

No More "Self-Help" Mobile Phone Unlocking

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Federal law prohibits the circumvention of technological measures used by or on behalf of copyright owners to protect their works. In the context of mobile handsets, although users previously enjoyed a limited exemption from this prohibition, a new ruling means that users no longer can use self-help to unlock their mobile phone and move it to an alternative network.

Periodically, through a rulemaking process, the Copyright Office (the "Agency") takes comments and evaluates whether the prohibition on circumvention measures adversely impacts the ability to use the works in a non-infringing manner. Recommendations are made by the Agency to the Librarian of Congress, who then establishes exemptions to the access control circumvention prohibition by rule. This time around, the [rule](#) did not continue the exemption for unlocking mobile devices.

So what happened?

In determining not to continue to provide for an exemption the unlocking of mobile devices, the Agency focused on three factors.

First, there had been a significant development in case law regarding whether the firmware (the software that runs the handset) was owned or licensed to the handset user. Prior to 2010, the assumption was that the owner of the handset owned the copies of software on their phones. This had enabled the Agency (in part) to conclude that the an exception to the prohibition against circumvention of technological measures was appropriate (*i.e.*, a non-infringing use of a work owned by the handset owner).

This assumption changed in 2010 when a federal court identified factors that would indicate that the mobile phone firmware was licensed to, rather than owned by, the handset owners. Assuming that a license was issued with respect to the firmware, it is generally apparent that the mobile phone firmware is licensed to the handset owner. What follows then is: (i) the handset owners must comply with the license terms; and (ii) if the license terms say you cannot circumvent the access controls to move the phone to another network, you cannot do it. It should be noted that although the Agency found the case law to be instructive, it did not find it to be controlling.

The second significant factor the Agency relied upon was that the handset owner could have its phone unlocked by the carrier through the carrier's unlocking policy. Put another way, the logic is that since the carriers will unlock the phone upon request (and satisfaction of certain conditions), there is no reason an exemption (which by their nature are extraordinary) from copyright law. This notion was bolstered by the practice of some who apparently bought pre-paid phones that were subject to subsidized pricing, unlocked the phones, and sold them in foreign markets at non-discounted prices. On the losing end of this transaction was the carrier, who was unable to recover the subsidy because the phone was not used on its network. Removing the exemption makes this

practice unlawful.

The final significant factor that the Agency relied upon was that, even though not every handset is available, there are many handsets than can simply be bought unlocked.

Therefore, be warned. It is a violation of law to unlock your mobile device without the assistance of your carrier. Monetary damages and penalties will apply. We expect carriers to begin modifying their terms and conditions to implement this ruling, and litigation against entities facilitating unlocking remains a possibility.

As a postscript, there is a “We the People” [petition with over 100,00 signatures](#) requesting that the White House to ask the Librarian of Congress to reconsider its decision. We shall see, but know that online petitions are not a substitute for the Federal Rulemaking Process.