

**Remarks of FCC Commissioner Ajit Pai
at the Cellphone Unlocking Forum
Hosted by TechFreedom and the Competitive Enterprise Institute**

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It's a little unusual in Washington to discuss an issue where Republicans, Democrats, and Independents can find common ground. But President Obama, Senators and Representatives, FCC Commissioners, and the American people are reaching a consensus on a simple proposition: Consumers should be allowed to unlock their cellphones and switch wireless carriers without being labeled scofflaws.

To the proverbial man on the street, it's absurd that we're even discussing this issue. How did we get to the point where a consumer could be criminally prosecuted for unlocking his cellphone? There are two aspects to the answer. One involves technology; the other, the law.

First things first. Most wireless carriers "lock" the phones they sell so that they only work with that carrier's network. So if you purchase an iPhone from one carrier and want to switch to another at the end of your two-year contract, you can't do that unless you "unlock" your phone. Unlocking requires you to access certain programming within a phone—say, by punching a specific sequence of numbers on the keypad—in order to allow the phone to function on another network. It's not like that scene in *WarGames* where Matthew Broderick used a pop top from a soda can to make a free call from an "unlocked payphone."

Next, enter the law—specifically, the Digital Millennium Copyright Act, or DMCA. The DMCA was designed to prohibit digital piracy, such as when someone distributes a song like Blondie's *Call Me* or Carly Rae Jepsen's *Call Me Maybe* on the Internet. To do that, the law prohibits consumers from deactivating the digital rights management software or other protections designed to prevent access to a digital copyrighted work.

It wasn't until about ten years ago that anyone thought the DMCA might apply when a consumer unlocked his phone. But the DMCA swept up cellphone unlocking through a technicality—the "locking" of a cellphone prevents access to software in the phone (such as the mobile operating system) when it's used on a new carrier's network. And so unlocking a cellphone is "circumventing a technological measure," to use the DMCA's words, even though no one thinks that unlocking a phone is equivalent to piracy.

Fortunately, the DMCA contains an out for situations like this. The Librarian of Congress, who oversees the U.S. Copyright Office, is entitled to grant three-year exemptions so that consumers aren't subject to the DMCA's anti-circumvention provisions. And in fact, the Librarian did just that in 2006 and again in 2009 so that consumers could unlock their phones without fear of prosecution.

But the third time wasn't the charm. Last October, the Librarian declined to extend the exemption for cellphone unlocking. As a result, a consumer who unlocks his mobile device now can face civil and criminal penalties under copyright law even if the contract with his carrier has been fulfilled.

This is a classic case of the government "solving" a problem that doesn't exist. The free market was working just fine before the Librarian's decision. An FCC report issued earlier this

year found that prices in the wireless market are down, and investment is up. More manufacturers are developing innovative mobile devices, and consumers are reaping the benefits.

And wireless carriers certainly don't need the federal government's help. They already have contract-law rights, such as early termination fees, to ensure that customers make good on their contracts. Adding heavy-handed copyright penalties, including hefty criminal fines, marries the sledgehammer to the fly.

My position is simple: The relationship between carriers and their customers should be governed by contract law, not copyright law and certainly not criminal law.

While there is broad support for overturning the Librarian's decision, there's also an ongoing debate over the best way to accomplish this objective. I've been thinking about this issue for a few months now, and here's where I stand.

First, we shouldn't just kick the can down the road. Let's fix this problem permanently. We don't need to have the exact same debate every three years, like an extended version of the movie *Groundhog Day*. I can assure you that the case for criminalizing cellphone unlocking isn't going to get any stronger with time.

Second, we don't need to give the FCC any additional authority. I realize that it isn't the norm for an FCC Commissioner to ask Congress *not* to give the agency more power. But the FCC didn't create this mess, and it's not in a position to clean it up. The problem is one of copyright law, and Congress should fix it directly.

Third, we shouldn't interfere with the freedom of contract. Consumers today can choose from a wide range of providers, plans, and phones. We shouldn't restrict carriers' ability to offer consumers better, cheaper, and faster options.

Fourth, we should also protect those who help consumers unlock their phones. Unlocking can be as simple as dialing a code on your phone, but it's often more complicated. I know *I* certainly couldn't take my phone out of my pocket and unlock it right now. So helping consumers exercise their right to unlock their cellphones shouldn't be a crime.

Fifth, this debate was inspired by cellphone unlocking, but the DMCA cuts a much wider swath. The anti-circumvention provisions also target netbooks, tablets, personal digital assistants—pretty much any mobile device. Consumers shouldn't be put in the position of migrating some of their electronics, but not others, from one carrier to the next. Let's make sure *all* wireless communications devices are included in the fix.

And *sixth*, let's keep our focus on the narrow issue at hand. I know that many people—maybe some in this room—favor broader reform of our copyright laws. And I also know that many people oppose broader reform. That's a debate best left for another day. Right now, there is wide support for removing cellphone unlocking from the ambit of copyright law. We should push that proposal across the finish line. For if it becomes entangled with more controversial issues, there's a pretty good chance that it'll get stuck in the starting blocks.

Fortunately, doing all this isn't complicated. In fact, Congress could accomplish these goals in a one-page bill by simply amending the definition of "circumvention" in the DMCA to exclude "circumvention initiated by or on behalf of the owner of a wireless communications device solely to connect that device to a wireless communications network." This fix would restore the common sense, market-based approach that ruled the day until last October's surprise.

These are my two cents. I look forward to hearing recommendations from our distinguished panelists. Working together, I'm hopeful that we can end unnecessary government intervention in the wireless marketplace and score an important victory for consumers.