

THE END OF THE CELL PHONE UNLOCKING SAGA?

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On July 25, 2014, the House of Representatives passed the version of cell phone unlocking legislation adopted ten days earlier by the Senate. President Obama promptly announced that he would sign the legislation, bringing at least a short-term resolution to a controversy that had burst into the public eye early in 2013. The underlying issue, however, has much deeper roots, stretching back to the enactment of the Digital Millennium Copyright Act in 1998. Moreover, the legislation only temporarily permits consumers to unlock their cell phones to access other mobile networks. In 2015, the Librarian of Congress will determine whether to renew this permission for another three years. A permanent solution to this problem appears precluded by the free trade agreements to which the United States is a party. This paper examines the legal background of this matter.¹

INTRODUCTION

The Digital Millennium Copyright Act (DMCA) prohibits the circumvention of technological protection measures, and thus blocks the disabling of software that locks cell phone customers into a particular mobile network. The DMCA contains a handful of permanent exceptions. Additionally, it authorizes the Librarian of Congress to issue temporary exemptions during a rulemaking process that occurs every three years. In the 2006 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 decided to phase out the exemption. This triggered a petition to the White House, which gained over 114,000 signatures. In response to the petition, the White House stated that it supported legislation that would restore the exemption. This, in turn, precipitated action in the Federal Communications Commission that ultimately led to voluntary commitments by mobile carriers announced on December 12, 2013. Additionally, Congress responded to the petition and the White House call for legislation by adopting a temporary extension of the cell phone unlocking exemption on July 25, 2014.

THE DMCA

Congress enacted the DMCA in 1998. Section 1201(a)(1) of the DMCA, 17 U.S.C. § 1201(a)(1), prohibits gaining unauthorized access to a copyrighted work by circumventing a technological protection measure (e.g., encryption) put in place by the copyright owner to control access to the work. To facilitate enforcement of the

¹ This paper is based in part on Jonathan Band, *Cell Phone Unlocking: A Legal Primer*, <http://www.arl.org/storage/documents/publications/band-cell-phone-unlocking-08mar13.pdf> and Jonathan Band, *The Cell Phone Unlocking Saga*, <http://infojustice.org/archives/32406>.

copyright owner's ability to control access to his copyrighted work, section 1201(a)(2) prohibits manufacturing or making available technologies, products, and services that can be used to defeat technological measures controlling access. Similarly, section 1201(b) prohibits the manufacture and distribution of the means of circumventing technological measures protecting the rights of a copyright owner (e.g., measures that prevent reproduction). Violation of section 1201 leads to civil and criminal liability. A repeat offender can be imprisoned for 10 years and fined \$1 million.

Section 1201 includes several specific exceptions from the prohibition on circumvention and circumvention devices for purposes such as achieving interoperability between computers programs, security testing, encryption research, and law enforcement. Congress understood that, aside from the exceptions mentioned above, there may be other legitimate reasons for circumventing technological protections. Accordingly, Congress suspended application of the prohibition on circumvention of access controls for two years, until the Librarian of Congress could conduct a rulemaking proceeding to determine whether additional exceptions were needed. The DMCA further requires the Librarian of Congress to conduct a similar rulemaking every three years thereafter. The Librarian's principal question is whether the prohibition on circumvention will adversely affect the ability of users of copyrighted works to make non-infringing use of them. Under the process set forth in the statute, the Register of Copyrights (the head of the Copyright Office, which is part of the Library of Congress) makes a recommendation on exemptions to the Librarian after consulting with the National Telecommunications and Information Administration (NTIA) within the Department of Commerce. The Librarian is not required to follow the recommendations of either the Register or the NTIA.

THE CELL PHONE UNLOCKING EXEMPTION

A cell phone contains a computer program, in a firmware format, that enables the cell phone to connect to the network of a mobile communications provider. The program in the cell phone can be reprogrammed to enable a user to connect to another provider's network. To prevent this reprogramming, and thereby lock a user into a particular network, the provider typically employs a technological measure that prevents access to the program.

TracFone, a cell phone provider, adopted a business model of making cell phones available below cost while generating profit by selling prepaid airtime cards. Several competitors purchased the inexpensive TracFone cell phones in bulk, circumvented the technological protection measure on the cell phones' programs, reprogrammed the cell phones so that they could connect to another network, and sold the reprogrammed cell phones to consumers. TracFone sued the competitors for violating the DMCA, and the competitors applied for an exemption in the 2006 rulemaking cycle.

In her recommendation to the Librarian of Congress to grant an exemption, the Register of Copyrights found that a user who unlocks a cell phone to connect to another network is not "engaging in copyright infringement or in an activity that in any way implicates copyright infringement or the interests of the copyright holder." Once the program was unlocked, it was reprogrammed, not copied. The reprogramming of a particular piece of firmware could be seen as making an

adaptation of a copyrighted work, but 17 U.S.C. § 117(a)(1) specifically permits the owner of a copy of a program to adapt that copy “as an essential step in the utilization of the computer program in conjunction with a machine.” Accordingly, the Librarian of Congress in 2006 approved the following exemption: “Computer programs in the form of firmware that enable wireless telephone handsets to connect to a wireless telephone communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless telephone communication network.”

Notwithstanding the exemption, TracFone continued to sue its competitors for violating section 1201(a) of the DMCA. Two federal district courts in Florida ruled that the exemption did not apply. The exemption permits circumvention when it is “accomplished for the sole purpose of lawfully connecting to a wireless telephone communication network.” However, according to the courts in *TracFone v. GSM Group*, 555 F.Supp. 2d 1331 (S.D. Fla. 2008), and *TracFone v. Dixon*, 475 F.Supp.2d 1236 (M.D. Fla. 2007), the competitors circumvented for the purpose of reselling cell phones for a profit, not for the purpose of connecting to a communications network. In other words, the exemption was available only to the user who would actually connect to the communications network, and not to the firm with the expertise to reprogram the cell phone for the user. This limitation of the exemption to end-users significantly limited its effectiveness.

In the rulemaking cycle beginning in December of 2008, TracFone’s competitors requested a modification of the exemption to clarify its application to the providers of reprogrammed cell phones in addition to end users. In 2010, however, the Librarian actually narrowed the exemption to used cell phones.²

The Librarian revisited cell phone unlocking in the next rule-making cycle. On October 26, 2012, the Librarian renewed the exemption allowing the unlocking of cell phones in order to operate on other networks, but the exemption applied only to cell phones acquired within the next 90 days, i.e., before January 24, 2013. The NTIA had supported renewal of the exemption adopted in 2010 to prevent consumers from being locked into a particular carrier’s network. The Register of Copyrights, however, was persuaded that with respect to new wireless cell phones, there were ample alternatives to circumvention. The marketplace had evolved such that a wide variety of unlocked phones were available to consumers -- even though not every device is available unlocked. At the same time, consumers who owned “legacy” phones would be adversely affected by an inability to unlock their phones. Accordingly, the Register recommended that the exemption be renewed only with respect to cell phones purchased no later than 90 day after the promulgation of the exemption. The Librarian agreed with the Register’s differentiation between new and legacy phones.³

² The 2010 rule allowed circumvention to gain access to: “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.”

³ The 2012 rule allowed circumvention to gain access to: “Computer programs, in the form of firmware or software, that enable a wireless telephone handset originally acquired from the

THE PETITION AND THE WHITE HOUSE RESPONSE

On January 24, 2013, a “We the People” petition concerning this issue was initiated on the White House’s website. The petition noted that as of January 26, “consumers will no longer be able unlock their phones for use on a different network without carrier permission, even after their contract has expired.” The petition argued that “[c]onsumers will be forced to pay exorbitant roaming fees to make calls while traveling abroad.” Further, this decision “reduces consumer choice, and decreases the resale value of devices that consumers have paid for in full.” The petition requested the White House to “ask the Librarian of Congress to rescind this decision, and failing that, champion a bill that makes unlocking permanently legal.”

On March 4, 2013, R. David Edelman, the White House Senior Advisor for Internet, Innovation, & Privacy, responded publicly on the White House website.

The White House agrees with the 114,000+ of you who believe that consumers should be able to unlock their cell phones without risking criminal or other penalties. In fact, we believe the same principle should also apply to tablets, which are increasingly similar to smart phones. And if you have paid for your mobile device, and aren't bound by a service agreement or other obligation, you should be able to use it on another network. It's common sense, crucial for protecting consumer choice, and important for ensuring we continue to have the vibrant, competitive wireless market that delivers innovative products and solid service to meet consumers' needs.

This is particularly important for secondhand or other mobile devices that you might buy or receive as a gift, and want to activate on the wireless network that meets your needs -- even if it isn't the one on which the device was first activated. All consumers deserve that flexibility.

The White House pointed out that the NTIA had recommended in favor of renewal of the existing exemption on the unlocking of cellphones, and that the Librarian of Congress had not followed this recommendation. It further observed that “the DMCA exception process is a rigid and imperfect fit for this telecommunications issue....” The Obama Administration would support “narrow legislative fixes in the telecommunications space that make it clear: neither criminal law nor technological locks should prevent consumers from switching carriers when they are no longer bound by a service agreement or other obligation.” In other words, the Administration

operator of a wireless telecommunications network or retailer no later than ninety days after the effective date of this exemption to connect to a different wireless telecommunications network, if the operator of the wireless communications network to which the handset is locked has failed to unlock it within a reasonable period of time following a request by the owner of the wireless telephone handset, and when circumvention is initiated by the owner, an individual consumer, who is also the owner of the copy of the computer program in such wireless telephone handset, solely in order to connect to a different wireless telecommunications network, and such access to the network is authorized by the operator of the network.”

⁴ <https://petitions.whitehouse.gov/response/its-time-legalize-cell-phone-unlocking>.

called for a narrow bill that targeted this problem, not a broad overhaul of section 1201 of the DMCA. The White House noted that the Federal Communications Commission would join the NTIA in reviewing this matter, and encouraged mobile providers to take voluntary actions “to ensure that their customers can fully reap the benefits and features they expect when purchasing their devices.”

THE INITIAL CONGRESSIONAL RESPONSE

On March 5, 2013, Senator Ron Wyden introduced the Wireless Device Independence Act of 2013, S. 467. It would amend the DMCA to provide that the prohibition on circumvention did not apply to “a user of a computer program ... that enables a wireless telephone handset[] or other wireless device ... originally acquired from the operator of a wireless telecommunications network ... to connect to a different wireless telecommunications network.” The user would have this right to circumvent only if she legally owns a copy of the computer program; the computer program is used solely for the purpose of connecting to the wireless network; and access to the network is authorized by its operator.

On March 7, 2013, Senators Klobuchar, Lee, and Blumenthal introduced legislation that took a different approach. The Wireless Consumer Choice Act, S. 481, would require the Federal Communications Commission to direct providers of mobile services to permit subscribers or their agents “to unlock any type of wireless device used to access such services.”

It soon became apparent that both of these bills, and the White House position itself, may have been inconsistent with the U.S. proposal in the Trans-Pacific Partnership Agreement (TPP) and existing obligations in the Korea-U.S. Free Trade Agreement (KORUS) and other free trade agreements to which the United States is a party.⁵ KORUS obligates the United States and Korea to adopt provisions concerning the technological protection measures based on section 1201 of the DMCA. Furthermore, KORUS mandates that the parties “confine exceptions and limitations” to the circumvention prohibition to a specific list of exceptions that matches the specific exceptions in the DMCA. Cell phone unlocking, of course, is not on that list. KORUS does allow for administrative procedures like the DMCA's rule-making to adopt temporary exemptions, but not permanent ones. Likewise, the U.S. proposal for the IP chapter of TPP, which was leaked in 2011, contained KORUS's closed list of exceptions, and thus would appear to preclude a permanent cell phone unlocking exemption.⁶

To be sure, Congress in theory could ignore the obligations in the free trade agreements, and enact a permanent exception for cell phone unlocking, but this would place the United States in breach of the agreements. It is highly unlikely that Congress

⁵ In 2003, Representatives Rick Boucher and Zoe Lofgren raised concerns about the impact of the free trade agreements on possible amendments to the DMCA. *Reps. Lofgren and Boucher Address FTAs and DMCA*, <http://www.techlawjournal.com/topstories/2003/20030618.asp>.

⁶ From an August 30, 2013 draft of the IP chapter leaked to Wikileaks, it appears that Chile and several of the other parties to the negotiation oppose the United States' “closed list” of permanent exceptions.

would be willing to cause such a breach. Alternatively, the United States could seek to renegotiate this provision in the agreements in which it appears.

H.R. 1892, the Unlocking Technology Act of 2013, introduced by Representatives Zoe Lofgren, Thomas Massie, Anna Eshoo, and Jared Polis, adopted the latter approach by directing the President to “take the necessary steps to secure modifications to applicable bilateral and multilateral trade agreements to which the United States is a party in order to ensure that such agreements are consistent with the amendments made by this Act.” Moreover, H.R. 1892 went beyond cell phone unlocking, and would amend section 1201(a)(1)(A) to permit circumvention (and the development of circumvention technologies), “if the purpose of the circumvention is to engage in a use that is not an infringement of copyright....” In other words, H.R. 1892 would codify the Federal Circuit’s interpretation of the DMCA in *Chamberlain v. Skylink*, 381 F.3d 1178 (Fed. Cir. 2004).⁷

In contrast, House Judiciary Committee Chairman Bob Goodlatte pursued a much narrower approach. His H.R. 1123, the Unlocking Consumer Choice and Wireless Competition Act, would reinstate the exemption that had terminated on January 26, 2013.⁸ This reinstated exemption would last just until October 2015, when the other exemptions terminated. H.R. 1123 also directed the Librarian to conduct a supplementary rulemaking to determine whether to extend the exemption to other wireless devices in addition to wireless telephone handsets, e.g., tablets such as the iPad. At the Judiciary Committee markup of H.R. 1123 on July 31, 2013, Representatives Jason Chaffetz and Zoe Lofgren introduced an amendment to permit circumvention by the purchaser of the handset, by a family member of the purchaser, or by another person at the direction of the purchaser or family member, for the sole use or benefit of the purchaser or family member. This amendment was adopted and H.R. 1123 was reported out of the Committee.

On February 25, 2014, the House Judiciary Committee issued its report on H.R. 1123, House Report 113-356. The report contained “Minority Views” signed by several Democrats, including Ranking Member John Conyers, Jerry Nadler, Bobby Scott, and Sheila Jackson Lee. They expressed concern that the text of the Chaffetz/Lofgren was presented to the Committee shortly before the July 31, 2013 markup, giving Committee members insufficient time to consider its potential ramifications. The Democrats also criticized the substance of the Chaffetz/Lofgren amendment, stating that the permitting third party assistance with unlocking could “unintentionally aid those who traffic in stolen devices and encourage the bulk purchase and resale of unlocked

⁷ See also *Lexmark Intern. v. Static Control Components*, 387 F.3d 522 (6th Cir. 2004). In a December 12, 2013, letter to U.S. Trade Representative Michael Froman, Representatives Polis and Eshoo expressed concern, as sponsors of H.R. 1892, that the leaked August 2013 TPP draft “includes language that would seemingly make any permanent fix to unlocking cellphones illegal.” They added that “intellectual property is a dynamic policy area in which preserving Congress’ ability to adapt to the changing nature of technology is absolutely critical for the United States and our trading partners.”

⁸ A companion bill, S. 517, was introduced in the Senate by Senate Judiciary Committee Chairman Pat Leahy and Ranking Member Chuck Grassley.

phones by unauthorized dealers.”

Congresswoman Lofgren submitted additional views in the Committee report, stating that “this bill is just a small step in the right direction of a much bigger issue:” correcting how the DMCA’s “broad protections” for digital locks “harms consumer choice, encourages anti-competitive behavior, and stifles innovation....”

Congresswoman Lofgren proceeded to explain that the U.S. Court of Appeals for the Sixth Circuit in *Lexmark Intern. v. Static Control Components*, 387 F.3d 522 (6th Cir. 2004), properly found that “using a lock to assert control over a non-copyrightable product rather than to protect copyrightable content was not a permissible understanding of 1201. Otherwise, the DMCA could be impermissibly used to protect monopoly.” While Congresswoman Lofgren supported the cell phone unlocking bill, “it is time for Congress to reexamine section 1201 and make clear that circumvention for uses that do not infringe on copyright are permitted—as was the original intent of the law.”

THE FCC RESPONSE

On September 17, 2013, the NTIA filed a petition with the Federal Communications Commission (FCC) asking it to issue a rule requiring telephone networks to unlock a wireless device such as a cellphone upon consumer request, once the initial service contract ends. In the petition, NTIA argued that an unlocking rule would be in the public interest because it would promote competition between networks and between new and used devices. It would also make it easier for consumers to use their devices when they travel. The petition requested a rule that would override a contractual restriction on unlocking. The NTIA claimed that the FCC has the authority to issue such a rule pursuant to Title III of the Communications Act, which defines the FCC’s authority to issue radio licenses and to regulate providers of radio communications.

On November 14, 2013, just ten days after becoming Chairman of the FCC, Tom Wheeler sent a letter to Steve Largent, the President of CTIA – The Wireless Association, calling on wireless industry to agree to voluntary principles concerning cell phone unlocking. Chairman Wheeler disclosed that the FCC had been working with CTIA for eight months to craft an approach that “would address consumers’ rights to unlock their mobile wireless devices once their contracts are fulfilled.”⁹ Chairman Wheeler stated that the FCC is “anxious to work with you and your members to resolve this matter expeditiously.” Chairman Wheeler then issued a clear threat: “it is now time for the industry to act voluntarily or for the FCC to regulate.” He set a goal of having a policy in place before the December holiday season.

Evidently, Chairman Wheeler’s threat worked. On December 12, 2013, CTIA announced that AT&T, Sprint, T-Mobile, U.S. Cellular, and Verizon Wireless had committed to adopt a set of voluntary industry principles for consumer unlocking of mobile wireless phones and tablets. The companies will complete implementation of the principles within twelve months. The principles are as follows:

⁹ <http://www.fcc.gov/document/chairman-wheeler-letter-ctia-cell-phone-unlocking>.

1. Disclosure: Each carrier will post on its website its clear, concise, and readily accessible policy on postpaid and prepaid mobile wireless device unlocking.
2. Postpaid unlocking policy. Carriers, upon request, will unlock mobile wireless devices or provide the necessary information to unlock their devices for their customers and former customers in good standing and individual owners of eligible devices after the fulfillment of the applicable postpaid service contract, device financing plan or payment of an applicable early termination fee.
3. Prepaid unlocking policy. Carriers, upon request, will unlock prepaid mobile wireless devices no later than one year after initial activation, consistent with reasonable time, payment, or usage requirements.
4. Notice. Carriers that lock devices will clearly notify customers that their devices are eligible for unlocking at the time when their devices are eligible for unlocking or automatically unlock devices remotely when devices are eligible for unlocking, without additional fee. Carriers reserve the right to charge non-customers / non-former customers a reasonable fee for unlocking requests. Notice to prepaid customers may occur at point of sale, at the time of eligibility, or through a clear and concise statement of the policy on the carrier's website.
5. Response time. Within two business days after receiving a request, carriers will unlock eligible mobile wireless devices or initiate a request of the OEM to unlock the eligible device, or provide an explanation of why the device does not qualify for unlocking, or why the carrier reasonably needs additional time to process the request.
6. Deployed personnel unlocking policy. Carriers will unlock mobile wireless devices for deployed military personnel who are customers in good standing upon provision of deployment papers. Consumers will have access to clear, concise, and readily available policies about unlocking their devices.¹⁰

According to Chairman Wheeler's November 14 letter, point 4, the issue of notice and the applicable fees, had been the sticking point in the discussions between CTIA and the FCC staff.

Chairman Wheeler issued a press release applauding the agreement and the FCC's role in its formulation:

The voluntary industry agreement announced today caps nine months of hard work by mobile wireless providers and FCC Staff. It's a win for consumers because of the FCC's advocacy on their behalf and because of

¹⁰ <http://www.ctia.org/docs/default-source/fcc-filings/ctia-letter-on-unlocking.pdf>.

the industry's responsiveness.¹¹

Additionally, Gene Sperling, the Director of the National Economic Council, issued a statement in which the Obama Administration took credit for the agreement. Director Sperling noted that after hearing from 114,000 people via the "We the People" platform, "the Obama Administration called to restore the basic consumer freedom of cell phone unlocking – to allow you to use your mobile devices on any compatible network you choose -- and provided a roadmap for the Federal Communications Commission, industry, and Congress to solve this for the American people."¹² Director Sperling noted that the wireless carriers had reached their unlocking principles "with the support of FCC Chairman Tom Wheeler." Director Sperling observed that "this issue is about the simple freedom to take your business where you please, and to find the wireless plan that suits your needs – provided you have paid for your mobile device." Director Sperling concluded that the FCC and the carriers are doing their part, and that "now it is time for Congress to step up and finish the job" by passing the Goodlatte bill, H.R. 1123, mentioned above.

HOUSE PASSAGE

On February 25, 2014, the Goodlatte cell phone unlocking bill passed the House of Representatives, but not without controversy. Before the bill went to the House floor on the suspension calendar (which means no amendments were permitted and a two thirds vote was required for passage), the following clause concerning bulk unlocking was added in the Rules Committee:

Nothing in this subsection shall be construed in any rulemaking commenced on or after the date of enactment to permit the unlocking of wireless handsets or other wireless devices, for the purpose of bulk resale, or to authorize the Librarian of Congress to authorize circumvention for such purpose under this Act, title 17, United States Code, or any other provision of law.

It appears that this language was added at the request of the wireless carriers, who were concerned about entities buying up new cellphones in bulk, perhaps fraudulently, and then unlocking them. The statute provided in paragraph (c)(1) that unlocking could be initiated by the owner of the device, by another person at the direction of the owner, by a provider of a wireless service at the direction of the owner, "solely in order to enable such owner or a family member of such owner to connect to a wireless telecommunications network, when such connection is authorized by the operator of such network." The carriers wanted to ensure that paragraph (c)(1) was not construed in a future rulemaking as Congressional authorization of bulk unlocking.

While stating that (c)(1) did not authorize the Librarian to permit bulk unlocking, the new language also did not say that (c)(1) should be construed as prohibiting bulk unlocking. Nonetheless, the new language caused some groups that initially supported the legislation, including the Electronic Frontier Foundation and Public Knowledge, to

¹¹ <https://www.fcc.gov/article/doc-324664a2>.

¹² <http://www.whitehouse.gov/blog/2013/12/12/answering-call-cell-phone-unlocking>.

change their position. This, in turn, prompted Representatives Zoe Lofgren, Anna Eshoo, Thomas Massie, and Jared Polis to send a “Dear Colleague” letter urging fellow members of Congress to vote against the Goodlatte bill. They objected to the new language on both procedural and substantive grounds. With respect to procedure, they noted that the language had been added without their consultation after the bill had been reported out of the House Judiciary Committee. With respect to substance, they stated that the new language could undercut the Sixth Circuit’s decision in *Lexmark v. Static Control Components*, where the court “prevented Lexmark from using dubious copyright claims and an overbroad reading of 17 USC 1201... to prevent third-parties from creating competing printer ink cartridges.” The letter did not explain why they thought the new language would undercut *Lexmark*, but presumably the Representatives believed that the language’s implication that Congress did not authorize a bulk unlocking exemption could suggest that Congress disapproved of the holding in *Lexmark* (and by implication in *Chamberlain v. Skylink*) that a section 1201 violation required a nexus with copyright infringement.

During a colloquy on the House floor just before the February 25th vote, Congressman Polis observed that although the new language wasn’t legally binding, it “signals that Congress believes that it is illegal for companies, including many small businesses and start-ups, to unlock cell phones in bulk.”¹³ He added that a prohibition on bulk unlocking would be “an inappropriate use of copyright law to bar small businesses and large businesses from unlocking devices when it has nothing to do with making illegal copies of protected works, the purpose of copyright law. Again, if there is a criminal problem, we should address that within the realm of criminal law and enforcement, not within the realm of copyright.” He stated that because the language suggests that Congress thinks that businesses that unlock cell phones for consumers are unlawful, it was a “poison pill.”

Congressman Issa replied that he initially had been troubled by the new language, but that after close study had concluded that it would not prevent a business from unlocking a cell phone for a consumer, or buying a locked phone from a consumer, unlocking it, and selling it to another consumer.

Just before the voting, an exchange occurred between Congressman Scott and Chairman Goodlatte. Congressman Scott asked whether “this legislation is meant to preserve the Registrar [sic] of Copyrights’ findings on bulk resale of new phones in both the 2010 and 2012 rulemakings and is not intended to apply to used phones.”¹⁴ Chairman Goodlatte responded that Scott was correct, “this legislation is not intended to impair unlocking related to family plans consisting of a small number of handsets or of used phones by legitimate recyclers or resellers. The objective of this savings clause is to make it clear that the legislation does not cover those engaged in subsidy arbitrage or in attempting to use the unlocking process to further traffic in stolen devices.”¹⁵

¹³ Cong. Rec., H1907, Feb. 25, 2014.

¹⁴ *Id.* at H1909.

¹⁵ *Id.* at H1910.

The letter from Congresswoman Lofgren and her colleagues, and the resulting debate on the House floor, caused many representatives to vote against the bill, but in the end it just barely received the two-thirds majority (295 to 114) necessary to pass on the suspension calendar. During the debate, Congressman Polis indicated that there had been negotiations at the last minute to address concerns with the bulk unlocking language, but there had been insufficient time to reach an agreement.

SENATE PASSAGE

On March 11, 2014, the House-passed bill was introduced in the Senate as S. 517. Negotiations ensued among the stakeholders, and agreement was reached to replace the controversial bulk unlocking legislation with the following more general savings clause: "Except as expressly provided herein, nothing in this Act shall be construed to alter the scope of any party's right under existing law." Additionally, the requirement that the Librarian of Congress conduct a supplemental rulemaking to consider extending the exemption to other wireless devices was replaced with a direction that the Librarian of Congress consider such an extension during the next rulemaking. S. 517 with these amendments was reported out of the Senate Judiciary Committee on July 10, 2014. S. 517 then passed the Senate with unanimous consent on July 15, 2014. On July 17, 2014, Senate Judiciary Committee Chairman filed a report on the legislation, Report 113-212. The Senate-passed bill moved back to the House of Representatives, where it was passed on July 25, 2014. Later that day, the White House released the following statement from President Obama:

I applaud Members of Congress for passing the Unlocking Consumer Choice and Wireless Competition Act. Last year, in response to a "We the People" petition from consumers across our country, my Administration called for allowing Americans to use their phones or mobile devices on any network they choose. We laid out steps the FCC, industry, and Congress should take to ensure copyright law does not undermine wireless competition, and worked with wireless carriers to reach a voluntary agreement that helps restore this basic consumer freedom. The bill Congress passed today is another step toward giving ordinary Americans more flexibility and choice, so that they can find a cell phone carrier that meets their needs and their budget. I commend Chairmen Leahy and Goodlatte, and Ranking Members Grassley and Conyers for their leadership on this important consumer issue and look forward to signing this bill into law.¹⁶

CONCLUSION

The relative speed with which the Administration and Congress responded to the cell phone unlocking controversy reflects how important cell phones have become in the

¹⁶ <http://www.whitehouse.gov/the-press-office/2014/07/25/statement-president-unlocking-consumer-choice-and-wireless-competition-a>.

daily lives of Americans. At the same time, the legislation enacted by Congress is only a temporary measure whose short term nature is forced by free trade agreements supported (in the case of KORUS) and proposed (in the case of TPP) by the Obama Administration. Moreover, the issue goes far beyond a consumer's freedom to use her wireless device on the network of her choice. Cell phone unlocking is just the tip of the iceberg of the problems caused by the breadth of the DMCA's prohibition on circumvention. Only H.R 1892, introduced by Representatives Lofgren, Massie, Eshoo, and Polis, really addresses the DMCA's fundamental flaw by amending it to prohibit just circumvention that leads to infringement. Congress should tackle this broader issue in the context of its ongoing review of the Copyright Act. Congress should also consider changes to the rulemaking process that resulted in the phasing out of the cell phone unlocking exemption. Such a flawed decision suggests a flawed decision-making process. Finally, the Administration should not limit Congress's ability to amend the DMCA by insisting on rigid circumvention provisions in TPP and other international agreements.

July 29, 2014