

BEFORE THE
DEPARTMENT OF COMMERCE
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

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Request for Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and
Innovation in the Digital Economy

REGARDING REFORMING SECTION 1201 OF DMCA FOR CELLPHONE UNLOCKING

COMMENTS OF
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ON BEHALF OF THE NATIONAL CAMPAIGN ON CELLPHONE UNLOCKING

I am submitting this Public Comment as a representative on behalf of our White House “We the People” petition campaign that engaged over 114,000 Americans in support of phone unlocking. This Public Comment is in response to the Department of Commerce’s Internet Policy Task Force *Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy* (specifically pages 26-27 that address Section 1201 of the DMCA and the impact of the anti-circumvention provisions).

The Digital Millennium Copyright Act (DMCA) was passed in 1998 and was designed to be forward leaning for new developments in technology. But technology moves very quickly. The DMCA was passed a month before Google was founded, three year before the iPod, nine years nine years before the Kindle and the iPhone, twelve years before the iPad, and while DVD’s existed in 1998 it only reached 32.6% adoption four years later in 2002.

Pre-iPod era content regulating legislation needs revisions for the modern economy. We can now assess where the DMCA has worked and where it has failed. This should be done most specifically in the context of § 1201 which was controversial in 1998 and has become more controversial since as its actual implications have become more apparent.

In trying to lock down technologies for the 20th century, today, 15 years later, the need for § 1201 reform is increasingly clear. Evidence of its antiquation was on clear display with the public outrage to the ban on cellphone unlocking. Not only were the American people angered at not being allowed to unlock their phones, many were thoroughly aghast that the process itself, the mechanism being used of the Librarian of Congress, rather than through new legislation passed by Congress. Many people were astonished to learn that millions of Americans may be felons for using their own devices in a way that doesn’t affect anyone else.

The legal apparatus created by §1201 is completely disconnected from the public’s opinion on these issues. Consumers’ Union did a nationwide survey¹ on the issue of unlocking where they found the 96% of those with long-term wireless service contracts said that consumers should be able to keep their existing handsets when switching carriers. For those with smartphones, the number was even higher: 98%. These

¹ Testimony of George Slover on behalf of Consumers Union, Before the Subcommittee on Court, Intellectual Property, and the Internet (June 6, 2013), H.R. 1123, the "Unlocking Consumer Choice and Wireless Competition Act." Available at judiciary.house.gov/hearings/113th/06062013/Slover%2006062013.pdf.

numbers, and the mass support from our campaign, the first campaign to reach the new 100,000 threshold for the *We the People* website, demonstrates that the American people oppose banning unlocking, they do not want a system that makes unlocking a federal felony punishable by years in jail, and, with good cause, they are deeply distrustful of allowing for the Librarian of Congress to be the one to provide a narrow “exception” every three years. The continued existence of such an extremely unpopular system is only the result of most Americans and their elected officials being largely unaware as to the nuances of §1201, nuances which allows for technologies like unlocking to be banned by default with an extremely high hurdle to grant a narrow and temporary exception.

The goals of the DMCA were to protect copyright, this can be seen in the legislation’s text and in the floor statements at the time. Today, to the extent that the law is now having collateral damage outside of that main purpose then those areas of collateral damage must be urgently addressed. The DMCA is one of the bluntest tools of governmental power, effectively banning large forms of technology. Because of its blunt force, Congress needs to err on the side of banning too little – as it can always create standalone legislation to deal with specific problems as they arise. If §1201 is banning more technology than it ought to, then that needs to be addressed immediately; it is clear that §1201 bans far more technology than it ought to for the stated purpose of protecting copyright. The momentum of our campaign makes this abundantly clear.

The consequences of banning beneficial technologies are almost impossible to measure a priori, because, given regulatory and legal certainty, the free hand of the market is often able to find market models that policy-makers could never have dreamed of. A case in point is with the video rental market. When Congress banned the renting of CD’s and of software, it chose to not ban renting movies (despite industry pressure to pass legislation to that effect). The decision to allow that market to play out resulted in the success story of Blockbuster and then successor market models like Netflix. Netflix was created through its DVD by mail market model, a market model that Congress likely couldn’t have predicted when it considered banning the video rental market. With the foothold of the DVD by mail market, Netflix expanded to its streaming model and the development of independent content creation. This innovation has helped the consumer and increased competition in the industry – a win-win. Similarly, Congress also considered banning the VCR, but we now know that the resulting home content industry is an 18 billion dollar market. These billion dollar

markets may never have existed if Congress instead shut these industries off in the beginning for fear of the impact of these technologies and market models being abused by some portion of the American population or hurting incumbent industries.

A general rule of regulation is that even if a technology can be abused that does not necessarily require the technology itself to be banned. While most vehicles can travel over 100 MPH, there are no roads with speed limits above 100 MPH. Cars are designed with the capacity to break the law. Instead of regulating that technology out of existence, policy-makers punish the behavior of speeding.

In the technology sector the impact of excessive regulation is not just the impact upon personal liberty, but also an impact upon future market models. Policy-makers should be extremely careful in stifling other industries by locking in the market models of the past; if they can't see over the horizon then they shouldn't regulate over the horizon.

The Unlocking Exception:

As of 2003, wireless companies have been required to offer wireless number portability for consumers. Since 2007, consumers have had the right to "unlock" their wireless device through an exception, this exception was again renewed in 2009.² And in 2012 when the existence exception was up for its third renewal, Consumers Union, Youghioghny Communications, MetroPCS and the Competitive Carriers Association (representing over a 100 wireless carriers) submitted comments in favor of another exception (which was supported by other commenting parties).

The National Telecommunications & Information Administration (NTIA) provided its own recommendation³ which was in favor of keeping the exception:

“The record continues to support the conclusions made by the Librarian in the 2010 proceedings. First, proponents have presented a *prima facie* case that “the prohibition on circumvention has had an adverse effect on noninfringing uses of firmware on wireless telephone handsets.” This is the same type of activity that was at issue in both the 2006 and 2010 proceedings, when the Librarian granted exemptions. Second, while

² Original exception was requested by Stanford Law Professor Jennifer Granick

³ NTIA Letter to Register of Copyrights, "Re: Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, RM 2011-7" (September 21, 2012), available at www.copyright.gov/1201/2012/2012_NTIA_Letter.pdf.

opponents claim that access controls on network operability protect rights granted by copyright law, it continues to be clear that “the primary purpose of the locks is to keep consumers bound to their existing networks, rather than to protect the rights of copyright owners in their capacity as copyright owners.” Therefore, after analyzing the evidence introduced by the parties, NTIA is persuaded that an exemption continues to be necessary to permit consumers affected by access controls to unlock their phones.”

NTIA then explained how the arguments being offered by The Wireless Association (CTIA), in favor of removing the exception, were contradicted by evidence. While CTIA claimed that the wireless carriers have implemented policies allowing consumers to unlock their phone in certain limited circumstances, the NTIA’s findings contradicted these claims, by finding that carriers “generally will only perform this service under certain condition,” for example, a “minimum days of continuous service, the expiration of handset exclusivity associated with the carrier, a minimum usage of credit, or prior proof of purpose.” NTIA found that:

“[I]t is unlikely that these policies will serve a large portion of device owners. For example, the common denominator. . . is that the owner of the phone must be a current ‘customer’ or ‘subscriber’ of the carrier requested to unlock the phone. This requirement excludes those that obtain a device from a family member, relative, friend or other lawful source; those users must then resort to the current exemption to unlock such devices, especially if they cannot locate the original proof of purchase.”

NTIA also found that “some carriers refuse to unlock certain devices,” such as the iPhone. Lastly the NTAI argued that the exception was needed because lawful unlocking required the carrier to provide a code and some carriers did not possess or were unable to obtain the information to facilitate unlocking – meaning that even if they allowed unlocking the only way to unlock would be through the circumvention method.

But despite this showing, and despite precedential value from the Librarian’s previous rulings, the Librarian disregarded this advice. On October 26, 2012, the Librarian of Congress did not renew the existing exception for cellphone unlocking by explaining, “[I]n light of carriers’ current unlocking policies and the ready availability of new unlocked phones in the marketplace, the record did not support an exemption for newly purchased phones.”⁴ Their rejection of the NTIA’s recommendation was largely without explanation, essentially concluding that the NTIA’s study was wrong without appearing to have conducting any fact-finding of their own. The NTIA had documented how current policies are insufficient, how the limited availability of unlocked phones was not enough to displace the need for consumers to be able to unlock locked devices. The

⁴ Federal Register, Vol. 77, No. 208 (October 26, 2012), available at www.copyright.gov/fedreg/2012/77fr65260.pdf.

Librarian's ruling disregarded these findings without any substantive explanation as to why the NTIA's findings were incorrect.

As FCC Commissioner Ajit Pai explained⁵ in the New York Times, this ruling means that:

Essentially, the millions of Americans who try to take their phones with them when they switch wireless carriers are suddenly in the cross hairs of American copyright law. These consumers now face the prospect of harsh fines and even jail time.

The framing of the Librarian's response demonstrates why §1201 needs to be revised. The onus should not be on petitioners to prove that there is a vital market need for the technology; rather, the onus should be on the side arguing to ban technology that the only way to solve a copyright infringing problem is through banning the technology. The default rule should not be that a technology is banned without it being critical to the economy and establishing that change requires a change to §1201.

Banning Unlocking Violates Property Rights:

At its core, allowing for unlocking to be illegal is a violation of individual property rights. The right to property is a natural right that the government has an important obligation to protect. Since real property is a natural right, the individuals' rights to their own property therefore exists even without the government and the Constitution provides several safeguards to protect the right of Americans to their property.⁶

If a consumer has bought a device, then it is their device to use as they see fit. They should be able to jail-break it or unlock it, provided that their actions do not affect anyone else. If they retain property rights to their device (particularly when the device is out of contract) then they should be able to do whatever they choose with that device and the government has no role interfering with their property. On June 6, 2013, Consumers' Union testified⁷ before the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet Judiciary Committee and provided a similar perspective:

“We believe consumers should have the right to unlock their mobile device for use with a different carrier's network – whether to switch carriers themselves, or to use their device more economically while they are traveling abroad, or to sell or give the device to someone else for use with

⁵ FCC Commissioner Ajit Pai, "Don't Treat Consumers Like Criminals (June 5, 2013), available at www.nytimes.com/2013/06/06/opinion/switching-wireless-carriers-shouldnt-be-a-crime.html?_r=2&.

⁶ See Takings Clause of Fifth Amendment, and Ninth Amendment.

⁷ Slover, *supra* note 1.

the carrier of the new owner's choice. In short, consumers should be able to use the mobile devices they have purchased as they see fit."

The Impact of the Decision:

This decision harms millions of Americans, discourages innovation, and creates higher barriers to entry in the mobile sector. Consumers' Union testimony⁸ on this issue is particularly on-point:

"As the Subcommittee embarks on its comprehensive examination of the Copyright Act, we think the mobile device unlock [sic] exemption is a very good place to start. In this instance, the harm the anti-circumvention provisions of the Digital Millennium Copyright Act (DMCA) are causing consumers is concrete and unmistakable. We also think this issue offers a useful window into the operation of the anti-circumvention provisions as you undertake to re-consider them more broadly."

They went on to state, "The cost to consumers is less competition, less choice, more expense, and more waste. We don't think that's a fair trade-off, and we don't think it belongs in the copyright laws." As the White House responded to our We the People petition, they found that legalizing unlocking is "important for ensuring we continue to have the vibrant, competitive wireless market that delivers innovative products and solid service to meet consumers' needs."⁹

This prohibition affects real businesses, this is a statement from Kyle Wiens (the CEO of iFixit):

"My business, iFixit, is a free, open-source repair manual for everything, including cell phones. The anti-circumvention measures of the DMCA has a material impact on our business, preventing us from helping people start businesses to unlock and repurpose cell phones. . .Please, protect consumer freedom. Fix this blatant misuse of copyright law by legalizing cell phone unlocking."

Here are only a few of the major benefits of unlocking for average Americans citizens:

International Travelers:

International airports have numerous kiosks and companies offering SIM cards for phone use. These often offer local calling minutes, international calling minutes and even data plans. For Americans traveling abroad this is an extremely good deal. American travelers can bring their phones, pop out the SIM card and use these cheap SIM cards to avoid paying massive international fees from their local US-based carriers.

⁸ *Id.*

⁹ *Petition: Make Unlocking Cell Phones Legal*, WHITEHOUSE.GOV (Jan. 24, 2013), <https://petitions.whitehouse.gov/petition/make-unlocking-cell-phones-legal/1g9KhZG7>.

If unlocking was legal, as it is in much of the rest of the world, Americans would be able to buy and use these SIM cards when traveling abroad. Additionally, this small change in law would have an impact upon consumers who choose not to unlock their phones by placing downward pressure through competition upon international calling rates – thus using the free market to reduce exorbitant international roaming costs.

Aaron Poffenberger, from Houston, Texas, e-mailed me his story which is now on his blog, on how he was personally effected:¹⁰

“My Cellphone Unlocking Story

In December 2011 my wife and I decided to buy new phones for ourselves and our children. We went to our local Costco and upgraded our T-Mobile account and bought 5 identical T-Mobile-branded phones. One of the reasons we prefer T-Mobile is their policy about cellphone unlocking: after 3 months T-Mobile will send the unlock code to the customer via email upon request. In cases where the customer needs it sooner, they'll usually accommodate.

We unlock our T-Mobile phones because they're GSM based. We've lived in England, traveled across Europe and made numerous visits to family in Central America. We prefer GSM phones because we can buy SIM cards in the country of our visit and have local numbers for family or friends to call while we're there.

After about 10 months with our new phones and plans I requested unlock codes for all 5 phones. T-Mobile were very accommodating as usual...except for my phone. For some reason their online systems had no record of the IMEI code for my phone. They looked diligently but couldn't find any record of the device. The only restriction T-Mobile place on unlocking phones is it must be one of their phones tied to a current customer account. We tried over the course of several months to get the issue resolved to no avail. Despite having receipts and other proofs of ownership T-Mobile wouldn't (and couldn't) unlock the phone.

Rather than fight the issue I decided to pay \$14.00 to buy an unlock code. It was then I realized the exception for cellphone unlocking had expired. Despite being the lawful owner of the phone. Despite T-Mobile's willingness to give me the code. I couldn't get the code. At least not lawfully.

I'm no fan of this provision of the DMCA but until recently it was a theoretical nuisance because of the unlock exception. Now it's very real. My phone is locked and will remain that way. There is no recourse; there is no exception...unless I'm willing to break the law.

Or Congress recognizes a technology-owner's right to control the use and disposition of their property and repeals this section of the DMCA.

–Aaron

¹⁰ Aaron Poffenberger, "My Cellphone Unlocking Story" (June 6, 2013), available at akpoff.org/archive/2013/my-cellphone-unlocking-story.html.

Aaron Poffenberger
Houston, TX

P.S. I gave my eldest daughter my phone after she broke hers. She's traveling to Nicaragua this month. She won't be taking the phone with her. It's locked to T-Mobile's network.”

Today, many regular international travelers break the law and use this technology anyway; but casual international travelers are often unaware or unwilling to break the law.

Nations' Deployed Service Members:

When our Service Members are deployed abroad, whether in wars in Afghanistan and Iraq, or on our permanent bases in South Korea and Germany, they often have to unlock their phones to be able to continue to use them. I have received messages from numerous service members who were very concerned about breaking the law and committing a felony in order to be able to use their phone in Afghanistan where their local carrier had no service whatsoever.

Our nation's Service Members deserve better than to worry about being felons, and losing their security clearances or being discharged, for using a technology that should never have been banned to begin with.

Resale Market:

Keeping unlocking legal will enable average Americans to trade in their old phones for newer phones and receive a higher value for their device (phones that can be used on more than one carrier will have more potential buyers and are capable for greater uses). Through empowering this resale market, consumers will be able to buy used phones that will work with their carrier. Giving them more flexibility and new consumer choices. Further, unlocking will ultimately reduce the number of phones that end up in landfills by finding new uses for older devices.

Federal Overcriminalization:

American citizens should not be under threat of going to prison, being convicted as felons, and losing their freedom and right to vote over behavior that is not a social harm. The danger of federal overcriminalization is not just the actual threat that average Americans would be arrested for these crimes, but

rather the impact of federal overcriminalization upon economic opportunities for business and prosecutors' ability to abuse the system and selectively target individuals for prosecution.¹¹

Our White House petition was possible through the collaboration with Sina Khanifar whose company offered unlocking technology for consumers until he received a letter from Motorola informing him that he needed to knock it off or risk civil liability and criminal liability. His company was ultimately shut down, and he narrowly avoided personal liability because Motorola decided not to pursue further action (from my Atlantic article "The Law Against Unlocking Cellphones Is Anti-Consumer, Anti-Business, and Anti-Common Sense"¹²):

"I started unlocking phones after a typical entrepreneurial experience: I had a problem and was forced to find a solution. I'd brought a cell phone from California to use while attending college in the UK, but quickly discovered that it wouldn't work with any British cell networks. The phone was locked. Strapped for cash and unable to pay for a new phone, I figured out how to change the Motorola firmware to unlock the device. Realizing that others were likely having the same problem, I worked with a programmer to create an application that allowed people to quickly and easily unlock their Motorola phones and use them with any carrier. After my first year of college ended in summer of 2004, I launched a website (Cell-Unlock.com) selling the software. It was a make-or-break moment for me personally. I was in a major financial crunch.

At first sales were slow, but during my second year at college Motorola released the extremely popular RAZR V3, and my website became a success.

It was then that I received Motorola's cease and desist letter. It claimed that I was in violation of the DMCA, a crime punishable by up to \$500,000 in fines and five years in jail per offense. I was 20 years old and terrified; my immediate reaction was to shut down the business."

When average and innocuous behavior is illegal, the threat is not just of individuals being arrested by an overzealous prosecutor, but also that the threat of criminal action can be used by businesses to attack and intimidate competition (as was done to Sina Khanifar).

Greater Wireless Carrier Competition:

¹¹ See *US. v. Drew*.

¹² Derek Khanna, *The Law Against Unlocking Cellphones is Anti-Consumer, Anti-Business, and Anti-Common Sense*, THE ATLANTIC (Feb. 11, 2013), <http://www.theatlantic.com/business/archive/2013/02/the-law-against-unlocking-cellphones-is-anti-consumer-anti-business-and-anti-common-sense/272894/>.

Costs for data usage, texting and phone calls have remained high for American consumers. Texting in particular is a cash cow where all texting plans are essentially 99.9% profit. In fact, consumers pay more, per same data size, to send a terrestrial text than NASA pays for messages from Mars¹³ (texting costs the carriers next to nothing). Other abuses in this market have been well documented, including carriers' voicemail prompts being deliberately long to increase the number of calling minutes. Competition through the free market can be a critical part in reining in these exorbitant pricing models.

In areas that are not subject to federal intervention through criminalization, we are seeing the market offer alternatives to drive down costs. This year for the first time, phone usage of alternative messaging services has now outpaced use of phone carrier SMS texting. In other words, the market has offered competition to offer similar texting like technology for free or very cheap costs.

In the Competitive Carriers Association's testimony before the House Judiciary Subcommittee on Courts, Intellectual Property they explained¹⁴ that:

The market reality under the exemption was to give consumers pro-competitive choices to select the carrier of their choosing without losing access to their iconic devices. For example, this past January, while the exemption was in place, T-Mobile CEO John Legere noted that T-Mobile had nearly two million iPhones operating on its network, even before it began selling the device. This may not have been possible absent the unlocking exemption, and those two-plus million consumers may still be unnecessarily tied to a less desirable network.

The wireless market is dominated by several major phone companies who have nearly exclusive access to the latest phones and to the latest technology for phone coverage. New market participants and smaller market participants have enormous difficulty entering this market. The up-front costs are astronomical; placing new companies in a chicken and egg like predicament of being unable to ramp up from a small level. With the new spectrum auctions there is a threat that the big market participants will be able to gobble up more of the

¹³ Grant Brunner, "Price Gouging: It Costs More to Send a Text Message on Earth Than From Mars," EXTREME TECH (November 30, 2012), available at www.extremetech.com/mobile/141867-price-gouging-it-costs-more-to-send-a-text-message-on-earth-than-from-mars.

¹⁴ Testimony of Steven Berry, President and CEO of Competitive Carriers Association, Before the House Judiciary Subcommittee on Courts, Intellectual Property and the Internet (June 6, 2013), H.R. 1123, the "Unlocking Consumer Choice and Wireless Competition Act." Available at judiciary.house.gov/hearings/113th/06062013/Berry%2006062013.pdf.

spectrum as a land grab and keep it away from new participants in the market. And to add to these difficulties, many consumers demand the latest phones that they may not be able to obtain as small carriers.

The Competitive Carriers Association (CCA) represents over 100 wireless carriers from small, rural providers to regional and national providers. CCA testified¹⁵ that:

Unlocking is particularly important for rural, regional, and smaller carriers that lack scope and scale to gain access to the latest, most iconic devices directly from the equipment manufacturer, which, in turn, prevents millions of consumers – your constituents – from accessing the latest devices. Competitive carriers face many challenges gaining access to the inputs necessary to provide mobile broadband service, including interoperable spectrum, networks through interconnection and roaming at reasonable terms and conditions, and devices. In an industry where the largest two carriers control access to these inputs, unlocking provides one small, but important, opportunity for competitive carriers to provide service to consumers who wish to enjoy innovative services and rate plans, but do not wish to give up previously purchased devices, applications and associated content.

Their testimony explained that the “entire mobile ecosystem serving consumers is dependent on vibrant competition in the wireless industry” and that they support efforts to “remove barriers to competition” including the ban on cellphone unlocking.

Permanently legalizing unlocking will empower this free market by removing it from DOJ intervention and allow consumers to bring over their old phones after their contract has expired. Criminalizing innocuous behavior to discourage new market participants is a form of federal intervention into the market.

Unlocking Will Allow Users to Have Secondary and Back-up Phones.

For consumers who would rather not resell their old phones or port them over to another carrier, they have the option of retaining their phones and finding new uses for these phones. Just as in Europe and Asia there are companies that sell SIM cards, in a free market system that permanently legalizes unlocking (and the technology), users could easily buy SIM cards with 500/1000 minutes.

Many parents want their children to be able to contact them in case of an emergency, during a field trip, once they start driving, or after extra-curricular activities – but they may not want their young children to have their own phones at such an early age. By removing unlocking from DMCA prohibition, these parent can give their old phones to children just for these purposes and buy SIM cards, while restricting calling, texting, e-mail and web privileges as they see fit.

¹⁵ *Id.*

In a world where 1) most individuals will have older phones, 2) unlocking is legal, and 3) these SIM cards are cheap, there may be logic in keeping an emergency phone in the trunk or dashboard of your car in case you run into a serious emergency. The average person may not buy a whole extra phone for these purposes, but they are far more likely to buy a SIM card that is extremely cheap and use an old phone for this purpose instead.

New Market Models:

Republic Wireless.

Republic Wireless offers a competitive new product for consumers, unlimited voice, text, internet and data for only \$19 a month. Their secret? Their service “off-loads” calls, text and data to wireless when the phone is in a wireless area and it uses Sprint when it is not in a wireless area. This market model undercuts the market by 60-80% and has the added benefit of being an innovative part of the solution to the spectrum crunch (off-loading will be a critical part in weathering the continuing explosion in consumers’ data usage).

Their problem? They are a newer market participant and don’t have the relationships with the handset providers necessary to offer the latest and greatest device technologies with their service. In a free market where unlocking was lawful, a consumer could bring their old iPhone, Samsung Galaxy, Blackberry Q10, Nokia 420 over to Republic Wireless and be on a \$19 per month all you can use plan.

According to Greg Rogers, Deputy General Counsel of Republic Wireless’s parent company:

"If consumers can legally unlock their phone, and if businesses can legally offer services for phone unlocking, both consumers and companies like ours will benefit from the competitive forces such laws would unleash -- particularly if it is done on a permanent basis. Allowing customers to bring their favorite devices to their chosen provider after their contract has expired will spur more competition in the wireless market and boost market models like ours as a result. Our goal is to be able to offer our service on a level playing field and let the consumer decide what service works best for them."

The National Unlocking Campaign:

When this ruling went into effect on January 26, there was an immediate negative response from the technology community. Most technology websites covered this issue and criticized the ruling as ridiculous, we were unable to find a single website with a favorable article on the ruling. In the six years that unlocking has

been lawful, it has become a widely used technology, so this ruling meant that potentially millions of Americans would now be felons.

My first article on the issue “The Most Ridiculous Law of 2013 (so far): It’s Now a Crime to Unlock Your Phone” received over a million hits and knocked The Atlantic offline temporarily. Recognizing a clear backlash from the American people, entrepreneur Sina Khanifar created a White House petition¹⁶ on this issue and we teamed up on a national campaign on this issue. The White house petition stated: “We ask that the White House ask the Librarian of Congress to rescind this decision, and failing that, champion a bill that makes unlocking permanently legal.” After a month of campaigning, we obtained 114,322 signatures making it the first White House petition to reach the new 100,000 threshold.

The White House responded by endorsing unlocking:

“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.”

Additionally the FCC endorsed unlocking as well:

"From a communications policy perspective, this [ruling] raises serious competition and innovation concerns, and for wireless consumers, it doesn't pass the common sense test. The FCC is examining this issue, looking into whether the agency, wireless providers, or others should take action to preserve consumers' ability to unlock their mobile phones. I also encourage Congress to take a close look and consider a legislative solution."

And FCC Commissioner Ajit Pai was most clear:

“To restore a free market that benefits consumers, we should amend the 1998 act to allow consumers to take their mobile devices from one carrier to another without fear of criminal prosecution or civil fines. We should also make clear that those who help consumers unlock their phones and tablets won’t be prosecuted either. And we should reiterate that contracts remain valid and enforceable. These fixes should be permanent, so that consumers, developers and wireless carriers don’t have to worry about the law shifting on a whim.”

The Solution:

¹⁶ Petition, *supra* note 9.

There are three common sense principles that should be applied to whatever legislation solution is enacted.

1. *The solution must be permanent.*
Entrepreneurs, and the public, shouldn't be placing a bet every three years that the Librarian of Congress will keep something as lawful; rather, regulatory certainty needs to be built into the market.
2. *Individuals need to be able to unlock their phones, but also develop the tools to unlock and sell those tools to consumers.*
There is little point in legalizing a technology that no one can find, buy and use.
3. *Other technologies that are also in the bucket of being affected by §1202 without a true copyright purpose should also be lawful.*
If legislation addresses unlocking then, at a minimum, it should also address jail-breaking, close captioning for the deaf and read aloud functionality for the blind.

The Fix Must be Permanent

Merely allowing the Librarian of Congress to rule once again on this issue every three years is unacceptable. The Librarian of Congress issued a statement as a response to our White House petition, which appears to double down on his ruling in favor of rejecting unlocking. He notes that his decision to ban unlocking is a decision limited by specific statutory criteria rather than a broad public policy analysis:

“The rulemaking is a technical, legal proceeding and involves a lengthy public process. It requires the Librarian of Congress and the Register of Copyrights to consider exemptions to the prohibitions on circumvention, based on a factual record developed by the proponents and other interested parties. The officials must consider whether the evidence establishes a need for the exemption based on several statutory factors . . . As designed by Congress, the rulemaking serves a very important function, but it was not intended to be a substitute for deliberations of broader public policy.”

The Librarian's job is not to assess the best policy in a vacuum but rather to consider specific statutory factors and otherwise keep the technology illegal by default. This statutory framework is not acceptable to continue to apply to unlocking.

If at this point, all participants recognize that unlocking is beneficial, then subjecting this technology to a triennial process for approval is unacceptable. As FCC Commissioner Ajit Pai explained¹⁷ in June, 2013: “President Obama, Senators and Representatives, FCC Commissioners, and the American people are reaching a consensus on a simple proposition: Consumers should be allowed to unlock their cellphones and switch wireless carriers without being labeled scofflaws.” Commissioner Pai explained that this was “a classic case of

¹⁷ FCC Commissioner Ajit Pai, Remarks at Cellphone Unlocking Forum with Tech Freedom and CEI (June 17, 2013), available at transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0617/DOC-321641A1.pdf.

the government ‘solving’ a problem that doesn’t exist.” The White House has explained¹⁸ that this Librarian of Congress’s method for temporary exceptions “is a rigid and imperfect fit for this telecommunications issue.”

The Librarian of Congress has specific statutory mandates on what to assess in whether to allow certain technologies. Congress, on the other hand, can take a holistic and thoughtful view on this issue; where there is no overwhelming governmental interest to ban a technology then it should remain lawful – permanently.

The market needs regulatory certainty. Venture capitalists need certainty before investing. Entrepreneurs need certainty before they leave their current job or drop out of college (as Mark Zuckerberg, Bill Gates, and Steve Jobs did) and launch their next venture.

Imagine, you are an entrepreneur and you are developing unlocking tools or building a website that sells these tools. You meet with angel funders and venture capitalists and you explain your product, your targeted demographic, your team and your monetization strategy. The potential funders then ask, “All that seems great, but what will happen after January? Which way will the Librarian rule this time? How can I invest in your technology if it may be illegal next year?”

Greg Kidd is an angel funder who was one of the first investors in Twitter and Square, when asked about this issue, whether he would invest in technology that may or may not be lawful next year, he responded:

“Here in the valley, we have a great appetite for taking calculated technical and business risks. But to add a jump ball of uncertainty over whether an opportunity that is legal one day might become illegal the next, for no other reason than a political or regulatory whim, is a red flag that shuts down my willingness to invest.”

This lack of appetite for legal uncertainty is more than a theoretical problem as there appears to be little logic or internal consistency in the Librarian of Congress’s rulings. While they may be justified on the most complicated of legal grounds, to the average investor and entrepreneur they are entirely unpredictable. This year as a case in point, while the NTIA advised in favor of unlocking the Librarian disregarded this recommendation and concluded that their evidence was wrong without real explanation – even the most knowledgeable lobbyist or lawyer likely would not have predicted that the Librarian would choose to now not renew the existing exception.

¹⁸ Petition, *supra* note 9.

Until 2010, jail-breaking iPhones was illegal, but jail-breaking iPads is now illegal as of 2013. This regulatory uncertainty is one of the most destructive forces for innovation. Now that there is no longer a policy debate on this issue, all sides agree that unlocking is beneficial, it is time to solve this issue permanently.

Commissioner Pai was very clear on this point:

“[W]e shouldn’t just kick the can down the road. Let’s fix this problem permanently. We don’t need to have the exact same debate every three years, like an extended version of the movie Groundhog Day. I can assure you that the case for criminalizing cellphone unlocking isn’t going to get any stronger with time.”

If Congress, the White House, the Commerce Department, FCC, FreedomWorks, EFF, Public Knowledge, Free Press, R Street, Tea Party Nation, National College Republicans, Young Americans for Liberty, Competitive Carriers Association, Consumers’ Union, experts like Vint Cerf and scholars from Mercatus, Cato, and Competitive Enterprise Institute, and the 114,000 Americans who signed our petition (and so many millions of others) think that this technology is a beneficial technology for the market, then why would we keep it as illegal subject to a potential triennial exception?

As I mentioned in the articles that started this campaign:

“A free society shouldn’t have to petition its government every three years to allow access to technologies that are ordinary and commonplace. A free society should not ban technologies unless there is a truly overwhelming and compelling governmental interest.”

There may be some debate among those in our coalition and in Congress as to whether unlocking or interoperability should be mandated, these are important policy discussions but it was not the basis of our campaign. Everyone is in agreement now that unlocking should not be a felony, that was our campaign, that issue needs to be resolved permanently through law immediately.

Legalize the Tools and Selling the Tools

There is little point in allowing personal use of a complex technology, unlocking, that is impossible for consumers to find, buy and use. It would follow that it is illogical to classify businesses that cater to this legal market as an illegal businesses. Instead, if consumers are allowed use this technology, and economists and market experts agree that this technology is beneficial for the market, then the technology must be lawful to develop and sell to the consumer.

This is also consistent with the comments of Commissioner Pai:

“[W]e should also protect those who help consumers unlock their phones. Unlocking can be as simple as dialing a code on your phone, but it’s often more complicated. I know I certainly couldn’t take my phone out of my pocket and unlock it right now. So helping consumers exercise their right to unlock their cellphones shouldn’t be a crime.”

As currently constructed, the exemption process, when granted, only provides an exemption for the user him/herself. This is not enough, which is why the solution must be permanent through legislation.

Addressing Other Similar Technologies

There are numerous other technologies also made illegal under the §1201 with potential exceptions under the triennial review process. There are those who argue legitimate reasons for some of them being banned; however, banning many of the technologies is simply indefensible. Technologies that have legitimate, non-infringing purposes, should not be banned under the DMCA. The default rule should be technologies that have legitimate, non-infringing purposes should be lawful, and Congress can then deliberate on each technology and face the difficult trade-offs on whether there is an overwhelming reason to ban the technology that is sufficient to outweigh the benefits of the technologies. This complicated trade-off is not the job of the Librarian of Congress.

Commissioner Pai explained in his remarks how the issues that affect cellphone unlocking actually apply to other technologies as well:

“[T]his debate was inspired by cellphone unlocking, but the DMCA cuts a much wider swath. The anti-circumvention provisions also target netbooks, tablets, personal digital assistants—pretty much any mobile device. Consumers shouldn’t be put in the position of migrating some of their electronics, but not others, from one carrier to the next. Let’s make sure all wireless communications devices are included in the fix.”

This is what the NTIA recognized when it advised in favor of expanding the existing exception to also include other devices as well – which is also what the White House advised in their response to our White House petition.

But the other related technologies that have strong beneficial uses and no impact upon copyright or purpose in facilitating copyright infringement must also be included. While jail-breaking (rooting) a phone was granted an exception, jail-breaking an iPad is still illegal. There is no overwhelming and compelling reason for keeping that technology as illegal.

There are an estimated 23 million jail-broken devices, but until 2010 jail-breaking for all devices was illegal meaning that these users could have been subject to criminal prosecution or fines. Jail-breaking is where a user patches their phone allow installation of “unapproved” software on the device. Far from being used

solely for “illegitimate means” many advanced users jail-break their phones to give them higher functionality, higher capability to secure their privacy, and the ability to increase the cybersecurity for the devices. Many computer science professionals and privacy advocates use devices that are jail-broken for this reason. If privacy advocates and computer science professionals want to jailbreak their phone to write their own software or to install cybersecurity tools that Apple will not allow then that is not the government’s business. Substantive reforms that address unlocking must also address jail-breaking which is a nearly identical technology and technique to unlocking.

Similarly, some technologies that would help persons with disabilities remain illegal. There are over 21.2 million Americans with vision difficulties, that could benefit from read aloud functionality, and there are 36 million deaf persons in the United States who could benefit from closed captioning technology. While the technologies, by themselves, do not categorically violate §1201, when developing the technologies requires circumventing a digital rights management (DRM) system, then it is illegal without an exception.

While the Librarian grants an exception, the exception is nearly unusable. For example, blind individuals may be allowed to use some technologies, but only if they code this technology. Exceptions like these make little sense. Even with the exception, businesses cannot cater to this 57.2 million person US market without permission from rights-holders, which is often refused. These accessibility technologies may help these individuals enter the job market or to be able to greater enjoy media in their personal time. Substantive reforms that address unlocking must also address accessibility technology. While the technologies are different, there is no legitimate rational to keep these technologies as illegal and then require advocates for the deaf and blind to petition every three years for an exception (an exception that ends up being so narrow that they are largely unable to use). This is not to say that changing §1201 for accessibility technology will solve all of the problems for accessibility technology, it will not, but it will remove a major roadblock that impacts an important technology.

Banning technologies that specifically facilitate piracy and copyright infringement are one matter, but to the extent that these provisions are now being interpreted to prohibit other technologies that have beneficial purposes, then that is an issue that must be immediately rectified.

Conclusion:

Legislation that would accomplish these three common sense requirements has now been endorsed by National Consumers League, FreedomWorks, R Street, Generation Opportunity, Campaign for Liberty, Let Freedom Ring USA, Cascade Policy Institute, the Harbour League, Public Knowledge, reddit, Fight for the Future, iFixit and the Electronic Freedom Foundation (among other groups).¹⁹ However, despite several months after our campaign on unlocking, the only legislation that accomplishes these goals has yet to receive a single hearing. Other legislation that would merely reverse the Librarian's ruling temporarily is the only legislation that has thus far received a hearing – despite the fact that nearly all outside groups consider that legislation to be insufficient to actually solving the problem.

Our contention is that given the enormous benefits that phone unlocking provides to the consumer, phone unlocking should be made permanently lawful for the consumer to use, industry to develop and marketers to sell. In addition, other technologies and techniques that are otherwise lawful and that don't involve copyright infringement should be made permanently exempt from §1201 and not dependent on a failing triennial exception process.

¹⁹ To be clear, this filing is not made on behalf of these organizations.