

Why Can A Librarian Make Unlocking Cellphones Illegal?

As of Jan. 26, 2013, pursuant to an October 2012 ruling by the librarian of Congress,[1] it is illegal to “unlock” a new mobile phone purchased from a carrier without the approval of the carrier.

In other words, cellphones are typically tied (or “locked”) to one particular service provider, such as AT&T Inc., T-Mobile USA Inc. or Sprint Nextel Corp. Often, if a mobile phone is purchased from a service provider — especially if the phone is provided for free or at a very low price in exchange for the consumer signing a contract for cellphone service — the service provider has likely installed software on the phone that tethers the phone to that particular provider. In order for the customer to use the same phone with a different service provider, the phone would have to be unlocked or it will not work with the new carrier. Now, consumers will have to get permission from their current service providers to unlock their phones — even if their service contracts have expired — in order to use a mobile phone purchased after Jan. 26, 2013, on a different network.[2]

So how does a librarian have the power to make decisions that affect consumer electronics, even when those devices are owned outright by the consumer?

The Digital Millennium Copyright Act and The Librarian of Congress

In 1998, Congress enacted the Digital Millennium Copyright Act,[3] which makes it unlawful to circumvent technological measures (also known as “access controls” or “digital locks”) used by, or on behalf of, copyright owners to protect their works. However, the DMCA also provides that every three years, the librarian of Congress (who oversees copyrights, as well as one of the largest library collections in the world) determine certain classes of works that should be exempt from the prohibition upon the recommendation of the Register of Copyrights. The librarian may not simply renew an exemption from the last rulemaking, and exemption proponents must reapply for consideration every three years so that changes in technology, markets, and developments in the law can be sufficiently considered in the rulemaking process.

The DMCA was enacted at least in part to prevent piracy (infringement) of copyrighted materials such as music, movies and software — works that became much easier to copy when distributed digitally. Under the DMCA, “No person shall circumvent a technological measure that effectively controls access to a work protected under [the U.S. Copyright Act].”[4] That is to say, the purpose of the DMCA is to protect copyrighted works guarded by digital locks, such as digital rights management controls on an e-book to prevent unauthorized copying of the book. As cellphones (and other consumer electronics) contain copyrighted computer programs protected by technological measures subject to the DMCA, the librarian of Congress can rule on certain matters related to these products.

However, there appears to be an important difference between (1) circumventing a digital lock on a DVD to make unauthorized copies of a copyright-protected movie, and (2) circumventing a digital lock placed on a mobile phone to prevent the owner of the phone not to make unauthorized copies of the phone or the digital lock software, but to utilize the phone with a different service provider. In other words, in the first scenario, the digital lock is attempting to prevent infringement of a copyrighted work (the movie), whereas, in the second scenario, the digital lock is the copyrighted work and is attempting to prevent something that has nothing to do with copyright infringement (obtaining cellphone service from a different provider).

In fact, the librarian exempted unlocking of cellphones in both 2006 and 2010. Indeed, in 2006,[5] the Register of Copyrights stated that the “purpose of the software lock appears to be limited to restricting the owner's use of the mobile handset to support a business model, rather than to protect access to a copyrighted work itself. ... [Although] a strict application of the statutory language of § 1201 would be likely to result in a finding that one who circumvents the software lock on a cell phone in order to connect to a new network is engaging in unlawful circumvention of an access control ... the act of circumvention is made in order to engage in conduct which cannot reasonably be understood as infringing activity, and ...

the interests of the copyright owner do not appear in any way to be adversely affected when such circumvention takes place.”

In prior rulings, a Second Circuit case[6] and a review of mobile phone agreements at the time lead to the conclusion that “a substantial portion of mobile phone owners also own the copies of the software on their phones.” However, according to the librarian, the case law has evolved and other changes have occurred since then. In 2010, the Ninth Circuit held that “a software user is a licensee rather than an owner of a copy where the copyright owner (1) specifies that the user is granted a license; (2) significantly restricts the user’s ability to transfer the software; and (3) imposes notable use restrictions.”[7]

The librarian also quoted CTIA-The Wireless Association, a trade association comprised of various commercial wireless service providers, stating that “locking cell phones is an essential part of the wireless industry’s predominant business model,” which involves keeping customers in contracts in order to recoup the carriers’ subsidizing the cost of wireless handsets. Although the ruling acknowledged the circuit split and indeterminate state of the law regarding cell phone software ownership, the ruling relied on several major “carriers’ current unlocking policies [which state that the software is licensed] and the ready availability of new unlocked phones in the marketplace” which resulted in the decision that it should no longer be legal to unlock a new cellphone without the carrier’s permission.

CTIA claims that using software to lock a subsidized mobile phone to a carrier’s network is analogous to a car owner having to pay off outstanding loan before being able to transfer a car title.[8] However, it appears that the ruling misapplies the original intent of the DMCA and, instead of protecting copyrights, regulates competition and merely provides carriers with stronger arguments to enforce contracts that already protect the carriers’ phone subsidies.

Unlocking Is Illegal, But Jailbreaking Is Not

Pursuant to the ruling that prohibits unlocking a cellphone, a service provider can legally prevent a customer from using a device with another provider simply by placing a digital lock on the device ... and willful violators of the law may now face criminal penalties.

However, in the same ruling, the Library of Congress exempted “jailbreaking” of cellphones (but not tablets or game consoles) from copyright protection.[9] Many smartphone manufacturers lock devices so only approved applications can be installed (e.g., iPhone users can only purchase apps from Apple’s App Store). “Jailbreaking” occurs when a user removes these restrictions in order to download of apps or software not approved by the manufacturer or otherwise makes unauthorized modifications to the operating system.

In addition to potentially rendering some features of the phone (or the phone itself) nonfunctional and making the device more susceptible to viruses and malware, jailbreaking voids the phone warranty and often violates the terms of phone license agreements. Once a consumer jailbreaks a phone, it can be unlocked; however, unlocking a phone through jailbreaking is illegal and legitimate unlocking by a carrier is no longer an option.

What This Means for Consumers

Consumers who purchase a new mobile phone from a carrier on or after Jan. 26, 2013, will either have to obtain the carrier’s permission to unlock the device or buy a new phone in order to change service providers. Consumers will also need to unlock their old phones for resale purposes. Of course, in both instances, service providers could be motivated to keep their devices locked, as it will result in more phone sales. It’s important to note that “legacy” phones “previously purchased or otherwise acquired by a consumer” prior to Jan. 26, 2013, (whether used or unused) may legally be unlocked because they have been grandfathered in under the ruling. However, some carriers already forbid unauthorized unlocking in their customer contracts, so unlocking a legacy phone, while legal, could be a breach of contract with the service provider.

Additionally, consumers traveling abroad won't be able to use SIM cards from international carriers on a locked phone without the carrier's permission, and using a current locked phone abroad with a U.S. carrier's services will result in hefty roaming fees.

Although CTIA claims that "the largest nationwide carriers have liberal, publicly available unlocking policies," consumers should compare the various service providers' unlocking policies before purchasing a phone from a service provider.

Although enforcement of the ruling could be difficult, the potential legal penalties for unlocking a phone without the carrier's consent (or providing unlocking services to consumers) could be severe. Civil penalties provide for statutory damages ranging from \$200 to \$2,500 per individual act, or the carrier's actual damages and the violator's additional profits. Criminal penalties for the first offense could result in up to \$500,000 in fines or imprisoned for not more than five years, or both, and twice that for any subsequent offense.

It's likely that the service providers will be the ones to detect if a customer unlocks a phone, which may violate the terms of the carriers' contracts, result in contract termination fees, penalties and/or discontinued service.

Conclusion

The DMCA provides for a triennial exemption review process by the librarian of Congress so that changes in technology, markets and the law can be evaluated in an attempt to keep the DMCA current. Although this process is good in theory, in practice it results in inconsistent, irrational and arbitrary results that often have little to do with protecting copyrights and significant impact on consumers.

In the end, the exemption could be reinstated in another three years during the librarian of Congress' next DMCA rulemaking proceeding, which will be initiated in late 2014.

Furthermore, a We The People petition^[10] created on Jan. 24, 2013, calls for the White House to ask the librarian to rescind the decision or support legislation that would make unlocking permanently legal. On March 4, R. David Edelman, the Obama administration's senior adviser for Internet, innovation and privacy, posted a response to the petition.^[11] After convening a panel of government experts on telecommunications, technology and copyright policy, the response declares that the White House agrees with the 114,000-plus Americans who signed the petition and believe that consumers should be able to unlock their cellphones (and tablets) without risking criminal or other penalties. In the response, Edelman stated:

[I]f 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.

Unfortunately, the White House's response does not necessarily mean that the Library of Congress will reinstate the exemption to the DMCA making unlocking legal. The Library of Congress issued a statement in response to the White House post claiming that the rulemaking process "was not intended to be a substitute for deliberations of broader public policy" and that it "can often serve as a barometer for broader policy concerns and broader policy action."^[12] The Obama administration states that it "would support a range of approaches to addressing this issue, including narrow legislative fixes," and calls on the Federal Communications Commission and the National Telecommunications and Information Administration to combine forces and address this "urgent issue."

In response to the White House's March 4 response to a We The People petition calling for the Librarian of Congress to rescind his decision or for the Obama administration to support legislation that would make unlocking cell phones (and other wireless devices) permanently legal, Sen. Ron Wyden, D-Ore., introduced a bill (S.467) on March 5 to allow consumers to unlock mobile wireless devices for interoperability purposes entitled the "Wireless Device Independence Act of 2013." The bill proposes an amendment to the Section 1201(a) of the U.S. Copyright Act, known as the Digital Millennium Copyright Act, and would be effective as if enacted on Jan. 26, 2013 — the date the librarian of Congress issued his most recent ruling making the unlocking of cell phones illegal. Full text of the bill is available [here](#).

It seems the time has come for a review of the DMCA by the legislature instead of the librarian.

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[1] 37 CFR Part 201, available at <http://www.copyright.gov/fedreg/2012/77fr65260.pdf>. The ruling provided for a 90 day transitional period to allow customers time to unlock their phones before the exemption went into effect.

[2] 37 CFR § 201.40(b)(3) ("Exemption to prohibition against circumvention ... Computer programs, in the form of firmware or software, that enable a wireless telephone handset originally acquired from the 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.").

[3] The Digital Millennium Copyright Act of 1998, codified in part in 17. U.S.C. §§ 1201 et seq.

[4] 17 U.S.C. § 1201(a).

[5] 2006 Recommendation of the Register of Copyrights to the Librarian of Congress, available at http://www.copyright.gov/1201/docs/1201_recommendation.pdf.

[6] *Krause v. Titleserv Inc.*, 402 F.3d 119 (2d Cir. 2005).

[7] *Vernor v. Autodesk Inc.*, 621 F.3d 1102 (9th Cir. 2010).

[8] See <http://blog.ctia.org/2013/01/26/unlocked-devices/>.

[9] 37 CFR § 201.40(b)(2) ("Exemption to prohibition against circumvention ... Computer programs that enable wireless telephone handsets to execute lawfully obtained software applications, where circumvention is accomplished for the sole purpose of enabling interoperability of such applications with computer programs on the telephone handset.").

[10] We Petition the Obama Administration to: Make Unlocking Cell Phones Legal, available at <https://petitions.whitehouse.gov/petition/make-unlocking-cell-phones-legal/1q9KhZG7>.

[11] It's Time to Legalize Cell Phone Unlocking, available at <https://petitions.whitehouse.gov/response/its-time-legalize-cell-phone-unlocking>.

[12] Statement from the Library of Congress Regarding White House Statement Today in Response to a Petition on Section 1201 Rulemaking, March 4, 2013, available at <http://www.loc.gov/today/pr/2013/13-041.html>.

This article originally appeared April 5, 2013 on [Law360.com](http://www.law360.com).