

Testimony of
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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

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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 arbitrated 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.