less fortunate. This distinction exists only for industry insiders steeped in telecommunications policy – even former Speaker of the House Newt Gingrich recently noted that he was "really puzzled" and that to "call [a smartphone] a 'cell phone' or a 'handheld computer' fails to capture the change that has taken place."

At the same time, form factors of devices have blurred as well. Gone are the days of the black rotary telephone from the phone company. Consumers do not differentiate between phones, smartphones, tablets, and "phablets." The unlocking exemption also should not distinguish between a handset and other wireless devices. To do so would only increase consumer confusion while frustrating the original intent of the exemption.

In conclusion, CCA commends these efforts to restore the consumer's right to unlock their wireless handsets, and urges a commonsense expansion to include all wireless devices. We support H.R. 1123 as an immediate fix to correct the Librarian of Congress's decision, and CCA welcomes revisiting the negative implications of copyright policy inadvertently impacting consumer choice and wireless competition in the upcoming broader review of copyright policy. I welcome any questions.

Mr. MARINO. Thank you, Mr. Berry. You came in under the wire. Mr. Altschul, please.

TESTIMONY OF MICHAEL ALTSCHUL, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, CTIA—THE WIRELESS ASSOCIATION

Mr. ALTSCHUL. Thank you, Chairman Marino, Ranking Member Watt, and Members of the Committee, for the opportunity to participate in today's hearing on H.R. 1123 and allowing CTIA to add its voice to the choir supporting this bill.

My name is Michael Altschul, and I serve as the Senior Vice President and General Counsel of CTIA—The Wireless Association. Membership in CTIA includes wireless carriers and their suppliers, as well as providers of wireless data services.

When the DMCA was enacted, Congress could not have known the technologies and markets that have become commonplace today. Accordingly, section 1201 authorizes the Librarian of Congress to issue temporary exemptions during a rulemaking process that occurs every 3 years. The triennial rulemaking was intended to be a safety valve to the anti-circumvention provisions of the DMCA and it can serve as an important barometer for issues such as this one that may be ripe for further discussion. Because the rulemaking process does not permit the Librarian to change the terms of the DMCA, only Congress, through the legislative process, can address these issues.

In the 2006 triennial rulemaking cycle, the Librarian of Congress granted an exemption for cell phone unlocking. This exemption was renewed in 2010. However, in the 2012 rulemaking, the Librarian determined that the exemption for unlocking was not necessary because the largest nationwide carriers have liberal publicly available unlocking policies and because unlocked phones are freely available from third party providers, many at low prices. If you go to our website or Best Buy or many other retailers, you can see close to 200 individual wireless phones that are available unlocked for sale to the public.

While the Librarian's order was clearly justified by the market circumstances and the requirements of the DMCA, CTIA in its comments stated that we would not oppose a narrowly tailored exemption that allows bona fide individual customers to use their own phones on a different network. This bill would create such a rule.

We did, however, oppose any broader exemption out of concern that broader relief would serve to permit the bulk commercial purchase of new phones in order to free ride on carrier subsidies and arbitraged sale of these phones, either in the United States or abroad. We were pleased that the Register recognized this potentiality in its 2010 ruling noting that bulk reselling of new mobile phones by commercial ventures is a serious matter. There is no justification for the result of this rulemaking proceeding to condone, either expressly or implicitly, the illegal trafficking of mobile phones. Such illicit practices raise the cost of doing business, which in turn affects the marketplace for mobile phones and the prices consumers pay for such devices.

Moreover, continuing the prohibition on bulk unlocking makes our streets just a little bit safer by making it harder for large scale phone trafficking syndicates to operate in the open and buy phones, unlock them, and resell them either in the U.S. or in foreign markets. Making it illegal to unlock devices without carrier consent adds another barrier to these fencing operations and may help dry up the demand for stolen phones.

But because we are not seeking to limit individuals' noncommercial ability to unlock their own devices and because the bill preserves the important limitations against bulk unlocking included in the Librarian's 2010 decision, CTIA supports H.R. 1123, which is narrowly tailored and appropriate to alleviating consumer confusion that may have arisen as a result of the Librarian's most recent decision.

While enactment of H.R. 1123 should alleviate consumer confusion about whether unlocking his or her wireless phone will subject them to possible criminal penalties, it is important to note that no one should view enactment of this legislation as enabling a universal phone that can be easily moved from one network to another. Unlocked phones are not the same as interoperable phones, and it would be a mistake to conflate the two. While there are circumstances in which a device can be unlocked and moved from one carrier to another, differences in technology and differences in spectrum assignments limit or preclude seamless movement of devices between most carriers. And even if some features will work on another carrier's network, unlocked handsets can result in a degraded customer experience since all the carrier's services may not be supported by the device.

And with that, thank you again for the opportunity to participate in today's hearing.

[The prepared statement of Mr. Altschul follows:]

Testimony of

Michael Altschul

General Counsel

CTIA – The Wireless Association®

before the

House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet

hearing on

H.R. 1123, the Unlocking Consumer Choice and Wireless Competition Act

June 6, 2013

Chairman Coble, Ranking Member Watt, and members of the Subcommittee, thank you for the opportunity to participate in today's hearing on H.R. 1123, the Unlocking Consumer Choice and Wireless Competition Act. My name is Mike Altschul and I serve as the Senior Vice President & General Counsel for CTIA – The Wireless Association® ("CTIA"). Membership in the association includes wireless carriers and their suppliers, as well as providers of wireless data services.

I am pleased to participate in today's hearing and to offer CTIA's views on H.R. 1123 and the exemption it creates to permit consumers to unlock mobile wireless devices under Section 1201 of the 1998 Digital Millennium Copyright Act (DMCA).

Section 1201 of the DMCA makes it unlawful to circumvent technological measures (also known as "access controls") used by, or on behalf of, copyright owners to protect their works, including copyrighted computer programs. As the Librarian of Congress has noted, when the DMCA was enacted, Congress could not have known the technologies and markets that have become commonplace today. Accordingly, Section 1201 also authorizes the Librarian to issue temporary exemptions during a rulemaking process that occurs every three years. The triennial rulemaking was intended to be a safety valve to the anti-circumvention provisions of the DMCA, and it can serve as a barometer for issues that may be ripe for further discussion. But because the rulemaking process does not permit the Librarian to change the terms of the DMCA, only Congress through the legislative process can address these issues.

Wireless carriers often use software to "lock" a cell phone to their network when they provide consumers with a discounted – or even free -- wireless device in exchange for the consumer's agreement to enter into a service plan with the carrier. Because Section 1201 blocks the disabling of this software, the Librarian of Congress repeatedly has been asked to issue temporary exemptions to the Section 1201 prohibitions. In the 2006 triennial rulemaking cycle, the Librarian of Congress granted an exemption for cell phone unlocking. This exemption was renewed in 2010. However, in the 2012 rulemaking, the Librarian of Congress determined that the exemption for unlocking was not necessary because ''the largest nationwide carriers have liberal, publicly available unlocking policies,'' and because unlocked phones are ''freely available from third party providers—many at low prices.''

Given that unlocked wireless devices are easily obtained from retailers and because wireless carriers, though their policies vary, generally have liberal, publicly available unlocking policies, CTIA believes the Librarian was on solid legal ground in declining to renew the exemption. While clearly justified by market circumstances and the requirements of the DMCA, the ruling went beyond CTIA's request, in which we were clear that we would not oppose a continued exemption that permitted unlocking undertaken by an individual customer for non-commercial purposes. We did, however, oppose any broader exemption out of concern that broader relief would serve to permit the bulk commercial purchase of new phones in order to free-ride on carrier subsidies through the reprogramming and arbitraged sale of these phones, either in the United States or abroad. The Register recognized this potentiality in its 2010 ruling, noting:

> [B]ulk reselling of new mobile phones by commercial ventures is a serious matter. There is no justification for the result of this rulemaking proceeding to condone, either expressly or implicitly, the illegal trafficking of mobile phones. Such illicit practices raise the cost of doing business, which in turn affects the marketplace for mobile phones and the prices consumers pay for such devices.

Moreover, continuing the prohibition on bulk unlocking makes our streets just a little bit safer by making it harder for large scale phone trafficking syndicates to operate in the open and buy large quantities of phones, unlock them and resell them in foreign markets where carriers do not offer subsidized handsets. Making it illegal to unlock devices without carrier consent adds another barrier to these fencing operations and may help dry up the demand for stolen phones.

Because we were not seeking to limit individuals' non-commercial ability to unlock their devices, and because the bill preserves the important limitations against bulk unlocking included in the Librarian's 2010 decision, CTIA can support H.R. 1123, which is narrowly tailored and appropriate to alleviating consumer confusion that may have arisen as a result of the Librarian's most recent decision.

The bill is a reasonable balance that protects consumers and carriers alike, while preserving elements of the Librarian's decision that keep our streets safe, and granting Congress time to contemplate whether broader changes to the DMCA may be appropriate.

While enactment of H.R. 1123 should alleviate consumer confusion about whether unlocking his or her wireless phone will subject them to possible criminal penalties, it is important to note that no one should view enactment of this legislation as enabling a "universal phone" that can be easily moved from one network to another. While there are circumstances in which a device can be unlocked and moved from one carrier to another, differences in technology (CDMA, GSM, LTE, etc.) and spectrum assignments can limit or preclude seamless movement between most carriers. Unlocked phones are not the same as interoperable phones and it would be a mistake to conflate the two.

With that, thank you again for the opportunity to participate in today's hearing. I look forward to any questions you may have.

Mr. MARINO. Thank you, sir.
Mr. Slover, please.

TESTIMONY OF GEORGE P. SLOVER,
SENIOR POLICY COUNSEL, CONSUMERS UNION

Mr. SLOVER. Thank you, Mr. Chairman, Ranking Member Watt, Members of the Subcommittee. It is a pleasure to be here on behalf of Consumers Union, the policy arm of Consumer Reports, the largest independent, not-for-profit product testing organization. Our mission is to work for a fair and just marketplace for consumers.

And we believe consumers should have the right to unlock their mobile device to use on another network, to switch carriers, or to use their device abroad, or to sell or give it to someone else. Consumers should be able to use the mobile device they bought, as they see fit.

As wireless takes over as the predominant way of communicating, we want consumers to be free to choose service and product offerings that suit their needs in a competitive marketplace. And being able to switch carriers to get a more suitable and affordable plan, without having to start over and purchase a new phone, can make a big difference.

And consumers agree. In a nationwide survey by Consumer Reports 2 years ago, 96 percent of those with long-term contracts said that, when we change carriers, we should be able to keep using the mobile phones we already have.

Until last October's decision by the Register of Copyrights and the Librarian of Congress, consumers had the legal right to unlock. Then in one fell swoop, unlocking went from legal right to felony.

But the unlocking we are talking about here has nothing to do with copyright infringement in any traditional sense, and has no business getting caught up in the dragnet of a law intended to help stop copyright infringement. It is far too blunt an instrument for protecting material that is actually copyright protected from actual infringement. It creates a zone of protection far wider than is needed or justified. It is like having a cake that you do not want your teenager cutting into and devouring with his friends. But instead of just telling him not to eat the cake, you tell him he is grounded for life if he even sets foot in the kitchen.

Mobile phone unlocking is a perfect candidate for DMCA exemption, as the Register and the Librarian readily concluded in 2010. Their reversal this time is hard to reconcile. However, if you parse their rationale, the result is a legal ruling that impairs competition and consumer choice, and will render millions of perfectly good mobile devices useless, left to gather dust in a drawer, or to slowly decompose in a landfill, or to be discarded into a recycling bin.

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. That is not a fair tradeoff and it does not belong in the copyright laws.

Pealing this misfit legal armor off the lock is a key step on the road to more competition. If consumers could shop for the best deal

on each of these two purchases separately, they would get lower prices, improved quality, and greater innovation and variety that more competition would encourage among mobile device manufacturers and wireless carriers alike. Some carriers now are offering alternatives to the bundled contract, a healthy development that would be sped up by restoring the right to unlock.

We are heartened by the interest in Congress, with a number of bills taking various approaches to a solution. While we would like to see a permanent solution, to make sure mobile phones cannot be put on lockdown again, we appreciate that a temporary solution can be an effective stopgap while the permanent solution is in the works.

If you opt for the temporary solution expressed in H.R. 1123, while you work on the permanent solution, we think it would be helpful to make a few clarifications now, without waiting, to ensure that the DMCA exemption as reinstated works in today's world, and to reduce the risk of unnecessary and unwarranted legal obstacles. Our recommended clarifications are in our written statement and in our comments to the Register.

For example, consumers should not be denied the right to unlock because the device they purchased does not carry with it the software inside it, but only carries a license to use the software. And consumers who use a tablet as their phone should have the same right to unlock as consumers who use a handset.

Mr. Chairman, thank you for including us in this hearing on an issue of great importance to consumers. I would be happy to answer any questions.

[The prepared statement of Mr. Slover follows:]

ConsumersUnion
POLICY & ACTION FROM CONSUMER REPORTS

STATEMENT OF

GEORGE P. SLOVER
CONSUMERS UNION

BEFORE THE

SUBCOMMITTEE ON COURTS,
INTELLECTUAL PROPERTY, AND THE INTERNET
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

ON

MOBILE PHONE UNLOCK

JUNE 6, 2013

Chairman Coble, Ranking Member Watt, and Members of the Subcommittee: I am pleased to be here on behalf of Consumers Union, the policy and advocacy division of Consumer Reports.[1] We very much appreciate your leadership in addressing this important issue of consumer choice.

As the Subcommittee embarks on its comprehensive examination of the Copyright Act, we think the mobile device unlock exemption is a very good place to start. In this instance, the harm the anti-circumvention provisions of the Digital Millennium Copyright Act (DMCA) are causing consumers is concrete and unmistakable. We also think this issue offers a useful window into the operation of the anti-circumvention provisions as you undertake to re-consider them more broadly.

We believe consumers should have the right to unlock their mobile device for use with a different carrier's network – whether to switch carriers themselves, or to use their device more economically while they are traveling abroad, or to sell or give the device to someone else for use with the carrier of the new owner's choice. In short, consumers should be able to use the mobile devices they have purchased as they see fit.

---

[1] Consumers Union is the public policy and advocacy division of Consumer Reports. Consumers Union works for telecommunications reform, health reform, food and product safety, financial reform, and other consumer issues. Consumer Reports is the world's largest independent, not-for-profit product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.

This is all the more important as wireless service increasingly becomes our predominant communications technology. Many Americans are choosing to "cut the cord," to give up their landline phones entirely and rely just on mobile wireless service: by the second half of 2012, thirty-four percent of adults lived in wireless-only households. And especially in rural areas and lower-income communities, many rely on their mobile devices as their only means of accessing the Internet.

To have the best access to high-quality, affordable wireless voice and data services, consumers need to be free to choose the service and product offerings that best suit their needs, in a competitive marketplace. And when a consumer wants to switch wireless carriers to get a more suitable and affordable plan, being able to do so without having to purchase a new phone can make a big difference.

Two years ago, in anticipation of the section 1201(a)(1)(C) triennial review, we conducted a nationwide survey to gauge consumer views on issues related to network interoperability for mobile phones.[2] And the findings could not have been more clear-cut. 96 percent of those with long-term wireless service contracts said consumers should be able to keep their existing handsets when changing carriers. For those with smart phones, the number was even higher – 98 percent.

Until the decision last October by the Register of Copyrights and the Librarian of Congress, consumers have had the right to unlock. But now, as a

[2] http://hearusnow.org/press_release/new-poll-shows-cell-phone-owners-believe-government-should-address-cell-phone-interoperability-rules

result of that decision, unlocking is a violation of the DMCA, and consumers are subject not only to civil liability, but to criminal prosecution, hefty fines, and imprisonment for it.

This newly-criminalized conduct is not copyright infringement, has nothing to do with copyright infringement in any traditional sense, and has no business getting caught up in the dragnet of a law intended to help protect against copyright infringement.

In this instance, the anti-circumvention provisions are a very blunt instrument for protecting material that is actually copyright-protected, from actual infringement. They draw the perimeter of the zone of protection far wider than is needed or justified for achieving the stated purpose.

Mobile phone unlocking would thus appear to be the perfect candidate for exemption under section 1201(a)(1)(C). And that's what the Register and the Librarian readily concluded in 2010.

How they could reverse themselves this time and reach essentially the opposite conclusion – that the exemption had reached the end of its useful life and should be phased out – is hard to reconcile with the facts as we see them.

Some say the Register and the Librarian somehow went off-track in applying the statutory standard. Others say the statutory standard and process do not allow for full consideration of what matters. Whatever the reason for the recent decision, the result is a legal ruling that obstructs competition and consumer choice, and will render millions of perfectly good mobile devices

useless, left to gather dust in a drawer, slowly decompose in a landfill, or be discarded into a recycling bin that leads to nowhere.

So we want to see the right to unlock restored. And we are heartened by the strong signs of interest in both Houses of Congress, and on both sides of the aisle, as well as in the White House and in the FCC. We count five bills pending in Congress, taking various approaches to a solution.

While a permanent solution has obvious advantages over a temporary one, and a comprehensive solution has advantages over a piecemeal one, a temporary piecemeal solution can sometimes be an effective stopgap measure for the time it takes to develop a well-considered comprehensive, permanent solution – as long as the two efforts go hand in hand.

If you do opt for the temporary solution while you work on the permanent one, we would ask that you consider not simply reinstating the old exemption as it was written 3 years ago, but going just a bit further and updating it as we recommended to the Register in the comments we submitted in the triennial review.[3]

We think it would be helpful to make a few clarifications now, without waiting, to reduce the risk of unnecessary and unwarranted legal obstacles to mobile device unlocking. The exemption as we proposed it in our comments to the Register, incorporating these clarifications, would read as follows:

[3] http://www.copyright.gov/1201/2011/initial/consumers_union.pdf; http://www.copyright.gov/1201/2012/comments/reply/consumers_union.pdf; http://www.copyright.gov/1201/2012/responses/cu_response_letter_regarding_exemption_6.pdf.

> Computer programs, in the form of firmware or software, including data used by those programs, that enable mobile devices to connect to a wireless communications network, when circumvention is initiated by the owner of the device to remove a restriction that limits the device's operability to a limited number of networks, or circumvention is initiated to connect to a wireless communications network.

That proposal includes a number of important clarifications:

First, the right to unlock should clearly apply regardless of whether, when consumers purchase their mobile device, they actually obtain legal ownership of the copy of the computer program inside the device that makes it work, or they technically only obtain a license to use the copy.

Second, it should apply regardless of whether consumers plan to interconnect the device to another network themselves, or they plan to sell or give the device to someone else, or they haven't decided yet.

Third, it should apply regardless of what exactly it is that consumers need to unlock, from a technical standpoint, to make interconnection possible using the particular device and the particular computer program inside it.

Fourth, it should apply to unlocking to enable interconnection for data as well as for voice communications.

Fifth, it should apply to new devices as well as used ones. Once consumers buy them, they should be able to unlock them. Some might say this would be an expansion, not a clarification, but the new exemption already eliminates this distinction for the phones to which it applies before the phase-out. This is one place where replacing the current exemption with the previous version would actually *reduce* consumer choice.

We can't see any good reason why consumers who are eligible for a new mobile phone under their wireless service contract should not have the option to sell or give away the new phone and keep using their old one, if that's what they choose to do.

And sixth, it should apply to tablets as well as phones. We recognize that H.R. 1123 as introduced explicitly treats this change as an expansion rather than a clarification, to be reserved for future rulemaking, but we would urge you to go ahead and make it now. Consumers are using both kinds of devices for the same purposes, and they should both be treated the same in relation to those purposes.

The anti-circumvention provisions in section 1201(a) were originally envisioned as a way to help protect copyrighted content against infringement in the Digital Information Age. But in this instance, wireless carriers have also found them to be a convenient way to reinforce the long-term bundled wireless contract that has been their preferred business model.

As the NTIA has observed, "the primary purpose of the locks is to keep consumers bound to their existing networks." And the locks also benefit

mobile device manufacturers, by artificially inflating demand for new devices through forced early obsolescence of the old devices.

The cost to consumers is less competition, less choice, more expense, and more waste. We don't think that's a fair trade-off, and we don't think it belongs in the copyright laws.

More broadly, removing the unwarranted legal protections around the lock is a key step on the road to more competition both in mobile devices and in wireless communications service. Under the current long-term bundled contract business model, consumers are effectively required to purchase a new mobile device as part of purchasing service on the carrier's wireless network. They pay for the device whether they take it or not, embedded in the price of the service. And they keep paying for it even after the carrier has fully recouped its cost.

In our view, tying these two purchases together provides no benefit to consumers. Instead, it steers consumers into long-term service contracts that then make it difficult to switch carriers. If consumers were able to shop for the best deal on each of these purchases separately, they would benefit significantly from the lower prices, improved quality, and greater innovation and variety that healthy competition would encourage among mobile device manufacturers and wireless carriers alike.

In Europe, for example, where LTE wireless service is sold separately from the mobile device, one study shows that the cost of the wireless service is only about a third of its cost in the United States.[4]

Some carriers are already beginning to consider moving away from the bundled long-term contract as an exclusive business model, to offer alternative choices to consumers. That's a healthy development, and it would be accelerated by restoring the right to unlock.

Mr. Chairman, that concludes my testimony. Thank you for inviting us to participate in this hearing on an issue of great importance to consumers. I would be happy to answer any of your questions.

[4] Kevin J. O'Brien, *Americans Paying More for LTE Service*, NY TIMES, Oct. 15, 2012, *available at* http://www.nytimes.com/2012/10/15/technology/americans-paying-more-for-lte-service.html?_r=0.

Mr. MARINO. Thank you, sir.
Now, for the third time, Mr. Metalitz.

TESTIMONY OF STEVEN J. METALITZ, PARTNER, MITCHELL SILBERBERG & KNUPP LLP

Mr. METALITZ. That is right, Mr. Chairman.
Mr. MARINO. Thank you.
Mr. METALITZ. Good morning and thank you very much for inviting me to testify before the Subcommittee.

In all five rulemaking proceedings that have been held under the Digital Millennium Copyright Act, I have represented a broad coalition of copyright industry organizations. Because the bill before you today addresses a decision made in the most recent DMCA rulemaking, I hope I can provide some useful context. I am not here to advocate a position on whether the Librarian of Congress' decision on the cell phone unlocking issue was right or wrong. Our coalition was neutral on that during the rulemaking.

I am here to say that if Congress concludes that the Librarian's decision was not the right policy outcome, then H.R. 1123 is an appropriate and well considered way to change it. It restores the status quo ante without undermining an important provision of title 17 that has done so much to benefit creators, distributors, and consumers of copyrighted works. That provision is section 1201. It protects the technological measures that copyright owners use to control access to their works. Since it was enacted in 1998, it has helped to launch three important trends.

First, in nearly every industrialized country in the world and in many other countries, similar legislation has been adopted. Some follow the U.S. model closely, others take a somewhat different approach, but they all recognize that access control technologies should be encouraged to better serve the public.

Second, responding to this encouragement, copyright owners have increasingly launched innovative new services that depend on access controls. Everyone in the software world is talking about cloud computing today. Cloud computing depends on access controls. These controls are also essential in upgrading the security of computer networks and reducing their vulnerability to attacks. Access controls have also enabled cloud services for delivery of all kinds of copyrighted materials—software, games, video, books, music, and so forth.

The third trend is as a result of the rapid proliferation of these services, more consumers today enjoy authorized access to more copyrighted works in more diverse ways and at more affordable price points than ever before. Access control measures have been indispensable to achieving this.

Now, perhaps the best part of the story is this. This Committee and the rest of Congress anticipated that this might happen. In enacting the DMCA 15 years ago, Congress foresaw that technological protection measures could be used not only to prevent piracy but also to support new ways of disseminating copyrighted materials to users. Congress was also wise enough to realize that not all of the consequences of these new legal protections could be anticipated. So it created the triennial rulemaking process whose purpose is to

identify specific factual situations in which access controls have had unexpected negative consequences.

Now, again, our copyright industry groups that have participated in these rulemakings do not agree with every decision that has come out, or everything in the way the Copyright Office has approached it, but overall we think the rulemaking process has fulfilled the functions that Congress intended for it. I point out some of these reasons for saying so in my written testimony.

First, instead of the Copyright Office ranging the field to regulate uses of access controls that a government official might think are problematic, it relies on private parties to step forward to identify exactly where the exemptions are needed.

Second, exemptions are reserved for situations in which they are necessary or it is impossible or extremely burdensome to make a noninfringing use without circumventing access controls.

Third, all the exemptions expire after 3 years. So the Copyright Office and the Librarian take another look at that point. That makes sense, given the pace of technology and pace of change in market developments.

And fourth, the Copyright Office has consistently provided detailed explanations of its recommendations. We do not always agree with them, but they provide a lot of useful guidance.

Now, H.R. 1123 is tightly focused on changing the decision issued by the Librarian of Congress on the single issue of cell phone unlocking. It does so without tampering with the structure of section 1201 or with the key ingredients for success of the rulemaking that I have just summarized. It simply restores the status quo ante, the cell phone unlocking exemption that the Librarian recognized in 2010 but decided to phase out in 2012. It places this restored exemption back into the existing rulemaking framework. It directs the Copyright Office to initiate a new rulemaking on the question of whether that exemption ought to apply to other devices, and both these exemptions would be reviewed again after 3 years under the same procedures the Copyright Office has developed.

In short, H.R. 1123, if enacted, would be the most effective and focused way for Congress to correct what it considers an erroneous outcome of the last DMCA rulemaking, and it would inflict the least possible disruption on the rulemaking process and keep intact this provision, section 1201, that has served American creators and consumers so well.

Thank you very much. I would be ready to answer any questions.

[The prepared statement of Mr. Metalitz follows:]

MITCHELL SILBERBERG & KNUPP LLP
A LAW PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

MS&K

BEFORE THE U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY AND THE INTERNET

HEARING ON H.R. 1123

UNLOCKING CONSUMER CHOICE AND WIRELESS COMPETITION ACT

WRITTEN STATEMENT OF

STEVEN J. METALITZ

COUNSEL TO JOINT CREATORS AND COPYRIGHT OWNERS

JUNE 6, 2013

1818 N Street, NW, 8th Floor, Washington, DC 20036-2406
Phone: (202) 355-7900 Fax: (202) 355-7899 Website: www.msk.com

Written Statement of Steven J. Metalitz
Counsel to Joint Creators and Copyright Owners
June 6, 2013

Thank you for this opportunity to present the perspectives of leading copyright industry organizations on H.R. 1123.

One of the most critical provisions that Congress enacted as part of the DMCA in 1998 is section 1201 of Title 17, which protects the technological measures that copyright owners use to control access to their works. Pursuant to section 1201(a)(1), the Copyright Office has held five rulemaking proceedings since 2000 to identify appropriate temporary exemptions to the prohibition on circumvention of effective access control technologies. I have represented copyright industry coalitions in all five of these rulemaking proceedings.[1] I hope that my testimony can help provide some context for the current legislation.

Our coalition took a neutral position on the proposed cellphone unlocking exemption during the most recent rulemaking proceeding, which concluded last October. I am not here to advocate a position on whether the Copyright Office's recommendation on that issue, which was approved by the Librarian of Congress, was right or wrong. I am here to say that, if Congress concludes that the Librarian's decision was not the desired policy outcome, then the bill before you is an appropriate and well-considered way to change it. It restores the status quo ante, without undermining a critically important provision of Title 17 that has done so much to benefit producers, distributors and consumers of copyrighted works.

1. Section 1201 has proven its value, and is now more important than ever.

When Congress enacted Section 1201 in 1998, it explicitly anticipated that technological protection measures could be used, "not only to prevent piracy and other economically harmful unauthorized uses of copyrighted materials, but also to support new ways of disseminating copyrighted materials to users, and to safeguard the availability of legitimate uses of those materials." Staff of House Committee on the Judiciary, 105th Cong., Section-By-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998, at 6 (Comm. Print 1998), *reprinted in* 46 J. COPYRIGHT SOC'Y U.S.A. 635 (1999). Looking back 15 years later, we can see that this foresight was remarkable. Today, more

[1] This coalition includes the Association of American Publishers (AAP); BSA | The Software Alliance; the Entertainment Software Association (ESA); the Motion Picture Association of America (MPAA); and the Recording Industry Association of America (RIAA), on behalf of all of whom I appear today.

consumers enjoy authorized access to more copyright works in more diverse ways, and at more affordable price points, than ever before. Technological measures that control and manage access to copyrighted works have been critical to achieving this success. Myriad innovative products and services are currently made available in connection with copyrighted works protected by access controls, and new business models that depend on such controls are emerging and being extended to new markets constantly.

Access controls are at the heart of most of the cutting edge internet-based services that play an increasingly large role in the dissemination of creative content. The advent of cloud services for delivery of copyrighted material – software and games as well as video and music – underscores the importance of protecting access controls against hacking. Access control technologies also play a critical role in the ongoing task of upgrading the security of computer networks and resources and reducing their vulnerability to viruses and other attacks. Thanks to access controls, virtually all commercial software applications can be accessed, downloaded and/or updated online, whether directly from the developer or through third parties.

No innovation in the world of software and information technology is attracting more attention today than cloud computing, which depends upon access controls. Cloud computing has become an increasingly important method of delivering IT functionality to consumers, businesses and governments. As software is increasingly downloaded for use or delivered as an online service in the futnre, the importance of keys, IDs and passwords in enabling these services while protecting software copyright holders' rights increases accordingly.

U.S. enactment of section 1201 in 1998 blazed a trail that scores of other countries have followed. Seeking for their citizens the same benefits of wider, more secnre access to copyrighted materials, nearly every industrialized country, and many of our trading partners in the developing world, have enacted legal protections for access controls. Some follow the U.S. model closely; others take a somewhat different approach more suited to their own legal systems and traditions; but all reflect a recognition that the use of access control technologies should be encouraged, and attacks on these technologies appropriately penalized, in order to foster the healthy growth of online digital marketplaces in works protected by copyright.

2. The 1201 rulemaking process is an essential feature of the legal framework for protecting access controls.

Although Congress' prediction about the overall positive impact of access controls has been borne out over the past 15 years, Congress was also wise enough to realize that not all of the consequences of the new legal protections for technological measures could be anticipated. This realization forms the basis for section 1201(a)(1)(B), which established the triennial rulemaking process that has now unfolded five times. Its purpose is to identify any specific factual situations in which the prohibition against circumventing access controls, far from promoting greater access to copyrighted materials, has the unintended impact of preventing or substantially impeding such access to particular classes of works for the purpose of making non-infringing uses. Congress thus provided a flexible but very useful tool for responding to unforeseen changes in technology and marketplaces, by enabling time-limited exemptions to the prohibition to be recognized in carefully defined cases.

Certainly the copyright industry groups that have participated in the five DMCA rulemakings do not agree with every decision that has resulted from it, nor even with important elements of the approach that the Copyright Office has taken in implementing its statutory mandate to conduct the rulemaking. And no doubt any administrative process could be improved. But overall, we believe the rulemaking process has been a success, and has largely fulfilled the functions Congress intended for it. In particular, the following features of the rulemaking process have been critical to the positive contributions it has made:

- Burden of persuasion. The rulemaking process proceeds from the assumption that the prohibition against circumventing access controls is the rule, and that the burden falls on petitioners to demonstrate the specific situations in which an exception to this rule is justified under the statute. Thus, instead of the Copyright Office ranging afield to regulate uses of access controls that a government official might think are problematic, it relies on private parties to step forward and to present persuasive evidence and legal argument under a defined yet flexible set of criteria drawn from the statute and its legislative history.

- Focus on necessity. Exemptions are reserved for situations in which it is either impossible to make a specified non-infringing use without circumvention, or in which the burdens of using other available means to do so are so significant as to justify allowing individuals to take matters into their own hands by circumventing access controls.

- Time limitation and de novo review. A fundamental feature of all exemptions recognized through the rulemaking process is that they automatically expire after three years, and that each successive rulemaking proceeds de novo. This is one of the most critical decisions Congress made in setting up the rulemaking process, because it reflects an understanding that the rapid and often unpredictable pace of change in both technology and market developments rules out any automatic extension of exemptions unchanged from cycle to cycle. The actual history of the rulemaking process bears out the wisdom of this approach, with several exemptions being recognized for one or two cycles and then falling out of the process as the evidence of the need for them faded or disappeared altogether. Even those exemptions which have, in some form, been recognized in successive rulemaking cycles have been adjusted or modified to take account of new circumstances regarding the need for circumvention and the consequences of granting or denying an exemption for certain uses.

- Detailed explanation of reasoning. Finally, from the inception of the rulemaking process, the Copyright Office has chosen to provide detailed analyses of the evidence presented to it and of the legal justifications for its recommendations to the Librarian on granting, modifying, or denying requested exemptions. As noted, the copyright industry coalition has not always agreed with these analyses, but we find them quite useful both in explaining the decision and in providing guidance for the next cycle, and I believe the same is true for representatives of parties seeking exemptions as well.

3. H.R. 1123 overturns the rulemaking decision on cell phone unlocking without harming section 1201 or the rulemaking process.

The bill before the subcommittee this morning is tightly focused on changing the decision issued by the Librarian of Congress last October on the single issue of cell phone unlocking. It does so without tampering with the structure of section 1201, with the mandate and parameters of the section 1201 rulemaking, or with the key ingredients for success that I have just summarized. In other words, it achieves its authors' stated purpose, without compromising or undermining the enormous value that section 1201 has delivered to copyright owners and users of copyrighted works alike.

In effect, H.R. 1123 simply restores the status quo ante – the cellphone unlocking exemption that the Librarian recognized in 2010, but decided to phase out in 2012. It places this restored exemption back into the existing rulemaking framework. It directs the Copyright Office to initiate a new rulemaking on the limited question of whether the same unlocking exemption ought to apply to other devices besides cell phones. This new rulemaking will be carried out under essentially the same procedures that the Copyright Office has developed, pursuant to Congressional mandate, in five rulemaking cycles under the DMCA. And both the restored cellphone unlocking exemption, and any additional unlocking exemption that might emerge from the "out-of-cycle" rulemaking that the bill requires, would be reviewed again after three years, under the same procedures.

In short, H.R. 1123, if enacted, would be the most effective and focused way for Congress to correct what it considers an erroneous outcome of the last DMCA rulemaking cycle. It would accomplish this while inflicting the least possible disruption on the well-established rulemaking process, and without making any changes to the DMCA provision that has served American creators and consumers so well — section 1201.

5358203.1

Mr. MARINO. Thank you, gentlemen, for keeping your initial comments to 5 minutes.

The Chair now recognizes the Chairman of this Subcommittee, the gentleman from North Carolina, Congressman Coble.

Mr. COBLE. Thank you, Mr. Chairman. I appreciate you and the gentleman from North Carolina covering for me. I apologize to the witnesses for my belated arrival. Today was one of those days when I had to be at five places simultaneously. You all have never had that happened to you before, have you? I am sure you have. Thank you, Mr. Chairman. I appreciate that.

Starting with Mr. Berry, and then including all of the witnesses, what is the current state of the unlocked cell phone market? And do consumers have a growing number of choices for unlocked handsets and providers than ever before, or is the marketplace limited?

Mr. BERRY. Hi, Mr. Chairman. You are correct. There are a lot of choices for the consumer, but there are also a lot of unique circumstances where the phone is a very personal device and we believe that consumers should have the choice whether or not to continue to use that particular phone. I think it actually enhances the competition or competitive elements in the market. Many of the small carriers, six or seven of them in your congressional district, have a difficult time getting access to the iconic devices and unlocking gives them an opportunity to retain that customer that may come into their area that wants to keep their iconic device. And I think it is a choice that consumers enjoy having and gives us, the smaller carriers, an opportunity to distinguish themselves in the marketplace.

Mr. COBLE. Thank you, sir.

Mr. ALTSCHUL. There are close to 200 different devices available on an unlocked basis to consumers in the United States. Just one store, Best Buy has on their website as of last night 146 different devices from the latest Apple and Galaxy phones to very simple feature phones, and Best Buy is just one of the retail outlets that are available to customers that are interested in buying unlocked phones and being free to take the appropriate phone to the carrier of their choice.

Mr. COBLE. Thank you, sir.

Mr. SLOVER. I would say that the focus should also be on the consumer who has got a phone already, and has a chance to get a new one if he wants and to give the old phone to somebody, else or to sell it, or he has got a phone that he likes, but he wants to switch it to another network. It is not just whether there are phones out there in the market that are available to consumers who want to buy them. A lot of those phones that we have been talking about are new phones. The used phones are going to be gradually phased out now—if the Register's decision stays in place, that has been phased out now. And so over time, there will be fewer and fewer used phones available, and they will be older and older used phones that are available.

So I think it is also important to focus on the consumer who has got a cell phone in his hand and what his choices are, what he can do with that phone.

Mr. COBLE. Thank you, sir.

Mr. METALITZ. I do not have anything to add, Mr. Chairman, on the state of the market, but just to note that if the consumer has the phone in his hand, under the current exemption, if he bought it prior to January, then he is certainly free to exercise the exemption that exists now.

Mr. COBLE. Thank you, sir.

Let me try one more question before my time expires.

Gentlemen, how is the unlocking issue dealt with in other Nations, and more specifically, is this only a U.S. issue or is it an issue elsewhere? Either of you.

Mr. BERRY. I am certainly not an expert on all the markets globally, but unlocking is a problem in some countries. I do not think it is quite the same in the United States. In the United States, we subsidize phones and some of the iconic phones are exclusive to a particular carrier, and that carrier obviously wants the customer to meet their commitments. Many of the countries overseas, Europe, they do not subsidize phones, and they have more of a standard technology. So that is a little easier to switch out SIM cards and actually use a phone across carrier networks. It is a little different than in the United States. Again, it is a very personal device, and I think having an unlocking opportunity—capability—allows you to do a lot of different things with that used phone that you would not otherwise be able to do.

Mr. COBLE. I thank you, sir.

Mr. METALITZ. Mr. Chairman, if I could just add on the international dimension. As I mentioned in my statement, many countries now have similar laws protecting access controls—and as, I believe, Chairman Goodlatte mentioned in his opening statement—we have obligations under our free trade agreements with regard to these types of protections. But I think the good news is that H.R. 1123, as I read it, is consistent with our obligations under those free trade agreements. If it were enacted, I do not think it would create a problem of compliance with the free trade agreements.

Mr. COBLE. I thank you, sir.

Mr. Chairman, I see my red light is illuminated. I yield back.

Mr. CHABOT. Mr. Chairman, could I make a unanimous consent request over here on this side?

Mr. MARINO. Yes.

Mr. CHABOT. Thank you, Mr. Chairman.

I would just like to ask unanimous consent to submit a couple of questions in writing for the panel's response at a future time.

Mr. MARINO. Without objection.*

Mr. CHABOT. Thank you.

Mr. MARINO. The Chair now recognizes the gentleman from North Carolina and the Ranking Member, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman.

As has become my policy as the Ranking Member, I generally have decided to go last in the questioning so that if any of my other colleagues need to leave, they can before the hearing is over, especially on the last day of the week when they are trying to get out of town. So I am going to defer to Mr. Johnson, and I will go last.

Mr. MARINO. The Chair recognizes Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman. I believe Mr. Watt just loves to hold back and wait until I ask my questions because they are so good, and then he gets to clean up behind me. [Laughter.]

I believe that is what the real deal is.

But thank you all for coming today.

Strong copyright protections are the backbone of innovation, creativity, and the public good. Copyright theft hurts everyone. Song writers and artists depend on royalties for their livelihood. Companies depend on protection so that they can make new content and

*The Subcommittee did not submit post-hearing questions to the witnesses.

products, and consumers want to know that when they download an app, it is not counterfeited or full of malware.

As this Committee looks to update areas of copyright law, I think it is important to leave room for companies to provide innovative solutions while protecting copyright owners. For instance, one of the great success stories of copyright law is the DMCA intermediary safe harbor. One major example of this success story is Google, which receives 17 million takedown requests monthly and processes each of these, on average, within 6 to 8 hours.

Today's hearing represents another opportunity for innovative solutions in the marketplace. As a cosponsor of the bipartisan H.R. 1123, the "Unlocking Consumer Choice and Wireless Competition Act," I recognize that we need solutions that bolster competition while empowering consumer choice. And as a parent who—sometimes I drop my mobile phone and crack the screen on it, and I do it every so often. But then my kids tend to do it more often. So they end up being the recipients of my phone. And both have accounts with other cell phone service providers. So it presents a dilemma that I am faced with.

I look forward to the testimony of our witnesses today.

I applaud my colleagues from across the aisle for coming together on this pro-consumer legislation.

And, Mr. Slover, in your written testimony you indicate—you referred to a nationwide survey of consumer views on unlocking mobile phones. Could you share with us the results of the survey? And thereafter, I would like for you to explain to us how the 1201 exemption for unlocked devices enhances consumer choices.

Mr. SLOVER. Well, the survey was done 2 years ago, and one of the highlights was that 96 percent of those we polled who have wireless handheld devices believed that consumers should be able to keep their handset when they switch carriers. And the figure actually went up to 98 percent for people who had smart phones. The margin of error on that survey was 3 percent. So that is virtually 100 percent of everybody who we surveyed thinks that consumers should have that right. So to them, it is just common sense that they should be able to keep their cell phone with them as they switch carriers. So that was the highlight of the survey.

There were other figures in there, too. There was one, about three-quarters of the people surveyed said that they thought that cell phones should be interoperable across all networks and that if necessary, Government laws and policies should be instituted to require that.

As to your question about the 1201 process, that is a broader issue than just how it applies in the phone unlocking context. In the phone unlocking context, we do not think it should have gotten caught up in that at all. I think it was a surprise to everybody—nobody was planning in 1998 that the anti-circumvention restrictions were going to help reinforce the long-term bundled package where you get your cell phone as part of your long-term contract. That is just how it worked out. And what we want to see is for that to be pulled out and separated from that.

The broader issues about 1201 are very interesting and certainly deserve attention, and we look forward to being a part of that discussion in the months to come.

Mr. JOHNSON. Thank you.

Mr. MARINO. Thank you.

The Chair recognizes the gentleman from North Carolina, Mr. Holding.

Mr. HOLDING. Thank you, Mr. Chairman.

Mr. Altschul, you were talking about some of the concerns if the rule were overbroad, concerns about the arbitrage of phones, the demand for stolen phones, fencing of phones. I am curious about what the business model is for the arbitrage of phones. If you could, kind of explain how that would work and how much are these phones worth if they are completely able to be unlocked and so forth.

Mr. ALTSCHUL. Well, we know that the U.S. is unique in offering consumers subsidized, very deeply discounted phones for those customers that enter into a service contract with their carrier. To the extent that the phone is compatible in markets overseas or in other countries, the software lock is the only thing that keeps somebody from basically gaming the system, from obtaining a deeply discounted phone, which the carrier is fronting the subsidy for up front out of the expectation that over the life of the service agreement, they will be able to recover their costs from the customer. Phones are small and light and are easily shipped to foreign countries where there is no discounting. So the difference between getting a modern, top-of-the-line feature phone or a smart phone for $199 in the United States that more or less instantly can be sold for $600 or $700 in another country creates the arbitrage opportunities.

Mr. HOLDING. What about on stolen phones? Is there a big market for stolen phones?

Mr. ALTSCHUL. Well, there is obviously a huge amount of street crime where these phones are being targeted by criminals, and it has caught the attention of the police chiefs in this city, in New York, and San Francisco, and other cities because of how easily fenced these phones are on the street. And, of course, with the existing rule, there is now no legal reason or basis for a brick and mortar storefronts to be in the business of taking a phone that a customer brings in and changing its identity, its software, and the ability to operate that phone on different networks.

So one of the concerns about going beyond allowing an individual customer known to a carrier to unlock phones creating a broad commercial exception would be to legitimize the ability of brick and mortar stores to be the first step of the fencing operation.

Mr. HOLDING. I think we see all the time that technology is rapidly changing, evolving, and I will posit this to all of you. The business model we have here, as you say, heavily subsidizing the phone on the front end—are there changes in technology on the horizon or forecasted that would change that business model, that would render it obsolete or not profitable? And so we try to do something legislatively here and before you know it, the business model has changed, and what we are doing here is moot and a waste of time.

Mr. ALTSCHUL. Well, the business model is constantly changing. Right now, there are the two dominant types of service agreements, both of which are popular with consumers: no contract phones with no service plan and typically not a discounted device and a contract

plan where there is a discounted device. T-Mobile 2 to 3 months ago announced a hybrid plan where they are breaking the tie between their service and device. Other carriers said if this is popular, they can follow a similar plan. There are prepaid offerings that offer some discounted devices. So already the marketplace has a mix, and consumers have shown how sophisticated they are in selecting and choosing the most attractive combination of service and devices that best meets their needs.

Mr. HOLDING. All right. Thank you.

Mr. Chairman, I yield back.

Mr. MARINO. Thank you.

The Chair recognizes Congresswoman Chu from California.

Ms. CHU. Mr. Slover, I want to get the basics of cell phone unlocking. At the end of my contract term with my wireless carrier, how would I be able to unlock my cell phone? Would I be able to unlock the phone myself, or do I need to seek out the help of my wireless carrier?

Mr. SLOVER. Well, there are some people who have figured out how to do it themselves. Most people would need to get help from somebody else. And you could either get that from your wireless carrier, your old wireless carrier; you could get it from your new wireless carrier, or you could find one of the people who has figured out how to do it and ask them to explain it to you, to walk you through the steps, to maybe send you a link to an explanation for it. There are a number of ways, and we would like to see all those ways available.

Mr. ALTSCHUL. If I may add to Mr. Slover's answer. One of the facts that the Librarian of Congress relied on in the record before it in this hearing was the fact that carriers will unlock their customers' phones once the service terms have been fulfilled. Carriers do that. It can be done over the phone. It involves codes the customer can follow, and there is no charge for it.

Also, on the Internet, along with a lot of other things, there is information how to do this. People should think twice because it also could be a back door for malware and viruses and other changes to the device that might not be welcome, as well as when it is done over the Internet or through third parties, there is a charge. If the customer goes to their carrier, under the carrier's terms there will be no charge to unlock the device.

Ms. CHU. Yes. Mr. Berry?

Mr. BERRY. I think it is also important to note—and I think you hit on a very important aspect, and that is, do you have to be MacGyver to unlock your phone? Sometimes you do, and some of the locking devices are getting more and more complex. And that is why we recommend that an agent be authorized. If you have locked yourself out of the house and you need a locksmith to come in and help you open the door, I mean, that is certainly an acceptable use of your property and it is certainly a property right that you have. I think that it should be recognized that locking and locking devices are getting more complex, and you are absolutely right. The wireless carrier sometimes does not have the code. Maybe it is an unlocked device that you bought at Best Buy and that particular carrier may not have that code to unlock the device

at the end of your service. So I think it is an important question and an important issue to address. Thank you.

Ms. CHU. Yes. Are you saying then any phone could be unlocked by any carrier or are there limits to that?

Mr. BERRY. My understanding is most phones can be unlocked by a carrier, an authorized carrier, but there are some devices that cannot be unlocked. For example, the Apple phone. If you do not have the code, you cannot unlock it. If you buy an Apple unlocked phone, it is not necessarily going to work on every carriers' network even if the carrier has the same technology in their network. And so it can get fairly complicated. Like Mr. Altschul said, there is no such thing as one interoperable phone. It depends on your network, your technology, and quite frankly, the OEM—the manufacturer that built it.

Ms. CHU. Mr. Slover, or anybody else, the Register of Copyrights found out with respect to new wireless handsets, there are ample alternatives to circumvention and the marketplace has evolved to the point where there is a wide array of unlocked phone options available to consumers. Do you believe that consumers have meaningful options when purchasing new unlocked phones, and why did the National Telecommunications and Information Administration support a broader exemption?

Mr. SLOVER. I think it is incomplete to look at the question just from the perspective of what is out there in the marketplace for consumers in general who want to buy a new phone, and are there enough unlocked phones out there that if they want an unlocked phone they could find one. Now, even on that question, they may not be able to find the specific kind of phone that they want unlocked. So it is more than just whether there are enough phones out there in general. But that is only one side of the equation.

And the other side of the equation is what about the person who has got a phone, is getting a new one, wants to pass their old one along to somebody else or wants to keep their old one and pass their new one along to somebody else, or wants to sell the one they are getting or the one they are giving up to somebody else. So from that side of it, the criminal prohibitions against unlocking the cell phone are a big hindrance.

Ms. CHU. Thank you, and I yield back.

Mr. MARINO. Thank you.

I guess it is my opportunity.

Mr. Altschul, what do the major carriers think about this legislation, and do they have any suggestions on how to tweak it?

And then, Mr. Berry, I am going to ask you about other carriers as well. Same question.

Mr. ALTSCHUL. The members of our association support the bill and they support it in the way it is narrowly drafted to restore the exemption as it was in 2010. That returns the situation to the status quo that the industry operated under for the prior 3 years.

Mr. MARINO. Mr. Berry?

Mr. BERRY. Yes, Mr. Chairman. Our members support the legislation, 1123. I think some of the smaller carriers, the rural and regional carriers, would probably see much more immediate benefit because they have more difficulty getting access to these iconic devices or to the type of smart phone that is very difficult for smaller

carriers that have less scale to be able to purchase. But all our carriers support the legislation and think that something should be done immediately.

Mr. MARINO. Thank you.

Mr. Metalitz, do you know of anyone or any entity that opposes this?

Mr. METALITZ. I am not aware of any, Mr. Chairman.

Mr. MARINO. Does anyone on the panel know of any opposition to this?

Mr. Slover, I think you testified initially in your initial reading that you want to see this permanently established with no time limits. Am I correct on that?

Mr. SLOVER. Well, we do not want our consumers to face a situation where there is uncertainty every 3 years. I think one aspect of that is that the *de novo* review that has been followed is a complete *de novo* review where you start over again, and the people who have proven that an exemption is justified, and satisfied that burden once, have to satisfy it each time, and you have got different people in the offices making the decisions perhaps. I think it would work better if there were a presumption at least that once there is an exemption in place, the starting point, the default is that it stays in place, and then the people who think it should be expanded can come in and explain why, and the people who think it should be narrowed or not renewed at all can come in and explain why.

Mr. MARINO. You are probably aware of this, but we could have some trade issues concerning this because of the agreements. There could be creative ways to rework those trade issues with other countries, but I think at this point it is inclined—I cannot imagine other countries having a problem with this, but it still would involve some trade issues.

Mr. Metalitz?

Mr. METALITZ. Yes. Mr. Marino, if I could just say a word about the *de novo* review. I think that is a positive feature of the system. You know, a wise man said long ago you cannot step in the same river twice. All of these areas are ones where there is a lot of change both in technology and in markets. And the Copyright Office and the Librarian have shown the ability to look at these and to adjust their recommendations accordingly. So I think that is a positive feature.

Mr. MARINO. I am going to play a little devil's advocate here based on my experience as a prosecutor. Do any of you gentlemen see any complications or down side to this from those individuals who just practice, as much as they can, hacking into our computers, hacking into our phones? Do you see any technical complications here that may make it somewhat more easy for these people to get into our phones by unlocking these? Anyone.

Mr. BERRY. Mr. Chairman, going back to the bulk—you would call bulk reselling—that is a problem. It continues to be a problem whether you have the exemption or not, as we have seen. And I think you should at least start from the point that this statutory language is neither sufficient or necessary to deal with the much larger issue of bulk reselling. And there are numerous other activities that you—breach of contract, infringement, copyright infringe-

ment, trademark infringement, not to mention the criminal codes to address that. You are always going to have those potential problems for those nefarious people that would like to break into the device in this case. But I do not know that it is so overbearing that the consumer should not continue to enjoy this opportunity to freely use their property.

Mr. MARINO. Thank you. My time has expired.

I am going to move on to Congressman Jeffries from New York.

Mr. JEFFRIES. Well, thank you very much. And let me also thank the Ranking Member.

Mr. Slover, the Librarian came to the conclusion that there was adequate consumer choice for unlocked phones on the market. Is that correct?

Mr. SLOVER. That is correct that that was the conclusion that the Register of Copyrights and the Librarian of Congress came to, yes.

Mr. JEFFRIES. Now, I assume you disagree with that conclusion.

Mr. SLOVER. I think it is incomplete and it is only one side of the question. It is incomplete because not all phones are available to all consumers in all situations, but in addition to that, the consumer who has got a phone already—it is all of the phones that are going to be rendered useless because they cannot be unlocked and resold without the potential for criminal penalties, which is going to be very chilling, I would think. And so over time, they are going to end up getting thrown away or left in a drawer someplace rather than being put to use where they could be. And the consumer who has got those, who would be able to get some benefit, either a family member taking over the phone, or being able to sell it for a small amount, or giving it away to some charitable organization that is collecting phones for their clients, they are all wasted.

Mr. JEFFRIES. Now, what is the state of play as it relates to someone who is coming off contract and will be able to make a decision as to whether to move forward with their current carrier or switch carriers in terms of the unlocked phone market that they would confront?

Mr. ALTSCHUL. Well, as the Librarian of Congress found on the record, carriers will unlock a customer's phone upon the customer's request, and they publish the requirements. You might think it would only be at the end of the contract. Different carriers have different policies, including just being in good standing and saying you are going to go on a trip, say, to Europe and you want the flexibility while traveling to use other carriers' networks. So that was in the record before the Librarian of Congress.

And the benefit of having the carrier do the unlocking is that you do not go to third party sources on the Internet or elsewhere which, in the unlocking process, increases the risk of malware and viruses being inserted into the device.

Mr. JEFFRIES. Now, currently it is my understanding that when carriers sign up a new customer to a contract, often the cell phone or certainly in the case of a smart phone, is offered to that customer at a very discounted price. To the extent that this bill moves forward—and I do support the legislation, but to the extent that the bill moves forward and becomes law, do you anticipate that

that would change in any way in terms of perhaps a decrease in the discount that is available or its outright elimination?

Mr. ALTSCHUL. Well, we operated under the rule that would be restored for the past 3 years, and the choices to consumers and the availability of discounted phones was not diminished under the prior rule. I do not think any of us have a crystal ball. The markets change. Consumers' tastes change. We have seen over the past few years, even with the existing rule, the greater popularity of no contract plans and the availability of unlocked phones with consumers. So I cannot predict what the future will bring, but I am fairly confident that this bill is not going to change the business practices one way or another.

Mr. JEFFRIES. Thank you.

Mr. Slover, have you done any analysis on this question?

Mr. SLOVER. Well, we would like to see greater choices for consumers. The idea of getting a contract where you do not have to worry about going over your minutes or going over your other limits, but not having to take a phone packaged in with that, if the two purchases could be considered separately, then there would be more transparency, the consumer would know what they are paying for. I mean, right now, you walk into one of the stores, and they direct you over to the display of phones that you can get for free or at a dramatically reduced price as a result of signing up for the contract. But it is not, "here is one thing you are buying, here is another thing you are buying, do you want to buy both of them from, us or not?"

And so the greater the choices that are made available—and to us, the lock and the penalties for getting around the lock, for unlocking to interconnect to another network are part of the artificial support system for the bundled contract. We are not saying the bundled contract should not be made available. We think it will still be made available to consumers who want it, but there will be more transparency and consumers will have more choices.

Mr. JEFFRIES. Thank you, Mr. Chair. I see that my time has expired. I thank the witnesses for their participation.

Mr. MARINO. Thank you.

The Chair recognizes Congressman Chaffetz from Utah.

Mr. CHAFFETZ. Thank you, and I thank the Committee for taking on this issue. It is one that I think is important to a lot of consumers today.

I want to start with the developers and some of the distribution of the potential tools that could be used to help unlock these phones. One of the problems, even with a DMCA exception, is it does not provide immunity for making or distributing the tools to circumvent a lock even for a lawful exemption. If we want to make sure people can unlock their phones, do we not need to clarify that the DMCA does not apply to phone unlocking or somehow provide an exemption to developing and distributing the tools in addition to just simply using them? Maybe we could start with Mr. Berry, please.

Mr. BERRY. Thank you, Congressman.

You are correct that there seems to be fewer and fewer apps developers that will provide this technology, the coding necessary to unlock phones. Again, I mentioned the agent. In many instances,

it is this individual or the wireless carrier that has the unique ability to unlock phones. And I think it would be appropriate to consider that capability, that unique capability as an agent of the consumer to help ensure that consumer can fully utilize their property rights. I think it is a good idea.

Mr. CHAFFETZ. What is the penalty if you were to not comply? Based on the law, the way it is now, if somebody were to do this, what is the penalty for that?

Mr. BERRY. Well, my understanding is it could be a fine up to $500,000 and it could be criminal prosecution and potential incarceration. So it is a felony.

Mr. CHAFFETZ. It seems pretty severe for unlocking a phone.

Does anybody else care to weigh in on this? Yes?

Mr. METALITZ. Yes, sir. I just wanted to make a couple of points.

First, I know the issue of criminal penalties has come up here several times, and I think it is important to bear in mind that the act of unlocking a phone, even if you assumed there was no exemption at all, would only attract criminal penalties if it was done willfully for the purpose of commercial advantage or private financial gain. And those are limitations that the Congress put in in 1998 when it enacted the DMCA. So many of the scenarios we have been hearing about about individuals unlocking their own phones or donating a phone to a charity, this type of thing could not be reached by that. In fact, there have been virtually no prosecutions under section——

Mr. CHAFFETZ. Well, and that is a good reason to take it off the books, is it not?

So would you agree, though, with Mr. Berry that the developers or distributors of these potential tools, if we were to enact something, should also be covered under this?

Mr. METALITZ. Well, no, I would not agree with that. I think that is a separate question. The reason I think Congress set up the rulemaking the way it did to only deal with the act of circumvention was the concern about developing a marketplace for tools to hack through access controls. And very, very few, if any, of these tools are specifically limited to one type of access control or to one type of use. So the concern would be that developing a marketplace for these tools could lead to a lot of exposure of other——

Mr. CHAFFETZ. But if the law was crafted such that your goal is to allow the consumer to unlock their phone, why would you not also protect the developer or the distributor of that tool or app or whatever it might be and allow that to happen?

Mr. METALITZ. Well, I think the testimony has——

Mr. CHAFFETZ. I mean, who is going to go and develop that if they are going, for their own financial gain, be facing a $500,000 fine and time in jail?

Mr. METALITZ. I think the testimony has been that, first of all, in many cases this unlocking would be taking place with the consent of the copyright owner, which in the situations where the carriers are doing it——

Mr. CHAFFETZ. What we are talking about is giving consumers more ability to do this. So why would you not protect the developer too?

Mr. METALITZ. Well, I think the other thing to look at is whether between 2006 and today when this exemption has been in place that applies to the act of circumvention have consumers been unable to exercise it. I do not know the answer to that.

Mr. CHAFFETZ. Well, I do.

Mr. Chairman, as my time is expiring here, I think to truly have an understanding of how the technology works, there need to be—everybody in that food chain needs to be protected under the law so that they can provide these tools and allow access and allow more freedom for the consumers to make these types of choices.

With that, I will yield back. Thank you.

Mr. MARINO. Thank you.

The Chair recognizes Congresswoman Lofgren from California.

Ms. LOFGREN. Well, thank you very much, Mr. Chairman. It was good to hear Mr. Chaffetz's questions because I have a similar set of questions.

First, let me say that I do support Chairman Goodlatte's bill. I believe I am a cosponsor of the bill, and I think it is a necessary thing.

I also believe, however, that we ought to do something further. Congressman Tom Massie and I have a bipartisan bill, H.R. 1892, that would engage a permanent fix in the section 1201 of the DMCA that would be not instead of the Chairman's bill but in addition to it because, as has been noted, we do need to amend some of our trade agreements. Sometimes I hear colleagues express concern about the role of the Congress in many of these trade agreements. I am certainly for trade, but they have managed to constrain the role of Congress in amending our laws as we see fit, which is a real problem for us. But we do direct in this bill the President to negotiate changes so that we can, once again, have our proper role as the legislative branch.

I would like to ask unanimous consent to include in the record a letter to the Register of Copyrights from the Department of Commerce recommending cell phone unlocking.

And if I could, Mr. Chairman, I would also like to ask unanimous consent to include in the record a letter from FreedomWorks, as well as a letter from the National Consumers League, supporting 1892 and certainly also supporting Mr. Goodlatte's bill.

Mr. MARINO. Without objection.

[The information referred to follows:]

UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Communications and Information
Washington, D.C. 20230

September 21, 2012

Ms. Maria Pallante
Register of Copyrights
Library of Congress
James Madison Memorial Building
Washington, DC 20540-3120

Re: Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, RM 2011-7

Dear Ms. Pallante:

The National Telecommunications and Information Administration (NTIA), an agency of the U.S. Department of Commerce, submits this letter to you to continue the statutorily required consultative process that NTIA has undertaken with you and your staff in connection with Section 1201(a)(1)(C) of the Digital Millennium Copyright Act (DMCA).[1] NTIA is the President's principal advisor on telecommunications and Internet policies pertaining to the nation's economic and technological advancement.[2] NTIA promotes "the benefits of technological development in the United States for all users of telecommunications and information facilities."[3] NTIA appreciates the opportunity to provide its input into this process.

Pursuant to the DMCA, our input to you reflects our core mission to advance the President's goal of promoting ubiquitous, open, state-of-the-art, and affordable broadband Internet access.[4]

---

[1] 17 U.S.C. § 1201(a)(1)(C). This section sets forth the required consultative process which is that "each succeeding 3-year period, 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 make the determination in a rulemaking proceeding . . ."

[2] National Telecommunications and Information Administration Organization Act, 47 U.S.C. § 902(b)(2)(D), (I) (2009).

[3] 47 U.S.C. § 901(c)(1).

[4] *See e.g.*, Testimony of The Honorable Lawrence E. Strickling, Assistant Secretary for Communications and Information, National Telecommunications and Information Administration, United States Department of Commerce, Before the Committee on Small Business, United States House of Representatives, Hearing entitled "Digital Divide: Expanding Broadband Access to Small Businesses" (July 18, 2012), https://www.ntia.doc.gov/speechtestimony/2012/testimony-assistant-secretary-strickling-digital-divide-expanding-broadband-acc.

Facilitating the creation of innovative online content, services, and technologies is vital to achieving this goal and U.S. economic prosperity.[5] It is important that the legal environment ensures that content that is created is protected from infringement and piracy, which copyright law provides. It is also essential that the legal environment be adequately open and flexible so that ideas flourish and grow into businesses that create jobs and fuel the economy. Policies that balance the legitimate concerns of users, content creators, and entrepreneurs will best promote technological innovation and consumer freedom and discourage illegal copying and distribution.[6]

NTIA believes that the exercise of reviewing proposed exemptions to the prohibition against circumvention of access controls every three years is an essential application of that balance. From the past proceedings to the present, we have witnessed an innovation explosion, with new opportunities, businesses, devices, and technologies entering the market almost daily – most of which were not contemplated when Congress enacted the DMCA.[7] NTIA notes that the past exemptions granted by the Librarian have contributed to a healthy, robust environment that has encouraged innovation both with adequate protections for copyrighted works and with exemptions that permitted non-infringing uses.[8] The Register's recommended approach, which tailors exemptions based on demonstrated harm to a particular use or user while also limiting the adverse consequences that may result from the creation of an exempted class, strikes the right balance between protecting the rights of the copyright holder and facilitating non-infringing uses as envisioned by the authors of this triennial process.[9]

---

[5] The Department of Commerce declared the following core policy in its work regarding the Internet: "Recognizing the vital importance of the Internet to U.S. prosperity, education, and political and cultural life, the Department has made it a top priority to ensure that the Internet remains open for innovation." Inquiry on Copyright Policy, Creativity, and Innovation in the Internet Economy, Docket No. 100910448–0448–01, Notice of Inquiry, 75 Fed. Reg. 61419 (Oct. 5, 2010).

[6] *See e.g.*, Commerce Secretary Gary Locke, Remarks at the Copyright Policy in the Internet Economy Symposium (July 1, 2010), https://www.ntia.doc.gov/speechtestimony/2010/remarks-copyright-policy-internet-economy-symposium.

[7] Several commenters noted this balance, such as the following: "Congress intended this proceeding to provide a safeguard against the bleak prospect that the introduction of legal protections for access controls might lead to a marketplace characterized by 'less access, rather than more, to copyrighted materials that are important to education, scholarship, and other socially vital endeavors.' . . . Congress also recognized, however, that access controls "support new ways of disseminating copyrighted materials to users, and to safeguard the availability of legitimate users of those materials by individuals."" Joint Comments of the Association of American Publishers, American Society of Media Photographers, Business Software Alliance, Entertainment Software Association, Motion Picture Association of America, Picture Archive Council of America, Recording Industry Association of America (*Joint Creators and Copyright Owners Comments*), Docket No. RM 2011-7, http://www.copyright.gov/1201/2012/comments/Steven_J._Metalitz.pdf. (*Citing* Staff of House Committee on the Judiciary, 105th Cong. Section-by-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998, at 36.)

[8] Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Docket No. RM 2008-8, Final Rule, 75 Fed. Reg. 43825 (July 27, 2010)(*2010 Final Rule*) http://www.copyright.gov/fedreg/2010/75fr43825.pdf.

[9] Letter from Lawrence E. Strickling, Assistant Secretary, NTIA, to Marybeth Peters, Register of Copyrights (November 4, 2009)(*Strickling Letter 2009*), http://www.copyright.gov/1201/2010/NTIA.pdf at 2; *see also* Letter from Nancy J. Victory, Assistant Secretary, NTIA, to Marybeth Peters, Register of Copyrights (Aug. 11, 2003), http://www.ntia.doc.gov/other-publication/2003/ntia-letter-register-copyrights-regarding-dmca.

NTIA has conducted an extensive review and analysis of the record before the Register, including the proposed exemptions, comments, reply comments, hearing transcripts and post-hearing questions and answers. In applying its particular expertise and experience to each proposed exemption, NTIA offers the following observations and recommendations.

A. Class 1 – Public Domain Works

The Open Book Alliance (OBA) proposes an exemption for public domain literary works that are made available in digital form and are protected by access controls.[10] According to OBA, Google imposes Technological Protective Measures (TPMs) that strictly limit use on library websites of books it has copied under agreements with such libraries.[11] Additionally, OBA claims that Google requires the libraries providing it with public domain works to limit their sharing of those works with third parties.[12] OBA asserts that these restrictions effectively restrict online access to public domain works, and only serve to benefit Google's business interest to the detriment of the online community.[13]

A work in the public domain is a creative work that is not protected by copyright and which can be freely used by everyone.[14] NTIA shares OBA's concern that the implementation of TPMs restricts universal access to such material. As OBA notes, these restrictions may have a negative impact on educational institutions and research organizations, and may result in other adverse effects to the public.[15] This "chilling" effect in turn discourages use of material that, by definition, should be widely accessible to any member of the public.

NTIA notes that the Copyright Office previously opined on this issue in the 2010 proceeding and stated:

> Works in the public domain are not affected by the prohibition on circumvention. Section 1201(a)(1), in part, states: "No person shall circumvent a technological measure that effectively controls access to a work protected under this title." A work in the public domain is not a work "protected under this title." Therefore, Section 1201 does not prohibit circumvention of a technological

[10] Comments of the Open Book Alliance *(OBA Comments)*, Docket No. RM 2011-7, http://www.copyright.gov/1201/2011/initial/open_book_alliance.pdf. In the alternative, OBA seeks a clarification that the provisions of 17 U.S.C. § 1201(a) do not apply to TPMs placed on digital copies of literary works in the public domain. NTIA does not express an opinion regarding this request and limits its view only to the proposed exemption.

[11] *See OBA Comments* at 3. According to OBA, Google has acquired and processed over 15 million books, out of which 3 million are in the public domain. *Id.*

[12] *See OBA Comments* at 4. OBA reports that Google has contracts or agreements with over 14 domestic and international libraries. *Id.*

[13] *Id.*

[14] *See e.g.*, Lolly Gasaway, When U.S. Works Pass Into the Public Domain, University of North Carolina, http://www.unc.edu/~unclng/public-d.htm (last visited Aug. 13, 2012); Copyright and Fair Use, Public Domain, South Louisiana Community College, http://libguides.southlouisiana.edu/content.php?pid=328614&sid=2688291 (last visited Aug. 13, 2012).

[15] *OBA Comments* at 7.

> protection measure when it simply controls access to a public domain work; in such a case, *it is lawful* to circumvent the technological protection measure and *there is no need* for an exemption.[16]

NTIA concurs with this determination of the Copyright Office that an exemption to circumvent TPMs in public domain works is not needed.[17]

B. Class 2 – e-Book Accessibility for Persons with Disabilities

The American Council of the Blind and the American Foundation for the Blind (ACB/AFB) propose an exemption for "literary works distributed electronically… that are generally inaccessible to those with blind or other print disabilities."[18] NTIA supports this proposed exemption, which expands on the existing exemption for making e-books accessible to the visually impaired.[19] The new language further assists visually impaired Americans by including all literary works where circumvention is required for accessibility purposes, as opposed to the current, narrower exemption that compels users to obtain another edition of the work if an accessible version exists, even if accessing this alternative edition would require purchasing another device.[20]

Due to a lack of widespread device compatibility with the plethora of different electronic formats for literary works, an accessible version of a work in a different format is often not a viable alternative to circumvention. Proponents note, for example, that while "Apple's iBooks application is the only mainstream e-book reader that is accessible to individuals who are blind or visually impaired," books purchased from Apple are readable only on the company's iPad, iPhone, and iPod Touch devices.[21] Visually impaired Americans who own e-readers or tablets produced by other companies are limited to the often insufficient accessibility features currently available for literary works that are compatible with their devices. In many cases, there is no

---

[16] Recommendation of the Register of Copyrights in RM 2008-8; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies at 256, (*2010 Register of Copyright Recommendation*) (June 11, 2010), http://www.copyright.gov/1201/2010/initialed-registers-recommendation-june-11-2010.pdf.

[17] In addition, NTIA questions whether the technological measures discussed by OBA actually protect access to a literary work. It may be that the technological measures merely act as "search filtering tools" that sort out results effectuated in search engines. In other words, the TPM may create a difficulty in finding the public work, but does not prevent access to the work once found. *See OBA Comments* at 5-7.

[18] Joint Comments of the American Council of the Blind and the American Foundation for the Blind, Docket No. RM 2011-7, http://www.copyright.gov/1201/2011/initial/american_foundation_blind.pdf. (*ACB/AFB Comments*). It is important to note that this proposed exemption was met with little or no opposition on the record. The Joint Creators have expressed concern with the expansion discussed here. *Joint Creators and Copyright Owners Comments* at 17-18.

[19] *See* 37 C.F.R. § 201.40(b)(6).

[20] *See ACB/AFB Comments* at 4-5.

[21] *Id.* at 8, 10.

accessible alternative version of a work available on a particular device that a particular visually impaired person happens to own.[22]

Requiring visually impaired Americans to invest hundreds of dollars in an additional device (or even multiple additional devices), particularly when an already-owned device is technically capable of rendering literary works accessible, is not a reasonable alternative to circumvention and demonstrates an adverse effect of the various access controls used.[23] Therefore, NTIA supports adoption of the expanded exemption for the next three years, and strongly encourages the market to obviate any future need for this exemption by making literary works more accessible to users with disabilities, ideally in an interoperable manner.[24]

The ACB/AFB proposal expands the contemplated class of work from the current exemption, referring to it as "literary works, distributed electronically."[25] The existing exemption uses a somewhat different phrasing, introducing the class of work as "literary works distributed in ebook format."[26] NTIA prefers the new, more generic language as it more precisely resolves the harm demonstrated in the record. Literary works are distributed electronically in a wide range of formats, not all of which are necessarily widely understood to constitute an "ebook format." In addition to the differing formats used in the popular online book stores (e.g., Amazon's Kindle Store, Apple's iBookstore, and Barnes & Noble's NOOK Book Store), literary works are sometimes made available in the Portable Document Format (PDF), as Hypertext Markup Language (HTML), and in a range of proprietary formats.[27] To the extent that such works otherwise fit within the contemplated class, including the presence of access controls that interfere with the use of assistive technologies for the visually impaired, they should be included regardless of format.

C. Class 3 – Interoperability of Third-Party Applications in Gaming Consoles

Proponents request an exemption allowing users to circumvent access controls embedded in video game consoles to execute any lawfully acquired software applications. While NTIA supports the innovative spirit epitomized by independent developers and researchers whose

---

[22] *Id.*, at 8-10. For example, the ACB and AFB note that e-books purchased in the Barnes & Noble NOOK format are "completely inaccessible to blind users." As well, the Kindle has used a TPM that blocks access to persons with disabilities for all but certain public domain titles.

[23] In effect, the TPM requires persons to purchase additional devices to read desired books that are not available in accessible format on their device. NTIA concurs with the proponents that this is unacceptable. *Id.* at 10.

[24] *Strickling Letter 2009* at 13.

[25] *Id.* at 1.

[26] *2010 Final Rule* at 43839. NTIA notes that the proponents appear to have misunderstood the final rule issued by the Librarian in 2010, when he granted the exemption for another three years. At that time, he stated the following sound policy: "... the Register has learned that, even where books are published electronically for the general public, the digital format used or licensed may be employed in a way that is incompatible with Braille readers and other assistive technologies on which blind and print-disabled persons rely. In the long run, this incompatibility may lead to delays, cost challenges and standards issues that may off-set the long-awaited benefits of digital media. Copyright and content issues cannot be divorced from the general goal of ensuring that hardware devices are designed with accessibility in mind." NTIA concurs with this analysis.

[27] *See* Finding E-books: A Guide, U.S. Library of Congress, *available at* http://www.loc.gov/rr/program/bib/ebooks/deviceformats.html (last visited Aug. 13, 2012).

needs proponents contemplate in this class, the evidence in the record is insufficient to support the considerable breadth of the proposed class.[28] Access controls on console boot loaders[29] and firmware programs prevent users from installing alternative operating systems and unauthorized games.[30] The record is not clear that an exemption is warranted for enabling interoperability with unauthorized applications or for installing an unauthorized operating system. Proponents offer some examples of researchers needing to install unauthorized operating systems to make use of certain consoles' substantial computing power, but there is compelling evidence suggesting reasonable alternatives exist to conducting research on game consoles.[31] Personal computer (PC) technology has evolved so that consoles may no longer offer any computing advantage over traditional PCs.[32] Furthermore, opponents have demonstrated that console manufacturers are willing to work with researchers to meet computing needs, and NTIA encourages them to continue such efforts.[33]

Proponents also assert a need for independent ("homebrewed") application developers to circumvent access controls on video game consoles.[34] NTIA recognizes that independent developers often advance innovation for the public benefit.[35] However, NTIA is also cognizant of the proposal's likely negative impact on the underlying business model that has enabled significant growth and innovation in the video game industry.[36] NTIA takes into consideration that console manufacturers depend on game sales and licenses to recoup development costs, and that widespread circulation of games unapproved by the console makers could conceivably negatively affect the video game market. Independent developers can request authorization from manufacturers to authorize users to install their applications without circumventing any access

---

[28] *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Docket No. RM 2011-7, Notice of Proposed Rulemaking, 76 Fed. Reg. 78866, 78867 (Dec. 20, 2011) (*2011 NPRM*), http://www.copyright.gov/fedreg/2011/76fr78866.pdf.

[29] *See* PC Magazine Encyclopedia, http://www.pcmag.com/encyclopedia_term/0,1237,t=boot+loader&i=38843,00.asp. (A boot loader is "a program that loads the operating system into memory.").

[30] Comments of the Electronic Frontier Foundation (*EFF Comments*) at 19-20, Docket No. RM 2011-7, http://www.copyright.gov/1201/2011/initial/eff.pdf.

[31] *EFF Comments*, at 20-23; Comments of the Entertainment Software Association (ESA Comments) at 11-12, Docket No. RM 2011-7, http://www.copyright.gov/1201/2012/comments/Lindsey_Tonsager.pdf; *Joint Creators and Copyright Owners Comments* at 27 ("they may purchase personal computers that accomplish the same functions or request permission from console manufacturers to install an alternate operating system").

[32] *ESA Comments* at 11-12.

[33] *Joint Creators and Copyright Owners Comments* at 27.

[34] *EFF Comments* at 24-28.

[35] Independent developers have created console applications that can turn TVs into interactive whiteboards or transform consoles into web servers. They've also designed tools that allow users to backup game files and enable File Transfer Protocol (FTP) functionality. *Id.* at 26-28.

[36] *ESA Comments* at 30-35; *Joint Creators and Copyright Owners Comments* at 28; *see also* Testimony of Christian Genetski, General Counsel, Entertainment Software Association, Section 1201 Rulemaking Hearing, Before the Copyright Office Panel, California Hearing (May 17, 2012) at 20, http://www.copyright.gov/1201/hearings/2012/transcripts/section_1201_rulemaking_hearing_%2005-17-2012.pdf. (For example, noting "over 1 million downloads of infringing versions of 250 select console games in just the first quarter of 2012.").

controls.[37] Proponents have cited the difficulty independent developers face in obtaining such authorizations.[38] NTIA encourages console manufacturers to create less burdensome game authorization processes that will empower independent developers to deliver more easily their content to the marketplace, and notes that continued difficulty in this regard will strengthen future requests for exemptions.

Although NTIA does not endorse the originally contemplated version of the proposed class, we believe proponents have demonstrated that access controls used in video game consoles restrict access to highly functional elements of code that inhibit users' ability to repair or replace hardware components on their own.[39] Console owners may need to obtain unlicensed repairs when the console is out of warranty or when the console and authorized replacement parts are no longer on the market.[40] In this situation, the console owner is clearly harmed, the device is inoperable without the repair and the owner of the device has no other option but to circumvent the access controls in order to repair the device.[41]

Unique identifiers embedded in console hardware prevent consoles from recognizing unauthorized hardware components.[42] Users must access, and then copy or replace, the unique identifiers to successfully integrate new or modified components with the original console.[43] Making *de minimis* modifications to these functional aspects of firmware code does not implicate content owners' exclusive rights.[44] To the extent that these TPMs protect a copyrighted work in the non-functional elements of the firmware code, an exemption is necessary to fulfill the noninfringing purpose of altering the code to make repairs to the console. Accordingly, a narrow exemption limited to unauthorized repairs would not undermine console manufacturers' existing business models or hinder innovation in the video game industry. Because NTIA believes only an exemption for repairs is warranted at this time, NTIA suggests the Copyright Office consider exempting the following class of works from the prohibition against circumvention:

---

[37] *Joint Creators and Copyright Owners Comments* at 26-27.

[38] *EFF Comments* at 24-25.

[39] *See* Response Letter from Andrew Huang, PhD, to the U.S. Copyright Office regarding Proposed Exemption 3 (*Huang Class 3 Response Letter*), Docket No. RM 2011-7, http://www.copyright.gov/1201/2012/responses/andrew_huang_response_letter_regarding_exemption_3.pdf. ("Video game console hardware consists of multiple subcomponents. Manufacturers often assign electronic IDs to certain system subcomponents, including hard drives, optical disk drives, and peripherals such as game controllers and memory cards. Unfortunately, these are all items subject to frequent wear-out, loss, and/or routine damage.").

[40] *Id.* ("Replacing a worn-out, lost or damaged component requires bypassing the ID check to prevent the user from being locked out of his or her console. Since the ID check is performed by the secured operating system within the console, bypassing the ID check often requires or involves jailbreaking parts of the system. This is true even if the ID is merely a serial number, as the original serial number is remembered by the secured operating system, and bypassing or recovering this record requires a jailbreak.").

[41] *See e.g.*, Comment of Kyle Wiens, CEO IFixit, http://www.copyright.gov/1201/2012/comments/Kyle_Wiens.pdf (arguing that an exemption permitting repairs of this nature would extend the life of consoles and other devices).

[42] *Huang Class 3 Response Letter* at 1.

[43] *Id.*

[44] *See EFF Comments* at 30-33; *see also Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992) (holding the functional authorization elements of a computer program are not copyrightable). Individuals making repairs do not alter or copy any copyrightable elements of the firmware.

> Computer programs that enable video game console hardware to operate with the console operating system, when circumvention is initiated by the owner of the console for the purpose of repairing or replacing malfunctioning hardware, for systems that are obsolete or no longer covered by manufacturer warranty.

NTIA believes this use – repairing a device – is a non-infringing use consistent with exemptions granted in past proceedings, such as for dongles.[45] In this case, obsolescence of a game system means that the system is no longer manufactured, or that replacement or repair is no longer reasonably available in the commercial marketplace.[46] An example of the latter is a console that is no longer covered by manufacturer's warranty, or where the manufacturer no longer accepts the device for repair.[47] This exemption would not authorize circumvention outside this narrow class for other repairs, replacement, or upgrading of hardware or software or for other purposes.[48]

D. Class 4 – Interoperability of Software in Personal Computers

In view of NTIA's strong support for growing the technology economy and for promoting the free flow of information, we appreciate proponents' concern for "software developers who wish to produce and adapt free software for use on personal computing devices, as well as device owners who seek more control over their personal computing through the use of free software."[49] However, based on the record and research into the Secure Boot feature of the Unified Extensible Firmware Interface (UEFI), which is the sole access control mechanism contemplated in connection with this proposed class, NTIA does not support granting the exemption at this time.

---

[45] For example, in 2010 the Librarian granted the dongle exemption using the following wording: "Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete. A dongle shall be considered obsolete if it is no longer manufactured or if a replacement or repair is no longer reasonably available in the commercial marketplace." *2010 Final Rule* at 43839.

[46] *See e.g., Comments of James Evans Turner,* http://www.copyright.gov/1201/2012/comments/James_Evans_Turner.pdf (noting the following in support of this exemption for repairs: "Millions of game consoles are rendered useless after hardware component failures, especially mechanical components like optical drives and hard drives. These systems are usually thrown away and end up in a landfill, contributing to the world-wide electronic waste problem. Through jailbreaking, even devices with failed components can continue to be useful. For example: By installing a hard drive and modified memory card into a Sony PS2, it can run software even when the built-in optical disc drive stops working (a problem that has affected millions of early units).").

[47] A valid repair would also include fixing security flaws or installing security updates when they are no longer available for the device. *See e.g., Comments of Keith D. Jackson,* http://www.copyright.gov/1201/2012/comments/Keith_Jackson.pdf.

[48] Opponents have argued that this exemption, in any form, could have the unintended consequence of encouraging its use for other purposes such as facilitating piracy. This scenario is possible with each exemption granted by the Librarian, but also is an essential element of the balancing of harms to particular users versus possible negative market effects required in this proceeding. 17 U.S.C. § 1201 (a)(C). In this case, NTIA believes that balance weighs in favor of permitting this very narrow exemption for repairs of obsolete systems and that negative effects on the market will be minimal, in any.

[49] Comments of the Software Freedom Law Center (*SFLC Comments*), Docket No. RM 2011-7, http://www.copyright.gov/1201/2011/initial/sflc.pdf.

NTIA is not convinced that Secure Boot constitutes "a technological measure that effectively controls access to a work" protected by U.S. copyright law.[50] Although Microsoft's Windows Hardware Certification Program requires manufacturing partners to implement Secure Boot and pre-install Microsoft's signing key, it is important to note that neither Secure Boot nor UEFI as a whole is actually part of the Windows 8 operating system.[51] The UEFI specification is developed by the Unified EFI Forum, a non-profit trade organization led by a wide range of companies, including AMD, Apple, Dell, IBM, Intel, and Microsoft.[52] There is no evidence that Secure Boot restricts access to Windows 8 or any other work for purposes of protecting copyright. An overview of Secure Boot on the Forum's web site focuses on the feature's benefits as a security mechanism, emphasizing the threat of malware posing as legitimate operating systems.[53] Secure Boot merely uses digital signatures to verify that an operating system came from a trusted source. The feature does nothing to ensure that users are properly licensed to use the operating system being loaded. If the operating system's digital signature can be verified using a key installed in the firmware, UEFI will allow it to boot regardless whether the software is licensed or pirated, and even regardless of whether it is protected by copyright law or released into the public domain. Furthermore, Windows 8 is compatible with millions of existing personal computers that lack Secure Boot because the operating system does not rely on it as an access control.

Both proponents and opponents appear to agree with NTIA's analysis of Secure Boot. In its initial comments, the Software Freedom Law Center notes that "[t]o the extent the firmware lock being circumvented merely prevents unauthorized operating systems from running, it does not protect access to a copyrighted work of the device producer, but rather prevents access to a competing copyrighted work to which the device owner has a license."[54] Secure Boot, if implemented in a fashion that prevents installing new keys or disabling the feature, serves only to prevent alternative operating systems from loading and not to restrict access to the one originally provided. Furthermore, the Business Software Alliance states that Secure Boot was created "to combat the massive threat to consumers and businesses posed by malware and viruses," and "not to 'control . . . access to a work protected under'" U.S. copyright law.[55] Given that neither the purpose nor the function of Secure Boot is to control access to a copyrighted work, NTIA concludes that an exemption is not appropriate under the DMCA.

---

[50] *See* 17 U.S.C. § 1201(a)(1)(A).

[51] Response Letter from the Software Freedom Law Center regarding Proposed Exemption 4 (*SFLC Class 4 Letter*), Docket No. RM 2011-7 (July 9, 2012), available at http://www.copyright.gov/1201/2012/responses/sflc_response_letter_regarding_exemption_4.pdf.

[52] Unified EFI Forum, About Page, http://www.uefi.org/about/ (last visited Sept. 6, 2012).

[53] Jeff Bobzin, Implementing a Secure Boot path with UEFI 2.3.1 (July 2011), http://www.uefi.org/learning_center/UPFS11_P2_SecureBoot_Insyde.pdf (last visited Sept. 6, 2012).

[54] *SFLC Comments* at 11.

[55] Business Software Alliance, Letter to David Carson (July 10, 2012) at 2 (*BSA July Letter*), http://www.copyright.gov/1201/2012/responses/bsa_response_letter_regarding_exemption_4.pdf.

E. Class 5 – Interoperability of Third-Party Applications in Mobile Devices ("Jailbreaking")

The Electronic Frontier Foundation (EFF) requests a continuation of the current exemption that allows the circumvention of access controls to enable a wireless phone to become interoperable with unauthorized but lawfully obtained applications, a practice customarily known as "jailbreaking."[56] EFF also seeks to expand the current exemption to include tablets[57] in addition to smartphones, which were the subject of the previous exemption.[58] EFF asserts that modifying device-operating software to permit interoperability with independently created software is a non-infringing use, and that the Librarian should grant the exemption because technological restrictions "harm competition, innovation, and consumer-choice."[59] The Joint Creators and Copyright Owners oppose both requests, claiming that "circumvention related to mobile phones and tablets increases piracy of applications and is detrimental to the secure and trustworthy innovative platforms that mainstream consumers demand."[60]

As a preliminary matter, NTIA interprets "interoperability" in a matter consistent with the Register's interpretation of the word during the previous proceeding. In making her recommendation to the Librarian, the Register concluded that "when one jailbreaks a smartphone in order to make the operating system on that phone interoperable with an independently created application that has not been approved by the maker of the smartphone or the maker of its operating system, the modifications that are made purely for the purpose of such interoperability are fair uses."[61] The Register clearly understood that proponents were referring to applications that have been written to the particular specifications of the smartphone platform, but that had not been granted official approval by the manufacturer or operating system maker. While in other contexts, "interoperability" may refer to *cross-platform* compatibility (e.g., running an application designed for Android phones on an iPhone), NTIA believes the proponents are using this word in the same fashion as understood during the previous proceeding.

---

[56] EFF refers to this practice as "jailbreaking," while the Joint Creators and Copyright Owners call it "platform hacking." *EFF Comments* at 2; *Joint Creators and Copyright Owners Comments* at 19. Although "platform hacking" is more descriptive, to remain consistent with customary usage by the technological community, NTIA will refer to this practice as "jailbreaking."

[57] EFF defines a tablet as "a personal mobile computing device, typically featuring a touchscreen interface, that contains hardware technically capable of running a wide variety of programs that is designed with technological measures that restrict the installation or modification of programs on the device, and is not marketed primarily as a wireless telephone handset." *See* Email from Marcia Hoffman, Senior Staff Attorney, Electronic Frontier Foundation to Ben Gallant (June 6, 2012), http://www.copyright.gov/1201/2012/responses/eff_letter_regarding_exemption_5_definition_tablet.pdf.

[58] EFF has not provided a definition of "smartphone." Nevertheless, NTIA finds the following definition sufficient for purposes of this proceeding: A smartphone is a device that lets a user make telephone calls, but also adds features that, in the past, a user has found only on a personal digital assistant or a computer, such as the ability to send and receive e-mail and edit documents. *See* Liane Cassavoy, *What Makes a Smartphone Smart*, ABOUT.COM, http://cellphones.about.com/od/smartphonebasics/a/what_is_smart.htm (last visited Aug. 13, 2012).

[59] *EFF comments* at 3-6.

[60] *Joint Creators and Copyright Owners* at 19. Although Joint Creators and Copyright Owners also assert that EFF has failed to establish that the conduct at issue is not covered by §1201(f), NTIA does not comment on whether §1201(f) applies and limits its response as to the applicability of §1201(c).

[61] *2010 Final Rule* at 43830.

NTIA notes that the record shows substantial and unprecedented support for this exemption in this proceeding.[62] The Copyright Office received over 600 individual comments from the general public, as well as a petition signed by over 25,000 individuals who seek to continue the ability to jailbreak their devices.[63] Moreover, the record indicates many non-infringing uses that can be accomplished after jailbreaking. Many use jailbreaking to personalize their phones and to install third-party software applications, increase functionality, or change system settings.[64] Users also jailbreak (or "root," in Android nomenclature) their devices to customize them for certain personal or work uses such as to increase privacy and security settings.[65] Researchers, software developers, and computer engineers jailbreak devices to identify security flaws and to create their own applications.[66] Some consumers resort to jailbreaking because their devices are older and no longer supported by the manufacturer.[67]

---

[62] The jailbreaking exemption was endorsed by a petition signed by over 8,215 people in the 2010 proceeding. The current record contains a similar petition supporting the exemption with over 27,000 signatures.

[63] *See e.g., Comments of Andrew Huang 2*, http://www.copyright.gov/1201/2012/comments/Andrew_Huang_2.pdf (this comment includes names of individuals as co-signers that support both proposed exemptions 3 and 5, as a means "to innovate and take advantage of the device's full potential"; these signatures were evidentially gathered at a website: jailbreakingisnotacrime.org).

[64] *See e.g., Comments of Alexander Alarcon*, http://www.copyright.gov/1201/2012/comments/Alex_Alarcon.pdf (he jailbroke his phone to be able to change system settings, functionality, and obtain unavailable applications such as a stock application); *Comments of Brandon Nelson*, http://www.copyright.gov/1201/2012/comments/Brandon_Nelson.pdf (he jailbroke his iPhone to increase the phone's speed and access to SMS (ability to send a text), email, and other functionality); Comments of Brian Johnson, http://www.copyright.gov/1201/2012/comments/Brian_Johnson.pdf (he jailbroke his Motorola Droid X to be able increase functionality such as editing calendar pages; he also jailbroke his HP Touchpad tablet to be able to upload a new OS since the tablet has been discontinued by the manufacturer); *Comments of Austin J. Salazar*, http://www.copyright.gov/1201/2012/comments/Austin_J_Salazar.pdf (he jailbroke his iPhone to obtain an application not available at the Apple Store that encrypts private or sensitive information such as credit card information).

[65] *See e.g., Comments of Shawn P. Thomas*, http://www.copyright.gov/1201/2012/comments/Shawn_%20P_Thomas.pdf (he jailbroke his iPod Touch and Android to customize and enhance usability); *Comments of Cameron Miller*, http://www.copyright.gov/1201/2012/comments/Cameron_Miller.pdf (she jailbroke her iPhone to get around settings and install certain communications software that are incompatible with handling of healthcare and academic records); *Comments of Rhona Mahony*, http://www.copyright.gov/1201/2012/comments/Rhona_Mahony.pdf (she jailbroke her and her daughter's phones to keep identity and location private and to encrypt voice and data for work and personal use).

[66] *See e.g., Comments of Edward DeMeulle*, http://www.copyright.gov/1201/2012/comments/Edward_DeMeulle.pdf (permit developers to experiment with new ideas); *Comments of Ian Darke*, http://www.copyright.gov/1201/2012/comments/Ian_Darke.pdf (IT professional that jailbroke his iPhone to upload an application that permits him to access his work's Virtual Private Network, an application for which is not otherwise available); *See e.g., Comments of James Evans Turner*, http://www.copyright.gov/1201/2012/comments/James_Evans_Turner.pdf (he jailbroke his iPhone to install security patches before the manufacturer provides a fix and may be used when the manufacturer no longer supplies fixes.); *Comments of James Coleman*, http://www.copyright.gov/1201/2012/comments/James_Coleman.pdf (he uses to write custom software applications); *Comments of Kacey Coughlin*, http://www.copyright.gov/1201/2012/comments/Kacey_Coughlin.pdf (IT professional and applications developer jailbreak devices to test apps and code, customize settings, increase security, and kill processes to better troubleshoot.).

[67] *See e.g., Comments of Adam Thiede*, http://www.copyright.gov/1201/2012/comments/Adam_Thiede.pdf (he jailbroke an older Android device to be able to upload more current firmware and OS obtained from the

Equally noteworthy, the record is also now better developed than the 2010 proceeding, when the market for mobile applications was relatively nascent.[68] In the three years since the Librarian adopted the current exemption, the number of mobile applications has grown at an exponential rate.[69] The evidence makes it clear that the mobile application market has thrived, and continues to do so, despite – and possibly in part because of – the current exemption. Furthermore, the record indicates that the current exemption has not hampered or deterred innovation; to the contrary, while in 2010 the focus was primarily on Apple's iPhone,[70] customers currently benefit from a much greater choice in mobile devices from an increasing number of manufacturers and distributors. In fact, the number of mobile phones in use now exceeds the U.S. population.[71] Many adults have more than one wireless device, including smartphones, tablets, and wireless cards.[72] In sum, it would be difficult to suggest, given considerable evidence to the contrary, that the exemption has harmed device manufacturers or software developers.[73]

The only opponents of this class in the current proceeding are the Joint Creators and Copyright Owners who assert that circumvention of access controls to allow software interoperability increases piracy and is detrimental to secured platforms.[74] However, NTIA is not convinced that such claims weigh against the need for an exemption for two reasons. First,

---

community); *Comments of Mark W. Rigler, Ph.d.* http://www.copyright.gov/1201/2012/comments/Mark_W._Rigler.pdf (he jailbroke in order to download applications that enhance memory and performance of an older phone).

[68] The record in 2010 with regards to this exemption was primarily aimed at Apple and its newly released product, the iPhone. *See generally 2010 Register's of Copyright Recommendation* at 77-105.

[69] In 2008, the reported number of mobile applications (apps) was approximately 8,000. The 100,000-apps milestone was passed in December 2009 and, as of December 2011, the number of apps exceeded one million. *See* Shelly Freierman, *One Million Apps, and Counting*, NEW YORK TIMES, Dec. 11, 2011, *available at* http://www.nytimes.com/2011/12/12/technology/one-million-apps-and-counting.html; *see also* Sonja Hickey, *2012 Prediction: Number of Mobile Apps Increases by Factor of 10*, APM DIGEST, Jan. 5, 2012, *available at* http://apmdigest.com/2012-prediction-number-of-mobile-apps-increases-by-factor-of-10 (noting that the number of applications available across all four major smartphone platforms (iOS, Android, BlackBerry, and Windows), as of December 5, 2011, is 987,863. That's an estimate of 2,000 applications being released daily).

[70] Library of Congress, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (*2010 Librarian Order)*, Docket No. RM 2008–8, *Final Rule*, 75 Fed. Reg. 43825, 43828 (July 27, 2010) (exemptions codified at 37 C.F.R. § 201.40(b)(1)-(6)), *available at* http://www.copyright.gov/fedreg/2010/75fr43825.pdf.

[71] Cecilia Kang, *Number of Cell Phones Exceeds US Population – CTIA Trade Group*, WASHINGTON POST, Oct. 11, 2011, *available at* http://www.washingtonpost.com/blogs/post-tech/post/number-of-cell-phones-exceeds-us-population-ctia-trade-group/2011/10/11/gIQARNcEeL_blog.html (highlighting that the number of mobile devices rose nine percent in the first six months of 2011, to 327.6 million — more than the 315 million people living in the U.S., Puerto Rico, Guam and the U.S. Virgin Islands. Wireless network data traffic rose 111 percent, to 341.2 billion megabytes, during the same period).

[72] *Id.*

[73] NTIA also notes that mobile apps development has evolved into an international phenomenon. The global market now generates billions of dollars in revenue as demonstrated by a year-old study, which found that worldwide mobile application store revenue is projected to surpass $15.1 billion in 2011, both from end users buying applications and applications themselves generating advertising revenue for their developers. This is a 190 percent increase from 2010 revenue of $5.2 billion. *See* Press Release, Gartner Says Worldwide Mobile Application Store Revenue Forecast to Surpass $15 Billion in 2011 (Jan. 26, 2011), *available at* http://www.gartner.com/it/page.jsp?id=1529214.

[74] *Joint Creators and Copyright Owners Comments* at 19.

these assertions strike a similar chord to those raised in the 2010 proceeding, when Apple was concerned with its reputation and further believed that jailbreaking would "breach the integrity of the iPhone's ecosystem."[75] A few years later, the record now shows that the iPhone has enjoyed tremendous popularity and continues to be one of the most popular mobile devices among users today.[76] Second, the exemption also has not prevented other manufacturers from introducing new devices fostering innovation and competition. Consumers in today's mobile market enjoy a vast array of choices both as to devices and services. Therefore, at this juncture, the detrimental effects the opponents allege are speculative in nature.

Having analyzed the record, NTIA is persuaded that designating a class of works that would continue to permit jailbreaking for purposes of interoperability will not adversely affect "the market for or value of the copyrighted works" and will provide relief from the harm proponents demonstrate.[77] Accordingly, NTIA supports the proposed EFF exemption with a few modifications as supported by the record:

Current Exemption[78]	**Proposed Exemption**
Computer programs that enable wireless telephone handsets to execute software applications, where circumvention is accomplished for the sole purpose of enabling interoperability of such applications, when they have been lawfully obtained,[79] with computer programs on the telephone handset.	Computer programs that enable wireless telephone handsets <u>or tablets</u> to execute lawfully obtained software applications, where circumvention is undertaken for the purpose of enabling interoperability of such applications with computer programs on the <u>device</u>.

[75] *2010 Librarian Order* at 43830. NTIA also notes that Apple did not oppose the current proposal to continue the exemption.

[76] Several reports highlight the popularity of Apple's iPhone and other Apple products. *See e.g.*, Andre Couts, *Apple iPhone More Popular Than All Android Smartphones in U.S. Combined in 4Q: Report*, DIGITAL TRENDS, Jan. 25, 2012, http://www.digitaltrends.com/mobile/apple-iPhone-more-popular-than-all-android-smartphones-in-us-combined-in-q4-report (highlighting that Apple's market share has doubled over the past year alone, while Android devices have fallen about 5 percent, from a high of 50 percent); Nielsen Wire, *More US Consumers Choosing Smartphones as Apple Closes the Gap on Android*, Jan. 18, 2012, http://blog.nielsen.com/nielsenwire/consumer/more-us-consumers-choosing-smartphones-as-apple-closes-the-gap-on-android; John Paczkowski, *Daddy, I Want an iPhone Now!*, ALLTHINGSD, Apr. 4, 2012, http://allthingsd.com/20120404/daddy-i-want-an-iPhone-now (noting that 40 percent of teens that don't have an iPhone are expecting to buy one in the next six months).

[77] 17 U.S.C. §1201(a)(1)(C)(iv).

[78] 37 C.F.R. § 201.40(b)(2).

[79] NTIA considers the new language in the proposed exemption to be simpler while still making it clear that circumvention is meant to enable the use of lawfully obtained applications. However, NTIA would not be opposed to including this phrase in the final exemption: "when they have been lawfully obtained."

Wireless Telephone Handsets or Tablets

NTIA is persuaded that the modified language better reflects today's technology.[80] Additionally, this exemption should apply across platforms and devices where it is necessary to jailbreak or root devices. The record is clear that this exemption is needed for multiple platforms (including, for example, both Android and Apple devices), on both mobile phones and tablets.[81] Moreover, NTIA believes that this change will serve to minimize any confusion on the part of the user. Therefore, NTIA suggests the inclusion of the language "wireless telephone handsets or tablets" to dispel any uncertainty and to further meet current consumer expectations.

Device

The modification is suggested to maintain consistency with the previous change. The term "device" is meant to include both wireless telephone handsets and tablets.

Definition of Tablet

After reviewing the record, NTIA supports EFF's proffered definition of "tablet," noting that this definition appropriately does not constrain the physical dimensions of such a device:

> ...[A] personal mobile computing device, typically featuring a touchscreen interface, that contains hardware technically capable of running a wide variety of programs and is not marketed primarily as a wireless telephone handset or as a smartphone.[82]

F. Class 6 – Mobile Phone Unlocking for Network Interoperability

As NTIA noted in the previous proceeding in 2010, proposed exemptions for unlocking mobile phones "raise important issues at the intersection of competition, communication, and copyright law."[83] That statement was true then and remains true today. Proponents request renewal of the current exemption to maintain the ability of users to unlock their wireless devices

---

[80] *EFF Comments* at 2-4.

[81] The record provides examples of all types of devices and the various non-infringing uses and should remain general. *See e.g., Comments of Josh McCullough*, http://www.copyright.gov/1201/2012/comments/Josh_McCullough.pdf (he states, in part, that he has an Android phone called "an HTC Evo 4G on the Sprint network, and within one month of purchasing it in March 2011 I had rooted the phone and installed a custom software/operating system called Cyanogenmod that allowed my phone to run more smoothly, save internal memory, erase unwanted applications that were included with the factory-stock operating system, and modify the user interface outside the limitations of the stock software.")

[82] Email from Marcia Hoffman, Senior Staff Attorney, EFF, to Ben Golant, June 6, 2012, http://www.copyright.gov/1201/2012/responses/eff_letter_regarding_exemption_5_definition_tablet.pdf. This definition is intended to include the Apple iPod Touch as well as the iPad and other similar devices, no matter the size.

[83] *Strickling Letter 2009* at 8.

to connect to the provider of their choice.[84] Proponents also seek an expansion of the current language to include all wireless devices, and both data and voice networks.[85] CTIA, the primary opponent of this proposed class, rejects any further expansion of the current language and has instead proposed to narrow the scope of the exemption.[86]

The record continues to support the conclusions made by the Librarian in the 2010 proceedings. First, proponents have presented a *prima facie* case that "the prohibition on circumvention has had an adverse effect on noninfringing uses of firmware on wireless telephone handsets."[87] This is the same type of activity that was at issue in both the 2006 and 2010 proceedings, when the Librarian granted exemptions.[88] Second, while opponents claim that access controls on network operability protect rights granted by copyright law, it continues to be clear that "the primary purpose of the locks is to keep consumers bound to their existing networks, rather than to protect the rights of copyright owners in their capacity as copyright owners."[89] Therefore, after analyzing the evidence introduced by the parties, NTIA is persuaded that an exemption continues to be necessary to permit consumers affected by access controls to unlock their phones.

Alternatives to Circumvention

CTIA argues that alternatives to circumvention now available to consumers make an exemption unnecessary. They discuss at least two alternatives: (1) wireless carriers have implemented policies allowing consumers to unlock mobile phones in certain limited

---

[84] Comments of Consumers Union (*CU Comments*) at 2, Docket No. RM 2011-7, http://www.copyright.gov/1201/2011/initial/consumers_union.pdf; Comments of Youghiogheny Communications, LLC (*Youghiogheny Comments*) at 1, Docket No. RM 2011-7, http://www.copyright.gov/1201/2011/initial/youghiogheny_comm.pdf; Comments of MetroPCS Communications, Inc. (*MetroPCS Comments*) at 1, Docket No. RM 2011-7, http://www.copyright.gov/1201/2011/initial/metropcs.pdf; Comments of RCA – The Competitive Carriers Association (*RCA Comments*) at 1, Docket No. RM 2011-7, http://www.copyright.gov/1201/2011/initial/rca.pdf.

[85] *CU Comments* at 2-5; *Youghiogheny Comments* at 2-5; *MetroPCS Comments* at 4-8; *RCA Comments* at 7-11.

[86] Comments of CTIA – The Wireless Association (*CTIA Comments*) at 63, Docket No. RM 2011-7, http://www.copyright.gov/1201/2012/comments/Bruce_G._Joseph.pdf. The Joint Creators and Copyright Owners take no position on this proposed class, but recommend that "the Register ... proceed[s] cautiously and only recommend a narrowly tailored exemption, if the proponents meet their burden." *Joint Creators and Copyright Owners Comments* at 32.

[87] *2010 Librarian Order* at 43830.

[88] *See 2010 Librarian Order* at 43830-32; *see also* Library of Congress, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Docket No. RM 2005-11, *Final Rule*, 71 Fed. Reg. 68472, 68476 (Nov. 27, 2006), *available at* http://www.copyright.gov/fedreg/2006/71fr68472.pdf (*2006 Librarian Order*).

[89] *2010 Librarian Order* at 43831; *2006 Librarian Order* at 68476 (the Librarian similarly concluded then that "the access controls do not appear to actually be deployed in order to protect the interests of the copyright owner or the value or integrity of the copyrighted work; rather, they are used by wireless carriers to limit the ability of subscribers to switch to other carriers, a business decision that has nothing whatsoever to do with the interests protected by copyright").

circumstances,[90] and (2) consumers can now purchase a wider range of unlocked devices.[91] NTIA does not believe either option to be a fully viable alternative to circumvention.

While the record does show that some carriers are unlocking wireless devices on behalf of their customers, it also indicates that carriers generally will only perform this service under certain conditions. Those conditions include, for example, minimum days of continuous service,[92] the expiration of handset exclusivity associated with the carrier,[93] a minimum usage of credit,[94] or prior proof of purchase.[95] While such policies may, in some circumstances, provide an alternative to circumvention, the evidence presented in the record does not obviate the need for an exemption for several reasons. First, it is unlikely that these policies will serve a large portion of device owners. For example, the common denominator present in the cited terms and conditions is that the owner of the phone must be a current "customer" or "subscriber" of the carrier requested to unlock the phone.[96] This requirement excludes those that obtain a device from a family member, relative, friend, or other lawful source; those users must then resort to the current exemption to unlock such devices, especially if they cannot locate the original proof of purchase. Second, some carriers refuse to unlock certain devices. For example, until recently[97] AT&T's terms deemed the Apple iPhone as "not eligible to be unlocked."[98] An exemption is thus warranted to allow iPhone users, as well as users of other devices excluded by such policies, to unlock their devices.[99] Third, an exemption continues to be needed because some of the policies cited dictate that, in order to unlock a device, the carrier must have the necessary code or the ability to reasonably obtain it, therefore it is possible for a consumer to meet the unlocking policy and still be unable to have his device unlocked if the carrier does not possess or is unable to obtain the required information.[100]

---

[90] *See CTIA Comments* at 8-10 (CTIA introduced the policies of Verizon Wireless, AT&T, T-Mobile, Virgin Mobile, and MetroPCS).

[91] *See CTIA Comments* at 44.

[92] *See CTIA Comments* at 8-10 (e.g., T-Mobile generally requires a minimum of 40 days of service, and 60 days and at least $10.00 or a prior refill within the last 30 days if it's a prepaid account; AT&T requires 90 days and the customer's account to be current and in good standing).

[93] *See CTIA Comments* at 8-10.

[94] *See CTIA Comments* at 8-10. (*e.g.*, T-Mobile requires $10.00; Virgin Mobile prepaid customers can have their phones unlocked if they have spent at least $80.00 of recharge credit).

[95] *See CTIA Comments* at 8-10.

[96] *See CTIA Comments* at 8-10.

[97] News reports indicate that AT&T will now unlock iPhones under certain circumstances. NTIA is encouraged by this development, but does not change its position with respect for the need of the exemption for the reasons detailed above. *See e.g.*, http://thenextweb.com/mobile/2012/04/08/atts-iphone-unlock-process-detailed-a-quick-online-chat-apple-does-the-unlocking-requires-imei-only/.

[98] *Id.* at 9 (AT&T also notes that "certain other devices" are not eligible to be unlocked but does not disclose exactly which devices).

[99] *See e.g., Comments of Nancy Wallis* (*Comments of Nancy Wallis*), http://www.copyright.gov/1201/2012/comments/Nancy_Wallis.pdf (she lives in Montana and purchased a used iPhone, which she had to unlock and change from the original carrier to a local one.)

[100] *CTIA Comments* at 8-9.

NTIA is not persuaded that the current availability of unlocked devices or carriers unlocking devices warrants denying this exemption.[101] First, carriers may not unlock certain devices. For example, proponents note that certain carriers have policies locking devices to their network or will not unlock certain devices or provide codes for unlocking.[102] Next, proponents further point out that while at least one carrier sells certain phones that are unlocked, many legacy phones and even prepaid phones are still locked to this carrier. While NTIA does not advocate here that all phones must be unlocked in order to obviate the need for this exemption, the record demonstrates that the majority of phones remain locked.[103] Additionally, circumstances may dictate the need to unlock to connect to an available carrier, even when a currently owned device is ineligible for carrier unlocking. For example, customers may relocate or live in an area without coverage or with poor coverage and desire to switch carriers for better service.[104]

CTIA has further indicated that "[u]nlocked (unsubsidized) phones are freely available from third party providers – many at very low prices."[105] CTIA then suggests that "[i]f a consumer seeks to connect to a preferred wireless carrier, phones that will enable him or her [to] do so are readily available in the marketplace for a fee."[106] Therefore, "there is no reason to create an exemption to the statutory prohibition simply to enable the user to keep using the old phone."[107]

Therefore, in determining whether a proposal is a viable alternative to circumvention of access controls, the Register should consider not just whether there are other devices available to achieve the non-infringing use, but also whether users can avail themselves of the suggested alternatives without encountering significant barriers. For example, these barriers may include prohibitive costs to unlock, lack of attractive or popular devices for unlocking, or requiring the consumer to purchase a new device. In particular, NTIA does not support the notion that it is an appropriate alternative for a current device owner to be required to purchase another device to switch carriers.[108]

In sum, NTIA commends the decisions of certain wireless companies to provide an alternative to circumvention and encourages others to follow suit. Not only do these policies avoid the need to circumvent in some circumstances, but they also help those users that may not

---

[101] The Federal Communications Commission reports that "most handsets sold in the United States are 'locked,' meaning that they normally will operate only on a single wireless network, . . . The ability of a consumer to unlock a handset depends on the service provider." *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Fifteenth Report*, 26 FCC Record 9664, at 152 (*FCC Fifteenth Report*) http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-103A1.pdf.

[102] Reply Comments of MetroPCS Communications, Inc. on the Notice of Proposed Rulemaking, Docket No. RM 2011-07 (March 2, 2012) (*MetroPCS Reply Comments*), http://www.copyright.gov/1201/2012/comments/reply/metropcs_communications.pdf (citing to AT&T policies)

[103] *FCC Fifteenth Report* at 152.

[104] *Comments of Nancy Wallis* at 1; *MetroPCS Reply Comments* at 19.

[105] *Id.* at 5.

[106] *Id.* at 44.

[107] *Id.*

[108] *RCA Comments* at 3 (citing *FCC Fifteenth Report* at 152).

have the necessary technological skills or required equipment to unlock their devices. However, at this juncture, an exemption remains necessary.

Exemption Language

Having analyzed the record and the different proposals submitted, NTIA recommends that the Librarian designate a class of works that would continue to permit circumvention to allow network interoperability in wireless devices because such exemption will not adversely affect "the market for or value of the copyrighted works," and will provide relief from the harm detailed by the proponents.[109] Accordingly, the following exemption accepts several of the proposed modifications to the 2010 exemption, but also strikes a balance with the opponents' concerns and the current state of the marketplace. As the underlined text indicates below, the proposed exemption is substantially similar to the one the Librarian adopted in 2006 and 2010.[110]

Current Exemption[111]	**Proposed Exemption**
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 telecommunications network and access to the network is authorized by the operator of the network.	Computer programs, in the form of firmware or software (including data used by those programs) that enable used wireless devices to connect to a wireless network that offers telecommunications and/or information services, where circumvention is initiated by the owner of the copy of the computer program to connect to a wireless network that offers telecommunications and/or information services and access to the network is authorized by the operator of the network.

Data Used by Those Programs

NTIA is persuaded by proponents that the language "including data used by those programs" is warranted to provide clarity, because "the required adjustments for [network] interoperability often do not require changing large sections of code but, rather, accessing and changing the data that is used by such code."[112] This rationale is consistent with the Librarian's 2010 determination that such minor alterations of data do not rise to the level of infringing the rights

[109] 17 U.S.C. §1201(a)(1)(C)(iv).

[110] *See 2010 Librarian Order* at 43829, *2006 Librarian Order* at 68479-80.

[111] 37 C.F.R. § 201.40(b)(3).

[112] *See Youghiogheny Comments* at 2, *MetroPCS Comments* at 4 (MetroPCS asserts that such modifications are consistent with the 2010 conclusions of the Librarian and the Copyright office).

of copyright owners.[113] NTIA is persuaded by the record that such rationale remains sound and supports the modification.

Wireless Devices

Regarding "wireless devices," NTIA is persuaded by proponents that the modification is needed to better reflect the current marketplace and to avoid confusion.[114] The line that distinguishes a mobile phone from other wireless devices is increasingly disappearing,[115] and this effect is only exacerbated by the introduction of tablets and devices characterized as "hybrids"[116] that are fully capable of connecting to wireless communications networks. This change is intended to ensure that the exemption can be utilized by the owners of wireless devices that are capable of connecting to a wireless communications carrier, including but not limited to smartphones, tablets, and hybrid devices.

NTIA does not concur with the opponents' claim that a case must be made for *each* device before an exemption for unlocking purposes is granted.[117] This proceeding requires the Librarian to "publish any class of copyrighted works for which the Librarian has determined . . . that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected, and the prohibition [against circumvention] shall not apply to such users with respect to such class of works."[118] Thus, the focus is to determine the particular "class of copyrighted works" that would be exempted from the prohibition against circumvention, not to ascertain where such works may appear. Simply put, the purpose of this exemption is to allow any device technically and otherwise legally capable of connecting to a wireless communications network to do so, despite the presence of relevant access controls that prevent such ability. Accordingly, NTIA supports the modification.

Wireless Network that Offers Telecommunications and/or Information Services

Proponents suggest changing the current "telecommunications network" language to "communications networks" for clarification purposes. Consumers Union proposes the modification with the understanding that "both telecommunications and information services fall under the umbrella of 'communications network'."[119] Likewise, MetroPCS seeks the change to eliminate "ambiguity surrounding whether data-centric devices . . . can be unlocked for the purposes of substantially operating over a competing carrier's data network.[120] Given that the

---

[113] *2010 Librarian Order* at 43831 ("[w]hen specific codes or digits are altered to identify the new network to which the phone will connect, those minor alterations of data [] do not implicate any of the exclusive rights of copyright owners").

[114] *CU Comments* at 2; *Youghiogheny Comments* at 2; *MetroPCS Comments* at 4-5.

[115] *CU Comments* at 2; *Youghiogheny Comments* at 2; *MetroPCS Comments* at 4-5.

[116] Devices such as the Samsung Galaxy Note are marketed as "offering the best of a smartphone with the best of a tablet" thereby rendering a hybrid or a "phablet." *See* Melissa Daniels, *Galaxy Note "Phablet" is a Hybrid Hit*, MOBILEDIA (Mar. 28, 2012), *available at* http://www.mobiledia.com/news/135375.html.

[117] *Joint Creators and Copyright Owners Comments* at 33; *CTIA Comments* at 53-55.

[118] 17 U.S.C. § 1201(c).

[119] *CU Comments* at 4-5.

[120] *MetroPCS Comments* at 6.

networks of wireless carriers are now able to increasingly serve as the conduit for the transmission of different type of information including voice signals, text messages, and Internet data, NTIA is persuaded that the better terminology in current commerce is "wireless network that offers telecommunications and/or information services." NTIA notes that this language is a departure from what either the proponents or the opponents advocate, but the term "communications network" is not a settled term in the law, and our proposed language is more consistent with the Telecommunications Act nomenclature.[121] This additional language both captures the essence of what the proponents are seeking and reflects the current state of the wireless industry.

G. Classes 7 and 8 – Audiovisual Works for Educational Purposes, Documentaries, Multimedia e-Books, and Noncommercial Videos

The current exemption permits circumvention for (1) educational use by college and university professors and film and media studies students; (2) documentary films; and (3) noncommercial videos.[122] This exemption embodies the values of the triennial proceeding, which is aimed at promoting non-infringing uses such as fair use. NTIA is cognizant of the piracy issues presented by the opponents, but emphasizes that these exemptions are neither aimed at, nor capable of, legalizing infringement of copyrighted works. NTIA also finds it compelling that the current version of this exemption has been in place for six years, with some limited expansion in 2010, and opponents have not presented any evidence of abuse or harm to content owners over that time period. To the contrary, the record indicates that the current exemption is working as intended.[123]

Opponents argue there are sufficient alternatives to circumventing online video and fixed-disc media, including screen capture software, cell phone capture, license agreements, and video

---

[121] See 47 U.S.C. § 153(24) ("The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . ."); 47 U.S.C. § 153(53)("The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public . . . ."); 47 U.S.C. § 153(50)("The term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.")

[122] 37 C.F.R. § 201.40 (b)(1)(i)-(iii).

[123] *EFF Comments* at 38-43; Comments of the University of Michigan Library (*UMichigan Comments*) at 1-4, Docket No. RM 2011-7, http://www.copyright.gov/1201/2011/initial/levine_u_michigan_library.pdf (citing multiple uses of audiovisual works in the arts and sciences); Comments of the International Documentary Association [sic] *et al.* (*IDA Comments*) at 4-6, Docket No. RM 2011-7, http://www.copyright.gov/1201/2011/initial/IDA_Mark_Berger.pdf; Comments of Peter Decherney *et al.* (*Decherney Comments*), Docket No. RM 2011-7, http://www.copyright.gov/1201/2011/initial/peter_decherney.pdf (noting that "[t]he current exemption has been used to teach courses in subjects as varied as Biology, South Asian Studies, English, History, Art History, Communication, Film, Law, Drama, and Sociology. As a result of this exemption, professors have cut down on the time previously spent switching discs and clicking through menus and advertisements; it has improved the quality of clips that can be used in class; and it has allowed both professors and media studies students to make clips from films, television shows, and DVD extras that are not available in other formats and are extremely valuable for teaching. Most importantly, the exemption has permitted professors and media studies students to take advantage of presentation and editing software that enables them to show clips side-by-side, mix clips with stills and text on the same screen, and annotate clips with voiceover narration and/or hand-drawn notes.).

clip websites.[124] NTIA staff were able to experience firsthand some of these contemplated alternatives during presentations held at the Copyright Office with the parties involved. After taking those options into consideration, however, NTIA does not believe that there exist sufficient alternatives to obviate the need for an exemption due to several factors. Generally, the technological alternatives produce low-quality videos, and associated license agreements often impose significant content limitations on the final work product. Documentarians and filmmakers are particularly hindered by poor quality video, which does not meet the industry's strict technical standards.[125] As for educators and students, screen capture software and hardware may not be universally available due to high costs and tight budgets,[126] and even those educators and students that are able to access such software and hardware may find the quality insufficient for the pedagogical purpose and distracting in a classroom setting.[127] Finally, proponents argue that video clip websites offer too limited of a selection to serve fair use needs in most cases.[128] Furthermore, proponents have introduced evidence supporting the conclusion that copyright license negotiations are expensive and burdensome, especially when the licensee seeks to critique the copyrighted work.[129] Proponents note that these burdens alone provide ample reason to support exemptions for documentary filmmakers, consistent with the Register's previous recommendation.[130]

Therefore, with the following consideration, NTIA supports a continuation of the current exemption as well as several proposed expansions described below.

Current Exemption[131]	**Classes 7 and 8 Proposed Exemption**
Motion pictures on DVDs that are lawfully made and acquired and that are protected by	Motion Pictures and other similar audiovisual works[132] on DVDs or delivered via

[124] *See e.g.*, Comments of the DVD Copy Control Association (*DVDCCA Comments*), Docket No. RM 2011-7, http://www.copyright.gov/1201/2012/comments/DVD%20CCA.pdf.

[125] *IDA Comments* at 15.

[126] *See* Transcript, Hearing on Exemption to Prohibition on Circumvention of Copyright Protections Systems for Access Control Technologies, Section 1201 – Digital Millennium Copyright Act, 105 (June 4, 2012) (*June 4 Transcript*), http://www.copyright.gov/1201/hearings/2012/transcripts/section%20_1201%20_06-04-2012.pdf (mentioning the higher costs of better quality software). Proponents also suggest many educators might not have the technical knowledge to operate screen capture software. *Id.* at 112.

[127] Comments of the Media Education Lab at the Harrington School of Communication and Media at the University of Rhode Island (*URI Comments*) at 10-11, Docket No. RM 2011-7, http://www.copyright.gov/1201/2011/initial/media_edu_lab.pdf; *June 4 Transcript* at 32.

[128] Reply Comments of Peter Decherney *et al.* (*Decherney Reply*) at 5-6, Docket No. RM 2011-7, http://www.copyright.gov/1201/2012/comments/reply/peter_decherney.pdf.

[129] *Decherney Reply* at 9-10; *IDA Comments* at 15-17 (One presenter described numerous difficulties in attempting to get permission to utilize ten seconds of the motion picture "Toy Story.").

[130] This may include Errors and Omission insurance, which by itself may impose a burden on some filmmakers, but should be utilized when available. *See Decherney Reply* at 7 ("media insurers issue fair use endorsements on E&O insurance, but only when supported by both an opinion letter from an attorney asserting that the use of the copyrighted materials comports with the doctrine of fair use and an independent assessment by the media insurance company.").

[131] 37 C.F.R. § 201.40(b)(1)(i)-(iii).

[132] Some proponents propose the use of the term "audiovisual works" while others propose the use of "motion picture" to define the class of work contemplated for this exemption. NTIA believes the former term better reflects

the Content Scrambling System when circumvention is accomplished solely in order to accomplish the incorporation of short portions of motion pictures into new works for the purpose of criticism or comment, and where the person engaging in circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use in the following instances: (i) Educational uses by college and university professors and by college and university film and media studies students; (ii) Documentary filmmaking; (iii) Noncommercial videos	Internet Protocol that are lawfully made and acquired when circumvention is accomplished solely in order to incorporate short portions of audiovisual works into new works for the purpose of fair use,[133] and where the person engaging in circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use in the following instances: (i) Educational Uses by College and University Professors and College Students; (ii) Educational Uses by K-12 Educators; (iii) Documentary Filmmaking; (iv) Primarily Noncommercial Videos; (v) Nonfictional or Educational Multimedia e-Books

Content Delivered via Internet Protocol

Proponents seek to circumvent access controls on IP-delivered video and Blu-Ray discs in addition to DVDs. While it is difficult to exhaustively identify the specific access controls online video distributors use to protect IP-delivered works, it is clear that they exist.[134] Online content is becoming more prevalent, with many works delivered exclusively through an online platform.[135] Proponents have convincingly demonstrated a need to access such works; therefore, NTIA supports the inclusion of content streamed via Internet Protocol.

---

the record in this case, which now includes television programs such as news that are contained on DVDs or delivered via Internet Protocol. NTIA notes that in some cases, television programs, for example, have been defined as audiovisual works, but have not been defined as "motion pictures." *See WGN Continental Broadcasting Co. v. United Video, Inc.*, 693 F.2d 622 (7th Cir. 1982). We believe this exemption should include these types of works and the record supports this notion. This expansion should not include some other works that may be defined by copyright law as "audiovisual works," such as video games. The record does not support the expansion of this exemption to include these other works. *See* 17 U.S.C. § 101; *see e.g., Midway Mfg Co. v. Artic Intern'l, Inc.*, 704 F.2d 1009 (7th Cir. 1983)(defines video games as audiovisual works under copyright law). NTIA therefore supports the statutory class as stated in 17 U.S.C. §101 used here with a slight modification: "Motion pictures and other similar audiovisual works ..." to keep the exemption narrow.

[133] NTIA does not include the phrase "for the purpose of criticism or comment" in the proposed exemption because that phrase is too narrow. Instead, the phrase "for the purpose of fair use" is more appropriate as it includes those uses defined by the 17 U.S.C. §107, such as criticism, comment, news reporting, teaching, scholarship, and research. The record contains examples of these uses.

[134] *Decherney Reply* at 14. Proponents have explained that online distributors constantly change access controls with ease.

[135] *Id.* at 13.

NTIA is not prepared, however, to support extending the exemption to include audiovisual works on Blu-Ray discs at this time. DVD is the dominant format and, in concert with the inclusion of IP-delivered video, provides a sufficient alternative to circumventing access controls used in Blu-Ray media.[136] A vast majority of content is released in both DVD and Blu-Ray formats, with very few works released exclusively on Blu-Ray. Should proponents need access to high-definition content, NTIA's proposed exemption is intended to include high-definition media delivered online.[137]

All College and University Professors and College Students; K-12 Educators

The current exemption permits all college and university professors to circumvent for educational uses, but limits student use to those in film and media studies classes.[138] NTIA supports expanding the exemption to include all college and university students, in addition to all K-12 educators.[139] Proponents have demonstrated a need for all higher education students to incorporate audiovisual media into classroom assignments and its benefits to the learning experience.[140] Given the multimedia nature of today's cultural expression, classroom use of video clips is necessary to aid instruction across a wide range of subjects. Proponents have also demonstrated that K-12 classrooms similarly benefit from the inclusion of audiovisual works in lessons and other pedagogical uses.[141] As new technology becomes more prominent in society, classrooms should be encouraged to similarly evolve. Regardless of students' particular field of study, incorporating multimedia teaching methods better prepares them for life in a digital age. NTIA is optimistic that schools will be proactive in preventing abuse of the exemption by educating students and professors on the relevant law, and by developing "best practices" or other guidelines to help clarify any confusion on the part of such users.

Documentary Filmmakers; Primarily Noncommercial Videos

NTIA supports continuing the exemption for documentary filmmakers and noncommercial videos, as well as expanding it to include multimedia e-books. Documentary films are a paradigmatic fair use of copyrighted works and provide beneficial commentary on important issues. Noncommercial videos, such as "vids,"[142] regularly contribute to public discourse by granting the general public the ability to use copyrighted works for non-infringing purposes.[143]

---

[136] *See* Comments of the Advanced Access Content System Licensing Administrator, LLC (*AACSLA Comments*) at 20-24, Docket No. RM 2011-7, http://www.copyright.gov/1201/2012/comments/Bruce_H._Turnbull.pdf.

[137] *See IDA Comments* at 2 (claiming documentarians sometimes need to incorporate high-definition content).

[138] *2010 Librarian Order* at 43827.

[139] NTIA did not support the extension to K-12 educators in 2010 because proponents did not present enough evidence demonstrating harm. *See Strickling Letter 2009* at 4. In this proceeding, the proponents have cited multiple studies and included educator testimony that incorporating video leads to higher levels of student engagement. They have also demonstrated the increasing use of video in the classroom setting. *See also URI Comments* at 5.

[140] *Decherney Comments* at 21-24.

[141] *URI Comments* at 5, 9.

[142] *EFF Comments* at 40 (The EFF explains that "vids" are video remixes created "by combining clips from one or more sources with music, often in order to comment on the works in question.").

[143] *EFF Comments* at 36-37.

NTIA notes that some proponents of the noncommercial video exemption request that the language be "*primarily noncommercial works.*"[144] The noncommercial language is intended to limit uses to those supported by fair use, but it is also true that some commercial uses are also fair use.[145] NTIA believes expanding the language to "primarily noncommercial" would eliminate some confusion about whether a legitimate fair use that may generate some revenue (such as a "vid" posted to a video sharing site) qualifies for the exemption.[146]

Nonfictional and Educational Multimedia e-Books

Proponents advanced a proposed exemption for multimedia e-books that holds great potential for educational and noninfringing uses such as a comment and criticism.[147] Proponents argue that multimedia e-books are "an important and rapidly expanding form of authorship and communication in today's society . . . [and] are capable of intermingling literary and audiovisual materials . . . [where] [f]or the first time, authors can make important visual and audiovisual arguments that were not possible solely with the use of static text and still images."[148] Proponents note that e-books are now capable of processing and storing the multimedia content; however, use of short audiovisual clips is hindered by the prohibition against circumvention.[149] Proponents furnish ample examples of harm when authors attempt to procure licenses to use clips in e-books, including prohibitive costs and terms.[150] The record contains examples and demonstrations by university professors who would use this exemption to create e-books, largely for educational purposes.[151] For example, one author proposes to present an argument in her

---

[144] *Id.* at 57.

[145] *See e.g., Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569 (1994).

[146] EFF provided some additional examples that included a website hosted by a film critic that also generate some revenue from ads to help cover costs of software, equipment and hosting or video editors. *EFF Comments* at 37-38. However, opponents argue that the EFF advocated a definition of primarily noncommercial that is very broad and would open the exemption for nearly "all videos that are not themselves advertisements." *Joint Creators and Copyright Owners Comments*, at 39. NTIA does not believe the latter interpretation would be appropriate. The exemption should be limited to those instances where the work itself is not being made available for sale, rent, or other distribution, and the primary purpose is not to generate income for the creator of the work. Therefore, incidental income generated from ads can be appropriate under this formulation.

[147] This is an example of the utility of conducting this proceeding every three years, as this use of e-books did not exist when the previous proceeding occurred. Multimedia e-books incorporate video and audio content. The content is embedded into the actual e-book file so readers can view or listen to clips as they read the text. *See* Comments of Mark Berger *et al.* (*Berger Comments*), Docket No. RM 2011-7, http://www.copyright.gov/1201/2011/initial/IDA_Mark_Berger.pdf (describing purposes such as criticism, comment, news reporting, teaching, scholarship, or research).

[148] *See e.g., Berger Comments*, at 3.

[149] *Id.* at 5; *see e.g., Comments of Patricia Aufderheide*, University Professor and Director of the Center for Social Media, School of Communication, American University (Feb. 2, 2012), http://www.copyright.gov/1201/2012/comments/Patricia_Aufderheide.pdf (she is using this tool to develop books and teach history and ethics of documentary film, using clips from a PBS *Nova* program entitled "Is Wal-Mart Good for America?" and Brave New Films' *Wal-Mart: The High Cost of Low Price*.).

[150] *Berger Comments* at 7.

[151] *See e.g., Comments of Tony Conrad*, SUNY Distinguished Professor, Department of Media Study, University of Buffalo (Feb. 4, 2012), http://www.copyright.gov/1201/2012/comments/Tony_Conrad.pdf; Comments of University Film & Video Association, Rob Sabal, President (Feb. 9, 2012), http://www.copyright.gov/1201/2012/comments/Robert_Sabal.pdf (increasingly important for scholarly and educational purposes); *Comments of Chiara Ferrari*, Assistant Professor, California State University, Chico,

book comparing "threshold moments" in certain movies, using short clips to demonstrate the point. She notes that written text would be inadequate to describe the scenes, while a visual demonstration is powerful and clear.[152] The record does not support other uses beyond the creation of nonfictional or educational e-books and therefore the exemption should be narrowed using the language "nonfictional or educational."

Fictional Films

Another proposed expansion is the inclusion of "fictional films," which commonly incorporate audiovisual clips to parody or comment on copyrighted works as a form of fair use.[153] NTIA does not believe the record supports this exemption.[154] In essence this exemption expands the exemption granted to documentary filmmakers to include all other filmmakers.[155] Evidence in the record does not provide adequate description or definition of this class of users to suggest otherwise. Furthermore, it is unclear whether this group of filmmakers struggles to obtain licenses for the works they intend to use beyond mere inconvenience, unlike documentary filmmakers.[156] Therefore, NTIA agrees that the proponents have not met the burden for this proposed exemption as presented.[157]

H. Class 9 – Audiovisual Works for Improved Accessibility

With the 21st Century Communications Video Accessibility Act (CVAA), Congress recognized that the information divide is leaving behind persons with disabilities.[158] Proponents

---

http://www.copyright.gov/1201/2012/comments/Chiara_Ferrari.pdf ("I am currently working on an e-book in communication criticism to create an open source text that allows for multiple authors and participants and I anticipate being able to use this exemption for the first and following editions of this book.")

[152] *Berger Comments* at 8 (Bobette Buster is authoring the book *The Use of Cinematic Enchantment: Deconstructing Master Filmakers* where should would like to use film clips from films in the 1970s and 1980s, but can do so without circumventing TPMs on the DVD.) NTIA witnessed a demonstration in the June 4, 2012 hearing that supports this assertion. She demonstrated certain scenes from Toy Story II and III, Schlinder's List, and Godfather to demonstrate the emotion of cinema, among other points, all of which she would like to make in her e-book but cannot without the exemption. Bobette Buster, Film Professor, screenwriter, and producer, Testimony, Washington, D.C., June 4, 2012, Transcript at 169-178.

[153] *IDA Comments* at 6-7; *IDA Reply* at 3-4.

[154] NTIA can imagine situations where an independent filmmaker is producing a fictional film that includes parody or other social commentary, which may include short clips from audiovisual works protected by a TPM, that may qualify as fair use. However, the current record does not give us that example and therefore the case has not been made for fictional films.

[155] NTIA notes that in the record, advocates for the documentary and fictional filmmaking generally only speak to the former and not the latter. In other documents, the advocates simply resort to the shortened term "filmmakers" to describe the class. NTIA is not convinced that the record is developed with evidence of the need for this category. *See e.g., IDA Reply* at 4; Comments of Film Independent, Chicago Filmmakers, Kindling Group, Kirby Dick, Jeffrey Kusama-Hinte, J S Mayank, David Novack, and Laurence Thrush (*Comments of Film Independent, et al.*) http://www.copyright.gov/1201/2012/comments/laurence_thrush.pdf; *Comments of Elizabeth Coffman*, http://www.copyright.gov/1201/2012/comments/Elizabeth_Coffman.pdf (notes her using short clips for documentary films from news and movies, but does not mention fictional filmmaking.)

[156] *See e.g., Joint Creators and Copyright Owners Reply* at 42.

[157] *See e.g., AACSLA Comments* at 25.

[158] *Report of the Senate Committee on Commerce, Science, and Transportation*, Twenty-First Century Communications and Video Accessibility Act of 2010, S. Rep. No. 111-386, at 1-2 (2010) ("If certain current and

introduce four new proposed exemptions that promise improved accessibility to audiovisual works for the visually and hearing impaired. The first two would enable circumvention of access controls on IP-delivered audiovisual works for creating, improving, or rendering: (1) visual representations of audible portions; and (2) audible descriptions of visual portions.[159] The second pair of exemptions would similarly enable creating, improving, or rendering visual representations and audible descriptions from works on fixed-disc media.[160]

In support of these four proposals, proponents assert three particular categories of uses that would benefit from an exemption: research, improvement of accessibility features by third parties ("crowdsourcing"), and individual use.[161] For example, researchers at Gallaudet University aspire to create a software tool that enables individual users to add, improve, and customize closed captions and video descriptions.[162] They envision developing a specialized media player that users can run when playing a DVD on their computer or watching an online video. The process would invoke the help of volunteer crowdsourcers, who would be able to create captions and descriptions, or correct and improve captions and descriptions already accompanying an audiovisual work they have lawfully obtained.[163] They would then upload the electronic files they have created to an online database. Individual users with visual or hearing impairments would then be able to access the database through the software program and overlay the corresponding accessibility features while viewing an audiovisual work they have lawfully acquired. To be clear, the program itself would not include the functionality that enables individual users or crowdsourcers to circumvent access controls.[164] Rather, the media player will only play already decrypted media files.

---

emerging technologies are not accessible to the disabled community, this economic disparity may increase. Enhanced accessibility could help diminish this economic divide.").

[159] Comments of the Telecommunications for the Deaf and Hard of Hearing, Inc. *et al.* (*TDI Comments*), Docket No. RM 2011-7, http://www.copyright.gov/1201/2011/initial/IPR_TDI_gallaudetU.pdf (detailing all four proposals). TDI also argues for a more broad exemption to cover accessibility for many technologies. While NTIA may be sympathetic to this position, TDI did not make the case for a more broadly applied exemption to the DMCA for every technology that may impede accessibility. Reply Comments of the Telecommunications for the Deaf and Hard of Hearing, Inc. *et al.* (*TDI Reply*), Docket No. RM 2011-7, http://www.copyright.gov/1201/2012/comments/reply/tdi__gallaudet.pdf.

[160] *TDI Comments* at 1-2.

[161] *Id.* at 7, 14, 16.

[162] The proponents intend this exemption to include this research and other research by other entities and individuals to benefit accessibility. Frequently the text argues generally for researchers and technologists. *See e.g.*, *Id.* at 5 ("These exemptions are particularly important to clear the way for accessibility technologists to fill gaps in recent legislation and regulatory efforts to require the captioning and video description of digital video programming.")

[163] Generally, "crowdsourcing" is a process that involves outsourcing tasks to a distributed group of people instead of allocating such tasks to a single individual. In the context of this proposed exemption, "crowdsourcers" refers to those individuals that would contribute their efforts to make audiovisual works accessible. *See Id.* at 17 ("Yet accessibility technologists and researchers are poised to fill in missing captions and video descriptions with technologies that harness the power of the Internet to coordinate legions of volunteers to transcribe captions and video descriptions for videos distributed over IP and on fixed media.")

[164] *See* Transcript, Hearing on Exemption to Prohibition on Circumvention of Copyright Protections Systems for Access Control Technologies, Section 1201 – Digital Millennium Copyright Act, 124-25 (June 5, 2012), http://www.copyright.gov/1201/hearings/2012/transcripts/section_1201_06-05-2012.pdf (*June 5 Transcript*).

The software tool proponents seek to develop illustrates the incredible potential of Internet technology and the advantage of a crowdsourcing network in facilitating improved accessibility. No company could afford or spare the time to closed caption every video hosted by the leading video sharing sites, or to add video descriptions to every video news clip across the online news media.[165] NTIA believes this exemption will open the doors for innovation and empower the millions of Americans with visual and hearing disabilities to participate to the fullest possible extent in our society's multimedia culture. It will encourage developers to provide the accessibility tools needed for the visually and hearing impaired communities.[166]

Proponents have demonstrated that the prohibition on circumvention has substantially adversely affected their ability to improve accessibility. There are many DRM-protected audiovisual works inaccessible to persons with hearing or visual disabilities. Current law does not require content distributors to caption or provide visual descriptions for fixed disc-based media,[167] and the CVAA only requires full-length IP-delivered videos previously broadcast on television be captioned.[168] Considering the wide range of disabilities requiring particular accessibility functions, regulatory remedies that impose additional burdens on content distributors might not be the most effective way to address accessibility needs. Rather, encouraging innovators like the proponents to find solutions – especially solutions that build on the crowdsourcing power of the Internet – could lead to great improvements in accessibility.

Moreover, for works with existing captions or video descriptions, the quality is sometimes insufficient, with spelling errors, timing issues, or mistakes making it difficult to understand the video program.[169] Captions are often distributed in a "one-size-fits-all" manner without the ability to customize specific characteristics such as font size or color so that persons with particular visual needs can read them.[170] To date, content distributors have not been able to fully meet the needs of the visually and hearing impaired communities. It has proven difficult for distributors to create the multitude of accessibility functions that could improve accessibility for the entire range of persons with disabilities.[171] However, access controls protect information necessary to create and incorporate closed captions (CC) and video descriptions (VD). For example, these TPMs restrict access to playhead information required to align the timing of the CC and VD with the corresponding video frames.[172] Also, CC and VD data may be embedded

---

[165] Today, an average of 72 hours of video is uploaded to YouTube every minute of every day. *See* http://www.youtube.com/t/press_statistics.

[166] *TDI Comments* at 5.

[167] Comments of the National Association of the Deaf *et al.* (*NAD Comments*) at 2, Docket No. RM 2011-7, *available at* http://www.copyright.gov/1201/2012/comments/Andrew_Phillips.pdf.

[168] *Id.* (citing the 21st Century Communications Video Accessibility Act of 2010).

[169] *NAD Comments* at 3-4.

[170] *TDI Comments at 7-9; June 5 Transcript* at 56-57.

[171] *TDI Comments* at 27 ("For example, the National Cable and Telecommunications Association and the National Association of Broadcasters stated that requiring the captioning of certain programs online would be so burdensome and costly to industry that such a requirement would disincentivize voluntary captioning altogether.")

[172] *TDI Comments* at 17 ("For example, to synchronize a user-generated caption or video description file with a video being lawfully viewed over a subscription service such as Netflix, it may be necessary to access the location of the playhead of the video . . . to display the captions or play back the video description in time with the video.").

in encrypted files that a person must extract in order to correct or improve distributor-created captions and descriptions.[173]

Proponents assert three uses adversely affected by the prohibition on circumvention, which ultimately inhibits the ability of the visually impaired and hearing impaired to perceive copyrighted audiovisual works. First, they claim a research need to circumvent access controls on fixed-disc media and IP-delivered video to develop a software program that would enable improvements of CCs and VDs. Second, individuals, nonprofit organizations, and government entities require an exemption to produce and improve visual and audible descriptions that can be used in conjunction with the developed software or other tools.[174] Third, persons with visual or hearing impairments must similarly initiate circumvention to incorporate the new or improved CC and VD or to utilize available software.[175] Proponents seek to empower the tool developers, the crowdsourcers, and most importantly, the end users.

The proposed uses are likely noninfringing. Proponents cite authority that improving accessibility embodies the spirit of fair use.[176] While that particular citation is limited to improving book accessibility for the blind, proponents have shown a similar fair use analysis could apply to the audiovisual works at issue. The proposed uses are noncommercial uses to improve individual accessibility.[177] While the researchers and crowdsourcers are not performing the service for their own benefit, their work ultimately benefits the personal use of individuals with hearing or visual disabilities.[178] Some of the copyrighted works at issue may be highly creative (motion pictures), while others are purely factual (news clips). In any event, adding or improving CC and VD makes use of the audiovisual work only to the "minimum extent necessary."[179] Individuals would also use this exemption to customize the captions for individual needs, in some cases using software that is currently available.[180] There is little

---

[173] *TDI Comments* at 18-22.

[174] *See e.g., NAD Comments* at 5 (Notes the efforts of Universal Subtitles that attempt to provide assistance to access online content.).

[175] *See e.g., NAD Comments* at 4.

[176] *See TDI Comments* at 23-26; *see also* H.R. REP. NO. 094-1476, at 73 (1976) (noting the application of the fair use doctrine to the noncommercial creation of Braille and audio recordings of books for use by those with vision disabilities); *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984) ("Making a copy of a copyrighted work for the convenience of a blind person is expressly identified by the House Committee Report as an example of fair use, with no suggestion that anything more than a purpose to entertain or to inform need motivate the copying."); CONF. REP. NO. 094-1773, at 70 (1976) (noting the applicability of fair use to generating captions for television programs in nonprofit schools for the deaf and hard of hearing).

[177] NTIA supports language that further limits the exemption to noncommercial uses for the sole purpose of improving accessibility. This would ensure uses are kept within the bounds of fair use.

[178] *See e.g., NAD Comments* at 4 ("It is very important that third parties are able to edit or enable editing of the quality of the captions to make video programs more accessible, such as lining up the caption text with the speech, adding to the captions where there are gaps, and adjusting the appearance of the captions to make them more accessible.")

[179] *TDI Comments at* 25.

[180] *See e.g., NAD Comments* at 4 ("a growing number of video programming software allows consumers to customize the captions on the screen, such as changing the color of the captions, the caption font and size, and even reposition the captions to a different part of the screen. Being able to customize the appearance of captions is

evidence suggesting these uses could have a negative effect on the market for audiovisual works. In fact, NTIA believes that this exemption may encourage an increase in purchases of audiovisual works, as more will be able to enjoy the content when accessibility has improved. Also, all movies or videos used with this technology must have been lawfully acquired, which could increase sales of audiovisual works.[181]

NTIA does not support the inclusion of Blu-Ray discs in the proposed exemptions at this time. As previously mentioned, DVD remains the dominant format, and online video distribution is outgrowing Blu-Ray adoption. Moreover, NTIA is uncertain what effect, if any, these proposed exemptions could have on the developing Blu-Ray market.[182] In any case, the user will be able to purchase the audiovisual works, largely without exception, on DVD for the next three years.

Opponents question whether an exemption is necessary. For example, one argued that the content industry is making progress towards providing captioning or video descriptions on most audiovisual works, but such efforts do not include all audiovisual works released.[183] Opponents cite recent regulatory measures that impose accessibility requirements on content distributors and claim the legal mandates have created market pressure to voluntarily improve accessibility.[184] Proponents have pointed out multiple shortcomings, such as insufficient mandates, and noted the continued pushback from the industry, including requests to extend deadlines, petitions for exemptions, and reluctance to adopt more than what is statutorily prescribed.[185] Opponents also claim a willingness to work with groups serving the hearing impaired or visually impaired to make content more accessible or, alternatively, negotiate a license to decrypt DVD and Blu-Ray content.[186] However, to date discussions have not progressed towards granting a license to the requesters.[187] NTIA commends all efforts to voluntarily provide captioning and video descriptions and to work with the disabilities community to facilitate improved accessibility.

NTIA acknowledges opponents' arguments, but is concerned that the asserted regulatory obligations and potential license agreements will not fulfill proponents' needs in the coming three years.[188] This is especially true for the minority of individuals with specialized

---

similar to a hearing person being able to adjust volume, bass, and treble in a program. This is especially important for deaf and hard of hearing people with low vision who need larger captions or better contrast between the text of the captions and the background picture.")

[181] *See e.g., TDI Comments* at 26.

[182] NTIA also notes that BD Live discussed in the record seems to provide some level of access to be able to modify the captioning available on the Blue-Ray Disc. This also seems to be an alternative that is helpful. Whether it will serve all of the needs discussed here, is uncertain. *AACSLA Comments* at 34.

[183] *AACSLA Comments* at 28-30.

[184] *Joint Creators and Copyright Owners Comments* at 45.

[185] *TDI Reply* at 5-10.

[186] *DVDCCA Comments* at 22.

[187] Letter to Maria A. Pallante, Register of Copyrights, et al., from Blake E. Reid, Counsel to Telecommunications for the Deaf and Hard of Hearing, Inc., et al. (Aug. 16, 2012)(*TDI August Letter*).

[188] For example, some deadlines for certain types of captioning have been pushed back further to January 1, 2014. In the Matter of Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, Petitions for Temporary Partial Exemption or Limited Waiver, *Memorandum Opinion and Order*, MB Docket No. 11-154 (Aug. 17, 2012).

accessibility needs, where standard captions and video descriptions do not provide adequate access to the content. As mentioned above, NTIA recognizes the difficulty in crafting regulations or negotiating agreements that can address every possible need for those individuals, and generally prefers non-regulatory solutions where they prove to be effective. NTIA does not agree, however, that this exemption will discourage such efforts.[189]

NTIA generally supports the proposals, but believes it is better to frame the exemption in terms of the three categories of use supported by the record. The following three narrower exemptions demonstrate a greater emphasis on the noncommercial nature of the uses and specify that circumvention can only be accomplished for the sole purpose of improving accessibility. This eliminates concerns that persons or entities will exploit the exemption for commercial gain or to access a derivative market that does not involve improved accessibility. Proponents note that creating the software will require help from the crowdsourcers and individual users. These individuals would participate as "beta testers" during the research and development of the various tools.[190] In addition, after the software is released, the assistance of third parties is necessary in creating the captions or video descriptions or providing other assistance to facilitate accessibility.[191] Therefore, NTIA does not recommend limiting this class to a single exemption solely for research purposes.

NTIA supports exemptions constructed as follows:

1. Motion pictures and audiovisual works that are lawfully made and acquired from (1) DVDs protected by the Content Scrambling System; or (2) works delivered via Internet Protocol protected by technological protection measures that control access to such works, when circumvention is accomplished by an individual, or an authorized entity as defined in 17 U.S.C. § 121 (d)(1), for the sole purpose of creating, developing, or researching primarily non-commercial tools that facilitate the creation, improvement, or rendering of visual and audible representations or descriptions of audible and visual portions of motions pictures and audiovisual works to improve the ability of individuals with hearing or visual impairments that lawfully access such works to perceive such works. (the tool developers)

2. Motion pictures and audiovisual works that are lawfully made and acquired from (1) DVDs protected by the Content Scrambling System; or (2) works delivered via Internet-Protocol protected by technological protection measures that control access to such works, when circumvention is accomplished by an individual, or other third party, to create and/or distribute non-commercial visual or audible representations or descriptions of visual or audible

[189] *AACSLA Comments* at 28-30.

[190] For example, TDI may include Gallaudet University students in research to improve the accessibility of these tools. This would include user control over captions to test using telecollaboration software. This test includes a video that would require captioning but could not be accomplished without an exemption. *TDI Comments* at 34.

[191] As noted above, all of these uses at some point will require breaking the TPM on a DVD or on online content.

portions of such works for the sole purpose of improving the ability of individuals with hearing or visual impairments who have lawful access to such works to perceive such works. (the crowdsourcers)

3. Motion pictures and audiovisual works that are lawfully made and acquired from (1) DVDs protected by the Content Scrambling System; or (2) works delivered via Internet-Protocol protected by technological protection measures that control access to such works, when circumvention is initiated by an individual with a hearing or visual impairment who has lawfully obtained such works, and the necessary hardware or software, to improve his or her ability to perceive such works by adding, improving, or rendering visual and/or audible representations or descriptions of the visual and audible portions of such works. (the end users)

I. Class 10 – Space Shifting

The practice known as "space shifting," in which a person produces a copy of a work for the express purpose of non-commercially and personally perceiving it on a device other than one for which it was originally intended, has been the subject of considerable controversy both within this proceeding and in the greater public discourse.[192] The proponents advocate for the ability to play the content from DVDs they own on other media devices such as tablets and laptops, as many of these new devices are being produced without optical DVD drives and rely strictly on online or locally-stored content.[193]

Because the law generally grants copyright owners the exclusive right "to reproduce the copyrighted work," the legality of space shifting rests in many contexts on the end users' ability to assert that the practice constitutes fair use under 17 U.S.C. § 107.[194] Unfortunately, there is a dearth of definitive case law dealing with space shifting; accordingly, neither proponents nor opponents show that any cases on this particular subject are conclusive.[195] As consumers increasingly expect personal content collections to be universally accessible, policymakers may want to consider a legislative resolution to this ongoing legal uncertainty. Advances in the market may also address this problem.

---

[192] *See e.g.*, Directors Guild of America, Inc., Reply Comments (Mar. 1, 2012)(*DGI Reply Comments*), http://www.copyright.gov/1201/2012/comments/reply/directors_guild_of_america.pdf. NTIA does not support the more broad exemptions to the extent they go beyond space shifting. Therefore, the exemption discussed here does not include backup copies or other personal uses except that specifically defined as moving from one format to another. *See e.g.*, Cassiopaea Tambolini, Proposed Exemption 10B, http://www.copyright.gov/1201/2011/initial/cassiopaea_%20tambolini.pdf. Five similar proposals made by individuals were grouped together as 10B. NTIA does not support this more broadly worded proposal and recommends the Register reject those proposed exemptions.

[193] Comments of Public Knowledge, Docket No. RM 2011-7 (Dec. 1, 2011) (*Public Knowledge Comments*) at 2, http://www.copyright.gov/1201/2011/initial/public_knowledge.pdf.

[194] *See* 17 U.S.C. § 106(1).

[195] Reply Comments of Public Knowledge (*Public Knowledge Reply*), Docket No. RM 2011-7, http://www.copyright.gov/1201/2012/comments/reply/public_knowledge.pdf. (The judicial status is discussed on page 11); *DVDCCA Comments* at 30.

That said, the absence of legal proceedings is certainly not an indicator that space shifting, as narrowly defined here, is not fair use.[196] The Register noted in its 2010 recommendation to the Librarian that, despite placing the burden of proof of non-infringement on proponents, "that does not mean that unless there is a controlling precedent directly on point, the Register and the Librarian must conclude that a particular use is an infringing use." Absent guidance from the courts, the Register and Librarian may "conclude that a particular use... is a fair use" for the purpose of assessing the alleged non-infringing use contemplated in a proposed exemption.[197] In particular, NTIA notes that the ability to space shift audiovisual works on DVDs that are not accompanied by an additional copy in any other format, online, or through alternative solutions such as Ultraviolet and Managed Copy weighs towards a fair use.[198] NTIA believes that where the alternatives are unavailable, the potential adverse affect on the market is minimal.[199]

To the extent that the contemplated, solely noncommercial practice of space shifting is a fair use, NTIA supports a more narrowly-constructed version of the exemption proposed by Public Knowledge:

> Motion pictures on lawfully acquired DVDs that are protected by the Content Scrambling System, when the DVD neither contains nor is accompanied by an additional copy of the work in an alternative digital format, and when circumvention is undertaken solely in order to accomplish the noncommercial space shifting of the contained motion picture.[200]

The modified version adds the clause "when the DVD neither contains nor is accompanied by an additional copy of the work in an alternative digital format" to further narrow the exemption to those instances where the demonstrated harm is clear. Proponents have focused on the fact that a prohibition on circumvention for space shifting purposes "is especially problematic as the consumer electronics market moves away from including DVD optical drives in new devices."[201] In turn, opponents cite as alternatives to circumvention the various digital formats in which motion pictures have been made available, and particularly "the widespread practice of DVDs and BDs [Blu-Ray discs] coming with 'digital copy' rights, the new market

---

[196] Opponents all argue that the cases cited by Public Knowledge do not settle the matter, and that the Register has rejected the argument that those cases hold that space shifting of DVDs is fair use. NTIA agrees. *See e.g., Joint Creators and Copyright Owners Comments* at 48-49.

[197] *2010 Recommendation of the Register of Copyrights* at 12.

[198] NTIA is concerned that owners of most existing DVDs will not gain the ability to view the work in another format without incurring additional costs. For example, although the service UltraViolet is now available, the FAQs state: "Can I add previously purchased movies and TV shows to my UltraViolet account? Not at this time; however, UltraViolet was designed to support this feature, so if movie/TV studios and/or retailers choose to make such 'upgrade' offers available, you'll be able to easily add existing titles to your UltraViolet Account." UltraViolet Website, FAQ, No. 16, http://www.uvvu.com/faqs.php#question-16 (last visited on September 5, 2012) (*UltraViolet Website*).

[199] NTIA agrees with Public Knowledge on this point of its fair use analysis. *Public Knowledge Comments* at 5.

[200] Public Knowledge proposed the following: "Motion pictures on lawfully made and lawfully acquired DVDs that are protected by the Content Scrambling System when circumvention is accomplished solely in order to accomplish the noncommercial space shifting of the contained motion picture." *Id.* at 1.

[201] *Id.* at 2.

practice of content providers releasing works on DVD now with UltraViolet rights, and the forthcoming AACS managed copy system."[202] NTIA supports the motion picture industry's efforts to make content available on the wide range of new devices, and encourages content creators to continue working to make their work universally accessible, irrespective of the end user's favored platform.[203]

To the extent that a DVD is accompanied by a license to view the work in an alternative digital format, NTIA agrees that the record does not show that circumvention is necessary. However, many consumers have accumulated large collections of DVDs that lack alternatives introduced since the format was first introduced, and absent the ability to space shift, they may lose access to those motion pictures as the market continues to shift towards mobile and Internet-dependent devices and away from optical DVD players.[204]

* * *

We appreciate the opportunity to express our views to you on the important questions raised in this proceeding. As we have noted, the exemptions granted by the Librarian in the past have in many cases provided the foundation for innovation and economic growth in our country, and we look forward to continuing to work with you to pursue those goals.

Should you have any questions regarding this discussion, please feel free to call me at 202-482-1840. Thank you again for your consideration of NTIA's views on this important matter.

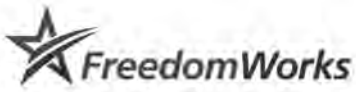
Sincerely,

Lawrence E. Strickling

[202] *DVDCCA Comments* at 25-26.

[203] NTIA notes, for example, that the UltraViolet service includes in some instances the ability to make an additional copy that is not hosted online. *See UtraViolet Website*, at FAQ No. 21.

[204] Wal-Mart introduced a new service in March 2012 that permits customers to bring in audiovisual works and for $2.00 per work copy the disc to digital format using a service called VuDu. In addition to this service requiring an additional purchase, NTIA notes that not all studios are participating in the service. Paramount, Sony, Fox, Universal, and Warner Bros. are the only studios participating in the program. Also for $5.00 consumers can upconvert their DVD to Blu-Ray if it is available. *See* Leslie Meredith, TechNews Daily, "Wal-Mart Unveils DVD to Digital Movie Service" (Mar. 14, 2012), http://www.mnn.com/green-tech/gadgets-electronics/stories/wal-mart-unveils-dvd-to-digital-streaming-movie-service.



May 31, 2013

Phone: 202.783.3870
Fax: 202.942.7629

www.freedomworks.org

400 North Capitol Street, NW
Suite 765
Washington, DC 20001

Dear FreedomWorks member,

As one of our millions of FreedomWorks members nationwide, I urge you to contact your representative and urge him or her to co-sponsor H.R. 1892, the Unlocking Technology Act of 2013. Introduced by Rep. Zoe Lofgren (D-CA) and a bipartisan group of lawmakers that includes Rep. Thomas Massie (R-KY), this bill would simply allow consumers to bypass digital manufacturer locks on devices that they already legally own.

Currently, many popular cell phones and other digital devices, ranging from tablets to the computers in your car, are sold with digital "locks" that prevent users from switching services or otherwise modifying the device. Savvy technology users quickly figured out how to "unlock" these devices so that, for example, once your initial contract runs out on your cell phone, you could then switch service providers.

However, under current law, this modification of a device you legally own is a crime. The Digital Millennium Copyright Act (DMCA), a 1998 law, makes all tampering with manufacturer hardware of software device locks illegal. While this is theoretically to protect copyrights, it is clear that this law is outdated when it prevents people from making basic alterations to devices they have legally purchased.

Under the DMCA, every three years the Librarian of Congress gets to decide whether unlocking should be allowed. From 2006-2012, cell phone unlocking was made legal, allowing smaller service providers into the market for cell phone service, which had been dominated by the few large providers whose services were locked into the most popular brands of cell phones. However, in 2013 the Library of Congress changed its mind, and cell phone unlocking became illegal once more.

The Unlocking Technology Act would simply make permanent the ability to unlock legally owned cell phones and other electronic devices. The bill is careful to specify that using unlocked devices to violate copyright is still illegal, but otherwise consumers will once again be free to make lawful use of their own property as they see fit.

The freedom to use and modify an item you have bought and paid for is just simple common sense, and it is time that outdated technology laws be changed to reflect that. Thus, I urge you to call your Representative and urge him or her to co-sponsor H.R. 1892, the Unlocking Technology Act of 2013.

Sincerely,

Matt Kibbe
President and CEO
FreedomWorks

NATIONAL CONSUMERS LEAGUE
[illegible] www.nclnet.org

June 6, 2013

The Honorable Howard Coble, Chairman
Subcommittee on Courts, Intellectual Property and the Internet
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Re: NCL Support for Device Unlocking Legislation

Dear Chairman Coble:

On behalf of the National Consumers League,[1] the nation's pioneering consumer and worker advocacy organization, I would like to applaud the subcommittee for convening today's hearing on H.R. 1123, the "Unlocking Consumer Choice and Wireless Competition Act."

NCL believes that American consumers should be free to lawfully use their devices as they see fit. Specifically, consumers who have paid for a wireless device should be able to unlock that device and use it on another carrier's network without fear of violating copyright laws.

Earlier this year, in response to a petition from more than 114,000 citizens, the White House indicated its support for a renewal of the device unlocking exemption to the Digital Millennium Copyright Act (DMCA) for wireless phones and tablets.[2] In addition, there are a number of bills pending in Congress -- including H.R. 1123 -- that would address this issue and once again make mobile device unlocking legal.

NCL believes that at a minimum, the DMCA exemption for wireless phone unlocking should be made permanent. Specifically, we believe that H.R. 1892, the "Unlocking Technology Act of 2013" introduced by Congresswoman Lofgren does the most good in protecting consumers' rights to use lawfully technology without infringing on copyright.

---

[1] Founded in 1899, the non-profit National Consumers League's mission is to protect and promote social and economic justice for consumers and workers in the United States and abroad. For more information, visit www.nclnet.org.

[2] Edelman, R. David. "It's Time to Legalize Cell Phone Unlocking." Official White House Response to Make Unlocking Cell Phones Legal We the People Petition. March 4, 2013. Online: https://petitions.whitehouse.gov/petition/make-unlocking-cell-phones-legal/1g9KbZG7

H.R. 1892 would not only permanently enshrine consumers' right to unlock their mobile devices, it would amend the DMCA to allow consumers to use a variety of technologies as they see fit without running afoul of copyright laws. For example, H.R. 1892 would allow consumers to space-shift lawfully purchased DVDs onto tablets or smartphone, enable the development of a range of accessible technologies for people with disabilities, and improve consumer protections from malicious hacking.[3]

We appreciate the opportunity to convey our views on cell phone unlocking to the subcommittee. We urge you to support H.R. 1892 and look forward to continuing to work with the subcommittee as it examines this important issue.

Sincerely,

Sally Greenberg
Executive Director
National Consumers League

cc: The Honorable Tom Marino, Vice-Chairman
The Honorable Mel Watt, Ranking Member

[3] Sly, Sherwin. "New Bill Preserves Phone Unlocking, Opens Doors to Larger Copyright Reform." Public Knowledge Policy Blog. May 9, 2013. Online: http://www.publicknowledge.org/blog/new-bill-preserves-phone-unlocking-opens-door

2

Ms. LOFGREN. I am really sort of in a pro-freedom place on this. The use of copyright to preclude people from using the phone that they bought with their own good money is just inappropriate. It is not the Congress' role to tell people the business model they should use. If people want to do a subsidized phone and a long contract, fine. If they do not want to do it, also fine. That is not our job to say how the market should work. But once someone buys something, they should own it.

I just think that if a carrier—you know, you have got a contract, for example, and if someone breaks that contract, you have a lot of remedies. I mean, you can sue them. You can charge them a fee

if you can put in your agreement. You can brick the phone. But I do not think that using criminal law to enforce the contract is appropriate. As a matter of fact, we have the same problem in the CFAA and its misuse with the late Aaron Swartz where you basically use the criminal law to enforce a private contract. That is just a misuse, I think, of the law.

It is good to see you, Mr. Slover, and I remember your many years of service here to the Committee.

It seems to me that—and it has been discussed—if you preclude individuals from using third party applications, which Mr. Goodlatte's bill does not address—and I do not criticize him. I think it is really not possible to do that without looking at 1201. You really, in many cases, preclude the owner of the phone from actually exercising their property rights, don't you? I mean, if I have a phone and I own the phone, I want to give it to my son, and the carrier will only unlock it for me as the owner, doesn't that constrain my property rights?

Mr. SLOVER. Absolutely. We believe that the right to unlock should include the right to get help in figuring out how to unlock. We would ordinarily assume that that would be implicit in the right to unlock. If it is not, we would like to see it fixed.

Ms. LOFGREN. Well, I think, you know, I am glad that people—you know, our last vote was a while ago, and sometimes it is hard to have hearings after the votes are over, but I am glad that we all came back. I praise the Chairman for scheduling this hearing. As I say, I am a cosponsor and supporter of his bill. But I hope that we can go further and really address the property rights issue that is present here for American consumers and allow full property rights to attach to them and this misuse of copyright law to enforce private contracts to end. And I would recommend the bill that Mr. Massie and I have introduced as a way. And we have got tremendous support from not only FreedomWorks but the Consumers League, Public Knowledge, and on and on—this bipartisan bill.

So I see my time is up and I yield back, Mr. Chairman, with thanks for recognizing me.

Mr. MARINO. Thank you.

The Chair recognizes the Ranking Member, the gentleman from North Carolina, Congressman Watt.

Mr. WATT. Thank you, Mr. Chairman.

I think the Chair actually asked the question that I was most interested in hearing the answer to, and that was whether is there anybody in the world that is out there opposed to this bill. You all seem to think that there is not. At least, that was the consensus I got. Anybody in the audience maybe could raise their hand if there is anybody opposed to it. So you all have answered that, and I think the answer is you do not know of anybody. Is that correct?

So the other question then I would ask is are there any suggested revisions to H.R. 1123 that would keep it in its current framework and deal with this issue, not the broader issues. Are there any revisions to H.R. 1123 that any of the panelists would suggest?

Mr. SLOVER. Yes, Mr. Watt. We did make a number of recommendations in our written statement. They are the same recommendations that we made to the Register of Copyrights in the

last review proceeding. We think those could all be done within the framework of reinstating the exemption in the 1201 process with directives in the legislation to make whatever of those clarifications you saw fit.

Mr. WATT. Wouldn't that put Congress in a more micromanaging position if we started going in every time a 1201 proceeding concluded and saying, well, we agree with this and do not agree with that? I mean, it is one thing to do it when you have broad-based support without any opposition. It is an entirely different thing to go in—I mean, one of the reasons we punted that to the Librarian of Congress and set up this process was to take into account more technical issues and give it more expertise. So you are not suggesting that we do legislatively now go back and change that.

Mr. SLOVER. Not as a larger matter. I am talking about specifically with this one. The proposals that we made to the Register we think are well considered and are warranted, and we had hoped to see them implemented by the Register of Copyrights.

Mr. WATT. And this bill gives you a shot to do that because it requires further review of this in a fairly expeditious time, in fact, in a shortened time frame from the 3-year time frame.

Mr. SLOVER. If you are talking about the further review that is directed as part of the legislation as introduced, I think that just goes to one of our recommendations, which was to include other devices——

Mr. WATT. So I take it that there are some things that you would like for them to have done that they did not do other than this unlocking provision that we put in this bill that would have us second guess even other parts of what they did or did not do.

Mr. SLOVER. Yes.

Mr. WATT. Okay. I got you.

Anybody else have any technical concerns about the content of H.R. 1123, things that you would suggest we might change?

Mr. BERRY. In short answer, no. I think that the bill needs to be enacted as quickly as possible.

I think in all fairness I should mention that I too made recommendations to the Librarian of Congress on three areas.

One is that it should be a wireless device, not a cell phone or a handheld phone. I think that is a recognition of where the economy has gone.

Also, I suggested changing the burden of proof in the process itself. If you change the burden of proof so that there is some precedential value to a previous decision of the Librarian, then you give this opportunity to continue whatever the process was going forward. It is hard to prove a negative, and if you had an exemption in effect at the time that you are trying to prove what was the harm, then I think you have sort of a dilemma there. So we suggested, at some further discussion and at some other time, maybe you might want to address the burden of proof.

I do not think it gets into the problem with WTO or the international treaties. In a previous life, I was chief counsel of the Senate Foreign Relations Committee. We looked at every treaty and every trade agreement that came through the Senate to ratify it, and I do not think that changing the burden of proof would be a significant international issue.

The *de novo* issue is not a statutory issue. It is a requirement that the Committee put in via Committee reference in the report. So it is not really addressed. What gets me probably the most is the NTIA, specifically from this Committee, the Committee said that the Librarian of Congress shall consult NTIA. NTIA found that we had met the burden of proof to continue the exemption, but the Librarian of Congress made a decision to the contrary notwithstanding. And I would think that the Congress put "shall" in there for a reason. They did not put "should." And the Librarian of Congress did not appreciate the NTIA's recommendation, and I think that there are some adjustments that could probably benefit everybody 3 years from now.

Mr. WATT. I got you. But "shall consult" does not mean "shall abdicate your responsibility."

I assume you are content to have those other issues. Hopefully we can address some of the ones Mr. Slover has suggested in a broader copyright context.

Mr. BERRY. I would like to see the Chairman's bill acted on immediately, yes, sir.

Mr. WATT. But in this bill, you think we have found the sweet spot.

Mr. ALTSCHUL. Well, if I could say the reason CTIA is able to support H.R. 1123 is because it is narrow and it does not reopen these issues, which have been fully aired in the past and I predict will be fully aired in the next triennial review and other bills as well.

Mr. WATT. Mr. Chairman, I am well over my time. I appreciate your indulgence, but I want to express my sincere appreciation to the witnesses for being here. I know a number of them traveled distances. So we thank them for doing so.

Mr. MARINO. Thank you.

I do too want to thank you for being here. Your insight and your knowledge is very helpful.

I want to thank the citizens in the gallery for sitting here and listening to this and having an interest in it.

And I thank my colleagues for being here because today they are headed back to work in their district, and I am sure some flights have been delayed because of this.

So, again, thanks to all of you.

This concludes today's hearing.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

This hearing is adjourned.

[Whereupon, at 12:32 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Material submitted by the Honorable Zoe Lofgren, a Representative in Congress from the State of California, and Member, Subcommittee on Courts, Intellectual Property, and the Internet

consumer action
Education and advocacy since 1971

www.consumer-action.org

PO Box 70037
Washington, DC 20024
202-544-3088

221 Main St, Suite 480
San Francisco, CA 94105
415-777-9648

523 W. Sixth St., Suite 1105
Los Angeles, CA 90014
213-624-4631

JUNE 6, 2013

HARLEY:

Consumer Action is pleased to support Congresswoman Zoe Lofgren's bill, Unlocking Technology Act (HR 1892) to allow consumers, repair shops and educators the ability to unlock mobile phones.

We believe that HR 1982 is a common sense approach to making cellphone unlocking accessible to the average consumer while not infringing on anyone's copyright property rights. This bill would create a narrow copyright exemption to allow consumers to take their cellphone business elsewhere without fear of legal violation.

The Unlocking Technology Act would ensure that all mobile devices (phones and tablets) could be permanently and legally unlocked. Other proposals only offer a temporary fix. HR 1892 would solve the phone unlocking problem for good.

Consumer Action is pleased to support a bill that makes permanent the ability for consumers to switch cellphone carriers without having to fear that this process may be deemed illegal every few years.

Copyright violations of music and movies would remain illegal. This bi-partisan bill would protect copyright holders while allowing for meaningful changes to the Digital Millennium Copyright Act (DMCA) that made unlocking a phone illegal to begin with.

SINCERELY,

RUTH SUSSWEIN

CONSUMER ACTION

Consumer Action has been a champion of underrepresented consumers since 1971. A national, nonprofit 501(c)3 organization, Consumer Action focuses on financial education that empowers low to moderate income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers to advance consumer rights and promote industry-wide change particularly in the fields of credit, banking, housing, privacy, insurance and utilities. www.consumer-action.org

Statement of Knowledge Ecology International in Support of the Unlocking Technology Act (H.R. 1892)

June 9, 2013

The bipartisan Unlocking Technology Act (H.R. 1892), introduced by Representative Lofgren (D-CA) and co-sponsored by Representatives DeFazio (D-OR), Eshoo (D-CA), Holt (D-NJ), Massie (R-KY), and Polis (D-CO) takes the welcome step of scaling back the overprotection of "digital locks" and promoting consumer choice and competition.

Copyright law creates legal barriers to the circumvention of technological protections measures (TPMs), also known as "digital locks" for works protected by copyright. These locks have notoriously been abused and can be used to protect works, even where there is no underlying copyright infringement. Current copyright law provides for extremely narrow exceptions to circumvention of a digital lock and new exceptions are only permitted where the Librarian of Congress issues one and, even then, such an exemption lasts for a mere three-year period.

Consumers are negatively impacted by the broad protections for digital locks, limiting their choices and harming competition. Current copyright law creates legal barriers to unlocking cell phones or tablets and the Librarian of Congress recently rejected a proposal to allow an exemption that would allow customers of wireless cell phone services from unlocking their phones and switch carriers, even after the expiration of the contract period.

The Unlocking Technology Act takes the welcome step of giving consumers the right to use the devices they have paid for, with any carrier, and changes an ill -considered provision in the Copyright Act that makes it a crime to break a digital locks to protect items where the true value does not lie in the copyright itself.

Consumers would therefore be allowed to unlock their cell phones to switch carriers, ensuring that once they have purchased the phone and any contract periods associated with the phone have expired, they have the freedom to select the carrier that best serves their needs.

The last section of the bill also highlights a concern with the trend of U.S. free trade agreements to further entrench current U.S. law (or, in some cases seeks to change what is in U.S. law). Previous bilateral trade agreements between the U.S. and other countries, as well as the currently negotiated plurilateral Trans-Pacific Partnership Agreement include restrictive language regarding exemptions to anti-circumvention provisions. The last section of the Unlocking Technology Act, thus directs the President to ensure that such trade agreements reflect the changes made by the bill.

Prepared Statement of Derek S. Khanna, Founder, Disruptive Innovation, Visiting Fellow, Yale Law School, Information Society Project

Testimony of Derek Khanna, Founder of Disruptive Innovation June 6, 2013

I would like to thank Members of the Subcommittee for the invitation to submit a written statement for the record. I am submitting this statement as a representative on behalf of our White House petition campaign that engaged over 114,000 Americans in support of unlocking.

First, I would like to congratulate Members of the Committee for addressing this extremely important issue that represents a culmination in our campaign with which over 114,000 people engaged. This important issue affects innovation, small businesses and ultimately impacts millions of ordinary consumers within the United States. Over the course of our campaign on this issue, the sheer ridiculousness of banning unlocking became more clear as we began to hear from more affected parties and gradually began to realize the real and measurable impact that this unlocking prohibition has had upon innovation and consumer choice. Most disturbing we have also heard of its terrible and unforeseen impact on our nations' Service Members which I will address later.

As of November 24, 2003, wireless companies have been required to offer wireless number portability for consumers. If the phone unlocking issue is evaluated seriously and legislation actually resolves this issue and restores a free market (while protecting freedom to contract), then legalizing phone portability may have a comparable impact as mandating number portability. Permanently legalizing users unlocking and the technology to enable unlocking could be the most beneficial change in mobile policy in over nine years.

As a leader of the campaign on cell-phone unlocking, I would like to put forward a few major points to you today. H.R. 1123, the Unlocking Consumer Choice and Wireless Competition Act, is a terrific first attempt to address a portion of the unlocking issue; however, there are some important fixes which must be made to ensure that this legislation succeeds in preserving consumers' rights to property and restoring a free market.

To actually fix the problem any serious legislative fix must not only 1) legalize the personal use of unlocking technology (as your legislation does) but it must also 2) legalize tools and services which facilitate unlocking (which H.R.1123 as currently written does not authorize) and 3) it must legalize this permanently (which H.R. 1123 does not do). This recommendation is consistent with the opinion of the former FCC Chairman, current FCC Commissioner Ajit Pai, and the statement from the White House; and it is required for a serious implementation of this policy fix. There is little point in allowing personal use of a complex technology, unlocking, that is impossible for consumers to find, buy and use. It would follow that it is illogical to classify businesses that cater to this legal market as illegal businesses. Instead, if consumers can use this technology, and the technology is beneficial for the market, then the technology should be lawful to develop and sell to the consumer.

A serious legislative fix for unlocking will create regulatory certainty by permanently legalizing the technology. In present form, H.R.1123 would require the Librarian of Congress to rule again on this issue – when after our successful campaign to garner Congressional and White House support, the Librarian's statement explains that he stands by his previous ruling. This regulatory uncertainty would inhibit innovation, consumer or business confidence and a robust legal marketplace.

The remaining Republican Commissioner of the Federal Communication Commission (FCC), Ajit Pai, issued a formal statement of his unequivocal support for unlocking through a permanent fix:

> "American consumers should not face jail time for unlocking their cell phones. This should not be a matter of criminal or copyright law. Instead, it should be addressed by contract law. If a consumer is not bound by a contract, he or she should be able to unlock his or her phone. The Digital Millennium Copyright Act (DMCA), as it pertains to this issue, unnecessarily restricts consumer choice and is a case of the government going too far. Fortunately, there's a simple solution: a permanent exemption from the DMCA for consumers who unlock their mobile devices."

Commissioner Pai's statements perfectly embody the principles of the unfunded campaign I have spearheaded since January. Commissioner Pai's op-ed in the New York Times for June 6, 2013 unequivocally makes the point that the real fix requires a permanent fix and legalizing selling the technology.

Starting this campaign with a column in the Atlantic, at the time it was unclear if this campaign could have a tangible impact upon policy. But that article received over a million hits, knocking the Atlantic off-line. This viral campaign has demonstrated an overwhelming consensus in favor of fixing this problem on a permanent basis. As the White House, Commerce Department, former FCC Chairman, FCC Commissioners, think-tanks, and 114,000 average Americans have expressed – unlocking is a beneficial technology for the market. In the words of the White House and my Atlantic column, legalizing unlocking is "common-sense."

What is unlocking? Many people, are unfamiliar with "unlocking." They are unfamiliar with unlocking primarily because it has been banned in the United States while it is legal in the rest of the world. This technology is not scary or dangerous. There is no reason why the technology itself should be contraband.

Smartphones today are essentially mini-computers in our pocket that we can use for phone calls and texting but also traditional computer functions including web access, e-mail, gaming, music and video consumption and the creation, distribution and consumption of a wide variety of professional office

document processing. These phones are "locked" through software to block the phone from using SIM cards from other phone carriers. Unlocking is a relatively simple software "patch" where a user plugs their phone into a computer and runs a small computer program. The technology is straightforward, easy to use and patches the phone very quickly. If you have ever updated an iPhone or Blackberry by plugging it into your computer - the unlocking process is usually not significantly more complex than that simple process.

Put simply: unlocking is a quick process to allow a phone to use SIM cards from other carriers – and thereby easily use an older phone on another carrier. When we talk about "legalizing unlocking," we are referring to legalizing use of this "patch" as a currently banned technology. Legalizing unlocking, the basis of our campaign, does not referring to any alterations to contract law, tort law or "interoperability." Legalizing unlocking would restore the free market by removing DOJ involvement. If consumers are allowed to unlock their own phones under US law, this legal adjustment would not interfere with a phone carrier's ability to contract with consumers and neither would it mandate that all phones be cross-compatible (interoperability). This position is consistent with Commissioner Pai's statement.

Overall: legalizing unlocking means letting users plug their phones into the computer to patch the software, and then use another carrier's SIM card.

(In contrast to unlocking, the terms "jail-breaking" and "rooting" refer to modifying the software of a portable computing device, including a smartphone, to allow the device to run software programs, or "apps," that were not authorized by the device manufacturer.)

History of tinkering: Allowing innovators the ability to explore technological solutions by tinkering, as unlocking does, is important for technological progress.

Personal computers have always allowed users to install their own software and operating systems on computers that they own. This free market approach has worked well in the PC market. Even with historic market dominance from Microsoft in the past few decades, there has still been substantial and growing competition from Apple's MacOS operating system, Google's Chrome operating system, and open-source operating systems like Linux (Ubuntu). This competition has fostered innovation in operating systems that has greatly benefited the consumer and have increased productivity for business.

This free market approach has led generations of tinkerers to build their own computers, even design their own circuit boards and code their own software – and these tinkerers have pushed technology forward. Generations of young people, myself included, grew up building their own radios to listen to broadcast AM/FM radio. Apple was created by tinkers who sold computing designs, components and

finally complete PC's to average people and businesses. Steve Wozniak and Steve Jobs sold their computers at the Homebrew Computer Club - where computer builders and computer programmers would show off their latest technology. Bill Gates created –bought, modified and improved – the DOS operating system which would become the basis of the Windows revolution. Modern Windows computers are a direct result of a free market system where Microsoft could offer operating systems for IBM built computers and other PC's.

Today, tinkerers build their own computers, pushing the boundaries of what computers are capable of, pushing the frontlines of robotics, faster computer chips through "overclocking," devising new and more secure cybersecurity solutions, and even testing the safety and integrity of our of nations digital voting machines. The Internet itself, has been a wonderland for tinkerers to design, build and launch their ideas for the world – which is how innovations like Amazon, Twitter and Google were created. When you empower the tinkerers, economic growth follows. From Edison's light bulb, Westinghouse's AC power to modern 3D printing and UAV drones –tinkerers invent the future.

Phone unlocking ought to be an important part of this story of innovation. Legalizing unlocking is a vital reform to restore the free market to the mobile market. If a user has bought a phone, and owns that device, then they should be allowed to do what they want with the device – and installing their own software is a crucial property right. To conclude otherwise, by continuing to ban unlocking, is to deny a fundamental tenet of property rights; which is the ability to modify your own property. Restraining users' ability to modify their property is an extreme invasion of personal freedom and liberty.

The impact of banning unlocking:

International Travelers: When you walk off the airplane at many international airports, there are numerous kiosks and companies offering SIM cards for phone use. These often offer local calling minutes, international calling minutes and even data plans (e.g., users can buy 400 minutes of talk time and 4 GB of data usage). For Americans traveling abroad this is an extremely good deal. American travelers can bring their phones, pop out the SIM card and use these cheap SIM cards to avoid paying massive international fees from their local US-based carriers. In the current legal structure this is illegal if doing so required the consumer to patch their device (or other forms of unlocking), so most American consumers cannot do this. But if this technology was legal, as it is in much of the rest of the world, Americans would be able to buy and use these SIM cards when traveling abroad. Additionally, this small change in law would have an impact upon consumers who choose not to unlock their phones by placing downward pressure through competition upon international calling rates – thus using the free market to

reduce exorbitant international roaming costs (if wireless carriers have to compete for international calling rates with these SIM card providers – that means cheaper prices for everyone).

Today, many regular international travelers break the law and use this technology anyway; but casual international travelers are often unaware or unwilling to break the law.

Nations' Deployed Service Members: When our Service Members are deployed abroad, whether in wars in Afghanistan and Iraq, or in our permanent bases in South Korea and Germany, they often have to unlock their phones to be able to continue to use them in theater and on base. I have received messages from numerous service members who were very concerned about breaking the law and committing a felony in order to be able to use their phone in Afghanistan where their local carrier had no service whatsoever.

Our nation's Service Members deserve better than to worry about being felons, and losing their security clearances or being discharged, for using a technology that should never have been banned to begin with.

Average American Citizens:

As the White House responded to our "We the People" petition, legalizing unlocking is "important for ensuring we continue to have the vibrant, competitive wireless market that delivers innovative products and solid service to meet consumers' needs."

Here are only a few of the major benefits of unlocking for average Americans citizens:

- **Resale Market:**

  The mobile market is gradually adapting to become (for some) a commodity-based market. What this means is particularly in 5-10 years, for many American citizens, having the latest iPhone, Blackberry or Android will be functionally equivalent to a 2-year old device (and for some Americans this is already the case). In such a market, where many Americans will no longer require the latest and greatest technology, there will be a robust and thriving resale market for used phones – already there is a small but growing market.

  Unlocking legalization would enable average Americans to trade in their old phones for newer phones for more money (phones that can be used on more than one carrier will have more potential buyers and are capable for greater uses). Through empowering this resale market, consumers will be able to buy used phones that will work with their carrier. Giving them more flexibility and new consumer choices. Further, unlocking will ultimately reduce the number of phones that end up in landfills by finding new uses for older devices.

- **Federal Overcriminalization:**

American citizens should not be under threat of going to prison, being convicted as felons, and losing their freedom and right to vote over behavior that is not a social harm. As noted by the Heritage Foundation and others, the danger of federal overcriminalization is not just the actual threat that average Americans would be arrested for these crimes, but rather the impact of federal overcriminalization upon economic opportunities for business and prosecutors' ability to abuse the system and selectively target individuals for prosecution (see *US. v. Drew*).

When average and innocuous behavior is illegal, the threat is not just of individuals being arrested by an overzealous prosecutor, but also that the threat of criminal action can be used by businesses to attack and intimidate competition. Our White House petition was possible through the collaboration with Sina Khanifar (who created the petition), whose company offered unlocking technology for consumers until he received a letter from Motorola informing him that he needed to knock it off or risk civil liability and criminal liability. His company was ultimately shut down, and he narrowly avoided personal liability because Motorola decided not to pursue further action (from my Atlantic article "The Law Against Unlocking Cellphones Is Anti-Consumer, Anti-Business, and Anti-Common Sense"):

> "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."

- **Greater Wireless Carrier Competition:**

Costs for data usage, texting and phone calls have remained high for American consumers. Texting in particular is a cash cow where all texting plans are essentially 99.9% profit. In fact, consumers pay more, per same data size, to send a terrestrial text than NASA pays for messages from Mars (texting costs the carriers next to nothing). Other abuses in this market have been well documented, including carriers' voicemail prompts being deliberately long to increase the number of calling minutes. Competition through the free market can be a critical part in reining in these exorbitant pricing models.

In areas that are not subject to federal intervention through criminalization, we are seeing the market offer alternatives to drive down costs. This year for the first time, phone usage of alternative messaging services has now outpaced use of phone carrier SMS texting. In other words, the market has offered competition to offer similar texting like technology for free or very cheap costs.

The wireless market is dominated by several major phone companies who have nearly exclusive access to the latest phones and to the latest technology for phone coverage. New market participants and smaller market participants have enormous difficulty entering this market. The up-front costs are astronomical; placing new companies in a chicken and egg like predicament of being unable to ramp up from a small level. With the new spectrum auctions there is a threat that the big market participants will be able to gobble up more of the spectrum as a land grab and keep it away from new participants in the market. And to add to these difficulties, many consumers demand the latest phones that they may not be able to obtain as small carriers.

Legalizing unlocking will empower this free market by removing it from DOJ intervention and allow consumers to bring over their old phones after their contract has expired. Criminalizing innocuous behavior to discourage new market participants is a form of federal intervention into the market.

- **Unlocking Will Allow Users to Have Secondary and Back-up Phones.**

For consumers who would rather not resell their old phones or port them over to another carrier, they have the option of retaining their phones and finding new uses for these phones. Just

as in Europe and Asia there are companies that sell SIM cards, in a free market system that legalizes unlocking, users could easily buy SIM cards with 500 minutes for $10-30 (est.).

Many parents want their children to be able to contact them in case of an emergency, during a field trip, once they start driving, or after extra-curricular activities – but they may not want their young children to have their own phones at such an early age. If a free market were allowed for mobile, these parent can give their old phones to their just for these purposes, while restricting calling, texting, e-mail and web privileges as they see fit.

In a world where 1) we all have older phones, 2) unlocking is legal, and 3) these SIM cards are cheap, there may be logic in keeping an emergency phone in the trunk or dashboard of your car in case you run into a serious emergency. As someone who has been personally stranded on a highway for several hours while my phone ran out of battery I would have greatly appreciated knowing that I had an emergency phone in my glove box, just in case, that cost me $15.

The average person may not buy a whole extra phone for these purposes, but they are far more likely to buy a SIM card that is extremely cheap and use an old phone for this purpose instead.

- **New Market Models**:

The government should not be in a position of picking winners and losers, and it's impossible to predict what innovations Silicon Valley and Silicon Prairie may come up with as a result of allowing a free market. But here are a few potential innovations and new market models that would benefit from unlocking:

- Republic Wireless.

Republic Wireless offers a competitive new product for consumers, unlimited voice, text, internet and data for only $19 a month. Their secret? Their service "off-loads" calls, text and data to wireless when the phone is in a wireless area and it uses Sprint when it is not in a wireless area. This market model undercuts the market by 60-80% and has the added benefit of being an innovative part of the solution to the spectrum crunch (off-loading will be a critical part in weathering the continuing explosion in consumers' data usage).

Their problem? They are a newer market participant and don't have the relationships with the handset providers necessary to offer the latest and greatest device technologies with their service.

In an unlocking world, a consumer could bring their old iPhone, Samsung Galaxy, Blackberry Q10, Nokia 420 over to Republic Wireless and be on a $19 per month all you can use plan.

According to Greg Rogers, Deputy General Counsel of Republic Wireless's parent company:

> "If consumers can legally unlock their phone, and if businesses can legally offer services for phone unlocking, both consumers and companies like ours will benefit from the competitive forces such laws would unleash -- particularly if it is done on a permanent basis. Allowing customers to bring their favorite devices to their chosen provider after their contract has expired will spur more competition in the wireless market and boost market models like ours as a result. Our goal is to be able to offer our service on a level playing field and let the consumer decide what service works best for them."

- Spectrum Congestion Based Pricing.

Economists have long argued that having consumers pay more for a limited commodity when it is in high demand is a smart way to handle congestion based upon excessive utilization during a part of a duration cycle. In other words, just as it is more efficient to create economic incentives for consumers to do laundry and other power intensive activities at night when power is in much lower demand, and just as many major cities in the world charge different pricing for tolls or parking depending on the congestion level for the city at that period of time, so too could the mobile market provide a similar market based solution. We are in a spectrum crunch, but part of that spectrum crunch is users all using data at the same time, and this crunch can be partially alleviated by users using their data at different times in the day. No one is arguing that the heavy hand of government should force this market model, but a new market participant, with the proper network implementation, could choose to offer unlimited data during nights and weekends, and tiered data costs during the day. This is most likely to come from new market participants that can offer swappable SIM cards for unlocking phones, a market which exists in other countries. Market based solutions like this will ultimately be a critical part in weathering the spectrum crunch given that there is a finite amount of spectrum.

There are three technologies that could be part of addressing the spectrum crunch (in addition to new spectrum), and this includes better compression of streaming video, off-loading of data to wifi and spectrum congestion pricing. These new market models are likely to come from new market participants that benefit from unlocking.

What is the Solution to Restore the Free Market and Fix the Problem:

The White House, former FCC Chairman Genachowski, FCC Commissioner Ajit Pai, technology experts, conservative think-tanks (R Street), other groups (Free Press, Tea Party Nation, FreedomWorks, National College Republicans) and 114,000 Americans have come out strongly in favor of unlocking. Even today, T-Mobile continues to have advertisements encouraging customers to bring unlocked phones to Verizon to change carriers. From former FCC Chairman Genachowski's statement:

> "From a communications policy perspective, this raises serious competition and innovation concerns, and for wireless consumers, it doesn't pass the common sense test."

But implementing this shared, and bipartisan, vision, and actually fixing the problem, requires a two-pronged approach. Implementing legislation must:

1) Legalize both personal use and the technology itself (allowing companies to develop, traffic and sell it), and
2) Legalization should be permanent.

Analysis of this legislation:

As previously noted, this legislation is a major first step towards fixing the unlocking issue and in many ways is a fruition of our campaign. However, in its current form, this legislation keeps the developing, trafficking and selling of this technology as illegal. And this legislation would not be a permanent solution to the problem, but would require the Librarian to rule once again.

If the esteemed members of this Committee, the White House, the Commerce Department, FCC, FreedomWorks, EFF, Public Knowledge, Free Press, R Street, Tea Party Nation, National College Republicans, Young Americans for Liberty, Competitive Carriers Association, Consumers' Union, experts like Vint Cerf and scholars from Mercatus, Cato, and Competitive Enterprise Institute, and the 114,000 Americans who signed our petition (and so many millions of others) think that this technology is a beneficial technology for the market, then why would we keep it as illegal?

As I mentioned in the articles that started this campaign:

> "A free society shouldn't have to petition its government every three years to allow access to technologies that are ordinary and commonplace. A free society should not ban technologies unless there is a truly overwhelming and compelling governmental interest."

What is the overwhelming and compelling governmental interest here that would require continuing the prohibition on this technology? If we keep the underlying technology illegal, and we keep public discussion of the technology as banned speech, then we are failing to actually make this technology available for the consumer, we are missing the innovation opportunities for the next Direct TV ready to shake up the wireless industry in the way satellite television shook up the cable industry and we will continue to hinder our nations creative tinkerers who build much of the innovation that we take for granted.

This prohibition affects real businesses, this is a statement (submitted to me to present here to the Committee) from Kyle Wiens (the CEO of Ifixit):

> "My business, iFixit, is a free, open-source repair manual for everything, including cell phones. The anti-circumvention measures of the DMCA has a material impact on our business, preventing us from helping people start businesses to unlock and repurpose cell phones. . .Please, protect consumer freedom. Fix this blatant misuse of copyright law by legalizing cell phone unlocking."

Ultimately, prohibiting the use of tools and services that facilitates unlocking illegal (as H.R. 1123 does) will functionally keep unlocking unavailable for the majority of American consumers; to the extent it does provide a small market it will ensure that all market opportunities are outsourced to other countries while being illegal in the United States. I would prefer innovators to develop this technology right here in the United States.

Additionally, reversing the decision of the Librarian is a terrific first step, but the market needs regulatory certainty. Venture capitalists need certainty before investing. Entrepreneurs need certainty before they leave their current job or drop out of college (as Mark Zuckerberg, Bill Gates, and Steve Jobs did) and launch their next venture.

Imagine, you are an entrepreneur and you are developing this unlocking technology. You meet with angel funders and venture capitalists and you explain your product, your targeted demographic, your team and your monetization strategy. The potential funders then ask, "All that seems great, but what will happen after January? Which way will the Librarian rule this time? How can I invest in your technology if it may be illegal next year?"

Greg Kidd is an angel funder who was one of the first investors in Twitter and Square, when asked about this issue, whether he would invest in technology that may or may not be lawful next year, he responded:

> "Here in the valley, we have a great appetite for taking calculated technical and business risks. But to add a jump ball of uncertainty over whether an opportunity that is legal one day might become illegal the next, for no other reason than a political or regulatory whim, is a red flag that shuts down my willingness to invest."

There appears to be no logic or internal consistency in the Librarian of Congress's rulings. Until 2010, jail-breaking iPhones was illegal, but jail-breaking iPads is now illegal as of 2013. What will you do as an entrepreneur if the Librarian of Congress changes the rules? This regulatory uncertainty is one of the most destructive forces for innovation and is a genuine threat to the free market. Therefore, a more complete solution would address this issue permanently.

Cellphone Companies' Red Herring – Claiming that they Allow Unlocking:

Since the success of our White House petition, there has been an attempt by cellphone companies to claim that this is a non-issue because they already allow unlocking – this is a complete red herring, and Members of the Committee deserve a more honest representation of the facts. This assertion is simply untrue.

First, even if phone companies routinely allowed unlocking, that is not an argument for keeping consumers' unlocking of their own phones as illegal. If phone companies sometimes unlock phones, then they recognize that this technology is beneficial to some users, and therefore users should be able to unlock their own phones without being arrested.

Second, even if phone companies allowed users to unlock upon request without exceptions – requiring consumers to call their providers and ask for permission is a step that many consumers would not take. By making this technology only available by permission – it's effectively keeping it unknown to most consumers and denying the thriving market that would likely exist. Many users would be discouraged with a complicated process to obtain unlocking codes for their phones. The law should not require users to call their providers for permission to do something they should already be able to do with their own property.

Third, phone providers have been caught denying consumers the ability to unlock and implementing hurdles to make unlocking onerous, circuitous or impossible. As the Commerce Department National Telecommunications and Information Administration (NTIA)'s recommendation to the Register of Copyright, recommending in favor of keeping the exception, argued:

> "While the record does show that some carriers are unlocking wireless devices on behalf of their customers, it also indicates that carriers

> generally will only perform this service under certain conditions. Those conditions include, for example, minimum days of continuous service, the expiration of handset exclusivity associated with the carrier, a minimum usage of credit, or prior proof of purchase. While such policies may, in some circumstances, provide an alternative to circumvention, the evidence presented in the record does not obviate the need for an exemption for several reasons. First, it is unlikely that these policies will serve a large portion of device owners. For example, the common denominator present in the cited terms and conditions is that the owner of the phone must be a current "customer" or "subscriber" of the carrier requested to unlock the phone. This requirement excludes those that obtain a device from a family member, relative, friend, or other lawful source; those users must then resort to the current exemption to unlock such devices, especially if they cannot locate the original proof of purchase. Second, some carriers refuse to unlock certain devices. For example, until recently AT&T's terms deemed the Apple iPhone as "not eligible to be unlocked." An exemption is thus warranted to allow iPhone users, as well as users of other devices excluded by such policies, to unlock their devices. Third, an exemption continues to be needed because some of the policies cited dictate that, in order to unlock a device, the carrier must have the necessary code or the ability to reasonably obtain it, therefore it is possible for a consumer to meet the unlocking policy and still be unable to have his device unlocked if the carrier does not possess or is unable to obtain the required information."

Carriers claiming that they allow unlocking for all consumers upon expiration of their contract is factually inaccurate and misleading. It may be true in isolated circumstances, but the NTIA's findings demonstrate that there is a system of impediments to ensure that many consumers cannot access this technology.

Fourth, even while some providers sell unlocked phones, this does not displace the market need, and a property owner's right, to patch their own phones to unlock them. This is consistent with the position of the NTIA:

> ". . .in determining whether a proposal is a viable alternative to circumvention of access controls, the Register should consider not just whether there are other devices available to achieve the non-infringing use, but also whether users can avail themselves of the suggested alternatives without encountering significant barriers. For example, these barriers may include prohibitive costs to unlock, lack of attractive or popular devices for unlocking, or requiring the consumer to purchase a new device. In particular, NTIA does not support the notion that it is an appropriate alternative for a current device owner to be required to purchase another device to switch carriers."

Fifth, wireless companies' assertions that they unlock phones is predicated upon unlocking after the contract has expired. But if a user owns his/her own phone, then they should be able to unlock that phone on day one. If it is a violation of a contract, then they should be

required to fulfill the contract by paying an early termination fee or other form of restitution – but having a contract should not be a basis for denying the consumer the ability to unlock their phones. Most likely, if consumers could legally unlock their phones on day 1, providers may allow consumers to unlock their phones as long as they continue to pay their bill for the contract period. In other contractual relationships, we allow for violations to be dealt with between the two parties (mortgages and car leases in particular).

Countering Subsidization Argument:

Some have argued in favor of maintaining the ban on unlocking because carriers subsidize the phones for consumers – so therefore they should be able to prohibit unlocking. This issue has been dealt with extensively elsewhere, but to summarize: this argument doesn't make much sense. Carriers do subsidize phones, and they recoup that investment through the contract that they write. Each of these contracts contains language to ensure that if a customer were to violate the contract in the first month, or the second year, the carrier still walks away whole.

Consumers violating their contracts are not a problem that carriers deal with exclusively, millions of consumers default on mortgage obligations and car leases – but the free market resolves those issues. Contracts allow for the seller to recoup their investment.

I am aware of no other situation where a seller provides a contract to a consumer and then expects the Department of Justice to arrest the consumer if they breach their side of the contract.

Overall, carriers subsidize phones and recoup through an "early termination fee" in their contract. If these fees are too low, then they wrote the contract and have the capacity to raise this fee as they see fit (and consumers can leave if too high). Consumers should not be arrested for violating contracts, rather they should be liable for the damages set in the contract. Under their contracts as currently written, there appears to be no way for the carrier to lose money.

In fact, anecdotal evidence demonstrates that most consumers that unlock their phones fulfill their two/three year contract. Imagine if you are a Service Member and are deployed to Afghanistan. You unlock your phone to use it in theater on a local carrier, but you continue to pay your monthly US bill to avoid fines, violating the contract and hurting your credit rating. In that situation, that consumer just become one of the more profitable customers for the phone companies (by paying full price and not using their service).

What is Wrong with Allowing the Librarian to Decide All Over Again?:

The Librarian of Congress issued a statement as a response to the White House petition, which appears to double down on his ruling in favor of rejecting unlocking. He notes that his decision to ban unlocking is a decision limited by specific statutory criteria rather than a broad public policy analysis:

> "The rulemaking is a technical, legal proceeding and involves a lengthy public process. It requires the Librarian of Congress and the Register of Copyrights to consider exemptions to the prohibitions on circumvention, based on a factual record developed by the proponents and other interested parties. The officials must consider whether the evidence establishes a need for the exemption based on several statutory factors . . . As designed by Congress, the rulemaking serves a very important function, but it was not intended to be a substitute for deliberations of broader public policy."

The White House further explained that this Librarian of Congress's method for temporary exceptions "is a rigid and imperfect fit for this telecommunications issue."

While the Department of Commerce recommended in favor of keeping unlocking as lawful, the Librarian of Congress rejected this advice. The Librarian of Congress has specific statutory mandates on what to assess in whether to allow certain technologies. Congress, on the other hand, can take a holistic and thoughtful view on this issue, and I would argue that where there is no overwhelming governmental interest to ban a technology then it should remain lawful. Whereas, the Librarian of Congress's mandate is to ban technology by default unless there is a vital market need for the technology.

Unlocking is a public policy question, not a "market needs" question. As a public policy question in the telecommunications sphere it should be resolved by Congress, not punted to a pseudo Legislative/Executive regulatory agent that manages the nation's preeminent library and also decides what technologies to ban.

Suggested Amendment to H.R. 1123:

This issue is highly technical, and H.R. 1123 is an important first step. Members of this committee deserve praise for taking the first stab to fix this problem and listening to their constituents who joined in our campaign.

A few small modifications would result in a narrow but surgical solution that addresses this problem and will provide necessary regulatory certainty to innovate. A small amendment could be proposed stating that developing, trafficking, selling or discussing the solutions for unlocking shall also be lawful. This amendment could include a permanent legalization, rather than allowing the Librarian to rule all over again every three years.

Further Areas of Investigation:

Congress ought not to rest with merely addressing the unlocking issue. There are numerous other technologies also made illegal under the same provisions and also under the triennial review process. Some could argue that some have "legitimate purposes" for being banned; however, banning many of the technologies is indefensible. Congress should evaluate what technologies should be

There are an estimated 23 million jail-broken devices, but until 2010 jail-breaking was illegal meaning that these users could have civilly liable, or even subject to criminal prosecution. Jail-breaking is where a user patches their phone allow installation of "unapproved" software on the device. Many advanced users jail-break their phones to give them higher functionality, higher capability to secure their privacy, and the ability to increase their cybersecurity. This jail-broken phone market is a major market opportunity, but it is under legal threat in the United States.

Similarly, technologies that would help persons with disabilities is also illegal. There are over 21.2 million Americans with vision difficulties, that could benefit from read aloud functionality, and there are 36 million deaf persons in the United States who could benefit from closed captioning technology. Both of these add-on technologies that can help these groups are illegal. While the Librarian grants an exception, the exception is nearly unusable. For example, blind individuals may be allowed to use some technologies, but only if they code this technology themselves . . . that doesn't make any sense. Even with the exception, no business can cater to this 57.2 million person US market without permission from rightsholders, which is often refused. These accessibility technologies may help these individuals enter the job market or to be able to greater enjoy media in their personal time.

This is scratching the surface of how large numbers of technologies have now been banned without any review by Congress. Banning technologies that facilitate piracy and copyright theft are on matter, but to the extent that these provisions are now being interpreted to

prohibit other technologies that can be easily rectified. The last major revision to copyright law was the Digital Millennium Copyright Act (DMCA), passed in 1998. That was three years before the iPod, six years before Google Books and nine years before the Kindle. Congress should evaluate how this legislation has now impacted modern technologies 15 years later, and to the extent that it now impacts technologies with no nexus to copyright infringement then those technologies should be lawful. Further, decisions on what innovations and technologies should constitute contraband should be regularly reviewed, particularly to ensure that we are not banning large market opportunities for legitimate and beneficial technologies.

Conclusion:

If Congress, the White House, Commerce Department, FCC, cell phone carriers and average Americans think that this technology is beneficial for the market – then shouldn't the law be that this technology is permanently lawful, both for personal use and for businesses to develop? If something changes, Congress retains the ability to easily ban this technology at a later date if it deems that draconian measure truly necessary. The benefits mentioned in these remarks would be a potential result of permanent legalizing of unlocking, and of allowing for businesses to cater to this market.

Banning technologies is an extreme step by government, a truly incredible reach of Federal power, and I would petition this body to be very careful in continuing to delegate the authority of what technologies to ban to a quasi-regulatory agent when, in these and many other circumstances, there is no compelling governmental interest.

This legislation, as currently crafted, does not reflect the input of the White House, former FCC Chairman, FCC Commissioner, scholars or outside groups such as R Street and FreedomWorks. Our campaign was about actually solving this problem and restoring a free market. Minor changes to this legislation would ensure that H.R. 1123 actually solves the problem it intends to address by permanently legalizing unlocking and allowing for businesses to sell the technology to consumers. Overall, our contention is that given the enormous benefits that phone unlocking provides to the consumer, phone unlocking should be made permanently lawful for the consumer to use, industry to develop and marketers to sell.

Prepared Statement of the Library Copyright Alliance

BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

HEARING ON H.R. 1123: THE UNLOCKING CONSUMER CHOICE AND WIRELESS COMPETITION ACT

STATEMENT OF THE LIBRARY COPYRIGHT ALLIANCE

The Library Copyright Alliance (LCA) consists of three major library associations—the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries—that collectively represent over 100,000 libraries in the United States employing over 350,000 librarians and other personnel.

LCA participated in the deliberations the led to the adoption of Section 1201 of the Digital Millennium Copyright Act (DMCA) in 1998. Additionally, LCA has participated in every rulemaking proceeding under Section 1201(a)(1)(C) concerning the adoption of exemptions to Section 1201(a)(1). LCA does not have any expertise concerning the specific issue of cellphone unlocking. However, our extensive experience with the DMCA allows us to make the following general observations concerning the Section 1201 rulemaking process.

Most significantly, the Section 1201 rulemaking is an exercise in legal theatre. All the parties to the rulemaking—those seeking an exemption, the rights holders, and the Copyright Office staff--acknowledge that it is unclear whether the rulemaking has any practical effect. This is because Section 1201(a)(1)(C) authorizes the Librarian of Congress to adopt exemptions to the Section 1201(a)(1)(A) prohibition on the act of circumventing a technological protection measure (TPM), but not to the Section 1201(a)(2) prohibition on the development and distribution of the technologies necessary to perform the circumvention. In other words, after receiving an exemption, a person might be legally permitted to perform the act of circumvention, but might have no lawful way of obtaining the technology necessary to perform that act.

Similarly, all the parties understand that what occurs inside the hearing room has no connection to the world outside it. In the last three rulemaking cycles, LCA has joined with other groups in seeking exemptions for educators and students to circumvent the TPMs on DVDs for the purpose of making educational uses of film clips. The rights holders know that the uses we seek will not harm their market in any way. They also know that whether the exemption is granted or rejected will have absolutely no impact on the level of infringement. This is because the technology necessary to circumvent the TPMs on DVDs is widely available on the Internet and easy to use. Nonetheless, the

rights holders reflexively oppose the exemption or seek to narrow it so that it would be unusable. As a result, the discussions in the rulemaking descend into hyper-technical issues such as the quality of video necessary for effective pedagogy in different kinds of courses.

Moreover, in two rulemaking cycles, witnesses from the Motion Picture Association of America (MPAA) demonstrated how a person could camcord a film off of a high definition television. MPAA was attempting to show that a relatively high quality recording could be made without circumventing a technological protection measure. What it succeeded in proving, however, was the contradiction underlying its position. If one could obtain a high quality copy without circumvention, why use technological protection measures in the first place, and why should their circumvention be unlawful? Moreover, the MPAA was demonstrating how to camcord a film precisely at the same time it was asking Congress, state governments, and foreign legislatures to impose criminal penalties on camcording.

The surreal quality of the Section 1201 rulemakings has also been evident in connection with the exemptions sought by the blind to circumvent TPMs that disable the text-to-speech function on e-books. In the first hearing concerning this exemption, a representative of the Association of American Publishers argued that blind already had a exception from copyright liability under the Chafee amendment, 17 U.S.C. 121, and thus did not need an exemption from Section 1201 liability. Fortunately, the Librarian of Congress rejected this position, which would have denied blind people the benefits of e-books. Nonetheless, in the following rulemaking cycle, the rights holders complained that the blind did not meet their burden of proof concerning their need for renewal of the exemption. And in the cycle after that, the Register of Copyrights recommended against an exemption on the grounds of insufficient evidence, but the Librarian of Congress wisely overruled her. The fact that every three years the blind need to expend scarce resources to petition the Librarian of Congress to renew this exemption, or that libraries and educators have to seek renewal of the film clip exemption every three years, demonstrates the fundamental flaw—that Section 1201 prohibits the circumvention of a TPM even to engage in a lawful use of a work.

The simplest way to fix this flaw, and to eliminate the resulting legal theatre of the Section 1201 rulemaking, is to adopt H.R. 1892, the Unlocking Technology Act of 2013. H.R. 1892 would amend Section 1201(a) to prohibit only circumvention acts and technologies directed at enabling copyright infringement. While H.R. 1123 provides a temporary fix to the narrow problem of cellphone unlocking, H.R. 1892 provides a permanent fix to the central problem with Section 1201(a).

June 6, 2013