

# Petition for Proposed Exemption Under 17 U.S.C. § 1201

*Note: This is a Word document that allows users to type into the spaces below.  
Please submit a separate petition for each proposed exemption*

## Item 1. Submitter and Contact Information

Clearly identify the submitter, and, if desired, provide a means for others to contact the submitter or an authorized representative of the submitter by email and/or telephone. (Parties should keep in mind that any private, confidential, or personally identifiable information appearing in this petition will be accessible to the public.)

Submitter: Competitive Carriers Association (“CCA”)

CCA is the nation’s leading association for competitive wireless providers and stakeholders across the United States. CCA’s membership includes more than 100 competitive wireless providers ranging from small, rural carriers serving fewer than 5,000 customers to regional and national providers serving millions of customers. The licensed service area of CCA’s over 100 carrier members covers more than 95 percent of the nation. CCA also represents approximately 200 associate members consisting of small businesses, vendors, and suppliers that serve carriers of all sizes.

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## Item 2. Brief Overview of Proposed Exemption

Provide a brief statement describing the proposed exemption (ideally in one to three sentences), explaining the type of copyrighted work involved, the technological protection measure (“TPM”) (or access control) sought to be circumvented, and any limitations or conditions that would apply (e.g., a limitation to certain types of users or a requirement that the circumvention be for a certain purpose).

CCA proposes an exemption for all-purpose tablet computers.<sup>1</sup> The all-purpose tablet computers category consists of a broad category of consumer devices including multi-purpose productivity and entertainment tablet computers, such as the iPad, Android-powered tablets, and the Microsoft Surface, among others. The specific exemption proposed is as follows:

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<sup>1</sup> CCA is filing four separate petitions addressing the following categories: (i) wireless handsets; (ii) all-purpose tablet computers; (iii) mobile hotspots and MiFi devices; and (iv) connected wearables and consumer machines (the Internet of Things). For consistency and efficiency, however, CCA believes that these petitions, and other similar petitions, should be consolidated into a single “wireless device” proceeding, as they all involve devices that connect to a telecommunications and/or broadband network. Consumers do not distinguish among categories of connected devices, and having an exemption only applicable to a subset of wireless devices is likely to cause consumer confusion and frustration.

Computer programs, in the form of firmware or software, or data used by firmware or software, that enable all-purpose tablet computers to connect to a wireless network that offers telecommunications and/or information services, when circumvention is initiated by the owner of the device, or by another person at the direction of the owner of the device, in order to connect to a wireless network that offers telecommunications and/or information services, and access to the network is authorized by the operator of the network.

### **Item 3. Copyrighted Works Sought to be Accessed**

Identify the specific class, or category, of copyrighted works that the proponent wishes to access through circumvention. The works should reference a category of work referred to in section 102 of title 17 (e.g., literary works, audiovisual works, etc.). Unless the submitter seeks an exemption for the entire category in section 102, the description of works should be further refined to identify the particular subset of work to be subject to the exemption (e.g., e-books, computer programs, motion pictures) and, if applicable, by reference to the medium or device on which the works reside (e.g., motion pictures distributed on DVD).

CCA proposes that consumers should have access through circumvention to a subcategory of copyrighted works identified in 17 U.S.C. Section 102(a)(1): “literary works.” The specific subcategory is: “Computer programs, in the form of firmware or software, or data used by firmware or software, that enable all-purpose tablet computers to connect to a wireless network that offers telecommunications and/or information services.”

In House Report No. 94-1476, Congress made it clear that the Section 102(a) copyright category “literary works” includes computer programs: “The term ‘literary works’ . . . also includes . . . programs to the extent that they incorporate authorship in the programmer’s expression of original ideas, as distinguished from the ideas themselves.”<sup>2</sup> The firmware and software, and data used by the firmware and software contained on all-purpose tablet computers constitute the expression of original ideas, and not merely the ideas themselves.

Accordingly, the proposed copyright work falls within a well-settled category of copyrighted works, as defined in Section 102 of Title 17.

### **Item 4. Technological Protection Measure**

Describe the TPM that controls access to the work. The petition does not need to describe the specific technical details of the access control measure, but should provide sufficient information to allow the Office to understand the basic nature of the technological measure and why it prevents open access to the work (e.g., the encryption of motion pictures on DVD using the Content Scramble System or the cryptographic authentication protocol on a garage door opener).

CCA proposes to circumvent software or firmware locks on an all-purpose tablet computer that prevents the device from accessing the wireless network of the wireless device owner’s choosing. All-purpose tablet computers are hardware or software-locked using a variety of methods, including service provider code (SPC) locking, system operator code (SOC)

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<sup>2</sup> H.R. Rep. No. 94-1476 at 54.

locking, band order locking and Subscriber Identity Module (SIM) locking or Universal Integrated Circuit Card (UICC) locking. These locking mechanisms bind the device to specific wireless networks and prevent consumers from accessing the wireless network of their choice. Only by circumventing these various TPMs can a device owner transfer the use of the device to a network and provider of their choosing.

## **Item 5. Noninfringing Uses.**

Identify the specific noninfringing uses of copyrighted works sought to be facilitated by circumvention (*e.g.*, enabling accessibility for disabled users, copying a lawfully owned computer program for archival purposes, etc.), and the legal (statutory or doctrinal) basis or bases that support the view that the uses are or are likely noninfringing (*e.g.*, because it is a fair use under section 107, it is a permissible use under section 117). Include a brief explanation of how, and by whom, the works will be used.

Consumers who unlock tablet computers may engage in one or more of several noninfringing uses of the copyrighted software or firmware that resides on their tablet computer and permits it to connect to networks. Typically, the circumvention of the TPM allows an owner, who has fulfilled all obligations to the original provider, to operate the device on the network of a new, compatible wireless provider of their choosing. However, tablets are also unlocked by charitable organizations, who donate the phones for use or re-sell them to finance charitable works, or by environmental organizations who encourage the re-use or recycling of devices to keep toxic chemicals out of landfills.

Noninfringing use of these copyrighted works is supported under multiple legal theories, three of which are explained here. First, tablet unlocking constitutes “fair use” under 17 U.S.C. Section 107. When most tablet computers are unlocked, the device owner is simply changing the variables in certain memory locations and updating the preferred roaming list (PRL) to make the tablet useable on the new network. Carriers regularly update the PRL on their customers’ tablets, so the original author of the copyrighted work intended these variables to be changed without constituting a copyright violation.

Further, unlocking a tablet computer meets all four factors of the “fair use” test set forth in Section 107: (1) the purpose of the use is to allow the lawful owner of the tablet to connect to a wireless network of their choice, a reasonable and noninfringing use; (2) the copyrighted work is intended to be changed in this manner and is necessary for the tablet owner to derive any continued value from the copyrighted work; (3) the amount of the code used in an altered state is extremely small compared to the tablet operating system as a whole; and (4) the market for and value of the copyrighted work actually increases, as it allows the tablet to be transferred on the secondary market more easily and to a broader array of buyers.

Second, unlocking a tablet computer does not create an infringing “derivative work.” This is because, in most instances, unlocking a tablet computer does not change the underlying tablet computer software, but rather it merely changes underlying variables accessed by the program. As discussed above, these variables are intended by the software designer to be changed, and their change, therefore, does not create an infringing derivative work. Instead, the software is merely being operated by the tablet owners as intended.

Third, if a derivative work is, in fact, created, it falls within the exception set forth in 17 U.S.C. Section 117(a)(1). This subsection states that a derivative work may be created by the owner of a copyrighted work if the “new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner.” Since the changes being made to the copyright work are the same ones that need to be made by the underlying carrier in order for the tablet to operate properly on its wireless network, such adaptations are inherently “essential step[s] in the utilization of the computer program in conjunction with [the device].” Indeed, in 2012, the Register agreed that unlocking was an “essential step” in the utilization of a handset, finding again that “[m]odifications to the firmware or software on the phone may be necessary to make the device functional with another service and better serve the legitimate needs of the consumer.”<sup>3</sup>

## **Item 6. Adverse Effects.**

Explain how the inability to circumvent the TPM has or is likely to have adverse effects on the proposed noninfringing uses (e.g., the TPM limits wireless connection to the network of the mobile carrier from which the cellphone was originally purchased or prevents an electronic book from being accessed by screen reading software for the blind). The description should include a brief explanation of the negative impact on uses of copyrighted works. The adverse effects can be current, or may be adverse effects that are likely to occur during the next three years, or both. While the petition must clearly and specifically identify the adverse effects of the TPM, it need not provide a full evidentiary basis for that claim.

All-purpose tablet computers, such as the iPad, Android tablets and the Windows Surface, have become an indispensable part of the consumer wireless ecosystem. Recent data indicates that over half of the households in the United States have at least one tablet, and, despite plateaus in saturated markets like the U.S., global growth forecasts suggest that there may be over 300 million tablets in use by 2018.<sup>4</sup> A review of materials from the largest national carriers reveals that they place carrier locks on all-purpose tablet computers – indeed, AT&T’s unlocking materials from 2014 indicates that it “locks all devices, as of November 11, 2004.”<sup>5</sup> Indeed, AT&T recently confirmed that if customers purchase an iPad Air 2 or iPad Mini 3 with the Apple SIM and activate cellular service via AT&T, the Apple SIM card will be locked to AT&T’s network and customers will need to purchase a new SIM to activate the device on another carrier.

Although a handful of carriers abide by a “voluntary” unlocking policy that includes tablets, it is critical to note that these policies are just that—*voluntary*. More importantly, however, is the recognition that the voluntary agreement is incomplete. For example, original equipment manufacturers (OEMs) are not signatories to existing voluntary agreements and are

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<sup>3</sup> 2012 Recommendation at 93.

<sup>4</sup> See <http://www.computerworld.com/article/2834238/tablet-sales-growth-slows-dramatically.html>.

<sup>5</sup> See <http://www.att.com/media/att/2014/support/pdf/ATTMobilityDeviceUnlockCodeInstructions.pdf>. AT&T’s unlocking instructions – nearly all of which require approval from the carrier – list a number of tablets as locked to AT&T, including tablets from Amazon, Dell, HP and others.

not bound by the currently voluntary agreement entered into by the nation's five largest carriers.<sup>6</sup> As NTIA noted in the last triennial review, and the voluntary agreement confirms, oftentimes carriers must have the necessary code or the ability to reasonably obtain it to unlock the device.<sup>7</sup> Where a voluntary agreement only requires that a carrier "initiate a request to the OEM to unlock the eligible device" it is possible for the carrier to comply with the agreement without the consumer ultimately unlocking his or her device. Additionally, carrier unlocking procedures may limit the number of times a device may be unlocked or permanently disable the unlock ability through carrier avenues.<sup>8</sup>

Consumers also lack adequate alternative to carrier-based unlocking solutions. While some tablets may be available independent of a particular carrier, many of the newest and most advanced tablets are only sold locked. Moreover, forcing subscribers to purchase a new, previously unlocked tablet hinders consumer choice. Consumers choose to hold onto purchased tablets for a variety of reasons, including device familiarity, the time necessary to transfer contacts, personal information and apps, and the significant investment in peripheral items like chargers, headsets, batteries and cases. Consumer preference, and the attached harm and potential harm to consumers, must be taken into account. In addition, Carriers may be slow to unlock, make unlocking unnecessarily complicated, or use an unlocking request as an opportunity to engage in unwanted "customer win-back" strategies. All of these are anti-consumer, and are obviated if consumers themselves have the right to unlock their own tablets, as they would with the proposed exemption.

After the previous handset unlocking exemption was allowed to expire, Congress saw sufficient current adverse effects, as well as the potential for adverse effects, to immediately reinstate and expand the exemption in the "Unlocking Consumer Choice and Wireless Competition Act." Even with other voluntary unlocking policies in place, Congress saw sufficient harm in the marketplace to adopt legislation.

Even President Obama, in a statement applauding Congress for passing the Unlocking Consumer Choice and Wireless Competition Act, referenced steps "to ensure copyright law does not undermine wireless competition," including fixes "that make it clear: neither criminal law nor technological locks should prevent customers from switching carriers when they are no longer bound by a service agreement or other obligation." Failure to grant an exemption would reinstate criminal penalties that may prevent consumers from switching carriers, a clear and immediate adverse effect.

The Copyright Office should heed the outcry from consumers, Congress and the FCC about the current and potential anti-consumer harms that failing to adopt an all-purpose tablet computer unlocking exemption would bring, and adopt CCA's proposed exemption.

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<sup>6</sup> See CTIA Consumer Code of Conduct § 12.

<sup>7</sup> NTIA Reply Comments at 16, *available at* [http://www.copyright.gov/1201/2012/2012\\_NTIA\\_Letter.pdf](http://www.copyright.gov/1201/2012/2012_NTIA_Letter.pdf); CTIA Consumer Code of Conduct § 12.

<sup>8</sup> See, e.g., AT&T Device Unlock Instructions at 1, *available at* <http://www.att.com/media/att/2014/support/pdf/ATTMobilityDeviceUnlockCodeInstructions.pdf>.