

*Before the*

**U.S. COPYRIGHT OFFICE  
LIBRARY OF CONGRESS**

In the Matter of Section 1201 Study

Docket No. 2015-8

**Additional Comments of the  
Institute of Scrap Recycling Industries, Inc.**

Phil Malone  
Jef Pearlman  
*Counsel for Commenter*

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**Table of Contents**

Question 2(b) – Permanent Exemption for Device Unlocking..... 1

*The exemptions for phone, tablet, and other mobile connectivity devices should be made permanent.*..... 1

*ISRI supports broadening the exemption to all types of used and unused mobile communication devices.* ..... 2

*The Copyright Office can and should implement presumptive renewal regardless of congressional action.* ..... 3

Question 3 - Anti-Trafficking..... 3

*Section 1201 should be read as containing an implied right for the beneficiary of a § 1201 exemption to make a tool for his or her own use in engaging in the permitted circumvention.*..... 3

*To avoid doubt, Congress should amend § 1201 to expressly permit the beneficiary of a § 1201 exemption to make a tool for his or her own use to take advantage of that exemption.* ..... 4

The Institute of Scrap Recycling Industries, Inc. ("ISRI") submits these comments in response to the Copyright Office's Section 1201 Study: Request for Additional Comments.<sup>1</sup>

The Institute of Scrap Recycling Industries, Inc. is the "Voice of the Recycling Industry." ISRI and its 21 chapters represent approximately 1,300 companies operating in nearly 4,000 locations in the U.S. and 34 countries worldwide that process, broker, and consume scrap commodities, including metals, paper, plastics, glass, rubber, electronics, and textiles. With headquarters in Washington, DC, ISRI provides education, advocacy, safety and compliance training, and promotes public awareness of the vital role recycling plays in the U.S. economy, global trade, the environment and sustainable development. Generating more than \$105 billion annually in U.S. economic activity, the scrap recycling industry provides nearly half a million Americans with good jobs. More information about ISRI can be found at [www.isri.org](http://www.isri.org).

As detailed in its recent triennial petition, comments, and reply comments, as well as its initial comments in this proceeding, over the past decade ISRI, other organizations, and individual consumers have spent significant time, effort, and money repeatedly requesting the same core exemption: allow lawful owners of mobile communication devices to modify the software on their devices to allow those devices to be used with the owner's service of choice.

Some version of this exemption has been granted in each triennial since 2006, and when the exemption was narrowed in 2012, Congress stepped in to expand it again and direct the consideration of other devices in the next triennial. Opposition to these exemptions is minimal, yet ISRI faces the prospect of expending more time, effort and, resources in 2018 to fight this fight once more, with little certainty that it will again be successful and its members will be able to continue their non-infringing activities without fear of DMCA liability. Perhaps worse, because the exemption will likely mitigate the adverse impacts ISRI members otherwise would suffer without it, it may actually be *harder* to meet these high burdens in 2018. Thus, the exemptions for device unlocking should be made permanent.

In addition, for the device-unlocking and other exemptions to be meaningful, the beneficiaries of such exemptions, as well as third parties assisting them, must be permitted to make and offer appropriate circumvention tools to accomplish the permitted, lawful unlocking.

ISRI therefore submits these comments supporting a permanent exemption for mobile communications device unlocking and a reading of and/or amendment of § 1201 to permit ISRI and others to rely on the assistance of others, including permitting the lawful manufacture of necessary tools, to exercise the right to lawfully unlock devices granted by the 2015 and future exemptions.

### **Question 2(b) – Permanent Exemption for Device Unlocking**

*The exemptions for phone, tablet, and other mobile connectivity devices should be made permanent.* As explained in detail in its triennial comments, ISRI and other proponents of phone

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<sup>1</sup> Section 1201 Study: Request for Additional Comments, 81 Fed. Reg. 66,296 (Sept. 27, 2016) [hereinafter *Request for Additional Comments*].

(and, later, tablet) unlocking exemptions have requested and received exemptions in every triennial for more than a decade.<sup>2</sup> When, in 2012, the exemption was significantly narrowed, Congress stepped in and expanded the exemption to its prior scope, demonstrating a clear intent that phone unlocking remain lawful. Each year fewer and fewer parties oppose unlocking: in 2015 only one party opposed the phone and tablet unlocking exemptions, and ultimately did not object to the language as granted.<sup>3</sup> And although the details of the exemptions have varied over time, the core has remained the same: to permit lawful owners of mobile communications devices to circumvent TPMs and make the necessary changes to switch wireless communications providers.

ISRI supported the current exemption language during the 2015 triennial, and believes that this or similar language would be appropriate for a permanent exemption. As explained below, ISRI would also support certain changes to the exemption language. Device unlocking does not infringe copyright, and an exemption for it has been consistently granted over more than a decade and has been ratified by Congress. Regardless of the language chosen, if any additional exemptions are to be made permanent, device unlocking should be among them.

*ISRI supports broadening the exemption to all types of used and unused mobile communication devices.* ISRI does not see any need to enumerate the types (e.g., phones vs. tablets vs. smartwatches) of mobile communication devices that can be lawfully unlocked. Certainly the diversity of such devices is growing rapidly, and the lines between different types are blurring equally fast. Yet throughout these proceedings, no opponents have come forward to demonstrate why unlocking a particular type of device would be a copyright violation and therefore should remain subject to the DMCA's prohibition on circumvention. Rather than locking in the categories appropriate to the year in which Congress acts, a permanent exemption should be technology-neutral. If the future creates a new need to enforce the DMCA against particular device unlockers, Congress can address the matter at that time.

ISRI also supports removing the restriction that only "used" devices can be unlocked. While ISRI members historically did not regularly purchase new, unused handsets for recycling or reuse, they should have the right to unlock lawfully obtained new devices going forward. Whether a device is new or used has no effect on whether unlocking it involves infringing copyright. Parties concerned about "trafficking" in pre-paid, subsidized new phones have demonstrated that they have other, more appropriate legal regimes to rely upon in combating that activity.<sup>4</sup> Expanding the exemption to new and used phones may now be necessary for some

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<sup>2</sup> See generally Comments of Petitioner Institute of Scrap Recycling Industries, Inc., Proposed Class 11: Unlocking—Wireless Telephone Handsets, Docket No. 2014-07 (Feb. 26, 2015), [http://www.copyright.gov/1201/2015/comments-020615/InitialComments\\_LongForm\\_ISRI\\_Class11.pdf](http://www.copyright.gov/1201/2015/comments-020615/InitialComments_LongForm_ISRI_Class11.pdf) [hereinafter *ISRI 2015 Triennial Comments*].

<sup>3</sup> Comments of TracFone Wireless, Inc., Docket No. 2014-07 (Mar. 27, 2015), [http://www.copyright.gov/1201/2015/comments-032715/class%2011/TracFone\\_Wireless\\_class11\\_1201\\_2014.pdf](http://www.copyright.gov/1201/2015/comments-032715/class%2011/TracFone_Wireless_class11_1201_2014.pdf).

<sup>4</sup> Reply Comments of Petitioner Institute of Scrap Recycling Industries, Inc., Proposed Class 11: Unlocking—Wireless Telephone Handsets 6-8, Docket No. 2014-07 (May 1, 2015), [http://www.copyright.gov/1201/2015/comments-032715/class%2011/TracFone\\_Wireless\\_class11\\_1201\\_2014.pdf](http://www.copyright.gov/1201/2015/comments-032715/class%2011/TracFone_Wireless_class11_1201_2014.pdf).

ISRI members to make non-infringing uses of the devices they have purchased. In addition, ISRI supports the freedom of consumers and others to unlock *any* wireless device they own for the purpose of using that device on the wireless network of their choice.

*The Copyright Office can and should implement presumptive renewal regardless of congressional action.* ISRI recognizes that the current Notice of Inquiry does not directly address presumptive renewal without legislative changes and that the Office is continuing to study comments regarding such renewal.<sup>5</sup> However, because the issues are so closely interrelated, ISRI believes it is important to reiterate its prior arguments that the Copyright Office can and should move away from its unnecessary de novo review requirement for previously granted exemptions, and that it possesses the authority to do so even without additional congressional action.<sup>6</sup> Sensible and permissible reforms by the Office of the triennial rulemaking process, including presumptive renewal and placing the burden of opposing such renewal on opponents, would provide many of the benefits of a statutory permanent exemption without the delay and uncertainty associated with congressional action.

### **Question 3 - Anti-Trafficking**

*Section 1201 should be read as containing an implied right for the beneficiary of a § 1201 exemption to make a tool for his or her own use in engaging in the permitted circumvention.* It also should be read as containing an implied right, like the right explicitly authorized in the Unlocking Act,<sup>7</sup> for third parties to assist beneficiaries in unlocking devices or to unlock devices for them,<sup>8</sup> as well as for third parties to make and offer tools for beneficiaries to use in engaging in the permitted circumvention.

As ISRI explained in its Initial 1201 Study Comments, an exemption permitting an ISRI member or other device owner legally to unlock a covered device is largely meaningless when doing so is technically difficult but third parties are prohibited from assisting or developing tools to help the device owner engage in this lawful behavior.<sup>9</sup> Because circumvention is often a complex, technical process, requiring custom software development and knowledge of software, hardware, and cryptography, the typical ISRI member and certainly individual device owners and users are technologically incapable of circumventing TPMs on their own. For device unlocking exemptions, whether statutory or granted in the triennial rulemaking, to allow the intended non-infringing uses, third parties must be permitted to assist beneficiaries to utilize the

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[www.copyright.gov/1201/2015/reply-comments-050115/class%2011/ReplyCommentsInstituteofScrapRecyclingIndustries\\_Class11.pdf](http://www.copyright.gov/1201/2015/reply-comments-050115/class%2011/ReplyCommentsInstituteofScrapRecyclingIndustries_Class11.pdf).

<sup>5</sup> *Request for Additional Comments*, *supra* note 1, at 66296.

<sup>6</sup> Comments of the Institute of Scrap Recycling Industries, Inc. 8-11, Docket No. 2015-8 (Mar. 3, 2016), <https://www.regulations.gov/contentStreamer?documentId=COLC-2015-0012-0065&attachmentNumber=1&disposition=attachment&contentType=pdf> [hereinafter *ISRI 1201 Study Comments*].

<sup>7</sup> Unlocking Consumer Choice and Wireless Competition Act, Pub. L. No. 113-144, 128 Stat. 1751 (Aug. 1, 2014).

<sup>8</sup> *Id.* § 2(c).

<sup>9</sup> *ISRI 1201 Study Comments*, *supra* note 6, at 15-16.

exemption, and beneficiaries as well as third parties must be permitted to develop and offer the tools necessary to do so.

*To avoid doubt, Congress should amend § 1201 to expressly permit the beneficiary of a § 1201 exemption to make a tool for his or her own use to take advantage of that exemption.* Permitting owners to lawfully unlock their devices but preventing them (and anyone else) from legally creating tools to do so renders the exemption far less meaningful than it should be. As noted above, circumvention is complex and technical, and it makes little sense to conclude that Congress intended to allow lawful circumvention of technological measures but also to continue to outlaw the creation of any of the technological tools necessary to achieve such lawful circumvention. To remove any uncertainty about whether such rights are implied in § 1201, Congress should amend the statute to correct this serious disconnect.

In addition, Congress should amend § 1201 to expressly permit, as it did in the Unlocking Act, third parties to unlock the devices of beneficiaries of exemptions or to assist them in unlocking their devices. Moreover, because of the technical complexity and sophisticated knowledge-requirements described above, § 1201 should be amended to permit third parties to make and distribute tools for use in lawful circumvention activity permitted by an exemption. Without third-party assistance and lawful tool creation, beneficiaries of exemptions will be largely stymied in making the lawful, non-infringing uses that the exemptions were intended to allow. Failure to amend § 1201 in these ways will significantly diminish the value of any exemptions and of the § 1201 rulemaking process itself.

As noted in the Request for Additional Comments, various copyright owners in their § 1201 Study comments asserted that permitting the manufacture of circumvention tools that could be used for *both* lawful and unlawful purposes should be outlawed because of the risk that, once such tools were created and made available, they would be used for some unlawful purposes in addition to the lawful purposes permitted by § 1201 exemptions.<sup>10</sup> While the validity of these concerns in other contexts can be debated, they bear no weight in the context of permitting tools tailored to unlocking of phones, tablets, and other connectivity devices as authorized in the 2015 Rulemaking. There is little or no danger that tools created specifically for circumventing the TPM that protects the software or data that keeps such devices locked and bound to the network of a particular wireless carrier—and for modifying just that software or data—will be useful or used for other, unauthorized circumvention of other TPMs. The exemption was specifically drafted to allow circumvention only of TPMs used to keep a device locked to a network and solely for the limited purpose of unlocking that device. Circumvention tools permitted by this exemption likewise focus solely on the TPMs that protect these locks and on subsequently unlocking the devices, and thus they are very unlikely to be used by non-beneficiaries for non-authorized purposes.

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<sup>10</sup> *Request for Additional Comments*, *supra* note 1, at 66299.