

August 14, 2006

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Dear Ms. Granick and Mr. Metalitz:

I am writing to follow-up on your participation in the Copyright Office's March 23 public hearings of the DMCA Section 1201 Rulemaking relating to The Wireless Alliance's proposed exemption: "Computer programs that operate wireless communications handsets."

Having reviewed the record, we seek additional and more detailed information relating to whether the software locks described in the comments and testimony of The Wireless Alliance are technological measures that effectively control access to works protected under title 17, as defined in 17 U.S.C. §1201(a)(3)(B). Section 1201(a)(3)(B) provides:

a technological measure "effectively controls access to a work" if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

Please provide us with any information you have relating to the following questions. Please provide the following information, separately for each of the four types of software locks described in the comments and testimony of the Wireless Alliance -- SPC locking, SOC locking, band order locking, and SIM locking:

- (1) Explain how each of the types of software locks controls access to a copyrighted work.
- (2) Identify and describe the copyrighted work (or works) with respect to which access is controlled by the software lock.
  - a. Who is the copyright owner of that copyrighted work?
  - b. If the software lock controls access to only a portion of the work(s), identify both the work(s) and the portion(s) of the work(s).

- (3) What information, process or treatment must be applied in order to gain access to that copyrighted work(s) (or the identified portion(s) of the work(s)).
- (4) In what respect is access to that copyrighted work controlled by the software lock, including (but not confined to):
  - a. what is the nature of the access to the copyrighted work that is controlled by the software lock
- (5) How does the software lock control such access to the copyrighted work?
- (6) Describe whether and how the authority of the copyright owner of the copyrighted work is implicated in the operation of the software lock, including (but not confined to):
  - a. who (e.g., the firmware manufacturer, the handset manufacturer, or the telecommunications service provider) installs and/or activates the software locks on the cellular phone handsets;
  - b. whether the software locks are applied “with the authority of the copyright owner”;
  - c. if the software locks are not installed by the copyright owner,
    - i. what is the relationship between the copyright owner and the person who installs the software locks;
    - ii. are (and if so, in what respect are) the software locks applied with the permission of the copyright owner; and
  - d. In what respect has the copyright owner authorized the application of information, or a process or a treatment, to gain access to the work.
- (7) In what circumstances, if any, is access to the copyrighted work authorized by the copyright owner.

To the extent that the answer to any of these questions varies depending upon the telecommunications service provider, handset manufacturer, handset model, firmware producer, or other parties who are involved, please provide explanations in your responses.

In addition to providing us with the requested information, we solicit your views on whether the software locks in question are technological measures that "effectively control access to a work" as defined in §1201(a)(3)(B).

We recognize that the comments and testimony of The Wireless Alliance have touched upon some of these questions, but the record on these questions is rather thin and we require more detailed information in order to complete our evaluation of the proposed exemption. We also recognize that Mr. Metalitz is not a proponent of the proposed exemption and does not represent handset manufacturers, telecommunications service providers or others directly involved the activity that is the subject of the proposed exemption. However, because it is our practice, when submitting questions to witnesses, to submit those questions to all persons who have testified on the proposed exemption, we wish to provide him with an opportunity to consider and respond to our questions.

Because these questions have arisen at a fairly late point in this rulemaking proceeding, we would be grateful if we could receive your responses promptly, and in any event no later than August 28.

Thank you for your assistance in this rulemaking proceeding.

Sincerely,

David O. Carson  
General Counsel