

Copyright Reform Bill Targets Anti-circumvention

by [Andrew McDiarmid](#) [1]

May 10, 2013

Ahead of next week's [first copyright reform hearing](#) [2], Congresswoman Zoe Lofgren, along with Thomas Massie, Anna Eshoo, and Jared Polis, introduced a bill to put changes to the anti-circumvention provisions of the DMCA squarely on the table. The bill is a forceful response to the controversy over cell-phone unlocking that erupted in January. The most comprehensive proposal to date, the [Unlocking Technology Act of 2013](#) [3] would go significantly farther than bills introduced [earlier this year](#) [4], which narrowly aimed to remedy last year's decision by the Library of Congress not to exempt phone unlocking from the anti-circumvention provisions beyond January.

Instead of focusing solely on phone unlocking, the new bill would create a broader exemption to the circumvention ban to allow DRM-cracking for all non-infringing purposes. A separate section would edit section 117 of the copyright act to make it clear that unlocking a wireless communications device solely to use it on another network is not copyright infringement.

These changes would be a welcome course-correction in an area of law whose history, in addition to the cell phone kerfuffle, famously (to copyright nerds, anyway) includes [ludicrous cases against the makers of generic garage-door openers](#) [5] and [replacement printer cartridges](#) [6]. Where there is no infringement, there is no harm, so users of copyrighted works should not have to fear legal action for gaining access to protected works for non-infringing purposes such as personal backups or fair use. Moreover, as in the garage-door and printer cases, where the DRM at issue is being used to protect a business interest unrelated to copyright, the DMCA should not apply. Those cases largely resolved the latter issue, but it's worth codifying nonetheless.

One final substantive portion of the bill is trickier. The DMCA also prohibits trafficking in circumvention tools or devices. But if nobody can distribute circumvention tools, a fair-use exemption for circumventing DRM arguably isn't worth a whole lot – most consumers can't crack DRM on their own and therefore need software or other tools to help them. So, the new bill would create a similar exemption for trafficking in circumvention tools primarily for non-infringing purposes. The trouble is that it's hard to see how this or any bill could exempt some trafficking without effectively exempting all trafficking and gutting this provision entirely.

To many, this too would be a welcome change. But there are serious arguments on the other side. Rightsholders would argue that the trafficking ban has made tools like [deCSS](#) [7] relatively obscure to mainstream consumers, thus serving its intended goal of limiting infringement to at least some degree, and that DRM is not per se restrictive and can enable new business models (e.g. streaming rentals) that benefit consumer choice. There's no shortage of dispute on these points. But whatever its efficacy, the circumvention tool trafficking ban was a key piece of the compromise struck in the DMCA, and the prospect of substantially loosening it raises complex questions that merit close scrutiny and debate at least.

The bill also calls for a report from NTIA on the anti-circumvention provisions' effect on consumer choice, competition, and the free flow of information. The report would include an examination of obstacles to further reforms or full repeal of the circumvention ban, specifically calling out international trade agreements like the [TPP](#) [8].

These proposals come at the beginning of what is sure to be a long debate over copyright reform, and in that context they are most welcome. Of the myriad issues now on the table, anti-circumvention reform is sure to be a central theme among the tech policy crowd, and today's bill provides a good starting point to that important conversation.

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