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Government Unlocks Cells

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Just after Thanksgiving, the U.S. Copyright Office gave consumers something extra to be thankful about by allowing them to lawfully “unlock” their cellphones for use on any service provider’s compatible network. Now, you may wonder why the Copyright Office of the Library of Congress is regulating consumer’s ability to keep their cellphones when they switch providers. Well, the answer is simple (in that Washington lawyer kind of way) – Congress gave the Copyright Office authority in the Digital Millennium Copyright Act (DMCA) to exempt certain classes of work from the anti-circumvention language in §1201 of the DMCA.

This section of the DMCA was designed to enhance Digital Rights Management (DRM) software that protects digitized, copyrighted works from piracy. However, Congress recognized that creating statutory penalties for circumventing all DRM schemes, even when they are protecting things not subject to regular copyright protection, would have been overbroad. Thus they created a release valve of sorts, by empowering the Copyright Office to create exempt classes of works that don’t receive anti-circumvention protection under §1201 of the DMCA. The statute requires the Copyright Office to hold a rulemaking proceeding every three years to determine which classes of works should be exempted from §1201 protection.

In this latest rulemaking one of the exempted classes of works was created because of complaints about cellphone service providers equipping the phones they sold with “software locks” preventing access to the phones’ “bootloader” program. Denying consumers access to this program had the effect of restricting the networks the phone could work with to only those that were originally programmed into the phone.

Under the language of the DMCA’s anti-circumvention provisions, any attempt to circumvent these “software locks” would constitute a violation of §1201 of the act, regardless of whether there was any underlying copyright concern. After receiving comments from the public requesting that a class of works be created to exempt circumventing these “locks,” the Copyright Office exempted “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.”

Because the DMCA’s anti-circumvention provision is meant to supplement private efforts to curb copyright infringement, a key finding in making this exemption was that

these “software locks” were *not* being used to protect copyrighted material from infringement. Rather, the “locks” were being used to limit consumer’s ability to switch service providers. However, this led to the overly complicated and heavily caveated exemption above. The Copyright Office wanted to make clear that there was no intention to exempt removing these “locks” so that someone could access the cellphones “bootloader” program for the purpose of infringing the copyright of the program’s author.

It should also be noted that there was virtually no recognized opposition to creating this exempt class of works. This happy circumstance came about because CTIA (the cellular industry’s lobbying group) and TracPhone Wireless did not timely file their opposing comments. Because these comments were filed late, the Copyright Office didn’t read or consider them, thereby allowing the rule to take effect virtually unchallenged. TracPhone has since announced, however, that is challenging the new rule in court. If nothing else, this highlights the importance of timely filing in any rulemaking proceeding.

The next Copyright Office exemption rulemaking will take place in the Fall of 2009, and it may behoove people with software gripes to take advantage of the opportunity.