ConsumersUnion
POLICY & ACTION FROM CONSUMER REPORTS

STATEMENT OF

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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 tablets as well as phones. Some might say this would be an expansion, not a clarification, but consumers are using both kinds of devices for the same purposes, and they should both be treated the same in relation to those purposes.

And sixth, it should apply to new devices as well as used ones. Once consumers buy them, they should be able to unlock them. 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. 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.

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.