

H.R. 1123, the “Unlocking Consumer Choice and Wireless Competition Act”

Testimony of Derek S. Khanna

Founder, Disruptive Innovation

Visiting Fellow, Yale Law School, Information Society Project

before the

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I would like to thank Members of the Subcommittee for the invitation to submit a written statement for the record. I am submitting this statement as a representative on behalf of our White House petition campaign that engaged over 114,000 Americans in support of unlocking.

First, I would like to congratulate Members of the Committee for addressing this extremely important issue that represents a culmination in our campaign with which over 114,000 people engaged. This important issue affects innovation, small businesses and ultimately impacts millions of ordinary consumers within the United States. Over the course of our campaign on this issue, the sheer ridiculousness of banning unlocking became more clear as we began to hear from more affected parties and gradually began to realize the real and measurable impact that this unlocking prohibition has had upon innovation and consumer choice. Most disturbing we have also heard of its terrible and unforeseen impact on our nations' Service Members which I will address later.

As of November 24, 2003, wireless companies have been required to offer wireless number portability for consumers. If the phone unlocking issue is evaluated seriously and legislation actually resolves this issue and restores a free market (while protecting freedom to contract), then legalizing phone portability may have a comparable impact as mandating number portability. Permanently legalizing users unlocking and the technology to enable unlocking could be the most beneficial change in mobile policy in over nine years.

As a leader of the campaign on cell-phone unlocking, I would like to put forward a few major points to you today. H.R. 1123, the Unlocking Consumer Choice and Wireless Competition Act, is a terrific first attempt to address a portion of the unlocking issue; however, there are some important fixes which must be made to ensure that this legislation succeeds in preserving consumers' rights to property and restoring a free market.

To actually fix the problem any serious legislative fix must not only 1) legalize the personal use of unlocking technology (as your legislation does) but it must also 2) legalize tools and services which facilitate unlocking (which H.R.1123 as currently written does not authorize) and 3) it must legalize this permanently (which H.R. 1123 does not do). This recommendation is consistent with the opinion of the former FCC Chairman, current FCC Commissioner Ajit Pai, and the statement from the White House; and it is required for a serious implementation of this policy fix. There is little point in allowing personal use of a complex technology, unlocking, that is impossible for consumers to find, buy and use. It would follow that it is illogical to classify businesses that cater to this legal market as illegal businesses. Instead, if consumers can use this technology, and the technology is beneficial for the market, then the technology should be lawful to develop and sell to the consumer.

A serious legislative fix for unlocking will create regulatory certainty by permanently legalizing the technology. In present form, H.R. 1123 would require the Librarian of Congress to rule again on this issue – when after our successful campaign to garner Congressional and White House support, the Librarian’s statement explains that he stands by his previous ruling. This regulatory uncertainty would inhibit innovation, consumer or business confidence and a robust legal marketplace.

The remaining Republican Commissioner of the Federal Communication Commission (FCC), Ajit Pai, issued a formal statement of his unequivocal support for unlocking through a permanent fix:

“American consumers should not face jail time for unlocking their cell phones. This should not be a matter of criminal or copyright law. Instead, it should be addressed by contract law. If a consumer is not bound by a contract, he or she should be able to unlock his or her phone. The Digital Millennium Copyright Act (DMCA), as it pertains to this issue, unnecessarily restricts consumer choice and is a case of the government going too far. Fortunately, there’s a simple solution: a permanent exemption from the DMCA for consumers who unlock their mobile devices.”

Commissioner Pai’s statements perfectly embody the principles of the unfunded campaign I have spearheaded since January. Commissioner Pai’s op-ed in the New York Times for June 6, 2013 unequivocally makes the point that the real fix requires a permanent fix and legalizing selling the technology.

Starting this campaign with a column in the Atlantic, at the time it was unclear if this campaign could have a tangible impact upon policy. But that article received over a million hits, knocking the Atlantic off-line. This viral campaign has demonstrated an overwhelming consensus in favor of fixing this problem on a permanent basis. As the White House, Commerce Department, former FCC Chairman, FCC Commissioners, think-tanks, and 114,000 average Americans have expressed – unlocking is a beneficial technology for the market. In the words of the White House and my Atlantic column, legalizing unlocking is “common-sense.”

**What is unlocking?** Many people are unfamiliar with “unlocking.” They are unfamiliar with unlocking primarily because it has been banned in the United States while it is legal in the rest of the world. This technology is not scary or dangerous. There is no reason why the technology itself should be contraband.

Smartphones today are essentially mini-computers in our pocket that we can use for phone calls and texting but also traditional computer functions including web access, e-mail, gaming, music and video consumption and the creation, distribution and consumption of a wide variety of professional office

document processing. These phones are “locked” through software to block the phone from using SIM cards from other phone carriers. Unlocking is a relatively simple software “patch” where a user plugs their phone into a computer and runs a small computer program. The technology is straightforward, easy to use and patches the phone very quickly. If you have ever updated an iPhone or Blackberry by plugging it into your computer - the unlocking process is usually not significantly more complex than that simple process.

Put simply: unlocking is a quick process to allow a phone to use SIM cards from other carriers – and thereby easily use an older phone on another carrier. When we talk about “legalizing unlocking,” we are referring to legalizing use of this “patch” as a currently banned technology. Legalizing unlocking, the basis of our campaign, does not refer to any alterations to contract law, tort law or “interoperability.” Legalizing unlocking would restore the free market by removing DOJ involvement. If consumers are allowed to unlock their own phones under US law, this legal adjustment would not interfere with a phone carrier’s ability to contract with consumers and neither would it mandate that all phones be cross-compatible (interoperability). This position is consistent with Commissioner Pai’s statement.

*Overall: legalizing unlocking means letting users plug their phones into the computer to patch the software, and then use another carrier’s SIM card.*

(In contrast to unlocking, the terms “jail-breaking” and “rooting” refer to modifying the software of a portable computing device, including a smartphone, to allow the device to run software programs, or “apps,” that were not authorized by the device manufacturer.)

**History of tinkering:** Allowing innovators the ability to explore technological solutions by tinkering, as unlocking does, is important for technological progress.

Personal computers have always allowed users to install their own software and operating systems on computers that they own. This free market approach has worked well in the PC market. Even with historic market dominance from Microsoft in the past few decades, there has still been substantial and growing competition from Apple’s MacOS operating system, Google’s Chrome operating system, and open-source operating systems like Linux (Ubuntu). This competition has fostered innovation in operating systems that has greatly benefited the consumer and have increased productivity for business.

This free market approach has led generations of tinkerers to build their own computers, even design their own circuit boards and code their own software – and these tinkerers have pushed technology forward. Generations of young people, myself included, grew up building their own radios to listen to broadcast AM/FM radio. Apple was created by tinkers who sold computing designs, components and

finally complete PC's to average people and businesses. Steve Wozniak and Steve Jobs sold their computers at the Homebrew Computer Club - where computer builders and computer programmers would show off their latest technology. Bill Gates created –bought, modified and improved – the DOS operating system which would become the basis of the Windows revolution. Modern Windows computers are a direct result of a free market system where Microsoft could offer operating systems for IBM built computers and other PC's.

Today, tinkerers build their own computers, pushing the boundaries of what computers are capable of, pushing the frontlines of robotics, faster computer chips through “overclocking,” devising new and more secure cybersecurity solutions, and even testing the safety and integrity of our of nations digital voting machines. The Internet itself, has been a wonderland for tinkerers to design, build and launch their ideas for the world – which is how innovations like Amazon, Twitter and Google were created. When you empower the tinkerers, economic growth follows. From Edison's light bulb, Westinghouse's AC power to modern 3D printing and UAV drones –tinkerers invent the future.

Phone unlocking ought to be an important part of this story of innovation. Legalizing unlocking is a vital reform to restore the free market to the mobile market. If a user has bought a phone, and owns that device, then they should be allowed to do what they want with the device – and installing their own software is a crucial property right. To conclude otherwise, by continuing to ban unlocking, is to deny a fundamental tenet of property rights; which is the ability to modify your own property. Restraining users' ability to modify their property is an extreme invasion of personal freedom and liberty.

**The impact of banning unlocking:**

International Travelers: When you walk off the airplane at many international airports, there are numerous kiosks and companies offering SIM cards for phone use. These often offer local calling minutes, international calling minutes and even data plans (e.g., users can buy 400 minutes of talk time and 4 GB of data usage). For Americans traveling abroad this is an extremely good deal. American travelers can bring their phones, pop out the SIM card and use these cheap SIM cards to avoid paying massive international fees from their local US-based carriers. In the current legal structure this is illegal if doing so required the consumer to patch their device (or other forms of unlocking), so most American consumers cannot do this. But if this technology was legal, as it is in much of the rest of the world, Americans would be able to buy and use these SIM cards when traveling abroad. Additionally, this small change in law would have an impact upon consumers who choose not to unlock their phones by placing downward pressure through competition upon international calling rates – thus using the free market to

reduce exorbitant international roaming costs (if wireless carriers have to compete for international calling rates with these SIM card providers – that means cheaper prices for everyone).

*Today, many regular international travelers break the law and use this technology anyway; but casual international travelers are often unaware or unwilling to break the law.*

Nations' Deployed Service Members: When our Service Members are deployed abroad, whether in wars in Afghanistan and Iraq, or in our permanent bases in South Korea and Germany, they often have to unlock their phones to be able to continue to use them in theater and on base. I have received messages from numerous service members who were very concerned about breaking the law and committing a felony in order to be able to use their phone in Afghanistan where their local carrier had no service whatsoever.

*Our nation's Service Members deserve better than to worry about being felons, and losing their security clearances or being discharged, for using a technology that should never have been banned to begin with.*

Average American Citizens:

As the White House responded to our “We the People” petition, legalizing unlocking is “important for ensuring we continue to have the vibrant, competitive wireless market that delivers innovative products and solid service to meet consumers' needs.”

Here are only a few of the major benefits of unlocking for average Americans citizens:

- **Resale Market:**

The mobile market is gradually adapting to become (for some) a commodity-based market. What this means is particularly in 5-10 years, for many American citizens, having the latest iPhone, Blackberry or Android will be functionally equivalent to a 2-year old device (and for some Americans this is already the case). In such a market, where many Americans will no longer require the latest and greatest technology, there will be a robust and thriving resale market for used phones – already there is a small but growing market.

Unlocking legalization would enable average Americans to trade in their old phones for newer phones for more money (phones that can be used on more than one carrier will have more potential buyers and are capable for greater uses). Through empowering this resale market, consumers will be able to buy used phones that will work with their carrier. Giving them more flexibility and new consumer choices. Further, unlocking will ultimately reduce the number of phones that end up in landfills by finding new uses for older devices.

- **Federal Overcriminalization:**

American citizens should not be under threat of going to prison, being convicted as felons, and losing their freedom and right to vote over behavior that is not a social harm. As noted by the Heritage Foundation and others, the danger of federal overcriminalization is not just the actual threat that average Americans would be arrested for these crimes, but rather the impact of federal overcriminalization upon economic opportunities for business and prosecutors' ability to abuse the system and selectively target individuals for prosecution (see *US. v. Drew*).

When average and innocuous behavior is illegal, the threat is not just of individuals being arrested by an overzealous prosecutor, but also that the threat of criminal action can be used by businesses to attack and intimidate competition. Our White House petition was possible through the collaboration with Sina Khanifar (who created the petition), whose company offered unlocking technology for consumers until he received a letter from Motorola informing him that he needed to knock it off or risk civil liability and criminal liability. His company was ultimately shut down, and he narrowly avoided personal liability because Motorola decided not to pursue further action (from my Atlantic article "The Law Against Unlocking Cellphones Is Anti-Consumer, Anti-Business, and Anti-Common Sense"):

"I started unlocking phones after a typical entrepreneurial experience: I had a problem and was forced to find a solution. I'd brought a cell phone from California to use while attending college in the UK, but quickly discovered that it wouldn't work with any British cell networks. The phone was locked. Strapped for cash and unable to pay for a new phone, I figured out how to change the Motorola firmware to unlock the device.

Realizing that others were likely having the same problem, I worked with a programmer to create an application that allowed people to quickly and easily unlock their Motorola phones and use them with any carrier. After my first year of college ended in summer of 2004, I launched a website (Cell-Unlock.com) selling the software. It was a make-or-break moment for me personally. I was in a major financial crunch.

At first sales were slow, but during my second year at college Motorola released the extremely popular RAZR V3, and my website became a success.

It was then that I received Motorola's cease and desist letter. It claimed that I was in violation of the DMCA, a crime punishable by up to \$500,000 in fines and five years in jail per offense. I was 20 years old and terrified; my immediate reaction was to shut down the business."

- **Greater Wireless Carrier Competition:**

Costs for data usage, texting and phone calls have remained high for American consumers. Texting in particular is a cash cow where all texting plans are essentially 99.9% profit. In fact, consumers pay more, per same data size, to send a terrestrial text than NASA pays for messages from Mars (texting costs the carriers next to nothing). Other abuses in this market have been well documented, including carriers' voicemail prompts being deliberately long to increase the number of calling minutes. Competition through the free market can be a critical part in reining in these exorbitant pricing models.

In areas that are not subject to federal intervention through criminalization, we are seeing the market offer alternatives to drive down costs. This year for the first time, phone usage of alternative messaging services has now outpaced use of phone carrier SMS texting. In other words, the market has offered competition to offer similar texting like technology for free or very cheap costs.

The wireless market is dominated by several major phone companies who have nearly exclusive access to the latest phones and to the latest technology for phone coverage. New market participants and smaller market participants have enormous difficulty entering this market. The up-front costs are astronomical; placing new companies in a chicken and egg like predicament of being unable to ramp up from a small level. With the new spectrum auctions there is a threat that the big market participants will be able to gobble up more of the spectrum as a land grab and keep it away from new participants in the market. And to add to these difficulties, many consumers demand the latest phones that they may not be able to obtain as small carriers.

*Legalizing unlocking will empower this free market by removing it from DOJ intervention and allow consumers to bring over their old phones after their contract has expired. Criminalizing innocuous behavior to discourage new market participants is a form of federal intervention into the market.*

- **Unlocking Will Allow Users to Have Secondary and Back-up Phones.**

For consumers who would rather not resell their old phones or port them over to another carrier, they have the option of retaining their phones and finding new uses for these phones. Just

as in Europe and Asia there are companies that sell SIM cards, in a free market system that legalizes unlocking, users could easily buy SIM cards with 500 minutes for \$10-30 (est.).

Many parents want their children to be able to contact them in case of an emergency, during a field trip, once they start driving, or after extra-curricular activities – but they may not want their young children to have their own phones at such an early age. If a free market were allowed for mobile, these parent can give their old phones to their just for these purposes, while restricting calling, texting, e-mail and web privileges as they see fit.

In a world where 1) we all have older phones, 2) unlocking is legal, and 3) these SIM cards are cheap, there may be logic in keeping an emergency phone in the trunk or dashboard of your car in case you run into a serious emergency. As someone who has been personally stranded on a highway for several hours while my phone ran out of battery I would have greatly appreciated knowing that I had an emergency phone in my glove box, just in case, that cost me \$15.

The average person may not buy a whole extra phone for these purposes, but they are far more likely to buy a SIM card that is extremely cheap and use an old phone for this purpose instead.

- **New Market Models:**

The government should not be in a position of picking winners and losers, and it's impossible to predict what innovations Silicon Valley and Silicon Prairie may come up with as a result of allowing a free market. But here are a few potential innovations and new market models that would benefit from unlocking:

- Republic Wireless.

Republic Wireless offers a competitive new product for consumers, unlimited voice, text, internet and data for only \$19 a month. Their secret? Their service “off-loads” calls, text and data to wireless when the phone is in a wireless area and it uses Sprint when it is not in a wireless area. This market model undercuts the market by 60-80% and has the added benefit of being an innovative part of the solution to the spectrum crunch (off-loading will be a critical part in weathering the continuing explosion in consumers' data usage).

Their problem? They are a newer market participant and don't have the relationships with the handset providers necessary to offer the latest and greatest device technologies with their service.

In an unlocking world, a consumer could bring their old iPhone, Samsung Galaxy, Blackberry Q10, Nokia 420 over to Republic Wireless and be on a \$19 per month all you can use plan.

According to Greg Rogers, Deputy General Counsel of Republic Wireless's parent company:

"If consumers can legally unlock their phone, and if businesses can legally offer services for phone unlocking, both consumers and companies like ours will benefit from the competitive forces such laws would unleash -- particularly if it is done on a permanent basis. Allowing customers to bring their favorite devices to their chosen provider after their contract has expired will spur more competition in the wireless market and boost market models like ours as a result. Our goal is to be able to offer our service on a level playing field and let the consumer decide what service works best for them."

- Spectrum Congestion Based Pricing.

Economists have long argued that having consumers pay more for a limited commodity when it is in high demand is a smart way to handle congestion based upon excessive utilization during a part of a duration cycle. In other words, just as it is more efficient to create economic incentives for consumers to do laundry and other power intensive activities at night when power is in much lower demand, and just as many major cities in the world charge different pricing for tolls or parking depending on the congestion level for the city at that period of time, so too could the mobile market provide a similar market based solution. We are in a spectrum crunch, but part of that spectrum crunch is users all using data at the same time, and this crunch can be partially alleviated by users using their data at different times in the day. No one is arguing that the heavy hand of government should force this market model, but a new market participant, with the proper network implementation, could choose to offer unlimited data during nights and weekends, and tiered data costs during the day. This is most likely to come from new market participants that can offer swappable SIM cards for unlocking phones, a market which exists in other countries. Market based solutions like this will ultimately be a critical part in weathering the spectrum crunch given that there is a finite amount of spectrum.

There are three technologies that could be part of addressing the spectrum crunch (in addition to new spectrum), and this includes better compression of streaming video, off-loading of data to wifi and spectrum congestion pricing. These new market models are likely to come from new market participants that benefit from unlocking.

**What is the Solution to Restore the Free Market and Fix the Problem:**

The White House, former FCC Chairman Genachowski, FCC Commissioner Ajit Pai, technology experts, conservative think-tanks (R Street), other groups (Free Press, Tea Party Nation, FreedomWorks, National College Republicans) and 114,000 Americans have come out strongly in favor of unlocking. Even today, T-Mobile continues to have advertisements encouraging customers to bring unlocked phones to Verizon to change carriers. From former FCC Chairman Genachowski's statement:

“From a communications policy perspective, this raises serious competition and innovation concerns, and for wireless consumers, it doesn't pass the common sense test.”

But implementing this shared, and bipartisan, vision, and actually fixing the problem, requires a two-pronged approach. Implementing legislation must:

- 1) Legalize both personal use and the technology itself (allowing companies to develop, traffic and sell it), and
- 2) Legalization should be permanent.

**Analysis of this legislation:**

As previously noted, this legislation is a major first step towards fixing the unlocking issue and in many ways is a fruition of our campaign. However, in its current form, this legislation keeps the developing, trafficking and selling of this technology as illegal. And this legislation would not be a permanent solution to the problem, but would require the Librarian to rule once again.

If the esteemed members of this Committee, the White House, the Commerce Department, FCC, FreedomWorks, EFF, Public Knowledge, Free Press, R Street, Tea Party Nation, National College Republicans, Young Americans for Liberty, Competitive Carriers Association, Consumers' Union, experts like Vint Cerf and scholars from Mercatus, Cato, and Competitive Enterprise Institute, and the 114,000 Americans who signed our petition (and so many millions of others) think that this technology is a beneficial technology for the market, then why would we keep it as illegal?

As I mentioned in the articles that started this campaign:

“A free society shouldn't have to petition its government every three years to allow access to technologies that are ordinary and commonplace. A free society should not ban technologies unless there is a truly overwhelming and compelling governmental interest.”

What is the overwhelming and compelling governmental interest here that would require continuing the prohibition on this technology? If we keep the underlying technology illegal, and we keep public discussion of the technology as banned speech, then we are failing to actually make this technology available for the consumer, we are missing the innovation opportunities for the next Direct TV ready to shake up the wireless industry in the way satellite television shook up the cable industry and we will continue to hinder our nations creative tinkerers who build much of the innovation that we take for granted.

This prohibition affects real businesses, this is a statement (submitted to me to present here to the Committee) from Kyle Wiens (the CEO of iFixit):

“My business, iFixit, is a free, open-source repair manual for everything, including cell phones. The anti-circumvention measures of the DMCA has a material impact on our business, preventing us from helping people start businesses to unlock and repurpose cell phones. . .Please, protect consumer freedom. Fix this blatant misuse of copyright law by legalizing cell phone unlocking.”

Ultimately, prohibiting the use of tools and services that facilitates unlocking illegal (as H.R. 1123 does) will functionally keep unlocking unavailable for the majority of American consumers; to the extent it does provide a small market it will ensure that all market opportunities are outsourced to other countries while being illegal in the United States. I would prefer innovators to develop this technology right here in the United States.

Additionally, reversing the decision of the Librarian is a terrific first step, but the market needs regulatory certainty. Venture capitalists need certainty before investing. Entrepreneurs need certainty before they leave their current job or drop out of college (as Mark Zuckerberg, Bill Gates, and Steve Jobs did) and launch their next venture.

Imagine, you are an entrepreneur and you are developing this unlocking technology. You meet with angel funders and venture capitalists and you explain your product, your targeted demographic, your team and your monetization strategy. The potential funders then ask, “All that seems great, but what will happen after January? Which way will the Librarian rule this time? How can I invest in your technology if it may be illegal next year?”

Greg Kidd is an angel funder who was one of the first investors in Twitter and Square, when asked about this issue, whether he would invest in technology that may or may not be lawful next year, he responded:

“Here in the valley, we have a great appetite for taking calculated technical and business risks. But to add a jump ball of uncertainty over whether an opportunity that is legal one day might become illegal the next, for no other reason than a political or regulatory whim, is a red flag that shuts down my willingness to invest.”

There appears to be no logic or internal consistency in the Librarian of Congress’s rulings. Until 2010, jail-breaking iPhones was illegal, but jail-breaking iPads is now illegal as of 2013. What will you do as an entrepreneur if the Librarian of Congress changes the rules? This regulatory uncertainty is one of the most destructive forces for innovation and is a genuine threat to the free market. Therefore, a more complete solution would address this issue permanently.

### **Cellphone Companies’ Red Herring – Claiming that they Allow Unlocking:**

Since the success of our White House petition, there has been an attempt by cellphone companies to claim that this is a non-issue because they already allow unlocking – this is a complete red herring, and Members of the Committee deserve a more honest representation of the facts. This assertion is simply untrue.

First, even if phone companies routinely allowed unlocking, that is not an argument for keeping consumers’ unlocking of their own phones as illegal. If phone companies sometimes unlock phones, then they recognize that this technology is beneficial to some users, and therefore users should be able to unlock their own phones without being arrested.

Second, even if phone companies allowed users to unlock upon request without exceptions – requiring consumers to call their providers and ask for permission is a step that many consumers would not take. By making this technology only available by permission – it’s effectively keeping it unknown to most consumers and denying the thriving market that would likely exist. Many users would be discouraged with a complicated process to obtain unlocking codes for their phones. The law should not require users to call their providers for permission to do something they should already be able to do with their own property.

Third, phone providers have been caught denying consumers the ability to unlock and implementing hurdles to make unlocking onerous, circuitous or impossible. As the Commerce Department National Telecommunications and Information Administration (NTIA)’s recommendation to the Register of Copyright, recommending in favor of keeping the exception, argued:

“While the record does show that some carriers are unlocking wireless devices on behalf of their customers, it also indicates that carriers

generally will only perform this service under certain conditions. Those conditions include, for example, minimum days of continuous service, the expiration of handset exclusivity associated with the carrier, a minimum usage of credit, or prior proof of purchase. While such policies may, in some circumstances, provide an alternative to circumvention, the evidence presented in the record does not obviate the need for an exemption for several reasons. First, it is unlikely that these policies will serve a large portion of device owners. For example, the common denominator present in the cited terms and conditions is that the owner of the phone must be a current “customer” or “subscriber” of the carrier requested to unlock the phone. This requirement excludes those that obtain a device from a family member, relative, friend, or other lawful source; those users must then resort to the current exemption to unlock such devices, especially if they cannot locate the original proof of purchase. Second, some carriers refuse to unlock certain devices. For example, until recently AT&T’s terms deemed the Apple iPhone as “not eligible to be unlocked.” An exemption is thus warranted to allow iPhone users, as well as users of other devices excluded by such policies, to unlock their devices. Third, an exemption continues to be needed because some of the policies cited dictate that, in order to unlock a device, the carrier must have the necessary code or the ability to reasonably obtain it, therefore it is possible for a consumer to meet the unlocking policy and still be unable to have his device unlocked if the carrier does not possess or is unable to obtain the required information.”

Carriers claiming that they allow unlocking for all consumers upon expiration of their contract is factually inaccurate and misleading. It may be true in isolated circumstances, but the NTIA’s findings demonstrate that there is a system of impediments to ensure that many consumers cannot access this technology.

Fourth, even while some providers sell unlocked phones, this does not displace the market need, and a property owner’s right, to patch their own phones to unlock them. This is consistent with the position of the NTIA:

“ . . . in determining whether a proposal is a viable alternative to circumvention of access controls, the Register should consider not just whether there are other devices available to achieve the non-infringing use, but also whether users can avail themselves of the suggested alternatives without encountering significant barriers. For example, these barriers may include prohibitive costs to unlock, lack of attractive or popular devices for unlocking, or requiring the consumer to purchase a new device. In particular, NTIA does not support the notion that it is an appropriate alternative for a current device owner to be required to purchase another device to switch carriers.”

Fifth, wireless companies’ assertions that they unlock phones is predicated upon unlocking after the contract has expired. But if a user owns his/her own phone, then they should be able to unlock that phone on day one. If it is a violation of a contract, then they should be

required to fulfill the contract by paying an early termination fee or other form of restitution – but having a contract should not be a basis for denying the consumer the ability to unlock their phones. Most likely, if consumers could legally unlock their phones on day 1, providers may allow consumers to unlock their phones as long as they continue to pay their bill for the contract period. In other contractual relationships, we allow for violations to be dealt with between the two parties (mortgages and car leases in particular).

**Countering Subsidization Argument:**

Some have argued in favor of maintaining the ban on unlocking because carriers subsidize the phones for consumers – so therefore they should be able to prohibit unlocking. This issue has been dealt with extensively elsewhere, but to summarize: this argument doesn't make much sense. Carriers do subsidize phones, and they recoup that investment through the contract that they write. Each of these contracts contains language to ensure that if a customer were to violate the contract in the first month, or the second year, the carrier still walks away whole.

Consumers violating their contracts are not a problem that carriers deal with exclusively, millions of consumers default on mortgage obligations and car leases – but the free market resolves those issues. Contracts allow for the seller to recoup their investment.

*I am aware of no other situation where a seller provides a contract to a consumer and then expects the Department of Justice to arrest the consumer if they breach their side of the contract.*

Overall, carriers subsidize phones and recoup through an “early termination fee” in their contract. If these fees are too low, then they wrote the contract and have the capacity to raise this fee as they see fit (and consumers can leave if too high). Consumers should not be arrested for violating contracts, rather they should be liable for the damages set in the contract. Under their contracts as currently written, there appears to be no way for the carrier to lose money.

In fact, anecdotal evidence demonstrates that most consumers that unlock their phones fulfill their two/three year contract. Imagine if you are a Service Member and are deployed to Afghanistan. You unlock your phone to use it in theater on a local carrier, but you continue to pay your monthly US bill to avoid fines, violating the contract and hurting your credit rating. In that situation, that consumer just become one of the more profitable customers for the phone companies (by paying full price and not using their service).

**What is Wrong with Allowing the Librarian to Decide All Over Again?:**

The Librarian of Congress issued a statement as a response to the White House petition, which appears to double down on his ruling in favor of rejecting unlocking. He notes that his decision to ban unlocking is a decision limited by specific statutory criteria rather than a broad public policy analysis:

“The rulemaking is a technical, legal proceeding and involves a lengthy public process. It requires the Librarian of Congress and the Register of Copyrights to consider exemptions to the prohibitions on circumvention, based on a factual record developed by the proponents and other interested parties. The officials must consider whether the evidence establishes a need for the exemption based on several statutory factors . . . . As designed by Congress, the rulemaking serves a very important function, but it was not intended to be a substitute for deliberations of broader public policy.”

The White House further explained that this Librarian of Congress’s method for temporary exceptions “is a rigid and imperfect fit for this telecommunications issue.”

While the Department of Commerce recommended in favor of keeping unlocking as lawful, the Librarian of Congress rejected this advice. The Librarian of Congress has specific statutory mandates on what to assess in whether to allow certain technologies. Congress, on the other hand, can take a holistic and thoughtful view on this issue, and I would argue that where there is no overwhelming governmental interest to ban a technology then it should remain lawful. Whereas, the Librarian of Congress’s mandate is to ban technology by default unless there is a vital market need for the technology.

Unlocking is a public policy question, not a “market needs” question. As a public policy question in the telecommunications sphere it should be resolved by Congress, not punted to a pseudo Legislative/Executive regulatory agent that manages the nation’s preeminent library and also decides what technologies to ban.

**Suggested Amendment to H.R. 1123:**

This issue is highly technical, and H.R. 1123 is an important first step. Members of this committee deserve praise for taking the first stab to fix this problem and listening to their constituents who joined in our campaign.

A few small modifications would result in a narrow but surgical solution that addresses this problem and will provide necessary regulatory certainty to innovate. A small amendment could be proposed stating that developing, trafficking, selling or discussing the solutions for unlocking shall also be lawful. This amendment could include a permanent legalization, rather than allowing the Librarian to rule all over again every three years.

**Further Areas of Investigation:**

Congress ought not to rest with merely addressing the unlocking issue. There are numerous other technologies also made illegal under the same provisions and also under the triennial review process. Some could argue that some have “legitimate purposes” for being banned; however, banning many of the technologies is indefensible. Congress should evaluate what technologies should be

There are an estimated 23 million jail-broken devices, but until 2010 jail-breaking was illegal meaning that these users could have civilly liable, or even subject to criminal prosecution. Jail-breaking is where a user patches their phone allow installation of “unapproved” software on the device. Many advanced users jail-break their phones to give them higher functionality, higher capability to secure their privacy, and the ability to increase their cybersecurity. This jail-broken phone market is a major market opportunity, but it is under legal threat in the United States.

Similarly, technologies that would help persons with disabilities is also illegal. There are over 21.2 million Americans with vision difficulties, that could benefit from read aloud functionality, and there are 36 million deaf persons in the United States who could benefit from closed captioning technology. Both of these add-on technologies that can help these groups are illegal. While the Librarian grants an exception, the exception is nearly unusable. For example, blind individuals may be allowed to use some technologies, but only if they code this technology themselves . . . that doesn’t make any sense. Even with the exception, no business can cater to this 57.2 million person US market without permission from rightsholders, which is often refused. These accessibility technologies may help these individuals enter the job market or to be able to greater enjoy media in their personal time.

This is scratching the surface of how large numbers of technologies have now been banned without any review by Congress. Banning technologies that facilitate piracy and copyright theft are on matter, but to the extent that these provisions are now being interpreted to

prohibit other technologies that can be easily rectified. The last major revision to copyright law was the Digital Millennium Copyright Act (DMCA), passed in 1998. That was three years before the iPod, six years before Google Books and nine years before the Kindle. Congress should evaluate how this legislation has now impacted modern technologies 15 years later, and to the extent that it now impacts technologies with no nexus to copyright infringement then those technologies should be lawful. Further, decisions on what innovations and technologies should constitute contraband should be regularly reviewed, particularly to ensure that we are not banning large market opportunities for legitimate and beneficial technologies.

**Conclusion:**

If Congress, the White House, Commerce Department, FCC, cell phone carriers and average Americans think that this technology is beneficial for the market – then shouldn't the law be that this technology is permanently lawful, both for personal use and for businesses to develop? If something changes, Congress retains the ability to easily ban this technology at a later date if it deems that draconian measure truly necessary. The benefits mentioned in these remarks would be a potential result of permanent legalizing of unlocking, and of allowing for businesses to cater to this market.

Banning technologies is an extreme step by government, a truly incredible reach of Federal power, and I would petition this body to be very careful in continuing to delegate the authority of what technologies to ban to a quasi-regulatory agent when, in these and many other circumstances, there is no compelling governmental interest.

This legislation, as currently crafted, does not reflect the input of the White House, former FCC Chairman, FCC Commissioner, scholars or outside groups such as R Street and FreedomWorks. Our campaign was about actually solving this problem and restoring a free market. Minor changes to this legislation would ensure that H.R. 1123 actually solves the problem it intends to address by permanently legalizing unlocking and allowing for businesses to sell the technology to consumers. Overall, our contention is that given the enormous benefits that phone unlocking provides to the consumer, phone unlocking should be made permanently lawful for the consumer to use, industry to develop and marketers to sell.