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VIA ELECTRONIC SUBMISSION

Office of the General Counsel
U.S. Copyright Office,
James Madison Memorial Building,
Room LM-401, 101
Independence Avenue, SE,
Washington, DC 20559-6000

Re: Notice of Inquiry, Docket No. RM 2008-8, of Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies ("NOI"); Proposed Class 5D

To the General Counsel and Whom It May Concern:

I am a Senior Director of eBay Inc. ("eBay"), having global responsibility for copyright, trademark and other intellectual property matters. eBay submits these comments pursuant to the above-referenced NOI, and respectfully asks that the Librarian of Congress renew the exemption granted in the 2006 rulemaking for unlocking cell phones, and exempt the following class of works from 17 U.S.C. § 1201(a)(1)'s prohibition on the circumvention of access control technologies for the period 2009-2012:

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.

The language of this exemption is identical to the previously adopted exemption in 37 C.F.R. 201.40(b)(5), and would have the effect of renewing the prior exemption for an additional three years.

A. Argument and Factual Support

1. The Requested Exemption from Section 12019(a) for Circumvention of Any Locking Mechanism that Controls Access to Software Found Within a Mobile Handset is Appropriate and Necessary.

- a. Unlocking is a Noninfringing Activity

While each request for exemption is reviewed *de novo*, it is informative that in 2006 the Librarian of Congress noted, in connection with the Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Docket No. RM 2005-11, that the Register of



Copyrights concluded that software locks are access controls that adversely affect the ability of consumers to make noninfringing use of the software on their cellular phones. 37 C.F.R. § 201 (2006); 71 Fed. Reg. 68476 (Nov. 27, 2006).

b. A prohibition on unlocking cell phones is likely to have a substantial adverse effect.

eBay is an online marketplace, located at (among other international websites) <http://ebay.com>, where millions of sellers and buyers of goods and services can come together to trade virtually anything on earth. eBay members create, edit and approve their listings offering items for sale.

A recent Frontier Economics study prepared for eBay (see: http://ec.europa.eu/competition/sectors/media/ebay_frontier_report.pdf) identifies a range of benefits enjoyed by consumers who shop at online marketplaces such as eBay:

- Price savings - shopping online in the UK is on average 25 per cent cheaper than shopping on the high street;
- Enhanced consumer choice - consumers have access to products on a local, national and international basis, as well as an extensive range and depth of products;
- Reduced search and transaction costs - consumers can compare prices at low cost and marketing costs to sellers are low;
- Cross-border trade - consumers can easily buy products from sellers based in other countries;
- Price discovery – eBay's auction format assists in the formation of market-clearing prices; and
- Formation of new markets – by bringing together buyers and sellers of specialist or second-hand products that would otherwise struggle to find a market, eBay facilitates the development of markets that wouldn't otherwise exist.

Another identified benefit is small business creation. For example, according to a 2006 study conducted by AC Nielsen on behalf of eBay found that approximately 1.3 million sellers around the world use eBay as their primary or secondary source of income, with an estimated 630,239 in the United States. The Internet, and online marketplaces such as eBay, provides entrepreneurs and small and medium-sized enterprises (SMEs) with an opportunity to penetrate established markets and create new markets.

People looking for items on eBay may either browse goods by categories or using search functionality. One of the categories on the eBay platform in which individuals and SMEs can offer goods is "Cell Phone and PDAs." A recent search of "used" within this category on the ebay.com platform returned five thousand two hundred fifty-nine (5,529) listings. Naturally, used phones have a greater chance for resale, and will appeal to a greater pool of potential purchasers, if they may be unlocked since they can select the carrier of their choice. It is eBay's belief that renewing the exemption will continue to foster competition in the wireless marketplace, continue to create opportunities for SMEs, and benefit consumers without adversely impacting copyrighted works.

In fact, a failure to renew the exemption as proposed very likely will harm consumers generally, and eBay SMEs specifically. One of my responsibilities within eBay is to provide legal support for the Verified Rights Owner ("VeRO") program. Implemented in 1998, eBay's VeRO program is the most advanced and successful notice and take-down program of its kind, and is designed to receive 17 U.S.C. § 512 DMCA notices as well as other notices of infringement. Currently, there are over thirty-one thousand (31,000) official participants in the program. As might be expected with a program of this size, there are instances where reporting parties may be unsophisticated about intellectual property laws and rights and they benefit from guidance and additional resources that can help educate them regarding intellectual property

laws as well as the purpose and proper use of the VeRO program. As might also be expected, there are other instances where reporting parties test the outer limits of what may qualify as a good faith belief that their intellectual property rights are being infringed. For example, unfounded notifications of claimed infringement submitted for the purpose of interfering with a competitor are clearly abusive. Additionally, product manufacturers may desire to limit or control the secondary market. For example, see the recent *Wall Street Journal* article which explores role of right owner VeRO notifications in minimum pricing enforcement efforts by manufacturers:

http://sec.online.wsj.com/article/SB122835660256478297.html?mod=most_viewed_week.

Based on our experience in managing the VeRO program, we are confident that in the absence of the requested exemption, wireless providers will submit DMCA notices through the VeRO program in an effort to remove certain cell phones from the eBay platform – to the detriment of consumers, SMEs and eBay. Indeed, eBay understands that there are wireless providers that, in fact, pursue legal claims alleging circumvention of copyrighted software protection system under § 1201(a)(1). To help ensure that eBay sellers are not subject to such legal actions or DMCA notifications, an explicit exemption is needed making clear that SMEs, including eBay sellers, are entitled to engage in non-infringing unlocking activities.

B. Concluding Remarks

In closing, given that handset unlocking is a non-infringing activity that serves substantial needs in the marketplace, and because § 1201(a)(1)(A) may otherwise prohibit handset unlocking, eBay believes the Copyright Office was correct in 2006 to adopt an exemption from the anti-circumvention provisions of the DMCA for computer programs that operate wireless handsets, and we recommend that an exemption of this type be renewed for an additional three-year period.

Very truly yours,



Daniel Dougherty
Sr. Director, Intellectual Property