

Long Comment Regarding a Proposed Exemption Under 17 U.S.C. 1201

Check here if multimedia evidence is being provided in connection with this comment

Please note that such evidence must be separately submitted on a disc or flash drive. See the Notice of Proposed Rulemaking for detailed instructions.

Item 1. Commenter Information

Identify the commenting party and, if desired, provide a means for others to contact the commenter or an authorized representative of the commenter by email and/or telephone. (Please keep in mind that any private, confidential, or personally identifiable information in this document will be accessible to the public.)

Commenting Party: Competitive Carriers Association (“CCA”)

CCA is the nation’s leading association for competitive wireless providers and stakeholders across the United States. CCA’s membership includes more than 100 competitive wireless providers ranging from small, rural carriers serving fewer than 5,000 customers to regional and national providers serving millions of customers. The licensed service area of CCA’s carrier members covers more than 95 percent of the nation. CCA also represents approximately 200 associate members consisting of small businesses, vendors, and suppliers that serve carriers of all sizes.

Contact: Rebecca Murphy Thompson, General Counsel
C. Sean Spivey, Assistant General Counsel
Email: sean.spivey@competitivecarriers.org
Telephone: (800) 722-1872

Item 2. Proposed Class Addressed

Identify the proposed exemption that your comment addresses by the number and name of the class set forth in the Notice of Proposed Rulemaking (e.g., “Proposed Class 7: Audiovisual works – derivative uses – noncommercial remix videos”).

Proposed Class 12: Unlocking—All Purpose Tablet Computers.¹ As noted in the *NPRM*, “This proposed class would allow the unlocking of all-purpose tablet computers. This class would encompass devices such as the Apple iPad, Microsoft Surface, Amazon Kindle Fire, and Samsung Galaxy Tab, but would exclude specialized devices such as dedicated e-book

¹ CCA originally sought four separate exemptions addressing the following categories: (i) wireless handsets; (ii) all-purpose tablet computers; (iii) mobile hotspots and MiFi devices; and (iv) connected wearables and consumer machines (the Internet of Things). For consistency and efficiency, however, CCA reiterates its request that these exemptions, and other similar exemptions, should be consolidated into a single “wireless device” exemption, as they all involve computer programs used in devices that connect to a telecommunications and/or broadband network. Consumers do not distinguish among categories of connected devices, and having an exemption only applicable to a subset of wireless devices is likely to cause consumer confusion and frustration.

readers and dedicated handheld gaming devices.”² CCA believes that all-purpose tablet computers of the type and nature can be broadly defined as “mobile computers that are operated with fingers or a stylus through the use of a touch screen display.” This definition is both specific enough to clearly define the class of machines to be covered by the exemption, and broad enough so as to not be unduly restrictive if new technologies arise during the exemption period.

CCA has proposed the following exemption for Proposed Class 12:³

Computer programs, in the form of firmware, software, or data used by firmware or software, that enable all-purpose tablet computers to connect to a wireless network that offers telecommunications and/or information services, when circumvention is initiated by the owner of the device, or by another person at the direction of the owner of the device, in order to connect to a wireless network that offers telecommunications and/or information services, and access to the network is authorized by the operator of the network.

CCA believes that this exemption properly enables users to take control over the use of their tablets, and permits them the choice of which network they will be connected to. Rather than relying on the presumed goodwill of wireless carriers, or the availability of unlocking codes from manufacturers, with this exemption consumers will be empowered to retain their current tablets when selecting the wireless service provider of their choice.

Given the growing importance of data as a form of wireless communication among consumers, CCA believes that the most appropriate exemption language is for devices that connect to “telecommunications and/or information services.” At present, very few wireless providers offer significant numbers of voice-only plans, and the ever-increasing demand by consumers for data weighs in favor of the Copyright Office clarifying the exemption in this proceeding to confirm that consumers have the right to unlock their devices for the purpose of connecting to wireless networks for both telecommunications and information service uses.

Item 3. Overview

Provide a brief summary of the circumvention activity sought to be exempted or opposed and why.

CCA proposes an exemption to circumvent software or firmware locks on a tablet that prevent the tablet from accessing the wireless network of the owner’s choosing.

The exemption is being sought because tablet owners have a clear ownership interest in the tablet itself, as well as the underlying operating system software, and should be afforded the

² *Exemption to Prohibition of Circumvention of Copyright Protection Systems for Access Control Technologies*, Notice of Proposed Rulemaking, Docket No. 2014-07, 79 FR 73856, 73865 (Dec. 12, 2014) (“*NPRM*”).

³ *NPRM* at 73865, fn. 46; *see also* CCA Tablet Unlocking Pet. at 1-2.

ability to make non-infringing uses of these products. Absent an exemption, tablet owners may be forced to purchase a new wireless device in order to change service providers and connect to the wireless network of their choice. This may result in substantial costs to the consumer, not only in the form of the price paid for a new tablet (while their current tablet becomes obsolete), but also in the form of personal information stored on the tablet, contacts, music, apps, and other investments made in peripheral items.

CCA's proposed exemption is not only consistent with the Copyright Office's mandate to allow circumvention where the public interest is served by permitting non-infringing use of the copyrighted material, but also will promote competition and consumer choice in an increasingly consolidated wireless industry.⁴

Item 4. Technological Protection Measure(s) and Method(s) of Circumvention

Describe the TPM(s) that control access to the work and the relevant method(s) of circumvention. The description should provide sufficient information to allow the Office to understand the nature of the relevant technologies, as well as how they are disabled or bypassed.

Tablets can be hardware or software-locked using a variety of methods, including service provider code locking, system operator code locking, band order locking and Subscriber Identity Module locking or Universal Integrated Circuit Card locking. These locking mechanisms bind the device to specific wireless networks and prevent consumers from accessing the wireless network of their choice. Only by circumventing these various TPMs can a tablet owner transfer the use of the tablet to a network and provider of one's choosing.

While software locks can, in some instances, serve legitimate, non-copyright related purposes like preventing customers from accidentally damaging the firmware on the tablet, these locks are most often used to inappropriately prevent a tablet from being moved from one network to another.

Tablets are unlocked using a variety of methods, typically by changing the variables in certain tablet memory locations and updating the preferred roaming list ("PRL") to make the tablet compatible with a new network. These variables are effectively a "blank slate" when the tablet comes off the assembly line, and then are updated to make them compatible with the network with which the tablet is intended to be used. Thus, these variables are intended by the copyright owner to be changed based on which network a particular tablet will be connected to. In this respect, no unusual or unexpected alterations are being made to the underlying operating system code – instead, anticipated changes are being made that will permit the tablet to operate.

⁴ The Federal Communications Commission's recently-released *Seventeenth Report* on mobile wireless competition found that the Herfindahl-Hirschman Index ("HHI"), a measure of market concentration, averaged 3,027 across the country—more than 20% above the level at which a market is considered "highly concentrated." The HHI numbers for the wireless industry have consistently been on the rise over the last five years or more. See *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Seventeenth Report, WT Docket No. 13-135, DA 14-1862, ¶¶ 32-33 (rel. Dec. 18, 2014).

Item 5. Asserted Noninfringing Use(s)

Explain the asserted noninfringing use(s) of copyrighted works said to be facilitated by the proposed exemption, including all legal (statutory or doctrinal) bases for the claim that the uses are or are likely noninfringing. Commenters should provide an evidentiary basis to support their contentions, including discussion or refutation of specific examples of such uses and, if available, documentary and/or separately submitted multimedia evidence.

Consumers who unlock tablets may engage in one or more of several noninfringing uses of the copyrighted software or firmware that resides on their tablet and permits it to connect to networks. Typically, the circumvention of the TPM allows an owner, who has fulfilled all obligations to the original provider, to operate the device on the network of a new, compatible wireless provider of one's choosing. However, tablets may also be unlocked by charitable organizations, which donate the tablets for use or re-sell them to finance charitable works, or by environmental organizations that encourage the re-use or recycling of devices to keep toxic chemicals out of landfills. Noninfringing use of these copyrighted works is supported under multiple legal theories, three of which are explained here.

Unlocking Constitutes "Fair Use" Under 17 U.S.C. Section 107

Tablet unlocking constitutes "fair use" under Section 107 of Title 17 of the United State Code. When most tablets are unlocked, the device owner is simply changing the variables in certain memory locations and updating the PRL to make the tablet useable on a new network. Carriers regularly update the PRL on their customers' tablets, so the original author of the copyrighted work intended these variables to be changed without constituting a copyright violation. Further, unlocking a tablet meets all four factors of the "fair use" test set forth in Section 107: (1) the purpose of the use is to allow the lawful owner of the tablet to connect to a wireless network of their choice, a reasonable and noninfringing use; (2) the copyrighted work is intended to be changed in this manner and is necessary for the tablet owner to derive any continued value from the copyrighted work; (3) the amount of the code used in an altered state is extremely small compared to the tablet operating system as a whole; and (4) the market for and value of the copyrighted work actually increases, as it allows the tablet to be transferred on the secondary market more easily and to a broader array of buyers.

Unlocking a Tablet Does Not Create an Infringing Derivative Work

Unlocking a tablet does not create an infringing "derivative work." This is because, in most instances, unlocking a tablet does not change the underlying tablet software, but rather it merely changes underlying variables accessed by the program. As discussed above, these variables are intended by the software designer to be changed, and their change, therefore, does not create an infringing derivative work. Instead, the software is merely being operated by the tablet owners as intended.

Any Derivative Work Created is Protected Under 17 U.S.C. Section 117(a)(1)

If, however, a derivative work is, in fact, created, it falls within the exception set forth in 17 U.S.C. Section 117(a)(1). This subsection states that a derivative work may be created by the owner of a copyrighted work if the "new copy or adaptation is created as an essential step in the

utilization of the computer program in conjunction with a machine and that it is used in no other manner.” Since the changes being made to the copyrighted work are the same ones that need to be made by the underlying carrier in order for the tablet to operate properly on its wireless network, such adaptations are inherently “essential step[s] in the utilization of the computer program in conjunction with [the device].” Indeed, in 2012, the Register agreed that unlocking was an “essential step” in the utilization of handsets, finding again that “[m]odifications to the firmware or software on the [device] may be necessary to make the device functional with another service and better serve the legitimate needs of the consumer.”⁵

Relevant Case Law Demonstrates That Tablet Owners are Owners of the Underlying Operating System Software for Section 117(a)(1) Exemption Purposes

In order to fall within the exception set forth in 17 U.S.C. Section 117(a)(1), the party creating the derivative work must also be the owner of the software – that is, if a device owner is a mere licensee of the software, Section 117(a)(1) protections are unavailable to him or her.⁶ Although the Supreme Court has not articulated a national framework on this issue, the two leading cases on licensing vs. ownership are *Krause v. Titleserv, Inc.*, 402 F.3d 119 (2d Cir. 2005) and *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010). In the *2012 Recommendation*, the Register concluded that the state of the law was sufficiently unclear as to make it impossible to determine whether all device owners were licensees or owners of the software.⁷ Despite this determination, the current state of the market and the terms on which much of the operating system software is provided to consumers in connection with a tablet purchase make it clear that tablet owners are the also the owners of the operating system software under either the *Krause* or the *Vernor* tests.

In *Krause*, the Second Circuit held that ownership of a copyrighted work, as opposed to a license, is indicated by balancing seven factors:

(1) whether substantial consideration was paid for the copy; (2) whether the copy was created for the sole benefit of the purchaser; (3) whether the copy was customized to serve the purchaser’s use; (4) whether the copy was stored on property owned by the purchaser; (5) whether the creator reserved the right to repossess the copy; (6) whether the creator agreed that the purchaser had the right to possess and use the programs forever regardless of whether the relationship

⁵ *2012 Recommendation* at 93. The same reasoning applies as to tablets.

⁶ Contrary to the arguments raised by CTIA in the 2012 proceeding, simply stating that a piece of software is being provided under “license” does not make it so. See *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1180 (9th Cir. 2010) (holding that simply labeling a software agreement as a license is not “dispositive”).

⁷ *2012 Recommendation* at 92 (“The Register concludes that the state of the law remains unclear. Although *Vernor* and *Krause* are useful guideposts in considering the status of software ownership, they are controlling precedent in only two circuits and are inconsistent in their approach; whether and how those standards would be applied in other circuits is unknown.”)

between the parties terminated; and (7) whether the purchaser was free to discard or destroy the copy anytime it wished.⁸

With respect to tablets, tablet owners pay substantial consideration for the copy of the software as part of the tablet price.⁹ The copy of the software is stored on property owned, namely the physical tablet, and the software creator permits the underlying operating system software to be used by the tablet owner indefinitely (and in some cases, even longer due to transfer rights). Further, the tablet owner is free to discard or destroy the copy (along with the physical tablet) anytime that he or she wishes. On balance, these *Krause* factors strongly favor a finding of ownership of the copyrighted operating system software by the wireless device owner.

In *Vernor*, 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.”¹⁰ These factors can be seen as more stringent, and it has been argued by some that they favor the view that the device owner is a licensee. Nevertheless, the test for ownership of a tablet’s underlying operating system is met under the *Vernor* test as well. Importantly, the *Vernor* test is a conjunctive test, and therefore demands that all three elements be met if a software user is to be considered a licensee, rather than an owner.¹¹

As applied to the facts at hand, tablets do not have “notable use restrictions.” Customers are permitted to use their tablets for any lawful purpose, and as the Register stated in the *2012 Recommendation*, “no wireless provider has taken the position that customers are unable to sell devices that they no longer use, or transfer them to a spouse, child or friend.”¹² Indeed, the Register’s findings have been validated by the voluntary agreement recently entered into by the nation’s five largest carriers.¹³ Accordingly, tablet operating system software fails one element of the *Vernor* test, and on this basis alone one could conclude that an owner of a tablet is also an owner of the copy of the operating system software.

However, there is also a second, independent basis on which to find that the tablet owner is also the owner of the software copy under *Vernor*. At least two significant mobile operating

⁸ *Krause*, 402 F.3d at 124.

⁹ For example, the price for an unlocked iPad Air 2 ranges from \$629 to \$829, with the hardware components of the tablet combining to form only a small portion of the cost of the device. See <http://store.apple.com/us/buy-ipad/ipad-air-2/>.

¹⁰ *Vernor*, 621 F.3d at 1111.

¹¹ See YULE KIM, CONGRESSIONAL RESEARCH SERVICE, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS, Order Code 97-589 at 8 (updated Aug. 31, 2008) (“Ordinarily, as in everyday English, use of the conjunctive ‘and’ in a list means that all of the listed requirements must be satisfied . . .”).

¹² *2012 Recommendation* at 92 (quoting MetroPCS Comments at 17).

¹³ See CTIA Consumer Code of Conduct § 12.

system software license agreements, Apple iOS 8.1¹⁴ and Windows 8.1 Pro,¹⁵ contain language that run explicitly counter to the second element in the *Vernor* test, that the copyright owner “significantly restricts the user’s ability to transfer the software.”¹⁶ Notably, iOS alone accounts for nearly one-third of the tablet market, according to recent market surveys.¹⁷

Given the evidence above, it is clear that tablet owners should be considered owners of a copy of the operating system software, and therefore entitled to the protections of Section 117(a)(1), and be permitted to create a derivative work in order to allow the tablet to connect to a wireless network of the tablet owners choice.

Item 6. Asserted Adverse Effects

Explain whether the inability to circumvent the TPM(s) at issue has or is likely to have adverse effects on the asserted noninfringing use(s), including any relevant legal (statutory or doctrinal) considerations. Commenters should also address any potential alternatives that permit the asserted noninfringing use(s) without the need for circumvention. Commenters should provide an evidentiary basis to support their contentions, including discussion or refutation of specific examples of such uses and, if available, documentary and/or separately submitted multimedia evidence.

The most clear, and most immediate, adverse effect that the TPMs that lock tablets have is to prevent consumers from easily switching their tablets to the competing network of their choice. Although carriers may unlock under certain circumstances, owners should not be beholden to the carrier after completion of service agreement commitments. As the Senate has noted, there are also “circumstances in which additional avenues for unlocking may be preferable over attempting to unlock through the carrier.”¹⁸ Absent an exemption, TPMs used to lock

¹⁴ See iOS Software License Agreement, Section 3 – “Transfer”, available at <http://images.apple.com/legal/sla/docs/iOS81.pdf> (permitting device owners to “make a one-time permanent transfer of all of your license rights to the iOS Software to another party in connection with the transfer of ownership of your iOS Device” – that is, it *explicitly allowing* the transfer of the software to a third party).

¹⁵ See Windows 8.1 Pro Microsoft Software License Agreement, “Can I transfer the software to another computer or user?” available at <http://www.google.com.hk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CB0QFjAA&url=http%3A%2F%2Fdownload.microsoft.com%2Fdownload%2F7%2F2%2F1%2F72103B1C-DE58-478C-BECF-4D846C2B4A15%2FUseTermsRetailWindows8.1Proupdate%2528toWindows8ProwhichwasacquiredfromretailorMicrosoft%2529English.pdf&ei=FsTFVOP2NIuP8QXusYGoDA&usg=AFQjCNEIAfxk7QIZwkt7h5LMCwb6wBNDNA> (stating that “[y]ou may also transfer the software (together with the license) to a computer owned by someone else,” subject to certain conditions and the agreement of the third party to abide by the terms of the license.).

¹⁶ *Vernor*, 621 F.3d at 1111.

¹⁷ Lance Whitney, “iPad sheds more market share but still dominates,” Cnet.com, (May 1, 2014), available at <http://www.cnet.com/news/ipad-sheds-more-market-share-but-still-dominates/>.

¹⁸ Senate Report 113-212, available at <http://www.gpo.gov/fdsys/pkg/CRPT-113srpt212/html/CRPT-113srpt212.htm>.

tablets to a particular network will foreclose the ability to exercise preferable, and in some cases, the only, avenues to unlock devices. Since circumvention to connect to an alternative network would be a noninfringing use of the copyrighted work, consumers should have the freedom to unlock their tablets on their own or through an agent of their choosing.

“Voluntary” Unlocking Policies are Insufficient to Protect Consumer Interests

While some carriers have “voluntary” unlocking policies for tablets, the exemption remains necessary in the event that incomplete or voluntary agreements to unlock devices fail to provide an owner the ability to unlock a tablet. For example, original equipment manufacturers (“OEMs”) are not signatories to existing voluntary agreements and are not bound by the current voluntary agreement entered into by the nation’s five largest carriers.¹⁹ As NTIA noted in the last triennial review, and the voluntary agreement confirms, oftentimes carriers must have the necessary code or the ability to reasonably obtain it to unlock the device.²⁰ Where a voluntary agreement only requires that a carrier “initiate a request to the OEM to unlock the eligible device” it is possible for the carrier to comply with the agreement in a manner that does not ultimately result in the consumer’s device being unlocked.

This also highlights the fact that OEMs (or third-party software developers) often consider themselves to be the owners of the copyrighted software, which is provided under a purported license to carriers. So, there remains the possibility that an OEM or software developer may refuse to allow carriers to alter their software in any respect, which would eliminate the ability of carriers to implement their voluntary unlocking promises. In such a circumstance, a consumer unlocking exemption granted in this proceeding would be the only path to allowing customers to switch wireless providers with their devices in hand.

This circumstance is not farfetched or theoretical. Indeed, in a recent discussion of the company’s post-sale transition plan, Cincinnati Bell Wireless (“CBW”) stated that it would only be allowing customers to unlock their handsets to move to another carrier if the handsets were “one year old or newer.”²¹ Even with this significant restriction, CBW would only permit customers to “transition to another provider by providing unlock codes (*if available*),” suggesting that there are a sufficient number of circumstances in which unlock codes are not available to warrant a specific disclosure.²² Although this was in the context of wireless handsets, it is not a significant leap to assume that the same is or would be the case for similarly-situated tablet customers.

¹⁹ See CTIA Consumer Code of Conduct § 12.

²⁰ NTIA Reply Comments at 16, *available at* http://www.copyright.gov/1201/2012/2012_NTIA_Letter.pdf; CTIA Consumer Code of Conduct § 12.

²¹ Phil Goldstein, “Cincinnati Bell customers frustrated by transition amid network shutdown,” FierceWireless (Jan. 12, 2015), *available at* <http://www.fiercewireless.com/story/cincinnati-bell-customers-frustrated-transition-amid-network-shutdown/2015-01-12>.

²² *Id.*

Thus there is clear evidence that these voluntary unlocking policies do not obviate the need for an exemption. As a result, customers must have the option and the right to unlock their tablets to realize their full utility, and without unwarranted interference from their original wireless provider.

The Availability of Unlocked Tablet Options Does Not Obviate the Need for an Exemption

Further, the availability of unlocked tablet options in the marketplace does not displace the need for a tablet unlocking exemption. Although some, but by no means all, tablets are available in an unlocked form, a consumer may not find her desired tablet as one of the unlocked options. Perhaps more importantly, a consumer may simply wish to keep his current familiar device, or that is, for example, particularly well-suited to managing his disability.²³ Where owners are unable to unlock their current tablet to connect to their network of choice, they are effectively forced to purchase a new tablet, despite having no desire to do so. The owner may then lose contacts, personal information, music, apps and other content, as well as significant investments made in peripheral items like chargers, headsets, batteries and cases – all of which increase the true cost of the lack of an unlocking exemption.

Substantial Evidence of Adverse Effects Exists, and Consumers Have No Reasonable Alternatives to Circumvention

After the previous handset unlocking exemption was allowed to expire, Congress saw sufficient current adverse effects, as well as the potential for adverse effects, to immediately reinstate and expand the exemption in the “Unlocking Consumer Choice and Wireless Competition Act.” Even with other voluntary unlocking policies in place, Congress saw sufficient harm in the marketplace to adopt legislation. And, in this respect, Congress was performing the will of the people. A White House petition garnered more than 114,000 signatures from concerned consumers who demonstrated the likely adverse effects of the rejection of the unlocking exemption.²⁴ Indeed, this consumer outcry extended not only to the original exemption for wireless handsets, but to tablets as well. As part of the “Unlocking Consumer Choice and Wireless Competition Act,” Congress directed the Copyright Office to expand its inquiry into other wireless devices, such as tablets, to ensure that anti-competitive locking policies were not harming the market for these important consumer products as well. Even with voluntary unlocking policies for tablets already in place, Congress saw sufficient harm in the marketplace to adopt legislation directing the Copyright Office to undertake this new examination.

²³ Persons who are blind or have low vision may require tablets with special features, and those tablets may not be available from all carriers. *See, e.g.*, “Tablet test with blind users: Overview,” available at <http://www.incobs.de/tests-english/items/tablettest-blind-en-overview.html>.

²⁴ *See* R. David Edelman, “It’s Time to Legalize Cell Phone Unlocking,” Official White House Response to Make Unlocking Cell Phones Legal, available at <https://petitions.whitehouse.gov/response/its-time-legalize-cell-phone-unlocking> (“White House Unlocking Response”).

Additionally, NTIA petitioned the FCC to commence a rulemaking to require carriers to unlock devices upon request.²⁵ NTIA stated that a rule would “increase competition in the mobile services market and enhance consumer welfare.”²⁶ While the enactment of the Unlocking Consumer Choice and Wireless Competition Act foreclosed the need for rulemaking, not extending an exemption would have the adverse effects of decreased competition and consumer welfare.

Even the Obama Administration, in a statement applauding Congress for passing the Unlocking Consumer Choice and Wireless Competition Act, referenced steps “to ensure copyright law does not undermine wireless competition,” including fixes “that make it clear: neither criminal law nor technological locks should prevent customers from switching carriers when they are no longer bound by a service agreement or other obligation.”²⁷ Failure to grant an exemption would reinstate criminal penalties that may prevent consumers from switching carriers, a clear and immediate adverse effect.

No viable alternatives to circumvention have emerged over the last three years, nor is CCA aware of any on the horizon.²⁸ As a result, the Copyright Office remains consumers’ best hope for a continued ability to lawfully unlock their tablets. The Copyright Office should heed the outcry from consumers, Congress and the Administration about the current and potential anti-consumer harms that failing to adopt a tablet unlocking exemption would bring, and adopt CCA’s proposed exemption.

Item 7. Statutory Factors

Evaluate the proposed exemption in light of each of the statutory factors set forth in 17 U.S.C. 1201(a)(1)(C):

(i) *the availability for use of copyrighted works;*

Without question locks on tablets reduce the availability for use and the usability of the copyrighted software operating system. A customer who would otherwise be technically able to use his or her device on a competing network is prevented from doing so by artificial locks. Thus, the ability to use the copyrighted operating system software that powers the tablet is substantially limited; if a customer switches networks and has a tablet that cannot be unlocked, he or she is no longer able to use the copyrighted operating system.

²⁵ NTIA, Petition for Rulemaking of the National Telecommunications and Information Administration (filed Sept. 17, 2013), *available at* http://www.ntia.doc.gov/files/ntia/publications/ntia_mobile_devices_unlocking_petition_09172013.pdf.

²⁶ *Id.* at 1.

²⁷ *See* White House Unlocking Response.

²⁸ Nor have the previous exemptions adversely affected the marketplace for the accessed copyrighted works. Tablets, and the copyrighted underlying operating systems, continue to be among the most popular consumer electronic devices in the country. As tablet sales continue to increase, it simply cannot be said that the market for these works is being depressed by the Copyright Office’s unlocking exemption.

Importantly, as the Register found during the prior proceeding:

There is no indication that mobile . . . firmware is sold in any way other than with the [device] for which it is developed, and no indication that there are alternative “formats” available that would not require circumvention – that is, there is no evidence that users of locked legacy [devices] can simply install an alternative operating system that does not include carrier locks. Accordingly, the first factor favors an exemption.²⁹

These facts remain as true today as they did in 2012. CCA is unaware of mobile tablet firmware being sold in any other way than bundled with the tablet for which it was developed, and is aware of no other formats of such operating system software available that would not require circumvention. As such, the Register should make the same finding in this proceeding that the first statutory favor favors an exemption.

(ii) the availability for use of works for nonprofit archival, preservation, and educational purposes;

An exemption permitting the unlocking of tablets increases the availability of the copyrighted operating system works for use for nonprofit archival, preservation, and educational purposes. As an initial matter, a significant number of nonprofit organizations fund their operations through the collection, unlocking and resale of wireless devices. In addition, artificial locks on tablet software may prevent those operating systems from being studied in the classroom or archived for future study. An exemption to the prohibition on circumvention of tablet locks certainly will not negatively impact, and may in fact promote, the use of these works for such purposes.

(iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;

Similar to the use of the works for nonprofit and educational purposes, there should be no concern that a tablet unlocking exemption will have any negative impact on criticism, comment, news reporting, teaching, scholarship or research. In fact, there may be positive benefits for these fields that flow from an unlocking exemption. For example, journalists can improve consumer awareness by writing about the behavior of an unlocked device moving from one network to another. Similarly, this would allow industry commenters to review the performance of a single tablet on multiple wireless networks.

(iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and

If anything, the circumvention of tablet locks actually *improves* the market value of the copyrighted work. Since the operating system conveys with the wireless device, the creator of the copyrighted work is actually benefited by being able to reach the widest possible audience. If a tablet is locked to a particular network, it inherently has a smaller base of customers on the

²⁹ 2012 Recommendation at 97.

secondary market, and is therefore worth less to the original purchaser. The operating system is a large part of the value of the fully operational tablet, and customers will be willing to pay more for a tablet (and the underlying operating system) that is worth more, and can be transferred more easily, on the secondary market.

Although the Register found that the market for mobile device operating system software was “unlikely to be affected by enabling consumers to alter that software for the purpose of using the handset on another carrier,” this was coupled with the finding that “[t]here is nothing in the record to suggest that the market for firmware has declined in the six years following the first granting of an unlocking exemption.”³⁰ CCA agrees with the Register’s prior determination. In fact, the market for firmware (and the tablets with which it is sold) has only increased since the Register made that determination in 2012. A recent CTIA survey cited by the Federal Communications Commission found that “the number of connections grew ... from 326.5 million at the end of 2012, to 335.7 million at the end of 2013 [or 3 percent].”³¹ Thus, it can be demonstrated that the market for firmware (and the wireless devices with which it is sold) has only increased since the Register made its determination in 2012. Accordingly, the Register should again draw the same conclusion, based on the same or stronger current evidence, that “the fourth factor . . . favors an exemption.”³²

(v) any other factor that may be appropriate for the Librarian to consider in evaluating the proposed exemption.

The Librarian should consider the positive impact that an unlocking exemption will have on consumer choice and competition in the wireless industry. By allowing customers to have control over their own wireless devices, and to put them on the network of their choosing, the Librarian is conferring a significant social benefit. The Librarian should empower consumers to make informed choices about wireless services.

Item 8. Documentary Evidence

Commenters are encouraged to submit documentary evidence to support their arguments or illustrate pertinent points concerning the proposed exemption. Any such documentary evidence should be attached to the comment and uploaded through the Office’s website (though it does not count toward the 25-page limit).

None submitted.

³⁰ 2012 Recommendation at 98.

³¹ Seventeenth Report at ¶ 20 (citing CTIA Wireless Industry Indices at 7).

³² 2012 Recommendation at 98.