

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

Item 1. Commenter Information

Commenting Parties: Competitive Carriers Association (“CCA”) and TracFone Wireless, Inc. (“TracFone”)

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Item 2. Proposed Class Addressed

Proposed Class 11: Unlocking—Wireless Telephone Handsets.¹ As noted in the *NPRM*, “This proposed class would allow the unlocking of wireless telephone handsets. ‘Wireless telephone handsets’ includes all mobile telephones including feature phones, smart phones, and ‘phablets’ that are used for two-way voice communications.”²

In these Comments, CCA and TracFone (collectively the “Parties”) propose the following revisions to the exemption for Proposed Class 11 proposed by TracFone.³ The Parties offer these revisions to resolve concerns expressed by TracFone in the Second Round of Comments.

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, on its own, 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. Furthermore, while CCA does not submit formal reply comments in response to its other proposals for Classes 12-15, it should be noted that Classes 12 and 14 did not receive any opposition, and Classes 13 and 15 only received limited opposition related to the exemptions’ application to OnStar[®] and other in-vehicle navigation and support systems. See The Alliance of Automobile Manufacturers Short Comment Regarding a Proposed Exemption under 17 U.S.C. § 1201 (Proposed Class #13), Docket No. 2014-07 (filed Mar. 27, 2015); General Motors, LLC Long Comment Regarding a Proposed Exemption under 17 U.S.C. § 1201 (Proposed Class #13), Docket No. 2014-07 at 2-3 (filed Mar. 27, 2015); The Alliance of Automobile Manufacturers Short Comment Regarding a Proposed Exemption under 17 U.S.C. § 1201 (Proposed Class #15), Docket No. 2014-07 at 1-2 (filed Mar. 27, 2015).

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, 73864 (Dec. 12, 2014) (“NPRM”).

³ The redlined text reflects edits made to the exemption language as proposed by TracFone Wireless. See TracFone Wireless Long Comment Regarding a Proposed Exemption Under 17 U.S.C. § 1201, Docket No. 2014-07 at 3-4 (filed Mar. 27, 2015) (“TracFone Comments”).

Computer programs, in the form of firmware or software, or data used by firmware or software, that enable wireless devices to connect to a different wireless network than the network to which it was previously locked (the “Original Network”), when initiated by the owner of the device (the “Owner”), or by another person at the direction of the Owner, but only if: (a) all legal obligations to the Original Network service provider associated with the provision of any subsidy, discount, installment plan, lease, rebate or other incentive program (collectively, “Subsidy”) have been satisfied by or waived for the Owner; (b) the device was not obtained by theft or fraud; and (c) such unlocking is not for any unlawful purpose, including, but not limited to, obtaining unauthorized access to a wireless network or profiting from the Subsidy.

Item 3. Statement Regarding Proposed Exemption

CCA continues to believe that its proposed exemption regarding wireless handsets submitted in this proceeding is 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. CCA also believes it has met its burden by meeting a prima facie case to support its proposed exemption.

However, the Parties submit this revised exemption to resolve the concerns expressed by TracFone in this proceeding. The above-proposed language attempts to reach common ground between CCA’s original proposed exemption,⁴ and TracFone’s response. As TracFone has acknowledged previously:

TracFone supports a pro-consumer exemption to 17 U.S.C. §1201 that permits legitimate consumers acting in good faith to unlock their wireless telephone handsets, so long as the exemption expressly excludes any provision that could be exploited by traffickers to steal subsidies and harm consumers.⁵

The Parties’ proposed exemption is pro-consumer by properly enabling users to take control over the use of their wireless handsets, and permitting them the choice of which network they will be connected to, while assuaging TracFone’s concerns regarding loopholes that would potentially prevent carriers from offering subsidies or other discounts that make wireless handsets affordable and accessible to American consumers. A service provider does not profit from a Subsidy by unlocking a device at the direction of an Owner who misrepresents that its legal obligations to the Original Network operator related to the Subsidy have been satisfied.

⁴ Compare CCA Cellphone Unlocking Pet. at 1-2 (filed Nov. 3, 2014); with *TracFone Comments* at 3-4; see also *NPRM* at 73864, fn. 42.

⁵ *TracFone Comments* at 3.