

Ending the lockout: permanent exceptions to the DMCA possible?

The US Copyright Office's prohibition against circumventing 'digital locks' is under attack. Edwards Wildman Palmer attorneys, **Glenn Pudelka** and **Kelly Donahue** investigate

As specified under the Digital Millennium Copyright Act (DMCA), the Copyright Office must enter into a rulemaking process every three years to determine appropriate exemptions to the act's anti-circumvention provisions, which allow for the technological protection of a copyrighted work. On 26 October 2012, the Copyright Office issued its latest set of final rules regarding these exemptions, eliminating a previous exemption that allowed mobile phone users to 'unlock' their devices for use on different cellular networks. The negative response from the public (and the White House) to the locking rule has prompted the introduction of several Senate and House bills to permanently permit unlocking mobile devices not under contract with a service carrier, and has further prompted calls from consumer rights organisations to repeal Section 1201 of the DMCA in its entirety.

The DMCA, passed in 1998, establishes a wide range of rules for the digital marketplace. Section 1201 of the DMCA prohibits the circumvention of certain technological measures instituted by or on behalf of copyright owners to protect their works (eg 'locking' a DVD to prevent unauthorised duplication). The DMCA gives the Copyright Office the ability to establish certain exemptions to Section 1201 relevant to changing technologies.

Exemptions are usually granted when the Copyright Office determines that an access control technology creates an adverse effect on non-infringing uses of copyrighted works. Every three years, exemption proposals can be submitted by the public, and after hearings and public comment periods, the final list of exemptions are issued by the Copyright Office. Each exemption expires after three years, meaning that any previous exemptions must be resubmitted for continued approval.

The digital lock exemption was previously approved in 2006 and 2010, but this time the Copyright Office limited its application to mobile phones purchased before or 90 days after the effective date of the ruling, preventing consumers from legally unlocking any mobile phones purchased after 26 January 2013. The Copyright Office cited the recent shift in case law and the wide array of unlocked phones

available on each cellular phone network as justification to limit the exemption. Previous case law assumed that consumers owned the software copy on their phones, while recent decisions have leaned toward suggesting that consumers are merely licensing the software from cell phone providers.

In response to the ruling, public interest groups submitted a petition to the White House containing over 113,000 signatures. The White House acknowledged that consumer should be allowed to unlock mobile phones for use on different networks in limited circumstances. This support triggered Senator Ron Wyden's (Oregon) introduction of the Wireless Device Independence Act of 2013, followed by the Unlocking Consumer Choice and Wireless Competition Act introduced by Senator Patrick Leahy (Vermont), its House companion bill, and the Wireless Consumer Choice Act introduced by Senator Amy Klobuchar (Minnesota).

Senator Leahy's bill proposes to reverse the Copyright Office's decision, allowing consumers to unlock phones only for another three-year period. While this bill would reinstate the exemption, it would prolong the issue, giving the Copyright Office authority to eliminate the exemption during the next triennial rulemaking process.

In the alternative, Senator Wyden's bill would make the exemption a permanent part of the DMCA, permitting consumers to unlock mobile phones to switch network providers. Senator Klobuchar's bill takes a different approach, asking the Federal Communications Commission (FCC) to negotiate with network providers to permit consumers to unlock their mobile phones expressly or through language in service agreements.

Proponents of unlocking mobile phones are concerned that none of these proposed bills actually solve the problem or go far enough in their quest to eliminate Section 1201 in its entirety. For example, these bills focus on the ability of individuals to unlock mobile phones, but do not address the legal grey area of businesses seeking to commercially unlock phones. Currently, the penalties for businesses engaged in the practice can be upwards of \$2,500 per violation. In addition, many argue that the exceptions simply make no sense and

should be eliminated. For example, another exception permits the circumvention of a lock in order to enable interoperability of phone applications with the phone's software (aka jailbreaking), but opponents of the DMCA point out that while this exception is permitted for cell phones, the Copyright Office rejected its application for tablets (citing insufficient evidence), a distinction that many find baffling.

While none of these proposed solutions are certain to pass, the widespread support for unlocking mobile phones suggests that changes are coming. For now, the White House and much of Congress have united behind the unlocking movement, but the real question is whether this momentum will result in a larger movement to further expand the DMCA exemptions or eliminate Section 1201 in its entirety. The latter seems highly unlikely given the industries that support such measures, but rapidly changing technology and consumers' ever-expanding demand to do more with what they have purchased may force the issue by the time the next rulemaking procedure takes place.

Authors



Glenn Pudelka is counsel in Edwards Wildman's intellectual property department in Boston. His practice focuses on various intellectual property issues, concentrating in the area of copyright, licensing and collaborations, and copyright litigation. Much of his work is with media, publishing and technology companies.

Kelly Donahue is an associate in Edwards Wildman's intellectual property department in Boston. She assists on matters including US and international trademark portfolio management and prosecution, various copyright protection matters, and internet domain name disputes.