

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 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.