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What Do Legally Unlocked Cell Phones Mean for the Consumer?

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Like everything else in the practice of law, the devil is always in the details. Almost everything is dependent on the particular facts of the situation. For example, if a person has a driver's license, she can drive a car. However, the driver's license does not allow her to drive the wrong way down a one-way street.

Similarly, as we discussed in our earlier article "[Copyright Law Gives Mobile Users New Freedom With Legally Unlocked Cell Phones](#)," the Librarian of Congress recently made it possible for consumers to unlock cell phones without violating copyright law. Exemptions exclude from 17 U.S.C. §1201(a)(1), inter alia, "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."

But, this does not mean that you can violate other rules such as, for example, the anti-distribution provisions of 17 U.S.C. §1201(a)(2). ("(2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that -- (A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title; (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or (C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.")

The Register of Copyrights portends that "[b]ut for the software lock protected by §1201, it appears that there would be nothing to stand in the way of a consumer being able to [lawfully connect to any carrier using] a lawfully purchased mobile handset and the software that operates it." See Recommendation of the Register of Copyrights in RM 2005-11; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Nov. 17, 2006, p. 50.

As a practical matter, however, mobile phone users may be able to use their wireless telephone handsets to connect



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to alternative wireless telecom networks for voice services, but data communication may be limited. Many telecom networks implement different, incompatible data communication protocols. Therefore, simply unlocking a mobile handset may not be sufficient to enable data communication on alternative wireless telecom networks. Many users, particularly business users, often rely heavily on the data connectivity feature of their mobile handsets. Without this feature, the ability to unlock a mobile handset may be of limited use to a subset of mobile phone users. Of course, in any event, a user's mobile handset must be an authorized subscriber on that telecom network before connectivity, voice or data is possible.

The effect on mobile handset subscribers aside, the Librarian of Congress exemption will most likely also cause a change in the market dynamics of the mobile handset and network industry. The Register of Copyrights notes that "[t]he purpose of the software lock appears to be limited to restricting the owner's use of the mobile handset to support a business model, rather than to protect access to a copyrighted work itself." See Recommendation of the Register of Copyrights in RM 2005-11; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Nov. 17, 2006, p. 50-51.

One particular business model employed by wireless telecom carriers relates to prepaid wireless handsets. See Mello Jr., John P., "DMCA Exemption Could Unlock Cell Phones", 02/06/2007. Software locks were frequently used to control the mobile handset user's access and use of the prepaid mobile handset. With the Librarian of Congress exemption in place, it is likely that the degree of control over prepaid users may be reduced. Furthermore, the business model employed by many wireless telecom network providers to subsidize mobile handset purchases in return for a fixed-length contract locking in the mobile user and the mobile provider may be affected.

In sum, how does all of this ultimately affect a consumer? It depends. If the consumer is very technically savvy, she can remove the lock in the firmware of the phone herself in order to enable interoperability with a different carrier. Inevitably, this type of hacker information is posted frequently on the Internet. For other consumers, we believe that the practical effects felt by consumers will be a result of the LOC exemption coupled with market forces. In particular, the vast majority of users are not going to edit the firmware on their cellular phones. Instead, it is far more likely that Carrier A will start advertising that, if a consumer wants to switch from a competitive provider, Carrier A will unlock that phone for the consumer so that it can be used on Carrier A's network. Thus, it is marketplace competition that we believe will take advantage of the LOC exemption and thereby give mobile users new freedom subject, of course, to any data protocol compatibility issues between the networks in question.

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