

UNLOCKING CONSUMER CHOICE AND WIRELESS
COMPETITION ACT

FEBRUARY 25, 2014.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

MINORITY AND ADDITIONAL VIEWS

[To accompany H.R. 1123]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1123) to promote consumer choice and wireless competition by permitting consumers to unlock mobile wireless devices, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The Amendment

The amendment is as follows:

Strike all after the enacting clause and insert the following:

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 the Librarian’s 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, subject to subsections (c) and (d).

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

(c) UNLOCKING AT DIRECTION OF PURCHASER OR FAMILY MEMBER.—With respect to paragraph (3) of section 201.40(b) of title 37, Code of Federal Regulations, as made effective by subsection (a) of this subsection, and with respect to any other category of wireless devices, in addition to wireless telephone handsets, with respect to which, as determined by the Librarian of Congress in a rulemaking conducted under subsection (b) or otherwise under section 1201(a)(1)(C) of title 17, United States Code, circumvention of a computer program by the owner of a copy of the program is permitted solely in order to connect to a wireless communications network when such connection is authorized by the operator of such network, in the case of a purchaser of such handset or device for personal use, such circumvention may be initiated by the purchaser, by a family member of such purchaser, or by another person at the direction of such purchaser or family member, for the sole use or benefit of such purchaser or family member.

(d) 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, including the authority, with respect to the applicable 3-year period, to modify or delete paragraph (3) of section 201.40(b) of title 37, Code of Federal Regulations, or modify or delete any category of wireless devices exempted under subsection (b) of this section.

Purpose and Summary

The legislation repeals an existing exemption made by the Librarian of Congress pursuant to Section 1201 of Title 17 concerning the circumvention of access control measures on cell phones, also known as “unlocking”, reinstates an earlier version of this exemption, directs the Librarian of Congress to undertake a new rulemaking for other cellular devices such as tablets with cellular connectivity, and permits unlocking to be initiated by the owner of a device or by an entity or person of their choosing under specific purposes for current or future exemptions related to wireless devices. The legislation is not intended to enable bulk unlocking by resellers.

Background and Need for the Legislation

The legislation repeals a current exemption in favor of reinstating an earlier exemption for which the Librarian of Congress

previously determined that an adequate record had been established. Rapid technological change in the cellular telephone industry, including consumer interest in more expensive smartphones, has resulted in a shift away from the earlier practice of consumers essentially disposing of their old cell phones after a few years of ownership. Especially for smartphones, consumers now use their cell phones for longer periods of time; reuse their devices upon upgrading by giving their older devices to family members; or sell their used devices in a growing marketplace for used phones and then using the proceeds from the sale to offset the cost of replacement devices. Since consumers with a legitimate interest in unlocking are unable to do so without risk of violating 17 U.S.C. §1201, the Committee has supported this legislation. Even with the recent industry announcement in December 2013 concerning unlocking, the legislation is needed to avoid the potential for criminal or civil sanctions for those who unlock cellphones for consumers.

Consumers seeking to own a cellphone without the initial upfront cost are more willing than ever to purchase a used cellphone, but may be prevented from using their newly acquired device on their network of choice since that device may be locked to a particular carrier. Since consumers may have acquired the used cellphone via an online store or auction site, they may not be able to work with, or even know, the original purchaser and/or network carrier to have the device unlocked by the original network carrier. Consumers seeking to switch network carriers may also need assistance unlocking their cellphones, either out of personal preference or an inability to enable the unlocking on their own. The Committee believes that consumers should be able to seek help from others such as relatives, neighbors, cellular providers and their agents, etc. . . . to effect the unlocking. The Committee does not support efforts to use this legislation for bulk unlocking. In these situations, the consumer must already be in possession of the cellular device in order to use this provision.

The Committee considered H.R. 1123 with a focus on individuals being granted the right to unlock, or seek assistance to unlock, their wireless devices. Such actions would be opposite not only the Committee's legislative intent, but also the specific statutory language adopted by the Committee. The Committee received testimony on, and is aware generally, of ongoing criminal enterprises in large cities that profitably steal large numbers of smartphones for resale after they are unlocked. This legislation would not enable such enterprises to avoid prosecution under the law for the underlying theft or for the circumvention.

The Committee also considered H.R. 1123 with a focus on the specific issue of unlocking wireless devices, rather than the broader issue of circumvention.

Hearings

The Committee's Subcommittee on Courts, Intellectual Property, and the Internet held a hearing on H.R. 1123 on June 6, 2013. Testimony was received from Michael Altschul, Senior Vice President and General Counsel, CTIA The Wireless Association; Steve Berry, CEO, Competitive Carriers Association; Steve Metalitz, Partner, Mitchell, Silberberg, and Knupp, LLP; and George Slover, Senior

Policy Counsel, Consumers Union. Additional material was submitted by Disruptive Innovation and the Library Copyright Alliance.

Committee Consideration

On July 31, 2013 the Committee met in open session and ordered the bill H.R. 1123 favorably reported with an amendment, by a voice vote, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that one rollcall vote occurred during the Committee's consideration of H.R. 1123—the Committee considered a 2nd degree amendment offered by Mr. Watt of North Carolina that would have limited the legal right to unlock a cell phone to the purchaser or a wireless communications network provider or its authorized agent or licensed vendor. The Watt amendment was defeated 8 to 17.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Coble (NC)		X	
Mr. Smith (TX)		X	
Mr. Chabot (OH)			
Mr. Bachus (AL)		X	
Mr. Issa (CA)		X	
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)			
Mr. Jordan (OH)		X	
Mr. Poe (TX)			
Mr. Chaffetz (UT)		X	
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Amodei (NV)			
Mr. Labrador (ID)			
Ms. Farenthold (TX)			
Mr. Holding (NC)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Mr. Smith (MO)			
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Mr. Scott (VA)	X		
Mr. Watt (NC)	X		
Ms. Lofgren (CA)		X	
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)			
Mr. Johnson (GA)	X		

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Pierluisi (PR)			
Ms. Chu (CA)	X		
Mr. Deutch (FL)	X		
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)		X	
Mr. Garcia (FL)			
Mr. Jeffries (NY)	X		
Total	8	17	

There were two amendments adopted by voice vote: the underlying manager's amendment offered by Mr. Goodlatte of Virginia and the 2nd degree amendment offered by Mr. Chaffetz of Utah and Ms. Lofgren of California.

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1123, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 5, 2013.

Hon. BOB GOODLATTE, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1123, the "Unlocking Consumer Choice and Wireless Competition Act."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susan Willie, who can be reached at 226–2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 1123—Unlocking Consumer Choice and Wireless Competition Act.

As ordered reported by the House Committee on the Judiciary
on July 31, 2013.

CBO estimates that implementing H.R. 1123 would have no significant effect on discretionary spending over the 2014–2018 period. Enacting H.R. 1123 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 1123 would repeal a rule published in October 2012 by the Librarian of Congress (LOC) that would limit the ability of certain owners of wireless telephone handsets to “unlock” their phones, that is, to circumvent software protections that prevent the owner from connecting to a different wireless network. The bill would reinstate an earlier rule that provided broader authority to circumvent such software protections. H.R. 1123 also would direct the LOC to consider, within a year after enactment, whether to extend that broader authority to other categories of wireless devices in addition to smartphones. Based on information from the LOC, CBO expects that implementing the provisions of the bill would not have a significant effect on the agency’s workload.

H.R. 1123 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

H.R. 1123 would impose a private-sector mandate by eliminating an existing right of action for wireless carriers (and others)—who are currently able to pursue legal action against those who, without permission, circumvent the access controls on wireless telephone handsets sold after January 26, 2013. The cost of the mandate would be the forgone net value of settlements and damages in such cases. A search of the literature suggests that few, if any, of those types of lawsuits have been brought against individual consumers. Because such claims would probably be uncommon in the future and the damage awards allowed in such cases would be relatively small, CBO estimates that the cost of this mandate would be small and fall below the annual threshold established in UMRA for private-sector mandates (\$150 million in 2013, adjusted annually for inflation). If the Librarian of Congress decides to broaden the exemption allowed under the bill to cover other types of mobile devices, such an action would expand the limit of such rights of action. The cost of that expansion would depend on what devices the Librarian would include under the exemption. CBO has no basis to

estimate additional costs as they would depend on the regulatory actions taken by the Librarian.

The CBO staff contacts for this estimate are Susan Willie (for Federal costs), and Marin Burnett and Nathan Musick (for the private-sector impact). The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 1123 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 1123 specifically directs the Librarian of Congress to conduct one rule making proceeding within the meaning of 5 U.S.C. 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 1123 reinstates an earlier exemption to 17 U.S.C. 1201 to permit individuals to unlock their cell phones, creates a new rulemaking to determine if that exemption should be extended to other cellular devices, and enables others to legally provide technical assistance for the purpose of unlocking.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1123 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short title. Section 1 sets forth the short title of the bill as the “Unlocking Consumer Choice and Wireless Competition Act.”

Sec. 2. Repeal of Existing Rule and Additional Rulemaking by Librarian of Congress. Subsection 2(a) reinstates an exemption in paragraph (3) of section 201.40(b) of title 37, Code of Federal Regulations, that was in effect on July 27, 2010. This exemption was made pursuant to the authority of the Librarian of Congress as a part of his statutory authority under Section 1201(a). This exemption, set forth in paragraph (3) of section 201.40(b) of Title 37, Code of Federal Regulations states “(3) 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 tele-

communications network and access to the network is authorized by the operator of the network.”

Subsection 2(b) creates an expedited process to determine whether or not the reinstated rule should cover other categories of wireless devices. The Committee added this provision to permit the Librarian of Congress to create parity among devices with cellular connectivity. Although the language of Subsection 2(b) does not limit the categories of devices that connect to wireless telecommunications networks to be considered, the Committee anticipates that this Subsection will be most relevant to computer tablet devices that have the ability to connect to wireless networks. The Committee expects robust debate among interested parties before the resulting Copyright Office rulemaking process concerning which additional categories of devices, if any, should be exempt from the 1201 anti-circumvention restrictions. Given the technical similarities among cellular connected devices, the Committee expects the Register of Copyrights and Librarian of Congress to either create a blanket exemption or no exemption in the future for all cellular devices.

Subsection 2(c) allows an act of unlocking to be initiated by the purchaser of a wireless telephone handset, by a family member of such person, or by another person at the direction of such purchaser or family member for the sole use or benefit of such purchaser or family member. This circumvention must be within the constraints of the exemption that had previously been granted by the Librarian of Congress, that are adopted by the Librarian based on the narrow additional rulemaking authorized by this legislation, or that may be adopted for the same purpose in subsequent proceedings under Section 1201(a)(1)(C). As reinstated, section 201.40(b)(3) of title 37, Code of Federal Regulations, allows such acts of circumvention to be initiated by the owner of the copy of the computer program on the phone that enables it to connect to a wireless telecommunications network, and then only when performed solely in order to connect to a wireless telecommunications network and such access is authorized by the operator of the network. For accuracy, the Committee notes that language of the exemption adopted by the Librarian should have referred to the owner of the device, rather than the owner of the copy of the computer program since most computer programs are licensed, rather than sold, although the Committee believes that the difference in language has no substantive effect. However, the Committee will change the language of this legislative provision accordingly in future actions.

As these limitations imply, the legislation does not grant the Librarian authority to authorize circumvention in any other context in which the Librarian may grant an exemption under Section 1201(a)(1)(C). The Committee understands that unlocking a handset to enable it to connect to the network of another carrier typically involves the simple entry of a code, and that doing so results in nothing more than enabling the phone to connect to another network. In reporting this legislation, the Committee notes the unique circumstances of the phone unlocking situation, including the fact that the circumvention that is authorized enables the purchaser only to connect his or her device to a wireless telephone network other than the one associated with the device when it was

purchased. Circumvention for unlocking does not compromise the security of the information on the phone, and it does not expose any copyrighted works present on the phone to increased risk of infringement. Legalization of circumvention that has such harmful effects is not the intent of this legislation and it would not be authorized by its provisions.

Nothing in this Act is intended to serve as a limitation on section 1201(a)(2) or section 1201(b), which remain critical to the effectiveness of Chapter 12 of Title 17 and are in no way altered or modified by the provisions of this legislation.

Section 2(d) contains a rule of construction to clarify the legislation's impact upon the Librarian's existing authority. Specifically, as a result of this legislation, the Librarian is not allowed to modify the usual 3-year cycle for its section 1201 rulemakings, to modify or delete existing exemptions, or to modify or delete exemptions created by subsection (b).

Minority Views

H.R. 1123, the "Unlocking Consumer Choice and Wireless Competition Act," as introduced, was a bipartisan, bicameral bill designed to restore consumers' ability to unlock their cell phones. We support this common sense proposal because it provides consumers with greater choice by allowing them to keep their existing cell phones if they choose to switch to a new cellular network provider. We also agree that individuals who are not technologically savvy should be allowed to obtain assistance with unlocking their cell phones.

Nonetheless, we believe that amendments adopted during the Judiciary Committee's markup of this legislation merit further attention. In particular, Congress should consider the possible unintended policy consequences of the following key changes made by the manager's amendment: (1) the expansion of the universe of persons authorized to unlock cell phones; (2) the imposition of the third party assistance requirement on any future exemptions involving the category of works that includes tablets; and (3) the potential impact on the Copyright Office rulemaking process. We submit these views to highlight these changes and identify issues of possible concern regarding the bill as reported.

We would also note that since the Committee's markup of H.R. 1123 on July 31, 2013, the five largest mobile carriers have agreed to allow cell phone unlocking after a consumer's service contract expires. Specifically, in December 2013, five major U.S. wireless companies entered into a voluntary commitment with the Federal Communications Commission that will make it easier for consumers to unlock their devices and switch from one carrier to another.¹ The adoption of these voluntary principles undoubtedly will assist consumers and may mitigate the need to rush legislation to the floor.

¹The five wireless companies are: AT&T, Sprint, T-Mobile, U.S. Cellular, and Verizon Wireless. Letter from Steve Largent, President & CEO, CTIA, to Thomas E. Wheeler, Chair, Federal Communications Commission *et al.* (Dec. 12, 2013), available at <http://www.fcc.gov/document/ctia-letter-carrier-unlocking-voluntary-agreement-fcc-statements>.

DESCRIPTION AND BACKGROUND

Public policy surrounding the use of cell phones is increasingly important as a result of the growing popularity of smartphones, which enable consumers to access a variety of services and perform multiple functions from a single device. Given the technology involved with these devices, these policy decisions invariably involve overlapping issues of copyright law, competition and communications law.

Consumers often obtain new cell phones at a deep discount as part of their contract. Cell phone locking has been used as a means to ensure that consumers do not switch cellular providers before carriers have recouped the initial device subsidy. The process that enables a device to work on other cell phone networks by changing the software settings is known as cell phone unlocking. By changing internal software settings that are usually secured by technological protection measures, cell phones can operate on alternate carrier networks.

Under current law, it is prohibited to circumvent access controls that protect copyrighted works.² Because software contained in cell phones is often protected by copyright law, an exemption is legally required to circumvent those protection measures for purposes that do not constitute an infringing use of the copyrighted work. These anti-circumvention provisions were established by the 1998 Digital Millennium Copyright Act (DMCA), which also created a triennial review, called the 1201 proceeding, to provide a process to determine whether exemptions to the prohibition against circumvention are warranted for various categories of works.³ The DMCA authorizes the Librarian of the Congress to issue temporary exemptions during a triennial rulemaking process.⁴ This process allows the Copyright Office to issue rules that keep pace with advances in technology and account for and reflect changes in business practices and consumer needs, and avoids statutory proscriptions that are outdated by rapid advances in technology and business practices.

The Copyright Office recommended an exemption for cell phone unlocking in the 2006 and 2010 rulemaking proceedings.⁵ In 2012, however, it determined that an exemption was no longer warranted because the evidentiary record showed that carriers were now offering unlocked cell phones in the marketplace and providing consumers with greater choices. The 2012 rulemaking concluded that an exemption should continue for phones purchased by consumers on or before January 26, 2013, but that phones purchased after that date would not be provided an exemption from the anti-circumvention prohibition.⁶ The 2012 decision by the Copyright Office was intended to provide a 90-day period during which consumers would have sufficient time to purchase phones that would be covered by the exemption.

² 17 U.S.C. § 1201 (2014).

³ Digital Millennium Copyright Act, Pub. L. No. 105–304, 112 Stat. 2860 (1998).

⁴ 17 U.S.C. § 1201(a)(1)(c) (2014).

⁵ See <http://www.copyright.gov/1201/2006> and <http://www.copyright.gov/1201/2010>.

⁶ See U.S. Copyright Office, *Section 1201 Rulemaking Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights* (Oct. 2012) [hereinafter Recommendation of the Register of Copyrights].

Shortly after the 2012 rulemaking decision was issued, more than 114,000 individuals signed a petition criticizing it and demanding that unlocking be exempted from the prohibition. Likewise, the White House and the Federal Communications Commission also expressed support for an exemption for cell phone unlocking.⁷

SECTION-BY-SECTION EXPLANATION

The following is a description of the substantive provisions of H.R. 1123, as reported.

Sec. 2. Repeal of Existing Rule and Additional Rulemaking By the Librarian of Congress. Subsection (a) of section 2 of the bill reinstates the previous exemption by negating the October 2012 change and reinstating the 2009 exemption, subject to subsections (c) and (d), which deal with unlocking at the direction of the purchaser or family member and rules of construction.

Subsection (b) directs the Librarian of Congress, upon the recommendation of the Register of Copyrights, to consult with the Assistant Secretary for Communications and Information at the Department of Commerce and undertake a new rulemaking within 12 months to determine if any other category of wireless devices in addition to wireless telephone handsets should also be covered by an exemption.

Subsection (c) permits 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.

Subsection (d) states that nothing in the bill alters or can be construed to alter the authority of the Librarian of the Congress under section 1201(a)(1) of title 17, United States Code, including the authority, with respect to the applicable 3-year period, to modify or delete paragraph (3) of section 201.40(b) of title 37, Code of Federal Regulations, or modify or delete any category of wireless devices exempted under subsection (b) of this section.

ISSUES RAISED BY H.R. 1123

I. Inadequate Process

H.R. 1123, as originally introduced, represented a carefully crafted agreement that was supported by Members of both parties, industry experts, and key consumer and business stakeholders. On the eve of the Committee's markup, however, this compromise was replaced with the text of an amendment by Representatives Jason Chaffetz and Zoe Lofgren (Chaffetz/Lofgren Amendment), which was not officially released to all Democratic Members until 9:00 pm on the night preceding the markup that was scheduled for 11:00 am the following morning. As a result, our Members neither had sufficient time to review the language and assess its potential ramifications nor to consult with consumer groups, as well as governmental and private sector representatives for their analysis.

⁷R. David Edelman, *It's Time to Legalize Cell Phone Unlocking*, available at <http://petitions.whitehouse.gov/response/its-time-legalize-cell-phone-unlocking>; Ajit v. Pai, *Don't Treat Consumers Like Criminals*, N.Y. TIMES, Jun. 5, 2013, at A23.

II. Third Party Assistance

As introduced, H.R. 1123 restored the 2010 exemption, which adequately responded to the concern that consumers should be able to unlock their cell phones. The two prior exemptions by the Copyright Office never explicitly authorized third party assistance, and the introduced bill was consistent with that approach.

The Chaffetz/Lofgren Amendment, however, added a third-party assistance provision that expanded the universe of individuals who could lawfully perform the unlocking service which exceeded the exemptions previously allowed by the Copyright Office. Under the Amendment, any “family member”—which is not defined in the measure—or any third-party that a purchaser (or family member) authorizes to unlock a phone can do so. The Amendment’s failure to define who would qualify as a “family member” could invite unnecessary and unenforceable probes into who may qualify as a “family member.” In addition, this language may unintentionally aid those who traffic in stolen devices and encourage the bulk purchase and sale of unlocked phones by unauthorized dealers. Further, the Amendment’s explicit authorization of third-party assistance was made permanent and thus would be virtually unreviewable under the traditional 1201 proceeding even though future advancements in technology may render the provision unnecessary. This third-party assistance provision was not included in the bills introduced by the House and Senate on a bipartisan basis in March.

This last-minute expansion has been made without a record showing that it is necessary and without any safeguards to minimize the possibility of fraud or other activities that could harm consumers. Testimony from the hearing on the original bill indicated that having carriers involved in unlocking would not pose an obstacle to consumers as they should be able to unlock with a new carrier or agent of the new carrier. This allows the individual to get the appropriate technical assistance from the carrier to whom he or she wants to transfer service. This process would be effective, and would ensure that a cottage industry does not form that can exploit consumers. As Mr. Mike Altschul, General Counsel, CTIA testified during the Committee’s hearing on the bill, “the benefit of having the carrier do the unlocking is that you do not go to a third party source on the Internet or elsewhere which, in the unlocking process, increases the risk of malware and viruses being inserted into the devices.”⁸ These are issues that we do not take lightly and the bill as reported could increase the likelihood of these concerns.

In response to the Chaffetz/Lofgren Amendment, Committee Ranking Member John Conyers, Jr. (D-MI) and Subcommittee on Courts, Intellectual Property, and the Internet Ranking Member Melvin Watt (D-NC) offered at the markup a substitute amendment that would have limited the measure’s third-party assistance provision to carriers or their authorized agents (Watt/Conyers Amendment). The Watt/Conyers Amendment was offered in recognition of the concern that the explicit authorization in the Chaffetz/Lofgren Amendment that would allow virtually anyone to

⁸ *Unlocking Consumer Choice and Wireless Competition Act: Hearing on H.R. 1123 Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary, 113th Cong. 55 (2013)* (testimony of Michael Altschul, General Counsel, CTIA—The Wireless Association).

perform the act of unlocking is perceived as a potential erosion of the prohibition in 1201(b) that applies beyond the cell phone market. The Watt/Conyers Amendment failed by a vote of 8 to 17.

III. Imposition of Third-Party Requirement on Future Exemptions Involving the Category of Works that Includes Tablets

As introduced, the bill would have restored the previous authority for cell phone unlocking and authorized an out-of-cycle 1201 rulemaking proceeding for related wireless devices such as tablets and other connected devices. Following the out-of-cycle proceeding, requests for a cell phone unlocking exemption as well as that for tablets and other devices would be considered along with any other exemption request every 3 years under the customary processes and procedures mandated by the DMCA.

The bill as reported by the Committee requires third party assistance to unlock devices beyond cell phones whenever the Copyright Office issues an exemption for those devices. The Copyright Office has never recommended an exemption for “other categor[ies] of wireless devices,” in the first instance. Under H.R. 1123 as reported, if the Copyright Office grants an exemption for cell phones or the other category of wireless devices in future proceedings, it is mandated to also permit third party unlocking. This issue—unlocking and the need for assistance for devices beyond cell phones—deserves and requires further examination.

IV. Potential Impact on Copyright Office Rulemaking

The bill as introduced preserved the 1201 process by narrowly focusing on the specific determination concerning an exemption for cell phone unlocking. This targeted approach left intact the valuable proceedings under which the Copyright Office gathers evidence to determine whether exemptions are warranted to the legal ban against circumventing technological measures that protect uninhibited access to copyrighted works.

The Chaffetz/Lofgren Amendment also requires an out-of-cycle proceeding to consider whether tablets and other wireless devices should be exempt from the anti-circumvention prohibition. As noted above, however, the amendment also added the third-party assistance requirement to any future rulemakings in which an exemption is authorized for cell phones or any other wireless devices, including tablets, for which there has never been an exemption provided in prior triennial reviews. The technology in wireless devices as a category, as opposed to cellular handsets, has never justified an exemption in prior 1201 proceedings. In an effort to ensure that third party assistance to unlock tablets is statutorily mandated whenever the Copyright Office grants an exemption for the category of works that includes tablets, the Chaffetz/Lofgren Amendment removes the ability of the Copyright Office to evaluate relevant evidence and intervening developments, and it does so without regard to its impact on the broad range of devices that are encompassed by that category.

The current process of evaluating the options and technological advances available to consumers to ensure a healthy competitive marketplace and protect copyrights has been time-tested. Steven Metallitz, Counsel to the Joint Creators and Copyright Owners, ex-

plained the reasons why we should respect the Copyright Office rulemaking:

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.⁹

CONCLUSION

We support legislation that restores the ability of consumers to unlock their cell phones and that preserves the Copyright Office's role in conducting a robust review of the requests for exemptions from the DMCA's anti-circumvention provisions. As originally introduced, H.R. 1123 achieved these goals. Unexamined changes to the original bill made during the Committee's markup raise issues that may result in unintended, adverse consequences. In light of the voluntary agreement reached in December 2013 by the major cellular network providers that further improves consumer's ability to unlock existing phones and switch carriers, these issues may also warrant further examination.

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Additional Views

The Unlocking Consumer Choice Act as reported by the Judiciary Committee is intended to fix a problem caused by a Copyright Office decision in implementing section 1201 of the Digital Millennium Copyright Act. Section 1201 forbids circumvention of technological measures that control access to a work protected by copyright. The penalties for violations include civil liability, imprisonment, and heavy fines.

Under section 1201, persons are legally barred from unlocking their personally owned cell phones or tablets, even after the expiration of their service contract.

Allowing consumers to unlock their wireless devices enjoys wide support from multiple stakeholders. In an official response to a "We the People" petition, the White House gave full support for allowing consumers to unlock their cell phones and tablets.¹

⁹*Id.* at 41 (testimony of Steven J. Metalitz, Counsel, Joint Creators and Copyright Owners).

¹<https://petitions.whitehouse.gov/response/its-time-legalize-cell-phone-unlocking>.

Subsequently all the major wireless service providers voluntarily agreed to unlock cell phones and tablets for customers who were no longer under contractual obligation with the service provider. In announcing the agreement to unlock cell phones and tablets, CTIA stated that the “agreement will continue to foster the world-leading range of devices and offerings that Americans enjoy today.”²

By permitting consumers to unlock phones for personal use, this bill will strengthen consumer choice and protections. It allows the tech savvy to assist their less savvy family members and friends in unlocking their device. Additionally, allowing any third-party to assist with the unlocking will ensure that any fees associated with unlocking will be reasonable. This also provides consumers with the freedom of not having to deal with former service providers, or potentially face restrictions on cell phone unlocking in foreign countries when taking their phone overseas.

However, this bill is just a small step in the right direction of a much bigger issue. The current broad protections for other types of “digital locks” harms consumer choice, encourages anti-competitive behavior, and stifles innovation and does not conform to the thinking outlined in *Lexmark V. Static Control Components*.³

Lexmark had developed a microchip based authentication system for its printer toner cartridges that prevented the use of refilled cartridges as well as the use of third-party competing cartridges.

Lexmark asserted that section 1201 of the Digital Millennium Copyright Act prevented Static Control Components (or any other printer cartridge manufacturer) from creating its own version of the authentication chip because of the copyright associated with the software used to operate the printer, even though the lock itself did not protect this software or any other copyrightable content. This essentially eliminated all competition.

The court in *Lexmark* sided with Static Control Components and, recognizing the potential for future abuses, in his concurring opinion Judge Merritt wrote that: “our holding should not be limited to the narrow facts surrounding either the Toner Loading Program or the Printer Engine Program. We should make clear that in the future companies like Lexmark **cannot use the DMCA in conjunction with copyright law to create monopolies of manufactured goods for themselves . . .**”⁴ In other words, 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 impermissibly be used to protect monopoly.

The view that circumvention alone is illegal cuts off the potential of innovation to use devices in unique but otherwise lawful ways not intended by the manufacturer. In essence, at stake is what it means to “own” a device that has been purchased. Individuals should be free to tinker with and customize the devices they own to the fullest extent unless the rights of others, such as copyright owners, are infringed.

²CTIA Announces Voluntary Principles on Unlocking Wireless Devices, <http://blog.ctia.org/2013/12/12/ctia-announces-voluntary-principles-unlocking-wireless-devices>.

³*Lexmark Intern. v. Static Control Components*, 387 F. 3d 522.

⁴*Lexmark Intern. v. Static Control Components*, 387 F. 3d 522, Judge Merritt Concurring at 551.

Judge Merritt understood that “Congress did not intend to allow the DMCA to be used offensively in this manner, but rather only sought to reach those who circumvented protective measures ‘for the purpose’ of pirating works protected by the copyright statute.”⁵

While I support the Unlocking Consumer Choice Act as introduced and as reported out of the Judiciary Committee, 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.

ZOE LOFGREN.



⁵ *Id.* at 552.