UNITED STATES COPYRIGHT OFFICE

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

ITEM A. COMMENTER INFORMATION

Petitioner Institute of Scrap Recycling Industries, Inc. ("ISRI")[1] is a Washington, DC-based trade association representing more than 1,300 companies—ranging from small, family-owned businesses to large, multi-national corporations—operating at more than 4,000 facilities in the United States and 40 countries worldwide. ISRI members are manufacturers and processors, brokers, and industrial consumers of scrap commodities, including ferrous and nonferrous metals, paper, electronics, rubber, plastics, glass, and textiles. ISRI advocates on behalf of its members on a variety of important issues directly and indirectly impacting the recycling industry in Washington, DC, state capitals across the U.S., and internationally.

ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 10: Computer Programs—Unlocking

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[1] *See* https://www.isri.org/ (last visited March 10, 2021).

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Introduction

Petitioner ISRI submits this reply comment in support of its December 14, 2020, comments requesting two exemptions for Proposed Class 10: Computer Programs—Unlocking. ISRI requested the expansion of the renewed unlocking exemption to cover (1) laptop computers (including Chromebooks) with 4G LTE or 5G or other cellular connection capabilities, and (2) any wireless devices equipped with 4G LTE or 5G or other cellular connection capabilities, without limitation to the current four categories, including, but not limited to Smart TVs, Internet of Things ("IoT") devices, extended reality ("XR") headsets, desktop computers, and drones.

This reply highlights new developments and data since our initial filing, along with additional examples. ISRI notes that its first proposed exemption, for laptops with cellular connectivity, was not opposed. This reply responds in part to a comment opposing ISRI's second proposed exemption, for all cellular-enabled wireless devices. Because both proposals fully satisfy all of the substantive legal and evidentiary requirements for granting an exemption set forth in DMCA Section 1201(a)(1) and the Copyright Office's Notice of Proposed Rulemaking, the requested exemptions should be granted.

I. The Existing Unlocking Exemption Should Be Extended to Cover Laptop Computers (Including Chromebooks)

A. Cellular-Enabled Laptops Continue to Be Introduced Into the Market

As anticipated in ISRI's initial comment, the 2021 Consumer Electronics Show held in January saw the announcement of several new 5G-compatible laptops. Lenovo updated its ThinkPad X1 Carbon and ThinkPad XI Yoga to provide optional 5G wireless connectivity, while announcing two new 5G-capable models, the ThinkPad XI Titanium Yoga and ThinkPad X12 Detachable.[2] HP followed suit, expanding its Elite Dragonfly line with two models that offer 5G options and introducing two other 5G-capable laptops.[3] Dell also added two 5G models to its Latitude series of laptops, the Latitude 9420 and 9520.[4] In addition to these laptops, the Acer Spin 7, which was announced in September 2020, is now available in the market with optional 5G wireless.[5] Meanwhile, 4G LTE laptops from Lenovo, HP, Dell, and other brands continue to have a growing presence in the market.[6]

The rollout of 5G laptops is coinciding with the rapid expansion of 5G coverage across thousands of U.S. cites.[7] Each of the major wireless carriers now have nationwide 5G deployments covering at least 200 million people, with T-Mobile in the lead covering over 270

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[2] https://www.cnet.com/news/lenovo-announced-thinnest-ever-2-in-1-at-ces-2021-thinkpad-x1-titanium-yoga/ (last visited March 10, 2021).
[3] https://www.cnet.com/news/hp-laptops-ces-2021-work-from-home-era-elite-dragonfly-folio-updates/ (last visited March 10, 2021).
[4] https://www.theverge.com/2021/1/5/22214058/dell-latitude-business-laptops-9420-automated-webcam-shutter-ces-2021 (last visited March 10, 2021).
[5] https://www.acer.com/ac/en/US/content/model/NX.A4NAA.001 (last visited March 10, 2021).
[6] *See, e.g.*, https://www.digitaltrends.com/computing/need-to-work-from-the-road-heres-the-5-best-laptops-with-lte/; https://www.xda-developers.com/best-4g-lte-laptops/ (last visited March 10, 2021).
[7] https://www.androidcentral.com/heres-every-us-city-5g-coverage-right-now (last visited March 10, 2021).

million people with its low-band network[8] at the end of 2020.[9] Verizon ended the year with a low-band network that covered 230 million, while AT&T's version reached 225 million.[10] The carriers collectively spent $81 billion in the FCC's latest 5G spectrum auction, signaling an intent to improve and expand their respective networks dramatically.[11]

5G-enabled laptops will become an increasingly popular choice among consumers as 5G becomes more widely available and delivers faster speeds.[12] And these devices will be entering the market at a time of high demand for laptops generally: in 2020, the U.S. PC market experienced its highest growth in two decades, led by a surging demand for laptops as businesses and schools shifted to operating remotely.[13] Moreover, survey research indicates that many U.S. companies plan to adopt hybrid workplaces or shift to remote work permanently, a trend that may further contribute to laptop demand.[14]

B. Excluding Cellular-Enabled Laptops and Preventing Their Unlocking Have Adverse Effects on Electronics Recyclers, Resellers, and Consumers

While some 5G-enabled laptops will not be available for consumers until later in 2021,[15] several laptops with 4G LTE connectivity have already been in the market for two to three years.[16] The average lifespan of a laptop, however, is estimated to be three to five years.[17] Thus, it is likely that ISRI members will begin to acquire 4G LTE-compatible laptops in larger quantities over the course of this year and continuing into 2022, as more devices are used for a year or two by their original owners and then are replaced with newer laptops. Moreover, ISRI expects that some number of these laptops will be locked to a particular carrier, given the indications of carrier locking of laptops from ISRI member reports and other sources noted in our initial comment.[18] The same replacement cycle likely will apply similarly to the new 5G-enabled laptops that will

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[8] Low band spectrum allows networks to provide "blanket coverage" nationwide, which, despite not delivering the extreme speeds and low latency associated with mid or high band spectrum, typically results in better performance than 4G LTE. *See* https://venturebeat.com/2019/12/10/the-definitive-guide-to-5g-low-mid-and-high-band-speeds/ (last visited March 10, 2021).

[9] https://www.cnet.com/how-to/5gs-many-names-explained-dont-fall-for-carrier-marketing-fluff/ (last visited March 10, 2021).

[10] *Id.*

[11] https://www.cnet.com/news/verizon-at-t-t-mobile-dominate-81-billion-5g-spectrum-auction/ (last visited March 10, 2021).

[12] Verizon, for example, recently announced plans to nearly double the coverage of its mmWave (high band) spectrum in 2021. https://www.theverge.com/2021/1/26/22251115/verison-5g-ultra-wideband-mmwave-coverage-double-2021 (last visited March 10, 2021).

[13] https://www.gartner.com/en/newsroom/press-releases/2021-01-11-gartner-says-worldwide-pc-shipments-grew-10-point-7-percent-in-the-fourth-quarter-of-2020-and-4-point-8-percent-for-the-year (last visited March 10, 2021).

[14] *See* https://www.forbes.com/sites/carolinecastrillon/2021/12/27/this-is-the-future-of-remote-work-in-2021/?sh=6439266b1e1d; https://www.pwc.com/us/en/library/covid-19/us-remote-work-survey.html (last visited March 10, 2021).

[15] *See, e.g.*, https://www.theverge.com/2021/1/5/22214058/dell-latitude-business-laptops-9420-automated-webcam-shutter-ces-2021 (last visited March 10, 2021).

[16] *See* Comments on Behalf of Petitioner Institute of Scrap Recycling Industries, Inc., Proposed Class 10: Computer Programs—Unlocking, Docket No. 2020-11 (hereinafter "ISRI 2020 Comments").

[17] https://www.businessnewsdaily.com/65-when-to-replace-the-company-computers.html (last visited March 10, 2021).

[18] *See* ISRI 2020 Comments.

be entering the market in the coming months, meaning that electronics recyclers and resellers will begin to receive them as well during the three-year period covered by exemptions granted in the current proceeding.

Because of the growing presence of cellular-enabled laptops in the market and the increasing number of such laptops that recyclers will receive, ISRI submits that, without this proposed exemption, recyclers and consumers will be adversely impacted in making noninfringing uses. In fact, many individuals and organizations have suffered adverse effects within the past year in connection to the covid-19 pandemic. As demand for laptops began to skyrocket during the early parts of 2020, supply chains struggled to keep pace, resulting in a global laptop shortage.[19] The shortage hit U.S. schools hard, and some schools were forced to wait months for laptop orders to be fulfilled—long after they had shifted to remote learning.[20] Being able to acquire laptops in a timely manner was especially critical for schools that serve students from poor and digitally underserved communities, who may not have adequate devices for remote learning at home.[21] While donation programs sought used laptops to help address schools' technological needs, ISRI members report that some donated devices were carrier locked and, as result, either went unused or were recycled. An unlocking exemption that covered laptops could help to give many devices a second life and help ensure more-equal access to remote learning.

The adverse effects caused by not being able to unlock laptops for the purposes of changing carriers are the same as those recognized as legitimate in the existing exemptions for other new and used wireless devices: (1) recyclers and resellers are unable to engage in noninfringing unlocking of laptops for the benefit of consumers, including companies, who are buying or selling laptops; (2) consumers are denied the ability to acquire laptops from resellers and use them on the network of their choice; (3) and competition between new and formerly owned laptops and between cellular networks is reduced.

II. The Current Exemption Should Be Extended to Cover All Wireless Devices

A. Including Cellular-Enabled Vehicle Components in the Unlocking Exemption Will Not Create Safety Risks

The only opposition to this proposed exemption was from the Motor & Equipment Manufacturers Association ("MEMA"), which asserted that the exemption's application to cellular-enabled vehicle components might jeopardize consumer safety.[22] Those concerns are misplaced and are not implicated by the limited exemption ISRI seeks.

According to MEMA, "[p]assenger and commercial vehicles are increasingly becoming more and more connected," while Electronic Control Units ("ECUs") "have an impact on almost every

[19] *See* https://www.theverge.com/2020/6/4/21279633/laptop-pc-shortages-supply-chain-coronavirus-covid-19-pandemic (last visited March 10, 2021).
[20] *See, e.g.*, https://www.nytimes.com/2020/10/12/technology/laptops-schools-digital-divide.html (last visited March 10, 2021).
[21] *See id.*
[22] *See* Motor & Equipment Manufacturers Association Opposition Comments, Proposed Class 10: Computer Programs—Unlocking, Docket No. 2020-11.

aspect of modern vehicles."[23] Since some vehicle systems function collectively, MEMA is concerned that a "change in one component of the system [via circumvention of TPMs] could have an impact on an entirely different system" and create safety risks.[24]

MEMA's objection fails to account for the fact that ISRI's proposed exemption would only permit the unlocking of vehicle components for the limited purpose of *changing wireless carriers*. This exemption is fundamentally different than one that would permit the *modification* of vehicle components; only the latter exemption might permit the kind of tampering that might affect how a vehicle component functions. ISRI does not believe that there are any safety risks associated with unlocking cellular-enabled vehicle components merely to connect such components to different wireless carriers. Nor does MEMA suggest that harms could result from this practice or identify any such harms. While MEMA notes that the TPMs on vehicle components help ensure that vehicles meet safety and emissions standards, MEMA does not explain how circumventing these TPMs simply for the purpose of switching wireless carriers would affect compliance with these standards. Thus, MEMA's safety concerns are inapposite and do not justify excluding cellular-enabled vehicle components from the proposed unlocking exemption.

B. A Broad Exemption For All Wireless Devices is Necessary to Keep Pace with the Rapid Proliferation of Cellular-Enabled Technologies

As ISRI explained in its initial comment, it believes that its members will begin to acquire new categories of devices equipped with 4G LTE or 5G beyond laptops and the devices covered by the current exemption.[25] Those include, but are not limited to: Smart TVs, IoT devices, XR headsets, desktop computers, and drones. ISRI members' ability to resell or recycle those devices to make the best use of them requires that they be able to unlock any carrier locks in order to allow those devices to be used on any wireless carrier, in the same manner as is currently permitted for the four existing categories of devices. ISRI proposed a similar exemption for all wireless devices in the 2017 Seventh Triennial Rulemaking. However, the Register declined to recommend the exemption after finding insufficient evidence of adverse impacts from the locking of such devices.[26]

While ISRI does not yet have additional examples of carrier locking, it contends that a category-specific approach to unlocking exemptions is unrealistic and unworkable given the rapid proliferation of wireless devices. It simply is not possible to anticipate and identify the range of devices for which unlocking is necessary and appropriate today, let alone a year or three years from now. But it will be equally important for consumers, businesses, and other owners of these wireless devices to be able to choose their device's carrier as it is for the owners of cellphones, tablets, and other devices covered by the current exemptions. Moreover, locking in the narrow, existing exemptions would require individuals and organizations to wait to seek new exemptions on a three-year timeline that is far too sluggish for the explosive growth of wireless devices. A broad exemption for the unlocking of all wireless devices would allow consumer use of, and

[23] *Id.*
[24] *Id.*
[25] *See* ISRI 2020 Comments.
[26] Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 83 Fed. Reg. 54,010, 54,020 (Oct. 26, 2018).

competition among, these technologies to proceed unimpeded.

Conclusion

Allowing the unlocking of laptops—and eliminating the four enumerated device categories—will promote consumer choice and competition in the rapidly expanding area of wireless technologies, without causing harm to any legitimate copyright interests. ISRI urges the Copyright Office to grant its requested exemptions and further enable ISRI members to engage in noninfringing unlocking for the benefit of consumers.