

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

In the Matter of)
)
Exemption to Prohibition on)
Circumvention of Copyright Protection)
Systems for Access Control Technologies)
)

Docket No. RM 2008-8

To: The Copyright Office

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

MetroPCS Communications, Inc. ("MetroPCS") hereby submits its comments in response to the *Notice of Proposed Rulemaking*¹ in the above-captioned proceeding pertaining to the Digital Millennium Copyright Act ("DMCA").

I. SUMMARY

MetroPCS earlier filed comments on December 2, 2008 in response to the *Notice of Inquiry*,² in which it proposed an extension, in slightly modified form, of the current exemption to the DMCA that allows the unlocking of wireless handsets to enable them to be placed in service on a wireless telecommunications network.³ Several other parties proposed similar exemptions.⁴ MetroPCS has reviewed the alternative proposals, and has discussed them with the other proponents in an effort to reach a consensus on a single proposed exemption related to the

¹ 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. 2, 2008) ("*NPRM*").

² See *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) ("*NOI*").

³ See Comments of MetroPCS;

⁴ Comments of Pocket Communications; Comments of Wireless Alliance, LLC, ReCellular, Flipswap, Inc.

(Continued...)

unlocking of wireless devices to enable them to be placed in service on wireless communications networks. As a result, MetroPCS files these comments to propose minor clarifying changes to its previously proposed exemption from the prohibition on circumvention of copyright protection systems for access control technology for computer programs that operate wireless communications devices.⁵ The following is respectfully shown:

II. PROPOSED CLASS EXEMPTION (AS REVISED)

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.

As noted above, MetroPCS is proposing this revision in order to incorporate and address certain aspects of the other proposals submitted in this proceeding, including the following proposals:

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;

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("Comments of Wireless Alliance").

⁵ *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 codified at 37 C.F.R. pt. 201).

*Proponent, Wireless Alliance, LLC, et al (“Wireless Alliance”).*⁶

MetroPCS discussed these proposals and the variations therein with the proponents and other interested parties in an effort to forge a consensus on a single exemption proposal.

MetroPCS submits that the revised exemption it now proposes accomplishes the intended purpose, reduces ambiguity and reduces the potential for unintended consequences from any adopted exemption.

III. STATUTORY FACTORS

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.

In its previous comments, MetroPCS demonstrated in detail 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).⁷ MetroPCS also demonstrated that adverse effects are more likely than not to occur if the proposed exemption is

⁶ The Copyright Office also grouped the proposed exemption of Fred von Lohmann and Jennifer S. Granick, Electronic Frontier Foundation (5A), with the MetroPCS, Pocket, and Wireless Alliance proposed exemptions. However, that exemption deals with a different class of works than what has been proposed by MetroPCS, Pocket and Wireless Alliance, and thus MetroPCS does not comment on such proposed exemption here.

⁷ 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).

not renewed.⁸ MetroPCS' previous comments favoring a renewal of the wireless handset unlocking exemption apply equally to its revised proposed exemption.

IV. RENEWING THE EXEMPTION IS JUSTIFIED

It is significant that multiple diverse parties have submitted exemption proposals that in effect extend the prior exemption. MetroPCS generally supports the proposals submitted in response to the Copyright Office's *NOI*, listed as 5B (MetroPCS), 5C (Pocket), and 5D (Wireless Alliance). Viewed as a whole, these similar proposals demonstrate that the Copyright Office was correct in 2006 to adopt an exemption from the anticircumvention provisions of the DMCA for computer programs that operate wireless handsets,⁹ and that handset users, the intended beneficiaries of the exemption, are reaping the intended benefits of the exemption. As a result, MetroPCS strongly recommends that an exemption of this type be renewed for an additional three-year period.

As demonstrated by the exemption proponents, software locks on wireless devices are unnecessary for the protection of copyrighted works – the DMCA's primary purpose – and in fact are being used to protect interests not covered by the DMCA. As MetroPCS previously noted, “[s]uch locks are used exclusively to bind handsets to specific carriers and consequently block consumers’ freedom of choice for wireless service.”¹⁰ MetroPCS reiterates that a failure to renew the prior exemption, with the proposed clarifications, would substantially harm consumers by allowing carriers to use the DMCA to prevent customers from utilizing wireless communications devices they have purchased to receive service on competing carriers’ networks.

⁸ MetroPCS incorporates by reference into these comments its previous filed comments.

⁹ *Final Rule* at 68476.

¹⁰ Comments of MetroPCS at 3; Comments of Pocket at 3; Comments of Wireless Alliance at 5-6.

MetroPCS, Pocket, and Wireless Alliance all submitted comments in response to the *NOI* urging the Copyright Office to adopt an exemption from the anticircumvention provisions of the DMCA for computer programs that operate wireless handsets. Viewed as a whole, these comments convincingly demonstrate the necessity of the Copyright Office adopting an exemption during this rulemaking proceeding that is substantially similar to the exemption adopted previously by the Copyright Office. All of the commenters demonstrated that a renewal of the exemption would continue to foster competition in the wireless marketplace without adversely impacting copyrighted works. The Wireless Alliance remarked that using a mobile device on the network of a customer's choosing "is pro-competitive and non-infringing."¹¹ Pocket commented that "[t]he 2006 exemption that allowed consumers to unlock their handsets is good for both the market and consumers," and "carrier locks dramatically reduce the benefits of free market forces within each silo of customers that are captive to a particular carrier."¹² In addition, as noted by MetroPCS, the Copyright Office's adoption of the prior exemption in 2006 "has allowed a significant number of United States customers to utilize existing handsets to purchase competing services. A failure to renew this exemption would substantially harm consumers by allowing carriers to prevent customers from utilizing [devices] which they have purchased to receive service on competing carriers' networks."¹³ Further, the exemption has not posed a problem for carriers to limit activities which are not exempt from the DMCA.

¹¹ Comments of Wireless Alliance at 3.

¹² Comments of Pocket at 3.

¹³ Comments of MetroPCS at 3.

V. **CLARIFICATION OF THE PROPOSED EXEMPTION WILL ELIMINATE AMBIGUITY AND REDUCE THE POSSIBILITY OF UNINTENDED CONSEQUENCES**

Each of the unlocking proposals submitted in support of a renewal of the Copyright Office's prior exemption was substantially similar to the current exemption. However, each proposed exemption contained some degree of variation from the others in order to address certain ambiguity perceived by the proponents. MetroPCS continues to support the exemption it proposed in response to the *NOI*. However, after consideration of the proposals of Pocket and Wireless Alliance, MetroPCS submits here a slightly revised proposal that is intended to eliminate ambiguity and reduce the possibility of unintended consequences. As earlier noted, MetroPCS' revised proposed exemption is:

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.

MetroPCS acknowledges that this proposed formulation of the exemption differs from the Copyright Office's prior exemption in a number of respects. Following is a redlined version of the exemption that is currently in effect in the *Final Rule* on which the changes proposed by MetroPCS are highlighted in a "Track Changes" mode:

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.

This revised formulation does not fundamentally alter the substance and intent behind the Copyright Office's existing exemption. Rather, this revised proposal is intended to take into consideration some of the changes proposed by Pocket and the Wireless Alliance, as well as to

clarify the language of the proposed exemption based upon the experience of MetroPCS in the wireless industry, in order to reduce ambiguity surrounding the exemption and to reduce the possibility of unintended consequences that may arise due to the exemption. The MetroPCS variations are discussed one-by-one in the paragraphs that follow.

The existing exemption commences with the phrase “computer programs in the form of firmware” for the proposed class. However, a limitation of the exemption to “firmware” may allow wireless providers to lock software on a wireless communications device through software not contained in firmware or at another level of the software different from the bootloader or operating system, which arguably might not fit the definition of firmware. Indeed, Pocket correctly notes that there are “ever-expanding strategies that are being used to control mobile handsets beyond what has been classically understood as ‘firmware.’”¹⁴ Thus, MetroPCS proposes using only the term “computer programs” and striking “firmware” in this clause. Such a formulation will eliminate unnecessary controversy, as well as reduce the possibility of a carrier being able to circumvent the exemption by locking a wireless device with software not contained in firmware or at a level of the computer program that might not be considered firmware. This broader wording is intended to capture all types of computer programs on wireless communications devices where locks are included to prevent access to another carriers’ wireless network. However, since the purpose of the unlocking remains limited in the remainder of the exemption, this change does no violence to the core objectives of the Copyright Office.

The original exemption next included the phrase “wireless telephone handsets.” MetroPCS submits that the Copyright Office should change this phrase because “wireless

¹⁴ Comments of Pocket at 1.

telephone handsets” is not commonly or traditionally used in the communications world, and is too limited. “Wireless telephone handsets” may not encompass a variety of common devices that consumers utilize over wireless communications networks.¹⁵ For instance, under some characterizations, certain devices such as wireless broadband cards, or smartphones and other wireless devices that have keyboards and computer capability, might fall outside of the definition or plain English understanding of “wireless telephone handsets.” Indeed, as noted by Pocket, “a number of products that represent substantial commerce in the marketplace utilize communication handsets that may not qualify as telephone handsets,” such as beepers and text devices.¹⁶ Such devices may also have their computer software locked by the original carriers, and such locks would prevent consumers from using such devices on a different carrier’s network. Consequently, all of the same reasons referenced by MetroPCS in its earlier comments as to why wireless telephone handsets should be included in the exemption would apply equally to all wireless communications devices. Thus, MetroPCS proposes that the exemption specify “wireless communications devices” in order to protect all wireless products that may be used on wireless communications networks from being locked for use only on the original carrier’s network.

Next, MetroPCS proposes that the Copyright Office use the plural phrase “wireless communications networks,” rather than the singular phrase “wireless telephone communication network.” In the first instance, the term “wireless communications networks” more accurately describes the networks from which the devices receive services. The term “wireless telephone

¹⁵ In its comments in response to the *NOI*, MetroPCS noted that “[f]or the purposes of these comments, the term ‘handsets’ refers to any device used to receive wireless services.” However, as discussed above, the better course is to modify the text of the exemption to make it clear, rather than separately discussing the definition of “wireless telephone handsets.”

communication network” does not enjoy common usage or have a well-known meaning. Indeed, a recent computer search of FCC decisions revealed that the term “wireless telephone communication network” can be found only once in the FCC Record – and that was in a proceeding that references the phrase in the Copyright Office’s 2006 exemption. In contrast, “wireless communications networks” is a term that is commonly used to describe the networks at issue here, and appears throughout the FCC Record. Moreover, using the plural “networks” instead of the singular “network” properly recognizes the fact that this exemption covers a device that is connecting not only to the network of a home carrier, but also to the network of any roaming carrier.¹⁷ Without such expansion, it may be unclear whether devices can be enabled to receive only home carrier services or roaming services as well.¹⁸ These changes help clarify the text of the exemption, without changing the meaning or intent of the Copyright Office’s original formulation.

MetroPCS also proposes that the word “sole” be removed from the proposed exemption. As noted by the Wireless Alliance, “it has become clear since the last rulemaking that federal district courts have denied motions to dismiss and granted relief on § 1201 claims against phone unlockers where the unlocking was for the purpose of lawfully connecting to a wireless telephone communication network. . .”¹⁹ Thus, “sole” has been interpreted by some to mean that the exemption may not apply to situations where there might be a purpose for circumvention in

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¹⁶ Comments of Pocket at 2.

¹⁷ Roaming services allow a consumer to use their wireless services over an area larger than what is covered by the network that is owned or operated by their home wireless provider, by allowing such devices to “roam” over such networks.

¹⁸ MetroPCS submits that the current exemption covers both home and roaming networks because the lock is the same for both. Further, since a handset that can only be used for local service will unnecessarily restrict the use of the device, the exemption should be clarified to include the broader term.

¹⁹ Comments of Wireless Alliance at 3.

addition to connecting to wireless communications networks, such as where the unlocker has a commercial purpose of earning a fee. MetroPCS agrees with the Wireless Alliance that such cases have been wrongly decided, and that, while the exemption as adopted previously does not currently exclude the actions of the Wireless Alliance, it should be clarified to remove all doubt. MetroPCS also agrees with the Wireless Alliance comment that “[t]he 2006 exemption was premised on the fact that cell phone unlocking is a noninfringing activity,” and such determination turned on the fact “that it simply does not intrude on the exclusive rights granted to copyright owners . . .”²⁰ The essential non-infringing character of unlocking does not change merely because the unlocking is done with a commercial objective in addition to enabling connection. Thus, the word “sole” is unnecessary. Indeed, the Wireless Alliance made the commercial business model of its members clear to the Copyright Office in 2006, and the Copyright Office adopted an exemption similar to the one proposed by Wireless Alliance. Thus, the Copyright Office should adopt during this rulemaking proceeding language that fully implements the proposed exemption to make its scope completely clearer to courts and others. MetroPCS believes that “[o]nly an explicit exemption will reassure customers and recyclers that they are entitled to engage in noninfringing unlocking activities,”²¹ and thus the word “sole” is unnecessary for the proposed exemption.

Lastly, while MetroPCS believes that the term “lawfully” should remain as part of the exemption, it believes that the term should be clarified by the Copyright Office to avoid mischief. MetroPCS believes that the term lawfully, as included in the exemption, should mean that users are not be able to circumvent computer programs with locking technology in order to hack into a

²⁰ *Id.* at 12.

²¹ *Id.*

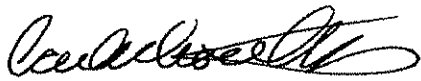
network to steal airtime, or in order to connect to a wireless communications network without paying fees to the ultimate network provider. To the extent that the term lawfully may have other meanings, MetroPCS submits that the Copyright Office should make clear that lawfully means that the circumvention is performed in order to enable services purchased from the serving carrier.

VI. CONCLUSION

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

Respectfully submitted,

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