

UNLOCKING CONSUMER CHOICE AND WIRELESS COMPETITION ACT

JULY __, 2014.—Ordered to be printed

Mr. LEAHY, from the Committee on the Judiciary,
 submitted the following

R E P O R T

[To accompany S.517]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the bill (S.517), to promote consumer choice and wireless competition by permitting consumers to unlock mobile wireless devices, and for other purposes, having considered the same, reports favorably thereon, with amendments, and recommends that the bill, as amended, do pass.

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I. BACKGROUND AND PURPOSE OF THE BILL

A. BACKGROUND

As of January 2014, 90% of American adults own a cell phone, 58% percent own a smartphone, and 40% own tablets.¹ Wireless devices like cell phones, smart phones, and tablets empower consumers, facilitating communication, education, work, and entertainment for Americans of all ages. Network carriers that operate voice and data networks often sell these devices in conjunction with service contracts, at a reduced cost in exchange for the consumer's agreement to use the carrier's voice or data plan for a predetermined period, often two years. Carriers typically place software on the device that prevents it from being used on another carrier's network.² This is often referred to as "locking" the device; efforts to alter this software are typically referred to as "unlocking" the device.

Consumers whose contracts with their original carrier have expired, or who have otherwise complied with the applicable contractual terms, may wish to continue using their old devices with new carriers who may offer better prices or better coverage. Alternatively, they may wish to give their old phone to a family member or friend or sell it to another consumer. Smart phones and tablets, for example, can cost many hundreds of dollars—sometimes more than \$500 each—and many consumers would like to choose which network they connect to without incurring the substantial cost of purchasing a brand new device. From 2006 until 2012, an exemption to the Digital Millennium Copyright Act (DMCA) expressly permitted cell phone users to "unlock" their cell phones when their contract expired, allowing them to connect to their chosen wireless network. The Unlocking Consumer Choice and Wireless Competition Act restores that exemption to promote consumer choice.

Some carriers, including the four largest national carriers, have established principles under which they will help consumers unlock their phones, and the Committee expects that most unlocking will continue to be done by wireless carriers at the request of their customers.³ There are, however, circumstances in which additional avenues for unlocking may be preferable over

¹ See *Mobile Technology Fact Sheet*, PEW RESEARCH INTERNET PROJECT (January 2014), <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet>.

² See Consumer and Governmental Affairs Bureau, *Consumer Guide: Mobile Phone and Device Unlocking FAQ's*, FEDERAL COMMUNICATIONS COMMISSION (Feb. 24, 2014), <http://www.fcc.gov/device-unlocking-faq> ("Unless you purchased a phone or device specifically sold as 'unlocked' at the point of purchase, you should assume that it is locked to a specific service provider's network. This is true whether you purchase the device from a service provider, at a general retail outlet (in person or on the web), or through a third-party.").

³ *Consumer Code for Wireless Service*, CTIA-The Wireless Association, <http://www.ctia.org/docs/default-source/default-document-library/ctia-consumer-code-for-wireless-service.pdf>; see also Letter from Steve Largent, President and CEO, CTIA-The Wireless Association, to Thomas E. Wheeler, FCC Chairman, and Mignon L. Clyburn, Jessica Rosenworcel, Ajit Pai, & Michael P. O'Reilly, FCC Comm'rs (Dec. 12, 2013), https://apps.fcc.gov/edocs_public/attachmatch/DOC-324664A1.pdf. The carriers that established the unlocking principles have agreed to fully implement them by early 2015. The principles do not address questions related to unlocking phones by third parties for bulk resale. See Letter from Senators Richard A. Blumenthal, Amy Klobuchar, Cory A. Booker, Mark R. Warner, and Edward J. Markey to Thomas E. Wheeler, FCC Chairman (April 29, 2014), www.blumenthal.senate.gov/download/letter-to-fcc-on-bulk-unlocking; Letter from Thomas E. Wheeler, FCC Chairman to Senator Richard A. Blumenthal (June 17, 2014), www.blumenthal.senate.gov/download/fcc-reply-to-bulk-unlocking-letter-from-sen-blumenthal.

attempting to unlock through the carrier. For example, some carriers require customers to bring their devices to the carrier’s physical store to have them unlocked.⁴ For those customers who do not live near the carrier’s retail location—perhaps because they live in a rural area, because they have limited mobility, or because the device was a gift from a friend or family member who lives in another part of the country—this requirement may prevent them from being able to get their devices unlocked.

While it is not particularly difficult for a tech-savvy phone owner to unlock her device independently, it is possible that those who unlock their own devices to connect to their chosen network may violate Section 1201(a)(1) of the DMCA, which prohibits the circumvention of technological measures that control access to copyrighted works.⁵ Because of the availability of civil or criminal sanctions under the DMCA, consumers with a legitimate interest in unlocking their wireless devices may be afraid to do so.

From 2006 until 2012, because of an exemption granted by the Librarian of Congress pursuant to Section 1201(a)(1) of the DMCA, consumers had a guarantee that they were not breaking any laws when they unlocked their own cell phones simply in order to connect to their chosen network. The DMCA gives the Librarian of Congress the authority to conduct a triennial review process through which it may grant exemptions to anti-circumvention measures in Section 1201(a)(1). Beginning in 2006, the Librarian granted an exemption that allowed users to unlock their own cell phones in order to connect to their chosen network, provided that the carrier authorized the connection. The Librarian’s exemption was narrowly focused on cell phones, which were then the dominant mobile digital devices on the market. The exemption was also granted by the Librarian in 2010.⁶

In its 2012 rulemaking, the Librarian chose not to recognize an “unlocking” exemption for new cell phones purchased after January 26, 2013, finding that an adequate record had not been established pursuant to the Librarian’s *de novo* review requirement.⁷ The Librarian’s decision prompted a strong public reaction: a “We the People” petition on the White House website opposing the Librarian’s decision garnered over 110,000 signatures.⁸ On March 4, 2013, in

⁴ See Consumer and Governmental Affairs Bureau, *Consumer Guide: Mobile Phone and Device Unlocking FAQ’s*, FEDERAL COMMUNICATIONS COMMISSION (Feb. 24, 2014), <http://www.fcc.gov/device-unlocking-faq> (“Contact your mobile wireless service provider. Devices can be unlocked with unlock codes or other software updates provided to you by your provider. Some providers will complete the unlocking process in-store, others will unlock your device remotely and automatically.”).

⁵ 17 U.S.C. 1201(a).

⁶ See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68472 (Nov. 27, 2006); Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43,825 (July 27, 2010).

⁷ See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65260 (Oct. 26, 2012); *id.* at 65266 (“[I]n light of carriers’ current unlocking policies and the ready availability of new unlocked phones in the marketplace, the record did not support an exemption for newly purchased phones.”).

⁸ Make Unlocking Cell Phones Legal, THE WHITE HOUSE: WE THE PEOPLE, <https://petitions.whitehouse.gov/petition/make-unlocking-cell-phones-legal/1g9KhZG7>.

response to the “We the People” petition, the White House said that it would “support a range of approaches” to permitting mobile phone unlocking.⁹

On March 11, 2013, Senators Leahy, Grassley, Franken, Lee, Hatch, and Klobuchar introduced the bipartisan Unlocking Consumer Choice and Wireless Competition Act, S.517, to restore the exemption for cell phone unlocking that had been in effect in previous years. Senators Thune and Whitehouse were also cosponsors. Chairman Goodlatte subsequently introduced identical legislation in the House of Representatives, and the House passed a modified version of the legislation in February 2014 (H.R.1123).

B. PURPOSE OF THE LEGISLATION

The Unlocking Consumer Choice and Competition Act, S. 517, ensures that individual consumers are not prevented from unlocking their phone for the legitimate purpose of connecting to a wireless network of their choice. While many network carriers already sell unlocked phones, or will unlock phones for consumers under the terms of their contracts, the Committee recognizes that many consumers want the ability to unlock their cell phones themselves—or receive assistance doing so—for purposes of connecting to a network of their choice. The exemption created by the Librarian of Congress from 2006-2012 permitted users to unlock their cell phones for this purpose without fear of penalties under the DMCA. The Unlocking Consumer Choice and Competition Act restores that exemption until the Librarian of Congress’ next triennial rulemaking under the DMCA, promoting flexibility for consumers and enhancing competition in the wireless market. A further provision instructs the Librarian of Congress to consider, during its next rulemaking, whether to allow unlocking for wireless devices other than cell phones, such as tablets.

The legislation provides two ways that cell phones may be unlocked, in addition to authorized unlocking by a device owner’s wireless carrier. First, it restores the Library of Congress’ 2010 exemption so that consumers may unlock their cell phones themselves in order to change carriers consistent with the terms of their contracts, provided that access to the chosen network is authorized. Second, the legislation ensures that cell phone owners who lack the technological understanding to unlock their phones can direct others to do the unlocking for them, solely to enable the owner or a family member to connect to a new wireless network.

Neither of the methods for unlocking recognized by the legislation excuses owners from compliance with applicable service agreements they may have with the wireless carriers that service their phones. Such agreements may, for example, require fulfillment of an applicable postpaid service contract, device financing plan, or payment of an applicable early termination fee. Moreover, nothing in the bill permits third parties to unlock devices independently of the device owner’s direction, or for a purpose other than allowing the owner or a family member to connect to a new wireless network. As the Librarian of Congress explained with respect to the scope of permissible commercial activity under the 2010 determination that is reinstated by the bill, “the designation of this class will not benefit those who engage in the type of commercial activity that is at the heart of the objections of opponents of the proposed class: the ‘bulk

⁹ R. David Edelman, *It's Time to Legalize Cell Phone Unlocking*, THE WHITE HOUSE: WE THE PEOPLE (March 4, 2013), <https://petitions.whitehouse.gov/response/its-time-legalize-cell-phone-unlocking>.

resellers' who purchase new mobile phone handsets at subsidized prices and, without actually using them on the networks of the carriers who market those handsets, resell them for profit. The type of commercial activity that would be permitted would be the resale of used handsets after the owners of the handsets have used them and then given or sold them to somebody else, who then resells them just as a used bookstore sells used books."¹⁰

The legislation also creates no new obligations for cell phone manufacturers or wireless carriers, such as how a carrier may choose to process unlocking requests or provide unlocking codes to third parties.

Section 2(b) of S.517 instructs the Librarian of Congress to consider, as part of its next triennial rulemaking under the DMCA, whether to allow unlocking for wireless devices other than cell phones, such as tablets, many of which may also be locked by carriers. This instruction acknowledges the growing importance of tablets and the potential for consumer harm if used tablets cannot be taken to a network of the consumer's choice, while respecting the independence and judgment of the Librarian of Congress and the rulemaking process established under existing law for exemptions to the anti-circumvention prohibitions of the DMCA.

While there are larger ongoing debates about the scope and application of Section 1201 of the DMCA, as well as other aspects of phone unlocking, those issues are not addressed by the legislation, which makes no changes to Section 1201 of the DMCA. The bill respects the independence of the Library of Congress under existing law to conduct the triennial rulemakings set forth in Section 1201(a)(1) and does not alter the authority of the Librarian in future rulemakings. Instead, the legislation takes a narrow, targeted approach to protect consumers and promote competition in the wireless market by allowing consumers, and those acting at their direction, to transfer their phones to alternative providers as described in the bill.

II. HISTORY OF THE BILL AND COMMITTEE CONSIDERATION

On March 11, 2013, Senators Leahy and Grassley introduced the Unlocking Consumer Choice and Wireless Competition Act. Senators Franken, Hatch, Lee, and Klobuchar were original cosponsors. The bill was referred to the Committee on the Judiciary.

The bill was placed on the Committee's agenda on June 26, 2014. The Committee considered S.517 on July 10, 2014. Senators Leahy and Grassley offered a substitute amendment which added a provision allowing consumers to seek help unlocking their devices from a third party. Senators Coons and Blumenthal were added as cosponsors of the bill during Committee consideration of the substitute amendment.

The substitute amendment was accepted by a voice vote without objection.

The Committee then voted to report the Unlocking Consumer Choice and Wireless Competition Act, with an amendment in the nature of a substitute, favorably to the Senate by voice vote.

¹⁰ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43,825, 43,831-32 (July 27, 2010).

III. SECTION-BY-SECTION SUMMARY OF THE BILL

Section 1—Short title

This section provides that the legislation may be cited as the “Unlocking Consumer Choice and Wireless Competition Act.”

Section 2—Repeal of Existing Rule and Additional Rulemaking by Librarian of Congress

Subsection (a): This subsection repeals Paragraph (3) of 37 C.F.R. § 201.40, as amended and revised by the Librarian of Congress on October 28, 2012 and replaces that text with the equivalent paragraph that was in effect on July 27, 2010.¹¹ In so doing, the subsection repeals the Library of Congress’ 2012 cell phone unlocking exemption, and reinstates the exemption that was granted pursuant to the triennial rulemaking conducted by the Librarian of Congress in 2010. The exemption created by the bill will remain in effect until the Library of Congress conducts its next triennial rulemaking and reaches a new decision on whether or not the record supports such an exemption. This subsection does not alter any other section of the Librarian of Congress’ 2010 or 2012 rulemakings, nor does it alter the authority of the Librarian of Congress in future rulemakings.

Subsection (b): This subsection directs the Librarian of Congress to consider, as part of its next regularly scheduled, triennial rulemaking, whether to extend an unlocking exemption to “other categor[ies] of wireless devices.” The subsection instructs the Register of Copyrights to consult with the Assistant Secretary for Communications and Information at the Department of Commerce before presenting a recommendation on this matter to the Librarian of Congress, as is required under 17 U.S.C. § 1201(a)(1)(C). The Librarian’s determination shall be conducted as a part of and subject to the applicable rules governing the Librarian’s triennial rulemaking under 17 U.S.C. § 1201(a)(1).

Subsection (c): Some consumers may find it challenging to unlock their devices. Accordingly, Subsection (c) allows owners of mobile devices to seek help unlocking their devices from a third party, and provides that they will likewise be able to do so under any future exemption applied to other wireless devices under Subsection (b), or future unlocking exemptions granted by the Librarian of Congress as described in Subsection (c)(2). In authorizing consumers to seek unlocking assistance, the Committee notes the limited circumstances under which phone or mobile device unlocking will occur. Unlocking a cell phone or other wireless device enables the device owner to connect his or her device to a wireless telephone network of his or her choice, and does not enable the device owner, or a third party on an owner’s behalf, to engage in other activities that infringe copyrighted works. Unlike many other situations where an exemption from the circumvention prohibition may be sought or granted, unlocking a cell phone to connect to a wireless network typically does not facilitate copyright infringement.

The “direction of the owner” extension is limited in scope. A person authorized by an exemption to unlock their wireless telephone handset or other wireless device may authorize a third party to

¹¹ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43,825 (July 27, 2010).

unlock the device for them where: (1) the circumvention is done solely to connect to a wireless telecommunications network; (2) the person directing the act of circumvention is the owner of the device; (3) the person connecting to the new wireless network is either the owner of the device or a family member of the owner; and (4) access to the new wireless network is authorized by the operator of the network. This section does not authorize circumvention in order to enable other unauthorized or harmful actions, such as removing or impairing security features that limit access to personal data or by exposing copyrighted content in ways that enable copyright infringement. Nor does the ability to seek help from a third party to unlock a device alter the contractual relationship between a consumer and that consumer's wireless carrier. Directing a third party to unlock his or her device does not excuse a consumer from complying with his or her contractual obligations in any underlying service agreement.

Subsection (d): This subsection sets forth two rules of construction to clarify and ensure that the legislation does not alter the scope of any party's rights under existing law, and that the legislation does not alter the authority of the Librarian of Congress under Section 1201(a)(1) to engage in the rulemaking process created by the DMCA. Nor does this bill effect the scope and applicability of other aspects of Section 1201, including the prohibitions of Sections 1201(a)(2) and 1201(b), which remain critical components of the DMCA.

Subsection (e): This subsection defines terms that appear in the legislation. The terms "commercial mobile data service" and "commercial mobile radio service" are intended to cover what are typically known as data plans and voice plans. The terms "wireless telephone handset" and "wireless device" mean a handset or other device that operates on a wireless telecommunications network." Smartphones and wireless-enabled tablets are two examples of the types of the devices that are covered by these respective definitions.

IV. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The Committee sets forth, with respect to the bill, S.517, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

July 17, 2014

Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The Congressional Budget Office has prepared the enclosed cost estimate for S. 517, the Unlocking Consumer Choice and Wireless Competition Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susan Willie, who can be reached at 226-2860.

Sincerely,

Douglas W. Elmendorf

Enclosure

cc: Honorable Chuck Grassley
Ranking Member

CONGRESSIONAL BUDGET OFFICE
COST ESTIMATE

July 17, 2014

S.517— Unlocking Consumer Choice and Wireless Competition Act.

CBO estimates that implementing S. 517 would have no significant effect on discretionary spending over the 2015-2019 period. Enacting S. 517 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

S. 517 would repeal a rule published in October 2012 by the Librarian of Congress (LOC) that limited the ability of certain owners of wireless telephone handsets to “unlock” their phones, that is, to circumvent software protections that prevent the owner from connecting to a different wireless network. The bill would reinstate an earlier rule that provided broader authority to circumvent such protections. S. 517 also would direct the LOC to consider whether to extend that broader authority to other categories of wireless devices in addition to smartphones. Based on information from the LOC, CBO estimates that implementing the provisions of the bill would not have a significant effect on the agency’s workload.

S. 517 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

S. 517 would impose a private-sector mandate by eliminating an existing right of action for wireless carriers (and others), who are currently able to pursue legal action against those who, without permission, circumvent the access controls on certain wireless telephone handsets. The cost of the mandate would be the forgone net value of settlements and damages in such cases. A search of the literature suggests that few, if any, of those types of lawsuits have been brought against individual consumers. Because such claims would probably be uncommon in the future and the damage awards allowed in such cases would be relatively small, CBO estimates that the cost of this mandate would be small and fall below the annual threshold established in UMRA

for private-sector mandate (\$152 million in 2014, adjusted annually for inflation). If the Librarian of Congress decides to broaden the exemption allowed under the bill to cover other types of mobile devices, such an action would eliminate additional rights of action. The cost of that expansion would depend on what devices the Librarian would include under the exemption and the forgone net value of settlements and damages. CBO has no basis to estimate the cost of such mandates as it would depend on the regulatory actions taken by the Librarian.

On November 5, 2013, CBO transmitted a cost estimate for H.R. 1123, the Unlocking Consumer Choice and Wireless Competition Act, as ordered reported by the House Committee on the Judiciary on July 31, 2013. The provisions of both pieces of legislation are similar, as are the CBO cost estimates.

The CBO staff contacts for this estimate are Susan Willie (for federal costs) and Marin Burnett (for the private-sector impact). The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

V. REGULATORY IMPACT EVALUATION

In compliance with subsection (b) of paragraph 11 of rule XXVI of the Standing Rules of the Senate, it is hereby stated that the passage of S.517 will require the Librarian of Congress to make a determination concerning an exemption for wireless devices other than cell phones during its next triennial rulemaking conducted pursuant to 17 U.S.C. 1201(a). The Committee finds that no significant regulatory impact will otherwise result from the enactment of S.517.

VI. CONCLUSION

The Unlocking Consumer Choice and Wireless Competition Act will ensure that consumers will be able to take their cell phones with them to the network of their choice after satisfying their contracts without violating the copyright laws.

VII. CHANGES TO EXISTING LAW MADE BY THE BILL, AS REPORTED

Pursuant to paragraph 12 of Rule XXVI of the Standing Rules of the Senate, the Committee finds no changes in existing law made by S.517, as ordered reported.