



**BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE
INTERNET**

**HEARING ON H.R. 1123: THE UNLOCKING CONSUMER CHOICE AND
WIRELESS COMPETITION ACT**

STATEMENT OF THE LIBRARY COPYRIGHT ALLIANCE

The Library Copyright Alliance (LCA) consists of three major library associations—the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries—that collectively represent over 100,000 libraries in the United States employing over 350,000 librarians and other personnel.

LCA participated in the deliberations that led to the adoption of Section 1201 of the Digital Millennium Copyright Act (DMCA) in 1998. Additionally, LCA has participated in every rulemaking proceeding under Section 1201(a)(1)(C) concerning the adoption of exemptions to Section 1201(a)(1). LCA does not have any expertise concerning the specific issue of cellphone unlocking. However, our extensive experience with the DMCA allows us to make the following general observations concerning the Section 1201 rulemaking process.

Most significantly, the Section 1201 rulemaking is an exercise in legal theatre. All the parties to the rulemaking—those seeking an exemption, the rights holders, and the Copyright Office staff—acknowledge that it is unclear whether the rulemaking has any practical effect. This is because Section 1201(a)(1)(C) authorizes the Librarian of Congress to adopt exemptions to the Section 1201(a)(1)(A) prohibition on the act of circumventing a technological protection measure (TPM), but not to the Section 1201(a)(2) prohibition on the development and distribution of the technologies necessary to perform the circumvention. In other words, after receiving an exemption, a person might be legally permitted to perform the act of circumvention, but might have no lawful way of obtaining the technology necessary to perform that act.

Similarly, all the parties understand that what occurs inside the hearing room has no connection to the world outside it. In the last three rulemaking cycles, LCA has joined with other groups in seeking exemptions for educators and students to circumvent the TPMs on DVDs for the purpose of making educational uses of film clips. The rights holders know that the uses we seek will not harm their market in any way. They also know that whether the exemption is granted or rejected will have absolutely no impact on the level of infringement. This is because the technology necessary to circumvent the TPMs on DVDs is widely available on the Internet and easy to use. Nonetheless, the

rights holders reflexively oppose the exemption or seek to narrow it so that it would be unusable. As a result, the discussions in the rulemaking descend into hyper-technical issues such as the quality of video necessary for effective pedagogy in different kinds of courses.

Moreover, in two rulemaking cycles, witnesses from the Motion Picture Association of America (MPAA) demonstrated how a person could camcord a film off of a high definition television. MPAA was attempting to show that a relatively high quality recording could be made without circumventing a technological protection measure. What it succeeded in proving, however, was the contradiction underlying its position. If one could obtain a high quality copy without circumvention, why use technological protection measures in the first place, and why should their circumvention be unlawful? Moreover, the MPAA was demonstrating how to camcord a film precisely at the same time it was asking Congress, state governments, and foreign legislatures to impose criminal penalties on camcording.

The surreal quality of the Section 1201 rulemakings has also been evident in connection with the exemptions sought by the blind to circumvent TPMs that disable the text-to-speech function on e-books. In the first hearing concerning this exemption, a representative of the Association of American Publishers argued that blind already had an exception from copyright liability under the Chafee amendment, 17 U.S.C. 121, and thus did not need an exemption from Section 1201 liability. Fortunately, the Librarian of Congress rejected this position, which would have denied blind people the benefits of e-books. Nonetheless, in the following rulemaking cycle, the rights holders complained that the blind did not meet their burden of proof concerning their need for renewal of the exemption. And in the cycle after that, the Register of Copyrights recommended against an exemption on the grounds of insufficient evidence, but the Librarian of Congress wisely overruled her. The fact that every three years the blind need to expend scarce resources to petition the Librarian of Congress to renew this exemption, or that libraries and educators have to seek renewal of the film clip exemption every three years, demonstrates the fundamental flaw—that Section 1201 prohibits the circumvention of a TPM even to engage in a lawful use of a work.

The simplest way to fix this flaw, and to eliminate the resulting legal theatre of the Section 1201 rulemaking, is to adopt H.R. 1892, the Unlocking Technology Act of 2013. H.R. 1892 would amend Section 1201(a) to prohibit only circumvention acts and technologies directed at enabling copyright infringement. While H.R. 1123 provides a temporary fix to the narrow problem of cellphone unlocking, H.R. 1892 provides a permanent fix to the central problem with Section 1201(a).

June 6, 2013