

**Before the  
COPYRIGHT OFFICE  
LIBRARY OF CONGRESS  
Washington, DC**

In the Matter of )  
 )  
**Exemption to Prohibition on** ) Docket No. RM 2008-8  
**Circumvention of Copyright Protection** )  
**Systems for Access Control Technologies** )  
 )  
To: The Copyright Office

**COMMENTS OF CRICKET COMMUNICATIONS, INC.  
ON THE NOTICE OF PROPOSED RULEMAKING**

Cricket Communications, Inc. (“Cricket”) hereby submits its comments (“Comments”) in response to the *Notice of Proposed Rulemaking*<sup>1</sup> in the above-captioned proceeding, pursuant to the Digital Millennium Copyright Act (“DMCA”). Cricket files its Comments to support extending the current exemption to the DMCA that allows the unlocking of wireless devices to enable them to be placed into service on a wireless telecommunications network.<sup>2</sup> Cricket supports slight refinements to the language of the current exemption as detailed and explained below. As discussed below, Cricket is a smaller wireless carrier that focuses on offering lower-cost, flat-rate plans using a streamlined distribution and service model. To keep costs low, Cricket permits its customers to bring in unlocked (or “reflashed”) phones that they already own and may have been used with another wireless carrier and activate it on the Cricket network.

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<sup>1</sup> See *Copyright Office, Exemption to Prohibition of Circumvention of Copyright Protection Systems for Access Control Technologies*, Notice of Proposed Rulemaking, 73 Fed. Reg. 79425 (Dec. 29, 2008) (“December 2008 NPRM”).

<sup>2</sup> *Id.* at 79427; see also *Copyright Office Notice of Inquiry on the Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technology*, 73 Fed. Reg. 58073, 58073 (Oct. 6, 2008) (to be codified at 37 C.F.R. pt. 201) (“October 2008 NOI”).

Through its Comments, Cricket seeks to provide the Copyright Office with additional factual information that will demonstrate that an extension of the exemption, with some language refinements, is not only warranted, but is needed in order to allow fair competition between wireless carriers and freedom of choice for consumers in selecting a wireless carrier and products and services best suited to their unique needs. Cricket has also reviewed and analyzed the language of the alternate classes proposed in the December 2008 NPRM and discussed the variations in the language with the proponents. Cricket supports a proposed exemption that contains refinements to the language of both the existing exception and the proposed classes identified in the December 2008 NPRM. The refinements supported by Cricket appear to have consensus support among the proponents. Cricket offers facts in these Comments in support of the clarifying changes to the previously proposed classes and the existing exemption.

## **I. PROPOSED EXEMPTION**

In its December 2008 NPRM, the Copyright Office requested suggestions on how the proposed classes should be “properly tailored.”<sup>3</sup> Cricket supports a refined version of the existing exemption adopted by the Copyright Office in 2006.<sup>4</sup> The version supported by Cricket is as follows.

Computer programs that enable wireless communications devices to connect to wireless communications networks when circumvention is accomplished for the purpose of enabling such devices to lawfully connect to wireless communications networks.

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<sup>3</sup> December 2008 NPRM at 79426.

<sup>4</sup> *Copyright Office Final Rule on the Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technology*, 71 Fed. Reg. 68472, 68476 (Nov. 27, 2006) (“2006 Final Rule”).

## II. BACKGROUND

Cricket, in conjunction with its affiliates, currently offers services in 30 states under the Cricket® brand. Cricket provides consumers with state-of-the-art mobile wireless services in packages targeted to meet the needs of lower income customers who are under-served by the traditional wireless carriers and offers an affordable alternative to traditional wireless and landline services.<sup>5</sup> Cricket's service is differentiated from many other carriers' services in that it offers unlimited local and long distance airtime, unlimited text and, in some cases, multi-media messaging for a low, flat monthly fee, with no signed contract. Consequently, Cricket's customers often use their service in a manner similar to wireline customers. Indeed, a majority of Cricket's customers have cut the cord and do not subscribe to wireline service.<sup>6</sup> Cricket is able to offer its high-quality, low-cost mobile service in large part because it has streamlined its distribution and service model. Cricket operates its network economically and passes these savings on to its customers.

Unlike many other wireless carriers, Cricket does not require long-term contracts or impose early termination fees. Cricket's plans operate on a month-to-month, pay-in-advance basis. A customer can terminate service at any time without incurring early termination fees or penalties. This flexibility and low or no cost activation and termination of services is a particularly important offering to consumers in the current economy and job market. Cricket believes that its straightforward, low-cost/high-value monthly service options provide a unique

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<sup>5</sup> Nearly half of Cricket's subscribers are minorities, and approximately 57% make under \$30,000 annually.

<sup>6</sup> According to customer surveys conducted by Cricket in November 2008, approximately 68% of Cricket's customers live in a household with no landline.

alternative to consumers in their markets and, in particular, successfully meet the needs of historically underserved lower-income and minority market segments.

**III. CRICKET WILL SUFFER ACTUAL HARM IF AN EXEMPTION IS NOT ADOPTED BECAUSE IT WILL LOSE REVENUE FROM POTENTIAL CUSTOMERS**

Proponents of an exemption “must provide evidence either that actual harm currently exists or that it is ‘likely’ to occur in the ensuing 3-year period.”<sup>7</sup> Cricket clearly meets this burden. Without an exemption for unlocking handheld devices, the prohibition on circumventing access controls would have a direct negative impact on Cricket’s ability to attract new customers. Without a continuation of the exemption, many consumers of wireless services who wished to switch their service to Cricket would be forced to incur the expense of purchasing new wireless handsets. As discussed above in Section I, Cricket serves customers who are cost-sensitive and attracted to lower cost wireless service. Typically, these customers are less able to repeatedly absorb the cost of purchasing new wireless devices.

Cricket, unlike many other wireless carriers, provides only minimal subsidies for the cost associated with a customer’s purchase of a new wireless handset.<sup>8</sup> This is an integral part of Cricket’s business plan to keep monthly subscription costs low. By allowing new customers to use a wireless handset that the customer already owns, or to purchase a new phone at the customer’s own expense if the customer so chooses, Cricket is able to keep monthly service costs down and to allow its customers to cancel their service at any time.

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<sup>7</sup> October 2008 NOI at 58075.

<sup>8</sup> In contrast, Cricket’s competitors typically entice new customers either by providing them with a new wireless phone at no charge, or by highly subsidizing the cost of a higher-end, more expensive model. These carriers then recover their cost for subsidizing the new phones by locking their customers into long term, non-cancelable contracts that are more expensive on a monthly basis.

In the current recession, with more people having less income and diminished financial resources to allocate to wireless service, Cricket's low cost wireless offerings are particularly important in the marketplace. However, prospective customers seeking to change their wireless service to Cricket are less likely to migrate to Cricket's network if doing so would mean that the customer would face the expense of buying a new handset—particularly if the customer already owns another wireless device. Even if a prospective new customer would save money on a monthly basis by switching to one of Cricket's low-cost monthly plans, that customer would still be less likely to make the change if the initial expense of purchasing a new phone poses too great a barrier. Given the current state of the economy, with thousands of people losing jobs each day, even a comparatively inexpensive new phone is likely to be an insurmountable obstacle for many people looking to change to Cricket's network—particularly for the lower income individuals that form the majority of Cricket's customers.

A meaningful percentage of Cricket's new customers in 2008 chose to reuse phones they already owned when switching over to Cricket's service. If an exemption is not adopted concerning lawful unlocking of wireless devices, Cricket stands to lose prospective customers migrating from other service providers because their current devices cannot be unlocked. The loss of prospective customers clearly meets the burden of proof that Cricket is "likely" to suffer actual harm in the ensuing three year period if an exemption is not adopted.<sup>9</sup>

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<sup>9</sup> October 2008 NOI at 58075; *Copyright Office Notice of Inquiry on the Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 70 Fed. Reg. 57526, 57528 (Oct. 3, 2005) (October 2005 NOI").

#### **IV. SOFTWARE AND FIRMWARE LOCKS RESTRICT LEGAL, NON-INFRINGING USES OF WIRELESS DEVICES**

##### **A. Locking Devices Impede the Use of Wireless Handsets.**

Proponents of exemptions must be able to identify the technological measure that “controls access” to a copyrighted work.<sup>10</sup> In the context of wireless handsets, locking devices are measures that control access to allegedly copyrighted works by preventing the user of a wireless telecommunications device from accessing or operating the firmware in conjunction with the network of the user’s choosing.<sup>11</sup> In plain terms, locking devices prevent wireless customers from changing to another wireless service provider because their handsets won’t work on a new provider’s network.

##### **B. Locking Devices Prohibit Consumers from Changing Networks.**

Wireless providers chain handsets to their networks using a variety of methods, including service programming code (SPC) locking,<sup>12</sup> system operator code (SOC) locking,<sup>13</sup> band order locking<sup>14</sup> and subscriber identification module (SIM) locking.<sup>15</sup> Although there are various

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<sup>10</sup> October 2008 NOI at 58077.

<sup>11</sup> 2006 Final Rule at 68476.

<sup>12</sup> Service Programming Code (SPC) – 6 digit code to access device Number Assignment Module (NAM) parameters for activating the mobile device. Default value of “000000”, often set to randomized values dependent on carrier specifications.

<sup>13</sup> System Operator Code (SOC), TDMA Specification TIA136 - 12-bit System Operator Code (SOC) is used to identify a Service Provider (SP) and is used along with the System Identity (SID) by a mobile station to acquire or reject services offered by specific SPs.

<sup>14</sup> Band order – Network directed message to assign receiving mobiles to a specific band class as defined in C.S0016-C Rev. 2.0 (formerly TIA 683-D).

<sup>15</sup> Subscriber Identification Module (SIM) – Subscriber Identification Module stores the service-subscriber key (IMSI) used to identify a subscriber on mobile devices. The use of SIM cards is mandatory in GSM devices. The equivalent of a SIM in UMTS is called the Universal Integrated Circuit Card (UICC), which runs a USIM application, whereas the Removable User Identity Module (R-UIM) is more popular in CDMA-based devices. A SIM lock, simlock, network lock or subsidy lock is a capability built into GSM phones by mobile phone manufacturers. Network providers use this capability to restrict the use of these phones to specific countries and network providers. Phones can be locked to accept only SIM cards from one or more of the following: Countries (the phone will work in one country, but not another); Network/Service providers (e.g. AT&T Mobility, T-Mobile, Vodafone, etc.); SIM types (i.e. only specific SIM cards can be used with the phone).

different types of phone locking, they all have a singular effect/impact – to prevent a handset from being used to receive service on compatible wireless providers’ networks.<sup>16</sup> Although locking devices serve some important purposes, refusing to unlock or asserting that unlocking violates copyright law is wrong and has other negative effects. Customers are less likely to migrate to another carrier if doing so means that the customer will incur the additional cost of purchasing a new handset.

**C. Unlocking a Phone is a Non-Infringing Use.**

Unlocking a phone is consistent with the requirement that “a prevented activity is...a non-infringing use under current law.”<sup>17</sup> During the process of unlocking, no copies are made of the phone’s software or of any content on the phone. Rather, a carrier that unlocks and/or reflashes a phone is simply updating roaming lists and memory locations contained on the phone. As noted by proponent MetroPCS in its Comments, reflashing a phone is similar to the process of changing data in the cells of a spreadsheet—the formulas themselves are in no way altered.<sup>18</sup> Indeed, the process of reflashing a phone is essentially identical to the process undertaken by the original selling carrier when it purchases the phone in its native state from the original phone manufacturer. Moreover, the holders of any copyrighted material on a phone that is reflashed are still protected throughout the reflashing process because separate access controls are in place to protect works such as ringtones, games, music and other programs that are downloaded to handsets.

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<sup>16</sup> Proponents of an exemption “must specifically explain what non-infringing activity the prohibition on circumvention is preventing.” October 2008 NOI at 58077.

<sup>17</sup> October 2008 NOI at 58077.

<sup>18</sup> Comments of MetroPCS Communications, Inc. on the Notice of Inquiry, p. 6.

Reflashing a phone merely permits a consumer who owns a wireless device the freedom to choose a wireless network. Even if minor modifications to a phone's software were required, which they are not, these minor changes would still be permissible under U.S. Copyright law. Specifically, 17 U.S.C. § 117(a)(1) permits minor modifications to copyrighted computer programs where "such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that is used in no other manner." In the case of reflashing wireless phones, consumers are merely looking to unlock the wireless device so that it can be activated and used on another carrier's network.

**V. LOCKING MECHANISMS ON WIRELESS DEVICES HURT COMPETITION AND HURT CONSUMERS**

Access controls on computer programs that enable wireless devices to connect to wireless networks hurt competition because they discourage, and in many cases effectively prohibit, consumers from migrating freely to the wireless network of the consumer's choice. In the case of Cricket, some prospective customers are less likely to migrate to Cricket's service if they are required to purchase a new wireless device. Cricket's primary target customers are individuals who are attracted to low-cost wireless services. These individuals in particular are likely to be deterred from leaving their existing carriers if they need to spend money to purchase a new handset when they already own one. This economic barrier is very real, particularly in these challenging economic times. As a result, it would be more difficult for Cricket to attract new customers and to contend with other wireless providers in an already competitive market unless the exemption to unlocking phones is readopted.

Access controls also have a negative effect on the individual consumers themselves. In addition to the cost implications of having to purchase a new wireless handset, consumers who

change networks are also saddled with the hassle of having to learn to operate a new device. This frequently means that a customer would have to undergo the painstaking process of re-entering contact lists, phone numbers and other information, as well as any other preferences that may have been saved on the customer's "old" phone.

In addition, access controls also limit consumer choice. In many cases, access controls effectively require consumers to remain on wireless networks that aren't necessarily the best match for those particular customers. The financial hurdle of purchasing a new wireless device may discourage them from moving to another network with a service plan that best meets their needs and preferences. Consumers may want to move to a carrier that offers different features and packages than their existing carrier, but are dissuaded by both the cost and inconvenience of changing phones. Prospective customers who want to switch to another service provider's network should not be deterred by the expense of having to buy a new phone. Consumers who have spent money to purchase a wireless device should be able to use that device on multiple networks.

## **VI. MIGRATING TO A COMPETING PROVIDER'S NETWORK IS A NON- INFRINGING USE OF A WIRELESS DEVICE THAT IS RIGHTFULLY OWNED BY THE CUSTOMER**

A significant number of the phones that are reflashed are reflashed for use by the same person. A customer who purchases a wireless device and is the rightful owner of that device should be able to use it as the customer wishes—even if that means migrating to the network of a competing wireless provider.

The Copyright Office has previously recognized that locks on handsets do not serve to protect the interests of copyright owners, but rather as a means to control the hardware, and as a

result, to discourage customer migration.<sup>19</sup> The exemption is not sought for the purpose of allowing infringement of any protected work. Holders of Content Copyrights for works such as games, music and ringtones are still protected when a handset is reflashed because separate controls for these items may be employed. Instead, the exemption is sought to preserve fair competition between wireless carriers and to allow consumers greater and uninhibited choice.

## **VII. THE PROPOSED EXEMPTION WILL NOT DETER INNOVATION IN WIRELESS PRODUCTS AND SERVICES**

In the 2006 rulemaking, it was suggested that allowing customers to move the devices they own to alternate networks may restrain technological expansion and innovation in the hardware and software products and services that wireless carriers develop and market and limit consumer's access to downloadable copyrighted content. Developments since the exemption was adopted, however, have shown that those concerns were unfounded. The exemption has given consumers freedom of choice, enhanced competition in the wireless marketplace, and saved consumers from both unnecessary expenditures to purchase new phones and making unnecessary deposits in the nation's landfills, all without slowing or restraining technological innovation or the development and deployment of new products or services.

For example, since the Office adopted the exemption, Verizon Wireless launched the first mobile TV Service, V CAST Mobile TV, in March 2007.<sup>20</sup> Apple launched the iPhone in June

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<sup>19</sup> See Final Rule at 68476 (noting that handset locks are used by wireless carriers "...to limit the ability of subscribers to switch to other carriers, a business decision that has nothing to do with the interests protected by copyright").

<sup>20</sup> *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Thirteenth Report, WT Docket No. 08-27, DA 09-54, at para. 164 (rel. January 16, 2009).

2007, and numerous additional touchscreen phones have since been developed and introduced.<sup>21</sup>

In addition, in May 2008, AT&T launched its own mobile TV service.<sup>22</sup>

In July 2008, AT&T launched the 3G version of Apple's iPhone, and at the same time Apple launched an online software clearinghouse, called App Store, to market applications from software developers for the new 3G iPhone. Within one month, by August 2008, Apple reported that there were *900 applications* available on the App Store.<sup>23</sup> All of these developments and innovations took place while the exemption was in place, and after more than a million iPhones apparently had been unlocked to operate with other carriers.

### VIII. SUGGESTED REVISIONS TO PROPOSED CLASS EXEMPTION

In the NPRM, the Commission invited parties to submit evidence demonstrating whether a proposed class exemption is warranted, as well as parties' suggestions concerning "how such a class *already proposed* should be properly tailored."<sup>24</sup> Cricket has already discussed why the proposed class exemption is necessary. With regard to the language used to define the proposed exemption, Cricket proposes the following:

Computer programs that enable wireless communications devices to connect to wireless communications networks when circumvention is accomplished for the purpose of enabling such devices to lawfully connect to wireless communications networks.

Cricket notes that other proposals submitted in this proceeding are substantially similar.<sup>25</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at para. 166.

<sup>24</sup> NPRM at 79426.

<sup>25</sup> The proposals include the following:

5A. Computer programs that enable wireless telephone handsets to execute lawfully obtained software applications, where circumvention is accomplished for the sole purpose of enabling interoperability of such applications with computer programs on the telephone handset; Proponent, Electronic Frontier Foundation.

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Cricket discussed these proposals with their proponents and with other interested parties in an effort to develop a unified, comprehensive proposed exemption for the unlocking of wireless devices to enable them to be placed in service on wireless telecommunications networks. Cricket submits its proposed language as an option that Cricket feels accurately encompasses the ideas held in common between Cricket and these other parties. Cricket further submits that its proposed language provides added clarity while continuing to capture the core elements of the exemption adopted by the Copyright Office in 2006.<sup>26</sup> Specifically, when viewed in red-line format against the Copyright Office's 2006 exemption, Cricket's modifications appear as follows:

Computer programs ~~in the form of firmware~~ that enable wireless communications devices ~~telephone handsets~~ to connect to a wireless communications networks, when circumvention is accomplished for the sole purpose of enabling such devices to lawfully connecting to a wireless communications networks.

Cricket supports the refinement of the proposed term "telephone handsets" to

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5B. Computer programs that operate wireless telecommunications handsets when circumvention is accomplished for the sole purpose of enabling wireless telephones to connect to a wireless telephone communication network; Proponent, MetroPCS.

5C. Computer programs in the form of firmware or software that enable mobile communication handsets to connect to a wireless communications network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless communication network; Proponent, Paul Posner, Youghioghny Communications, Inc. d/b/a Pocket Communications, Inc. ("Pocket").

5D. Computer programs in the form of firmware that enable wireless telephone handsets to connect to a wireless telephone communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless telephone communication network, regardless of commercial motives; Proponent, Wireless Alliance, LLC, et al ("Wireless Alliance").

<sup>26</sup> *Copyright Office Final Rule on the Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technology* (hereinafter "*Final Rule*") 71 Fed. Reg. 68472, 68476 (Nov. 27, 2006) (to be

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“communications devices” in view of the ever expanding types of wireless devices available. In addition to traditional telephone types of devices, today, there are also wireless devices that look and act more like mini-computers than phones. These devices are used nearly as often for sending written messages, or “texting”, as they are for holding traditional voice conversations. Newer versions of devices will allow customers to watch videos or stream live TV. Cricket believes that the use of the broader term “communications device” will more accurately encompass the wide range of devices that are locked today and to which this exemption should apply.

Cricket also supports the refinement of the proposed term “wireless telephone communications network” to “wireless communications networks” to better encompass the wide array of uses for wireless services. We note in particular that the word “network” was made plural, given that when a wireless device is roaming outside of its usual service area, it may be used to connect to more than one network.

Finally, Cricket supports adding the term “enabling such devices to” lawfully connect to a network because parties that conduct the act of unlocking or reflashing a phone are not actually connecting that phone to a network. Rather, unlocking a phone is an activity that permits a phone to connect to a network. A party who unlocks a phone is instead allowing another party to lawfully connect that phone to a network.

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codified at 37 C.F.R. pt. 201).

## **IX. STATUTORY CONSIDERATIONS**

17 U.S.C. § 1201(a)(1)(C) directs the Copyright Office to consider the following factors when considering an exemption:

- (i) the availability for use of copyrighted works;
- (ii) the availability for use of works for nonprofit, archival, preservation, and educational purposes;
- (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;
- (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and
- (v) such other factors as the Librarian considers appropriate.

Cricket submits that its Comments have demonstrated that all of these factors, when applicable, weigh strongly in favor of extending the existing exemption adopted by the Copyright Office in its previous rulemaking as codified at 37 C.F.R. 201.40(b)(5).<sup>27</sup> Cricket further submits that adverse effects are more likely than not to occur if the proposed exemption is not renewed.

## **X. CONCLUSION**

For the reasons set forth above, Cricket respectfully requests that the Copyright Office Register recommend to the Librarian that the exemption proposed herein be renewed as proposed.

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<sup>27</sup> The exemption adopted previously by the Copyright Office was: “(5) Computer programs in the form of firmware that enable wireless telephone handsets to connect to a wireless telephone communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless telephone communication network.” 47 C.F.R. 201.40(b)(5).

Respectfully submitted,

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