

LIBRARY OF CONGRESS
UNITED STATES COPYRIGHT OFFICE
Washington, D.C.

In the Matter of
***EXEMPTION TO PROHIBITION ON
CIRCUMVENTION OF COPYRIGHT PROTECTION
SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES
(Docket No. RM 2008-8)***

COMMENTS ADDRESSING THE PROPOSED CLASSES OF EXEMPT WORKS
in Response to:
NOTICE OF PROPOSED RULEMAKING DATED DECEMBER 29, 2008
73 Federal Register 79425

Submitted Monday, February 2, 2009, by
YOUGHIOGHENY COMMUNICATIONS-TEXAS, LLC
D/B/A POCKET COMMUNICATIONS

COMMENTS ADDRESSING THE PROPOSED CLASSES OF EXEMPT WORKS

I. BACKGROUND

In 2006, the Library of Congress issued a Digital Millennium Copyright Act Exemption¹ (the “2006 Exemption”) authorizing what has become known as “cell-phone unlocking,” but that 2006 Exemption will only remain in effect until October 28, 2009.

On October 6, 2008, the United States Copyright Office (the “Office”) of the Library of Congress published in the Federal Register a Notice of Inquiry for Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (the “October Notice”) requesting written comments in order to elicit evidence on whether non-infringing uses of certain classes of works (“Classes”) are, or are likely to be, adversely affected by the anti-circumvention prohibition² (“Anti-Circumvention Provision”) of the Digital Millennium Copyright Act of 1998.

On December 2, 2008, Youghioghenny Communications-Texas, LLC D/B/A Pocket Communications (“Pocket”) submitted written comments (our “December Comments”) in response to the October Notice.

On December 29, 2008, the Office published in the Federal Register a Notice of Proposed Rulemaking (the “December Notice”) listing the Classes the Office will consider for exemption from the Anti-Circumvention Provision and requesting additional written comments in order to elicit additional evidence either supporting or opposing such Classes.

Pocket now submits these comments (our “February Comments”) addressing the proposed Classes in response to the December Notice. These February Comments supplement and propose modest refinements to our December Comments and support and propose modest refinements to other Classes listed in the December Notice.

¹ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed.Reg. 68472, 68480 (November 27, 2006).

² 17 U.S.C. §1201(a)(1).

II. COMMENTING PARTY

Pocket is a Delaware limited liability company doing business as Pocket Communications. Although much smaller than mega-carriers such as Sprint-Nextel, AT&T, T-Mobile or Verizon, Pocket is a regional carrier that provides prepaid, flat-rate, unlimited-use wireless voice and data services over its South Texas communication networks. While Pocket provides wireless communications devices (“Devices”) for many of its wireless customers, it is also willing to let customers continue to use Devices they already own if they so desire.

III. CLASSES ADDRESSED

Our December Comments proposed the following Class for an exemption from the Anti-Circumvention Provision:

Computer programs in the form of firmware or software that enable mobile communication handsets to connect to a wireless communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless communication network. (Class 5C³ proposed by Pocket)

Upon a review of the Class groupings as listed in the December Notice, we realized that we and several others proposed Classes that were similar in many respects. In an effort to streamline this rulemaking process and build consensus among each of the proposers of the Classes similar to Class 5C, we conferred with such other proposers to harmonize these Classes. As a result, these February Comments also support and propose modest refinements to the following Classes that were listed in the December Notice:

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. (Class 5B⁴ proposed by MetroPCS Communications, Inc.)

³ In the December Notice, the Office characterized this Class as Class 5C.

⁴ In the December Notice, the Office characterized this Class as Class 5B.

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 motive. (Class 5D⁵ proposed by Jonathan Newman, Wireless Alliance, LLC, et al.)

For reasons discussed further in Section V, Subsection B of these February Comments, we now respectfully request the Register of Copyrights (the “Register”) recommend to the Librarian of Congress (the “Librarian”) that Class 5B, Class 5C and Class 5D be consolidated and slightly modified to exempt the following Class (the “Proposed Harmonized Class”) from the Anti-Circumvention Provision for the next triennium:

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. (Proposed Harmonized Class harmonizing Classes 5B, 5C & 5D)

IV. ARGUMENT SUMMARY

Several of the larger wireless communications network providers (“Providers”) employ various programming techniques (“Locks”) to make it very difficult for their customers to use Devices on competing networks. For a customer to be able to switch Providers and use a previously purchased Device on a different network, a customer must circumvent (or unlock) the Locks. Without this unlocking option, that customer would be forced to remain on the network of their current Provider or purchase a new Device and discard their previously purchased Device.

While unlocking a Device does not infringe on any copyright, without an exemption to the Anti-Circumvention Provision, consumers and their agents are effectively prevented from accessing their Device programming to unlock that Device.

⁵ In the December Notice, the Office characterized this Class as Class 5D.

The 2006 Exemption paved the way for consumers to unlock their Devices. The loss of that 2006 Exemption will either shackle consumers to one network or force those consumers to incur unnecessary expenses by having to purchase new Devices and add to our landfills by having to throw away their current Devices. The non-infringing activity of unlocking a Device should be preserved and protected by adopting the Proposed Harmonized Class in recognition that the 2006 Exemption remains a valid and necessary tool to protect consumers against an anti-competitive business practice and protect our environment against massive waste. If the Proposed Harmonized Class is not adopted, the predictable and foreseeable results would be great harm to our environment as well as reduced competition among Providers, which in turn would result in higher costs, reduced innovation, and inferior services for consumers.

V. SUPPORT FOR ARGUMENT

In determining which Classes will be exempted from the Anti-Circumvention Provision, the Librarian is statutorily required to consider the following factors:⁶

- (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 these February Comments, we will demonstrate that these factors support the adoption of the Proposed Harmonized Class and that actual harm is likely to occur if the Proposed Harmonized Class is not adopted.

⁶ 17 U.S.C. §1201(a)(1)(C).

A. UNLOCKING IS A NON-INFRINGEMENT ACTIVITY

As we stated in our December Comments, unlocking a Device for use on a competing network is a non-infringing, fair use of a copyrighted work because it does not require duplicating any Device programming or exercising any of the other basic rights afforded by copyright (a customer who owns an unlocked Device is not displaying or using the Device's programming except in connection with the use of that Device). Unlocking a Device merely redirects the Device to work on a different network.

An analogy we used in our December Comments that is particularly instructive is that changing the Provider of a Device is more like changing the factual information included in a copyrighted work rather than changing the protectable expression of that work. Just as a customer should have the right to add features to their Device like ringtones, games and other applications, a customer has the right to redirect their Device in order to switch Providers. Simply stated, when consumers unlock Devices, neither they nor their agents are copying any copyrighted material or using it for any unlawful purpose.

B. RATIONALE FOR MODEST REFINEMENTS TO THE PROPOSED CLASS

Both the October Notice and the December Notice authorize commenting parties to suggest modest refinements to the Classes proposed, provided that new Classes are not introduced.⁷ Recognizing various similarities between proposed Classes 5B, 5C & 5D,⁸ we have conferred with the respective proposers of each of those Classes in an attempt to reach a common consensus on acceptable wording for the Class.

⁷ Section 2C of the October Notice provides that "Comments responsive to the proposed classes may also propose modest refinements to the proposed classes . . . but may not propose completely new classes of works." This concept is restated in the December Notice.

⁸ Class 5A, pertaining to what is commonly referred to as "jailbreaking a phone," is thought to stand on its own, separate from Classes 5B, 5C & 5D. Even though a compound class definition could be imagined to also encompass Class 5A, any simplifications that would likely arise in the course of reaching such a complicated class definition would run the risk of creating unintended consequences.

The result of those efforts to find consensus has culminated in the following Proposed Harmonized Class:

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. (Proposed Harmonized Class harmonizing Classes 5B, 5C & 5D)

It will be recognized that this newly proposed Class does not fundamentally change the scope of the 2006 Exemption. Nonetheless, most of the differences between this Proposed Harmonized Class and our initial Class 5C proposal are thought to eliminate ambiguity and reduce the possibility of unintended consequences, and we recognize the overarching wisdom of this approach. As is typical of compromise, though, we remain cautious about some of the differences, and we feel it is imperative that the resulting Proposed Harmonized Class must be given the proper interpretation. Accordingly, we propose that Classes 5B, 5C & 5D be consolidated and slightly modified to be replaced by the Proposed Harmonized Class, but we also respectfully submit the following observations for a better understanding of the proper interpretation of the Proposed Harmonized Class.

(1) Deletion of the phrase “in the form of firmware or software”

While a Device’s “computer programs” are essentially the same as its “firmware or software,” there is wisdom in deleting one or the other of these phrases from the Class in order to eliminate repetition and promote clarity of scope. It is worth repeating though that the words “or software” had been proposed previously in light of the recognition that removal of a Device Lock does not always require access to what is classically understood as the firmware of a Device. As examples, without going into all the details that could be elaborated by Mr. Posner, unlocking most CDMA phones involves resetting simple numbers stored in the flash memory bank for the Device, and most GSM phones use SIM card locking strategies that prevent the Device from working with other Providers’ SIM cards, which are clearly not part of the classic firmware of a Device. This trend to store locks in software that is not part of the firmware is expected to

continue, particularly if it allows a Provider a way to continue holding customers captive from switching to another network.

(2) ***“Wireless communication devices” versus
“mobile communication handsets”***

“Wireless communication” and “mobile communication” are descriptors that encompass the same things, but “wireless communication” is thought to be slightly more common in the language currently being used in the marketplace.

However, the difference between “handset” and “device” is more material, ensuring that consumers can still seek out unlocking solutions despite the fact that their particular hardware may not technically qualify as a handset. Despite the recent trends in wireless applications, the majority of wireless devices would probably still qualify as handsets in the strictest sense, but this has been rapidly changing with the ubiquitous nature of wireless technology in recent years. While pure communication devices like pagers, text devices and smartphones must connect to a wireless network and are typically locked to a single carrier, more and more basic electronic devices are now incorporating modules that exchange data through a wireless network. Laptop computers remain at the forefront of this trend, with a number of carriers now providing continuous data links via wireless broadband cards that are locked to the given carrier. Even though the outcry for unlocking such technologies is only just beginning to be heard given the immature state of that market, there were several thousand requests for unlocking in this context in 2008 alone.⁹ Particular how-to answers may not be widely available as yet, but the consumer need and demand are very real, for the same reasons as apply to wireless phones.

Because the wireless communications industry is rapidly evolving and changing to address these largely unmet needs, the recharacterization of “mobile communication handsets” as “wireless communication devices” will allow the exemption to evolve with the industry options. The phrase “wireless communication devices” is accurate for cellphones and will continue to be accurate to describe comparable devices where

unlocking options are only now starting to emerge in order to help address the rising consumer outcry.

(3) Deletion of the word “sole” within the exempt purpose clause

As noted in the comments submitted by the Electronic Frontier Foundation in response to the October Notice, the word “sole” in the 2006 Exemption has been a source of unintended consequences, as district courts have occasionally held that cellphone unlocking was not exempt if a financial motive was present in addition to the lawful purpose of connecting to a wireless phone communication network.¹⁰ Because unlocking understandably requires consumers and their agents to find how-to answers from experts, and because the consumer herself is typically motivated to unlock her phone in order to save money, such an interpretation was obviously not the intent of the 2006 Exemption. It is inherent that unlocking will virtually always involve some financial motive in addition to the motive of connecting to another network. We recognize, though, that it was never intended that the word “sole” be interpreted to defeat the 2006 Exemption just because financial motives exist in addition to other lawful motives. Deletion of the word “sole” eliminates this obviously unintended consequence.

(4) Use of the word “lawfully” within the exempt purpose clause

The word “lawfully” has the potential to be equally problematic, but we embrace the most basic intent of this qualifier. The risk, of course, is that the courts will make their own guess at the meaning of the word and the industry might see other unintended consequences. While the misguided possibilities are virtually limitless, we respectfully request that the Office attempt to clarify the intended meaning of the word “lawfully” for these purposes, presumably within the realm of “lawful” purposes encompassing purposes that either do not infringe or are fair uses of the copyrights in the Device’s programming.

⁹ Statement of Paul Posner attached hereto as Exhibit A.

¹⁰ Page 3 of comments by Jennifer Granick, Esq. and Fred von Lohmann, Esq. of the Electronic Frontier Foundation, on behalf of The Wireless Alliance, LLC., ReCellular, and Flipswap, Inc., submitted December 2, 2008.

C. ACTUAL HARM IF PROPOSED HARMONIZED CLASS IS NOT ADOPTED

Without adoption of the Proposed Harmonized Class, a customer who wants to switch networks to a different Provider will have two options when their former Provider has Locks in the Device programming – either (1) abandon the non-infringing rights and reinstate service with the former Provider, or (2) abandon the non-infringing rights and throw the Device and its toxic components into a landfill. This is a classic lose-lose situation. Not only is the consumer actually harmed by a forced termination of the non-infringing activity but in all likelihood, the environment will actually be harmed. As discussed below, without the Proposed Harmonized Class, the Anti-Circumvention Provision would have a critical adverse impact on the wireless communication network market, our environment, and American consumers.

(1) Public Health, Environment and Economic Benefits

We estimate that at least 80 million Devices are thrown away and end up in our landfills each year.¹¹ Disposing of Devices in the trash represents an imminent threat to public health and the environment. Devices contain toxic substances such as lead, chromium, arsenic, beryllium, cadmium, copper, mercury, zinc and antimony. When Devices are landfilled or incinerated, these toxic substances are typically released into the environment. If these substances leach from landfills and other areas where discarded Devices are stored, the impact on human health can be disastrous. Exposure to these toxins leads to a wide range of harmful health effects including irreversible neurological damage, various forms of cancer, renal disease, and cardiovascular and reproductive problems.

A direct result of the 2006 Exemption is that more consumers are choosing to reuse their Devices after switching networks rather than throwing them away¹² which is keeping Devices out of landfills and preventing the poisoning of our environment. The adoption of the Proposed Harmonized Class encourages this behavior and sends a strong message to consumers and the wireless industry that reuse of Devices is a critical

¹¹ Statement of Paul Posner attached hereto as Exhibit A.

component of any plan to protect our precious environment and enhance public health.

Along with preventing the release of hazardous materials into our air, land, and water, reusing Devices offers significant economic benefits. Devices are made from valuable resources such as precious metals, copper, and plastics, all of which require energy to extract and manufacture. Reusing Devices which has been enabled by the 2006 Exemption and will continue to be enhanced by the Proposed Harmonized Class conserves these natural resources and keeps useable and valuable material out of landfills and incinerators. If Devices are reused and enabled to work on other networks by virtue of the Proposed Harmonized Class, the mining and processing needed to secure these metals would be avoided saving tremendous amounts of time, energy and money.¹³

(2) Harm to Consumers

In the Background Section to the Final Rule that embodied the 2006 Exemption, the Register concluded that “the access controls do not appear to actually be deployed in order to protect the interests of the copyright owner or the value or integrity of the copyrighted work; rather, they are used by wireless carriers to limit the ability of subscribers to switch to other carriers, a business decision that has nothing whatsoever to do with the interests protected by copyright.”¹⁴ This remains as true today as it was two years ago. Locks allow certain Providers to minimize competition and discourage innovation in the wireless communications market. The business model of these Providers is to force its customers to stay on their network by prohibiting these customers to use Devices (lawfully purchased and owned by such customers) on any other network. As a result of this anti-competitive business practice, customers get poorer service, higher prices and fewer solutions.

As a Provider, Pocket rejects this business model and believes that when customers find ways of properly unlocking their Devices, barriers to competition come

¹² Id.

¹³ Id.

¹⁴ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68472, 68476 (November 27, 2006).

down, innovative start-up Providers are able to enter the market, and free market factors allow customers to realize cost savings.

With the adoption of the 2006 Exemption, consumers are able (and with the adoption of the Proposed Harmonized Class, consumers will continue to be able) to choose amongst numerous competing Providers and can decide for themselves whether to go for more features and service or whether to go for a discount option in order to save money and minimize waste. The result democratizes the wireless landscape and allows expansion of service to consumers at all income levels. The removal of barriers to competition, in turn, allows Device subsidization to become a choice rather than the de facto standard that has favored mega-Providers. Additionally, consumers are able to choose amongst all competitors rather than being forced to only buy Devices from the network that they are tied to, again increasing competition and ultimately allowing customers to save on costs.

D. STATUTORY FACTORS

As the Register correctly noted in the Final Rule announcing the 2006 Exemption and is still currently the case, because the Locks do not actually protect against infringement of a copyrighted work, the analysis to be conducted on the first four statutory factors is neutral.¹⁵ The availability for use of copyrighted works would not be adversely affected by permitting an exemption for Locks; there would be no impact on the availability for use of works for nonprofit archival, preservation, and educational purposes or on the ability to engage in criticism, comment, news reporting, teaching, scholarship, or research; and circumvention of Locks to connect to alternative wireless communications networks would not be likely to have any effect on the market for or value of copyrighted works.

Thus, after determining that there is no legitimate copyright infringement concern to protect by locking Devices, it would appear that the fifth factor – “such other factors as the Librarian considers appropriate” - would be of utmost concern when deciding

¹⁵ 71 Fed. Reg. 68472, 68476.

whether or not to adopt the Proposed Harmonized Class. We feel that this factor overwhelmingly supports the case for the adoption of the Proposed Harmonized Class.

Consider again each of the following observations supported by this February Comment:

- rejecting the Proposed Harmonized Class would only protect an anti-competitive business model, not any legitimate copyright interest;
- adopting the Proposed Harmonized Class would ease the immense environmental burden of discarding Devices; and
- adopting the Proposed Harmonized Class would foster competition in the communications industry which is the driving force behind innovation and reduced costs.

It is also noteworthy that, with the signaling exception of mega-carriers that benefit from holding customers captive against switching to more affordable networks, exempting wireless unlocking is supported by virtually everyone who comments on the issue. In response to the October Notice, the Office received comments from two independent wireless network providers [Pocket and MetroPCS Communications, Inc.] as well as a variety of different reusers and recyclers of wireless devices [The Wireless Alliance, LLC., ReCellular, and Flipswap, Inc., all of which were represented by Jennifer Granick, Esq. and Fred von Lohmann, Esq. of the Electronic Frontier Foundation (EFF)]. Just this past month, in January, two groups [Houdini and the EFF] then separately launched public survey efforts to gather comments from a wider audience. In less than three weeks time, the Houdini survey resulted in more than a six-hundred-thirty different individuals who clearly indicated their support for exempting Classes 5B, 5C and 5D of the December Notice, and the EFF survey produced more than eight-thousand, four-hundred comments in support of such exemptions.¹⁶ Such overwhelming, voluminous support from such a diverse cross section of the public clearly reflects on the need for exempting the Proposed Harmonized Class.

¹⁶ The results of both survey efforts are supported by the Statement of Paul Posner, attached hereto as Exhibit A.

VI. CONCLUSION

The purpose of this rulemaking process is to remedy situations where the application of the Anti-Circumvention Provision creates a substantial adverse effect on non-infringing uses. Because Device unlocking is a non-infringing activity that serves such substantial needs in the marketplace, benefits consumers, protects our environment, and, most importantly, because the Anti-Circumvention Provision would otherwise prohibit Device unlocking, we respectfully urge the Register to recommend to the Librarian that the Proposed Harmonized Class be adopted.

YOUGHIOGHENY COMMUNICATIONS-TEXAS, LLC

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EXHIBIT A

**STATEMENT OF PAUL POSNER IN SUPPORT OF
POCKET'S COMMENTS ADDRESSING PROPOSED CLASSES OF EXEMPT WORKS**

FEBRUARY 2ND, 2009

My name is Paul Posner. I am the President of Youghioghenny Communications-Texas, LLC, a Delaware limited liability company that does business as Pocket Communications. I submit this statement in strong support of my company's comments to the United States Copyright Office of the Library of Congress with respect to the ongoing rulemaking to determine proper exemptions to the anti-circumvention prohibition of the Digital Millennium Copyright Act of 1998 (the DMCA).

In our formal written comments, we propose and address exemptions to the DMCA to permit consumers to unlock their wireless devices for the purpose of lawfully connecting to any wireless network. In support of those comments, in this statement I am sharing some of my beliefs that have been formed from my years of experience in the wireless industry.

Unlocking is a Non-Infringing Activity. I am not going to deal with the argument that unlocking wireless devices is a non-infringing activity because I feel that is a given. That case has been made quite cogently by our formal comments and in the comments of others, and even by the Register of Copyrights and the Librarian of Congress in the final rule that announced the DMCA's 2006 cellphone unlocking exemption.

Protecting the Free Market is Critical. A continued exemption that authorizes wireless unlocking so devices can work on competing networks is fundamental to protecting one of the core concepts that the American economy was built on – competition. So long as a wireless device is locked, its owner is forced to use the network of the carrier that sold her the device. Absent unlocking, there is no way for her to switch to another carrier unless she chooses to abandon that device and purchase a new one. This barrier creates a huge disincentive for anyone to switch networks and is a tremendous benefit to the wireless network carriers that have adopted this business model. Despite the financial attractiveness, however, permanent cellphone locks protect no legitimate interest other than an anti-competitive business model.

As the founder of a wireless network carrier, I made the conscious decision not to adopt this business model. Believing that innovation is stifled when the free market is stifled, I chose to create a business that depends on competition rather than one that cripples free market forces. I chose to create a business that lets consumers make decisions about what they want and need rather than trying to lock them up and then dictate what I would give them.

At Pocket, we are sensitive to the needs of the underserved lower income segment of the wireless communications market. The bulk of my customers are part of a vulnerable

population that is constantly looking to stretch each dollar to cover necessary living expenses. Such consumers would be the most vulnerable without the unlocking exemption from the DMCA. When Jane Consumer is under financial pressure because the economy is tough or her income is down, etc., she is forced to find less expensive alternatives for all her services, including her wireless. However, if she cannot unlock her old wireless device to switch networks, she has to choose between (a) throwing away the old one and buying a new one, or (b) keeping the old one and staying with the carrier whose rates were hurting her to begin with. The rationale for her to switch networks to save money quickly disappears if she has to buy a new device, and the carriers that use locks know this. Rather than endure the expense of purchasing a new device, Jane Consumer predictably stays with the carrier she intended to leave. Because a carrier's locks can effectively prevent customers from leaving when they need to, such carriers have very little incentive to improve service or lower costs in order to entice her to stay.

However, thanks to the 2006 unlocking exemption, because we and our competitors are able to let consumers continue using the wireless devices they already own, they can legitimately switch networks without the cost of buying a new phone. The result offers alternatives that are less expensive both on the front end and the long term. This is not only ideal for consumers who are hurting, but it is almost essential for new entrants into the wireless carrier market. While new service providers depend on being able to offer an affordable way of switching carriers, they typically need to be able to unlock the phones for close to half of their new business in order to survive. Again, thanks to the 2006 exemption, more carriers can enter the market, and consumers are able to save money both on monthly service fees and by not having to purchase new wireless devices.

Because Pocket and carriers like us are able to offer an alternative to the mega-carriers, those mega-carriers in turn are compelled to constantly seek to improve their service and lower their costs. And, coming full circle, the mega-carriers' pressure forces us to do the same, and the entire market is driven to innovate and improve. When the forces of a free market are allowed to flourish, consumers are the ultimate beneficiary.

Protecting the Environment and Natural Resources are Ancillary Benefits. In the hypothetical described above where unlocking was not available, if Jane Consumer did ultimately decide to switch carriers, she would have to either throw away her old device, donate it to a material recycler, or keep it as a paperweight. The United States Environmental Protection Agency (EPA) estimates that as many as 100 million such devices are retired annually in the United States and less than 20 percent of the millions of devices retired annually are recycled, which means that an estimated 80 million devices are thrown away and end up in our landfills each year. Once Jane Consumer throws away her wireless device, she initiates a process that ultimately pollutes the air we breathe, the water we drink, and the land we inhabit. As explained in our formal comments, these wireless devices contain many toxic substances and, when they are landfilled or incinerated, these toxic substances are typically released into our ecosystems and cause tremendous harm to our health and environment.

A direct result of the 2006 wireless unlocking exemption was that more consumers are

choosing to unlock and reuse their wireless devices after switching networks rather than throwing them away. Market-wide estimates are that ten to twenty million phones were unlocked in the United States in 2008 alone. Even just between Pocket and others that Pocket has worked with, close to a million consumers have been seen to unlock their wireless cellphones, and several thousand unanswered requests to unlock wireless modems and the like have been received. While we are a relatively small player in the wireless network market, that is just a fraction of the devices that are being unlocked and, hence, saved from the landfills. It is undisputable that the trend is for consumers to unlock and reuse their wireless devices, keeping increasing amounts of these devices out of our landfills and preventing the resulting harm to our environment.

Combining additional EPA data with our 2008 unlocking estimates (using a median number of 15 million phones unlocked), greenhouse gas emissions were reduced in 2008 alone by an amount equivalent to taking 20,520 cars off the road for the entire year, and enough energy has been saved to power more than 285,000 U.S. households with electricity for the entire year. Moreover, because wireless devices are made from precious metals, copper, plastics and the like, their reuse conserves these natural resources and lessens the impact from the exploration, mining, refining and production needed to generate such resources. Such dramatic reductions and savings are all as a *direct* result of the 2006 DMCA Exemption for cellphone unlocking.

Additional Support. As is further evidenced by the *thousands* of comments submitted by the public, the reasons are overwhelming for ensuring that wireless unlocking continues to be legal and even encouraged. Even though it is widely known that virtually everyone except the mega-carriers recognize the value of continuing to allow cellphone unlocking, this past month we entered discussions with various groups in attempts to find a more objective gauge on public sentiment.

Two of the groups that we worked with – namely, the Electronic Frontier Foundation and Houdini – initiated on-line surveys using the forms appended to this Statement. According to the Electronic Frontier Foundation (EFF), more than 8,400 individuals responded to their survey with an indication that they support continued exemption of cellphone unlocking and cellphone jailbreaking. While Houdini's survey was focused only on the cellphone unlocking exemption and presumably did not receive the extent of publicity achievable by EFF, their survey produced comments from 632 individuals that clearly supported exemption of Proposed Classes 5B, 5C and 5D. The magnitude of these numbers is even more incredible given that the data from each of them was collected in a window of about three weeks' time. As can be judged from the corresponding survey forms themselves (appended to this Statement), they each went straight to the points that we are now supporting, clearly demonstrating that there is a tremendous outcry for a continued exemption to authorize wireless unlocking.

Concluding Remarks. I strongly believe that once a person has bought and paid for a wireless device, that person should have the ability to use that device as they deem appropriate so long as such use is lawful. If that person wants to stay with the carrier that originally sold them the device, so be it. If that person wants to take their device to a

competing carrier, so be it. This choice and the growing competition benefits consumers and is healthy for the communications industry. Without the adoption of the exemption permitting unlocking, instead of consumers making this choice for themselves, their carriers will have the unfettered ability to make that choice for them preventing the benefits of a free and unfettered market. Time and again history shows that when any company is able to eliminate competition and reduce the available options, consumer costs increase and services provided decrease. The proposed exemption supported by our official comment does just the opposite – allowing lower cost alternatives and encouraging innovative solutions. That, all while providing dramatic benefits for the environment and our natural resources.

This is a good exemption, and it should be preserved.

A handwritten signature in black ink that reads "Paul Posner". The signature is written in a cursive, slightly slanted style.

Paul Posner
President, Pocket Communications



Free Your Phone

Cellphone manufacturers use locked software to stifle competition and restrict consumers:

- Apple uses software locks on the iPhone to [censor ebooks](#) and [block mobile applications](#) that would compete with Apple's own software.
- T-Mobile's software locks prevent owners from gaining root access to the [Google Android G1 phone](#), needlessly limiting the phone's bluetooth and other capabilities.
- And virtually every mobile device sold today is locked to a single telecommunications carrier.

Hundreds of thousands of cellphone owners have modified their phones to connect to the network or run the software of their choosing, and many more would like to. But the [Digital Millennium Copyright Act](#) poses a legal threat to phone users, even though the law was supposed to protect copyright owners and distributors of digital music and movies. This threat of litigation has driven consumers underground, stifling innovation and competition.

Now, you can support EFF's request that the Copyright Office grant an exemption to the DMCA that will protect phone users. Sign below to add your name to EFF's request to the copyright office.

Tell the Copyright Office to free your phone!

First Name:

Last Name:

City:

State:

E-Mail:

Check this box to sign up for the Electronic Frontier Foundation's "EFFector" newsletter.

Sign the Letter



A project of the [Electronic Frontier Foundation](#) | [Privacy Policy](#) | [Contact EFF](#)



DMCA Exemption Expires in 2009

Imminent Deadline for Comments

The exemption that allows consumers to "unlock" cell phones in order to switch them from one carrier network to another will expire this year unless the Library of Congress continues to see the light.

Check out the links at the bottom of this page for more information on the Digital Millennium Copyright Act (DMCA), the Cell Phone UnLocking Exemption, and current proceedings before the Library of Congress. The issue is vital and the threat is imminent!

Please Let the Library of Congress Know What You Think...

Customer Information

First Name:	<input type="text"/>
Last Name:	<input type="text"/>
Business or Organization:	<input type="text"/>
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By using this site to submit comments:

(1) you are saying that you support a continued DMCA exemption allowing consumers and their agents to continue accessing their handset programs to unlock those handsets, as set out in the class of works numbered 5C, as well as the similar classes numbered 5B & 5D, in the Notice of Proposed Rulemaking at 73 Federal Register 79425, 79427; and

(2) your comments will be sent to Houdinisoft, which will then compile some or all of the submitted information in a format of their choosing and have it forwarded to the Librarian of Congress, and you are authorizing Houdinisoft to do as much and to otherwise use this information in a manner that they deem appropriate.

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[DMCA \[Wikipedia\]](#)
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