

LAW.COM

Select 'Print' in your browser menu to print this document.

Copyright 2007 ALM Properties, Inc. All rights reserved.

Page printed from: <http://www.law.com>

[Back to Article](#)

Copyright Law Gives Mobile Users New Freedom With Legally Unlocked Cell Phones

By [Timothy C. Meece and Aseet Patel](#)
Special to Law.com
02-05-2007

It is becoming increasingly common for copyright owners to use the Digital Millennium Copyright Act (DMCA) (17 U.S.C. §1201(a)(1)) to prevent people from circumventing a technological measure that effectively controls access to a copyrighted work.

For example, in the past the mobile phone industry has applied the DMCA to create software locks that control user access to particular firmware in a mobile phone. The main types of software locks used in mobile phones were: service provider code locks, system operator code locks, band order locks and subscriber identity module locks. Since the firmware in the mobile phone is a copyrighted work, any attempts to circumvent these software locks in a mobile phone to gain unauthorized access to the firmware could be actionable under the DMCA.

Consequently, by placing software locks on mobile phones, a provider of a mobile telecommunications network could effectively prevent a user from switching her mobile phone to another competing network provider.

Built into the DMCA, however, is a provision (17 U.S.C. §1201(a)(1)(D)) that permits the Librarian of Congress, based on recommendations from the Register of Copyrights, to exempt for the ensuing three-year period from the DMCA certain classes of copyrighted works based on an analysis of a variety of factors. (See 17 U.S.C. §1201(a)(1)(C)(i)-(v).) One of these recent exemptions was an early Christmas present for cellular phone users.

THE LIBRARIAN OF CONGRESS EXEMPTIONS

On Nov. 27, 2006, the Librarian of Congress issued its [new exemptions](#) and they will remain in effect through Oct. 27, 2009. According to these new exemptions, persons making noninfringing uses of the following six classes of works will not be subject to the DMCA prohibition against circumventing access controls under 17 U.S.C. §1201(a)(1). Exemption 5 will be of the most interest to cell phone users.

1. Audiovisual works included in the educational library of a college or university's film or media studies department, when circumvention is accomplished for the purpose of making compilations of portions of those



Visit the New
MinorityLawJournal
Website for:

- Daily News Updates
- Featured Diversity Firms
- Magazine Articles – Diversity Scorecard, Associate Survey
- Directory of Minority Attorneys
- Editor's Corner

Registration is Free



LAW.COM **CLE CENTER**

Completing your
MCLE
is as easy as...

1 → 2 → 3

Enroll now

works for educational use in the classroom by media studies or film professors.

2. Computer programs and video games distributed in formats that have become obsolete and that require the original media or hardware as a condition of access, when circumvention is accomplished for the purpose of preservation or archival reproduction of published digital works by a library or archive. A format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.
3. Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete. A dongle shall be considered obsolete if it is no longer manufactured or if a replacement or repair is no longer reasonably available in the commercial marketplace.
4. Literary works distributed in e-book format when all existing e-book editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling either of the book's read-aloud function or of screen readers that render the text into a specialized format.
5. 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.
6. Sound recordings, and audiovisual works associated with those sound recordings, distributed in compact disc format and protected by technological protection measures that control access to lawfully purchased works and create or exploit security flaws or vulnerabilities that compromise the security of personal computers, when circumvention is accomplished solely for the purpose of good-faith testing, investigating or correcting such security flaws or vulnerabilities.

The DMCA sets out that the purpose of these exemptions is to identify where " ... users of a copyrighted work are ... adversely affected by the prohibition ... in their ability to make noninfringing uses ... of a particular class of copyrighted works." (See 17 U.S.C. §1201(a)(1)(C).)

In their official recommendation to the Librarian of Congress, the Register of Copyrights considered each of the factors set forth in the DMCA to conclude that exemption No. 5 is appropriate. (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. 42-53.) Of particular importance in the Register of Copyrights' reasoning was its belief that the software locks served a business goal (i.e., limit the ability of subscribers to switch to other carriers), rather than serving as an access control to protect the copyright owner's interest in the value or integrity of the copyrighted work. The software locks were simply being used to control the use of hardware components in the mobile phone. Therefore, the software locks, it concluded, offered no apparent benefit to the copyright owner in relation to the work to which access was controlled, and an exemption was warranted. (See *id.*)

THE CELLULAR PHONE INDUSTRY

Prior to this ruling, mobile service providers were using software locks to block user access to operating software and firmware embedded inside mobile phones. These locks prevented cellular users from switching existing phones from their current mobile carrier to a competitor's network. This was particularly problematic for users who traveled, because most mobile carriers only provide cellular service in certain geographical areas. Consequently, if a cell phone user wanted to switch from one carrier to another, the user oftentimes had to either (1) violate the DMCA by circumventing the locking software to access the computer program that allows the phone to operate (mobile firmware) or (2) buy a new phone from the new carrier.

In at least one instance, a mobile service provider has enforced its rights under Section §1201(a)(1) of the DMCA by filing suit in the U.S. District Court for the Southern District of Florida. See *TracFone Wireless, Inc. v. Sol Wireless Group, Inc.*, No. 05-23279-CIV (S.D. Fla., Feb. 28, 2006). In that suit, TracFone, a prepaid wireless company, alleged, among other things, that the defendants "avoided, bypassed, removed, disabled, deactivated, or impaired a technological measure for effectively controlling access to the proprietary software within the TracFone Prepaid Software without TracFone's authority." The case ultimately resulted in a permanent injunction in TracFone's favor.

Oddly enough, however, TracFone and most other major mobile service providers failed to provide their timely comments in response to the Librarian's public Notice of Inquiry. Only one opponent of the proposed exemption submitted timely comments. Meanwhile, numerous proponents of the exemption submitted timely comments which were entered into the record. The lack of attention on the part of the mobile service providers, however, should not be interpreted to mean that the exemption is of no consequence to the mobile phone industry. To the contrary, the results of the cell phone exemption on the industry and consumers will be significant.

RESULT OF CELL PHONE EXEMPTION

The result of this exemption is good news for cellular users. No longer will users be faced with an unpleasant choice of either (1) violating the DMCA or (2) having to buy a new phone.

Now, users can legally unlock their cellular phones. Unlocking a cell phone allows a consumer to keep their current phone while changing service providers. Because cellular users can now easily switch from one carrier to another, there will be increased competition amongst service providers. Increased competition should cause prices for cellular service to stabilize or drop and also encourage providers to provide better service.

Timothy C. Meece is a partner and senior shareholder of Banner & Witcoff, and Aseet Patel is an associate at the firm. They are located at the firm's Chicago office and may be reached at tmeece@bannerwitcoff.com and apatel@bannerwitcoff.com. i>

Law.com's ongoing LEGAL MINDS article series highlights opinion and analysis from our site's contributors and writers across the ALM network of publications.