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On March 4, 2012, the White House announced that it disagreed with the decision of the Librarian of Congress not to allow consumers to unlock their cell phones to access other mobile networks. The White House took this position in response to a “We The People” petition that gained over 114,000 signatures. After the White House announcement, Senators Ron Wyden and Amy Klobuchar introduced competing bills to address this issue. This paper examines the legal background of this matter.

I. Introduction

The Digital Millennium Copyright Act (DMCA) prohibits the circumvention of technological protection measures, and thus blocks the disabling of software that locks cell phone customers into a particular mobile network. The DMCA contains a handful of permanent exceptions. Additionally, it authorizes the Librarian of Congress to issue temporary exemptions during a rulemaking process that occurs every three years. In the 2006 rulemaking cycle, the Librarian of Congress granted an exemption for cell phone unlocking. This exemption was renewed in 2010. However, in the 2012 rulemaking, the Librarian of Congress decided to phase out the exemption. This triggered a petition to the White House, which gained over 114,000 signatures. In response to the petition, the White House stated that it supported legislation that would make the exemption permanent.

II. The DMCA

Congress enacted the DMCA in 1998. Section 1201(a)(1) of the DMCA, 17 U.S.C. § 1201(a)(1), prohibits gaining unauthorized access to a copyrighted work by circumventing a technological protection measure (e.g., encryption) put in place by the

copyright owner to control access to the work. To facilitate enforcement of the copyright owner's ability to control access to his copyrighted work, section 1201(a)(2) prohibits manufacturing or making available technologies, products, and services that can be used to defeat technological measures controlling access. Similarly, section 1201(b) prohibits the manufacture and distribution of the means of circumventing technological measures protecting the rights of a copyright owner (e.g., measures that prevent reproduction). Violation of section 1201 leads to civil and criminal liability. A repeat offender can be imprisoned for 10 years and fined \$1 million.

Section 1201 includes several specific exceptions from the prohibition on circumvention and circumvention devices for purposes such as achieving interoperability between computers programs, security testing, encryption research, and law enforcement. Congress understood that, aside from the exceptions mentioned above, there may be other legitimate reasons for circumventing technological protections. Accordingly, Congress suspended application of the prohibition on circumvention of access controls for two years, until the Librarian of Congress could conduct a rulemaking proceeding to determine whether additional exceptions were needed. The DMCA further requires the Librarian of Congress to conduct a similar rulemaking every three years thereafter. The Librarian's principal question is whether the prohibition on circumvention will adversely affect the ability of users of copyrighted works to make non-infringing use of them. Under the process set forth in the statute, the Register of Copyrights (the head of the Copyright Office, which is part of the Library of Congress) makes a recommendation on exemptions to the Librarian after consulting with the National Telecommunications and

Information Administration (NTIA) within the Department of Commerce. The Librarian is not required to follow the recommendations of either the Register or the NTIA.

III. The Cell Phone Unlocking Exemption

A cell phone contains a computer program, in a firmware format, that enables the cell phone to connect to the network of a mobile communications provider. The program in the cell phone can be reprogrammed to enable a user to connect to another provider's network. To prevent this reprogramming, and thereby lock a user into a particular network, the provider typically employs a technological measure that prevents access to the program.

TracFone, a cell phone provider, adopted a business model of making cell phones available below cost while generating profit by selling prepaid airtime cards. Several competitors purchased the inexpensive TracFone cell phones in bulk, circumvented the technological protection measure on the cell phones' programs, reprogrammed the cell phones so that they could connect to another network, and sold the reprogrammed cell phones to consumers. TracFone sued the competitors for violating the DMCA, and the competitors applied for an exemption in the 2006 rulemaking cycle.

In her recommendation to the Librarian of Congress to grant an exemption, the Register of Copyrights found that a user who unlocks a cell phone to connect to another network is not "engaging in copyright infringement or in an activity that in any way implicates copyright infringement or the interests of the copyright holder." Once the program was unlocked, it was reprogrammed, not copied. The reprogramming of a particular piece of firmware could be seen as making an adaptation of a copyrighted work, but 17 U.S.C. § 117(a)(1) specifically permits the owner of a copy of a program to

adapt that copy “as an essential step in the utilization of the computer program in conjunction with a machine.” Accordingly, the Librarian of Congress in 2006 approved the following exemption: “Computer programs in the form of firmware that enable wireless telephone handsets to connect to a wireless telephone communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless telephone communication network.”

Notwithstanding the exemption, TracFone continued to sue its competitors for violating section 1201(a) of the DMCA. Two federal district courts in Florida ruled that the exemption did not apply. The exemption permits circumvention when it is “accomplished for the sole purpose of lawfully connecting to a wireless telephone communication network.” However, according to the courts in *TracFone v. GSM Group*, 555 F.Supp. 2d 1331 (S.D. Fla. 2008), and *TracFone v. Dixon*, 475 F.Supp.2d 1236 (M.D. Fla. 2007), the competitors circumvented for the purpose of reselling cell phones for a profit, not for the purpose of connecting to a communications network. In other words, the exemption was available only to the user who would actually connect to the communications network, and not to the firm with the expertise to reprogram the cell phone for the user. This limitation of the exemption to end-users significantly limited its effectiveness.

In the rulemaking cycle beginning in December of 2008, TracFone’s competitors requested a modification of the exemption to clarify its application to the providers of reprogrammed cell phones in addition to end users. In 2010, however, the Librarian actually narrowed the exemption to used cell phones.¹

¹ The 2010 rule allows circumvention to gain access to: “Computer programs, in the form of firmware or software, that enable used wireless telephone handsets to connect to a wireless

The Librarian revisited cell phone unlocking in the next rule-making cycle. On October 26, 2012, the Librarian renewed the exemption allowing the unlocking of cell phones in order to operate on other networks, but the exemption applied only to cell phones acquired within the next 90 days, i.e., before January 24, 2013. The NTIA had supported renewal of the exemption adopted in 2010 to prevent consumers from being locked into a particular carrier's network. The Register of Copyrights, however, was persuaded that with respect to new wireless cell phones, there were ample alternatives to circumvention. The marketplace had evolved such that a wide variety of unlocked phones were available to consumers—even though not every device is available unlocked. At the same time, consumers who owned “legacy” phones would be adversely affected by an inability to unlock their phones. Accordingly, the Register recommended that the exemption be renewed only with respect to cell phones purchased no later than 90 day after the promulgation of the exemption. The Librarian agreed with the Register's differentiation between new and legacy phones.²

IV. The Petition and the White House Response

On January 24, 2013, a “We the People” petition concerning this issue was initiated on the White House's website. The petition noted that as of January 26,

telecommunications network, when circumvention is initiated by the owner of the copy of the computer program solely in order to connect to a wireless telecommunications network and access to the network is authorized by the operator of the network.”

² The 2012 rule allows circumvention to gain access to: “Computer programs, in the form of firmware or software, that enable a wireless telephone handset originally acquired from the operator of a wireless telecommunications network or retailer no later than ninety days after the effective date of this exemption to connect to a different wireless telecommunications network, if the operator of the wireless communications network to which the handset is locked has failed to unlock it within a reasonable period of time following a request by the owner of the wireless telephone handset, and when circumvention is initiated by the owner, an individual consumer, who is also the owner of the copy of the computer program in such wireless telephone handset, solely in order to connect to a different wireless telecommunications network, and such access to the network is authorized by the operator of the network.”

“consumers will no longer be able to unlock their phones for use on a different network without carrier permission, even after their contract has expired.” The petition argued that “[c]onsumers will be forced to pay exorbitant roaming fees to make calls while traveling abroad.” Further, this decision “reduces consumer choice, and decreases the resale value of devices that consumers have paid for in full.” The petition requested the White House to “ask the Librarian of Congress to rescind this decision, and failing that, champion a bill that makes unlocking permanently legal.”

On March 4, 2013, R. David Edelman, the White House Senior Advisor for Internet, Innovation, & Privacy, responded publicly on the White House website.

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.

This is particularly important for secondhand or other mobile devices that you might buy or receive as a gift, and want to activate on the wireless network that meets your needs—even if it isn't the one on which the device was first activated. All consumers deserve that flexibility.

The White House pointed out that the NTIA had recommended in favor of renewal of the existing exemption on the unlocking of cellphones, and that the Librarian of Congress had not followed this recommendation. It further observed that “the DMCA exception process is a rigid and imperfect fit for this telecommunications issue....” The Obama Administration would support “narrow legislative fixes in the telecommunications space that make it clear: neither criminal law nor technological locks

should prevent consumers from switching carriers when they are no longer bound by a service agreement or other obligation.” In other words, the Administration called for a narrow bill that targeted this problem, not a broad overhaul of section 1201 of the DMCA. The White House noted that the Federal Communications Commission would join the NTIA in reviewing this matter, and encouraged mobile providers to take voluntary actions “to ensure that their customers can fully reap the benefits and features they expect when purchasing their devices.”

V. Competing Legislative Solutions

On March 5, 2013, Senator Ron Wyden introduced the Wireless Device Independence Act of 2013. It would amend the DMCA to provide that the prohibition on circumvention did not apply to “a user of a computer program...that enables a wireless telephone handset[] or other wireless device...originally acquired from the operator of a wireless telecommunications network...to connect to a different wireless telecommunications network.” The user would have this right to circumvent only if she legally owns a copy of the computer program; the computer program is used solely for the purpose of connecting to the wireless network; and access to the network is authorized by its operator.

On March 7, 2013, Senators Klobuchar, Lee, and Blumenthal introduced legislation that took a different approach. The Wireless Consumer Choice Act would require the Federal Communications Commission to direct providers of mobile services to permit subscribers or their agents “to unlock any type of wireless device used to access such services.”

VI. A Potential Obstacle Posed by Free Trade Agreements and the Trans-Pacific Partnership Agreement

The White House position, however, may be inconsistent with the U.S. proposal in the Trans-Pacific Partnership Agreement (TPP) and existing obligations in the Korea-U.S. Free Trade Agreement (KORUS) and other free trade agreements to which the United States is a party. This demonstrates the danger of including in international agreements rigid provisions that do not accommodate technological development.

KORUS obligates the United States and Korea to adopt provisions concerning the technological protection measures based on section 1201 of the DMCA. Furthermore, KORUS mandates that the parties “confine exceptions and limitations” to the circumvention prohibition to a specific list of exceptions that matches the specific exceptions in the DMCA. Cell phone unlocking, of course, is not on that list. KORUS does allow for administrative procedures like the DMCA's rule-making to adopt temporary exemptions, but not permanent ones. The challenge before Congress is to devise a permanent exception for cell phone unlocking that does not breach the obligations under KORUS and other similar free trade agreements.

The draft text for TPP is secret, but the U.S. proposal for the IP chapter was leaked two years ago. The leaked proposal contained KORUS's closed list of exceptions. Because TPP is currently under negotiation, there still is time to make sure that the TPP does not prevent national governments, including the United States, from amending their laws to permit the unlocking of cell phones and other wireless devices.

March 8, 2013