



This document is scheduled to be published in the Federal Register on 08/25/2014 and available online at <http://federalregister.gov/a/2014-20077>, and on [FDsys.gov](http://FDsys.gov)

## **LIBRARY OF CONGRESS**

### **U.S. Copyright Office**

#### **37 CFR Part 201**

**[Docket No. 2014-06]**

### **Exemption to Prohibition on Circumvention of Copyright Protection Systems for Wireless Telephone Handsets**

**AGENCY:** U.S. Copyright Office, Library of Congress.

**ACTION:** Final rule.

---

**SUMMARY:** Pursuant to an act of Congress, the Librarian of Congress is amending applicable regulations to provide that the prohibition against circumvention of technological measures that effectively control access to copyrighted works set forth in the United States Code shall not apply to persons who engage in such circumvention to enable used wireless telephone handsets to connect to wireless telecommunications networks when the circumvention is initiated either by the owner of the handset or certain other persons, and when connection to the network is authorized by the operator of the network.

**DATES:** Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, by email at [jcharlesworth@loc.gov](mailto:jcharlesworth@loc.gov) or by telephone at 202-707-8350; or Sarang V. Damle, Special Advisor to the General Counsel, by email at [sdam@loc.gov](mailto:sdam@loc.gov) or by telephone at 202-707-8350.

**SUPPLEMENTARY INFORMATION:**

Pursuant to the Unlocking Consumer Choice and Wireless Competition Act, Pub. L. No. 113-144, enacted on and effective as of August 1, 2014, the Librarian of Congress is publishing a rule amending 37 CFR 201.40 to designate a class of copyrighted works that shall be exempt from the prohibition against circumvention of technological measures that effectively control access to copyrighted works set forth in 17 U.S.C. 1201(a)(1)(A) and to specify those persons who may initiate such circumvention.

### **Background**

The Digital Millennium Copyright Act (“DMCA”) was enacted to implement certain provisions of the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty. The DMCA created chapter 12 of title 17 of the United States Code, which prohibits circumvention of technological measures employed by copyright owners to protect their works. Specifically, section 1201(a)(1)(A) provides that no person shall circumvent a technological measure that effectively controls access to a work protected under title 17. In order to ensure that the public will have continued ability to engage in noninfringing uses of copyrighted works that may be adversely affected by the prohibition, however, subparagraph (B) of section 1201(a)(1) creates a regulatory exemption process.

Subparagraph (B) of section 1201(a)(1), as implemented through subparagraph (C), allows the Librarian of Congress, upon the recommendation of the Register of Copyrights, to adopt exemptions to the prohibition on circumvention when it is established that persons are, or are likely in the succeeding three-year period to be, adversely affected in their ability to make noninfringing uses of particular classes of works as a result of the prohibition. The Register’s recommendation is made based on an

evidentiary record developed through a multi-stage proceeding that includes written comments, oral testimony and other evidence submitted by the public, and after consultation with the Assistant Secretary for Communications and Information of the Department of Commerce (“Assistant Secretary”). In accordance with the statutory framework, a new rulemaking is commenced every three years.

In 2006, as part of the third triennial section 1201 rulemaking, the Librarian of Congress, upon the recommendation of the Register of Copyrights, for the first time announced an exemption from the prohibition against circumvention of technological measures that control access to computer programs that enable wireless telephone handsets to connect to wireless telephone communication networks when the circumvention is accomplished for the sole purpose of lawfully connecting to such a network – a process commonly referred to as “cellphone unlocking.” 71 FR 68472, 68480 (Nov. 27, 2006).

In 2010, as a result of the fourth triennial rulemaking, the Librarian of Congress, again acting upon the recommendation of the Register of Copyrights, adopted a slightly different version of the cellphone unlocking exemption to enable used wireless telephone handsets to connect to wireless telecommunications networks where the circumvention is initiated by the owner of the copy of the handset computer program solely in order to connect to such a network in an authorized manner. 75 FR 43825, 43839 (July 27, 2010).

In 2012, in the fifth triennial rulemaking, the Librarian adopted, upon the Register’s recommendation, a more limited unlocking exemption. The evidentiary record in the 2012 proceeding established that wireless carriers were more willing to unlock cellphones upon the expiration of customers’ contracts and that unlocked cellphones were

widely available for purchase in the marketplace. 77 FR 65260, 65264-66 (Oct. 26, 2012). As a result, while still permitting the unlocking of older, or “legacy,” phones, the 2012 rule ended the exemption with respect to new phones acquired after January 26, 2013, 90 days after the rule went into effect. As before, unlocking was limited to owners of the handset computer program undertaken solely for the purpose of connecting to a wireless network in an authorized manner. *Id.* at 65278.

In response to public calls for a broader exemption,<sup>1</sup> Congress passed the Unlocking Consumer Choice and Wireless Competition Act (“Act”), effective as of August 1, 2014. In place of the 2012 exemption, the Act substitutes the version of the Librarian’s cellphone unlocking exemption that was adopted pursuant to the 2010 rulemaking. In addition, the legislation provides that the circumvention permitted under the reinstated 2010 exemption, as well as any future exemptions applicable to wireless handsets or other wireless devices, may be initiated by the owner of the handset or device, by another person at the direction of the owner, or by a provider of commercial mobile radio or data services, to enable such owner or a family member to connect to a wireless network when authorized by the network operator. Pub. L. No. 113-144 sec. 2(a), (c). Finally, the legislation directs the Librarian of Congress to consider in the next triennial rulemaking proceeding whether to extend the unlocking exemption to other types of wireless devices based upon the recommendation of the Register of Copyrights, who in turn is to consult with the Assistant Secretary. *Id.* at sec. 2(b).

In accordance with the Act, the Librarian of Congress adopts the following amendments to the exemptions set forth in 37 CFR 201.40.

---

<sup>1</sup> See WE THE PEOPLE, <https://petitions.whitehouse.gov/petition/make-unlocking-cell-phones-legal/1g9KhZG7> (last updated July 25, 2014).

**List of Subjects in 37 CFR Part 201**

Copyright, General provisions.

**Final Regulations**

For the reasons set forth in the preamble, 37 CFR part 201 is amended as follows:

**PART 201–GENERAL PROVISIONS**

1. The authority citation for part 201 continues to read as follows:

**Authority:** 17 U.S.C. 702.

2. Section 201.40 is amended as follows:

- a. By revising the section heading;
- b. By revising paragraph (b)(3);
- c. By redesignating paragraph (c) as paragraph (d); and
- d. By adding a new paragraph (c).

**§ 201.40 Exemptions to prohibition against circumvention.**

\* \* \* \* \*

(b) \* \* \*

(3) Computer programs, in the form of firmware or software, that enable used wireless telephone handsets to connect to a wireless 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.

\* \* \* \* \*

(c) *Persons who may initiate circumvention.* To the extent authorized under paragraph (b) of this section, the circumvention of a technological measure that restricts wireless telephone handsets or other wireless devices from connecting to a wireless telecommunications network may be initiated by the owner of any such handset or other device, by another person at the direction of the owner, or by a provider of a commercial mobile radio service or a commercial mobile data service at the direction of such owner or other person, solely in order to enable such owner or a family member of such owner to connect to a wireless telecommunications network, when such connection is authorized by the operator of such network.

Dated: August 18, 2014.

**James H. Billington,**  
*Librarian of Congress.*

**[BILLING CODE 1410-30-P]**

**[FR Doc. 2014-20077 Filed 08/22/2014 at 8:45 am; Publication Date: 08/25/2014]**