

**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 2011-07

To: The Copyright Office

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

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TABLE OF CONTENTS

I. PROPOSED CLASS EXEMPTION AND SUMMARY 2

II. CTIA REHASHES OLD ARGUMENTS THAT HAVE BEEN PREVIOUSLY PRESENTED AND PROPERLY REJECTED BY THIS OFFICE..... 3

 A. The Register’s prior determinations have precedential value..... 5

 B. The exemption is properly within the scope of this Rulemaking 7

 C. Proponents have met the required burden of proof 8

 D. The limited availability of unlocked devices, or of unlocking by carriers, does not obviate the need for the exemption 9

 E. The exemption does not promote bulk unlocking, and proponents and the Register explicitly have stated that such activities are not covered by the exemption. 11

 F. The scope of this Rulemaking is clearly limited to Section 1201(a)(1) and proponents do not seek in any way to expand it to cover Section 1201(a)(2) services 13

 G. Any changes to the underlying mobile wireless device operating system code are permissible pursuant to 17 U.S.C. § 117(a)(1)..... 14

III. THE AVAILABILITY OF UNLOCKED DEVICES, OR DEVICES UNLOCKED UNDER STRINGENT CONDITIONS, DOES NOT OBTIATE THE NEED FOR A RENEWAL OF THE EXEMPTION..... 17

IV. METROPCS AND OTHERS HAVE PROVIDED SUBSTANTIAL EVIDENCE THAT THE FACTS SURROUNDING WIRELESS DEVICE LOCKING REMAIN THE SAME AND A RENEWAL OF THE UNLOCKING EXCEPTION IS NECESSARY 21

V. GIVEN THE CONTINUED EVOLUTION OF COMMUNICATIONS SERVICES, THE EXEMPTION SHOULD PROPERLY ENCOMPASS ALL WIRELESS DEVICES 22

VI. THE METROPCS CLARIFYING CHANGES TO THE EXEMPTION THAT ARE OPPOSED BY CTIA ARE NECESSARY AND JUSTIFIED 25

VII. CONCLUSION..... 26

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MetroPCS Communications, Inc. (“MetroPCS”) hereby submits its reply comments in response to the *Notice of Proposed Rulemaking*¹ issued in the above-captioned proceeding pursuant to the Digital Millennium Copyright Act (“DMCA”). In summary, MetroPCS respectfully requests that the Copyright Office continue, for an additional three year period, the exemption² from the prohibition on circumvention of copyright protection systems for access control technology for computer programs that operate wireless devices.³ In support, the following is respectfully shown:

¹ See *Copyright Office Notice of Proposed Rulemaking and Request for Comments on the Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technology*, 76 Fed. Reg. 78866 (Dec. 20, 2011) (“*Notice of Proposed Rulemaking*”).

² Although MetroPCS requests that the Copyright Office “continue” the 2010 exemption throughout these Comments, the exemption proposed by MetroPCS, as stated here, differs slightly from the exemption that was granted in 2010. The minor language changes proposed by MetroPCS are intended to allow all wireless device owners (not merely wireless “handset” owners) to have the opportunity to use their devices on a communications network of their choosing, and to prevent wireless providers from using any loopholes to deny consumers the full, pro-competitive benefits intended by the Copyright Office in connection with this exemption.

³ *Copyright Office Final Rule on the Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technology* (“*Final Rule*”) 75 Fed. Reg. 43825 (July. 27, 2010) (to be codified at 37 C.F.R. pt. 201). For the purposes of these Reply Comments, the term “handsets” refers to any device used to receive wireless services.

I. PROPOSED CLASS EXEMPTION AND SUMMARY

MetroPCS filed initial comments in response to the *Notice of Inquiry* on December 1, 2011.⁴ In those comments, MetroPCS requested that the Register extend, in slightly modified form, the current exemption to the DMCA that permits the unlocking of wireless devices to enable them to be placed in service on a communications network of the user's choosing.

MetroPCS proposed the following class exemption, which is substantially similar to the class of works recommended and approved by the Copyright Office in 2010 with limited clarifying changes:⁵

Computer programs, in the form of software or firmware, including data used by those programs, that enable wireless devices to connect to a wireless communications network, when circumvention is initiated by the owner of the copy of the computer program solely in order to connect to a wireless communications network and access to such communications network is authorized by the operator of such communications network.

As the MetroPCS Comments make clear, “[c]ontinuing the exemption for wireless devices would have substantial public interest benefits, and the actual and likely harms that would result from a denial (and the concomitant resurgence of wireless device locking) remain the same – if not worse – than in 2010.”⁶ Significantly, MetroPCS is not alone in its request for the extension of the existing exemption. RCA – The Competitive Carriers Association, Consumers Union and Youghiogheny Communications also support the renewal of the exemption and conclude that extension would have substantial public interest benefits. So, while CTIA purports to represent the interests of the wireless industry in opposing the extension of the existing exemption, the truth is that there is substantial support for the proposed exemption from individual carriers and

⁴ Comments of MetroPCS Communications, Inc. on the Notice of Inquiry, Copyright Office, Docket No. RM 2011-07 (filed Dec. 1, 2011) (“MetroPCS Comments”)

⁵ Attachment A shows a redline of the proposed exemption against the current exemption, adopted in 2010.

from a premier association representing a broad cross-section of competitive wireless telecommunications providers.⁷ Based on the evidence presented, proponents have met their burden to prove that the same harms and potential harms that existed in 2010 still exist today, and therefore the Register should renew the current exemption at a minimum, with strong consideration given to MetroPCS' proposed clarifying changes.

II. CTIA REHASHES OLD ARGUMENTS THAT HAVE BEEN PREVIOUSLY PRESENTED AND PROPERLY REJECTED BY THIS OFFICE

Only one party seriously opposes the renewal of the unlocking exemption – the same party that unsuccessfully opposed the exemption during the last two cycles: CTIA. In doing so CTIA falsely accuses the Register and the Librarian of failing to have acted properly in the past.⁸ However, CTIA fails to provide any meaningful support for this charge or to introduce new evidence as arguments against the exemption. Rather, CTIA merely rehashes old arguments that have already been considered and dismissed by the Copyright Office and the Register. Indeed, while CTIA's opposition may be voluminous, almost all of the questions posed by CTIA can be dismissed with a single phrase – “asked and answered.” CTIA parrots, in many instances word-for-word, the legal and policy arguments raised and dismissed in 2010. While exemption proponents are, of course, required to provide evidence of a continuing harm that an exemption would remedy in each proceeding, it has been plainly stated that “unless persuaded otherwise, the Register is likely to reach a similar conclusion” with respect to a renewed exemption “when

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⁶ MetroPCS Comments 2.

⁷ Indeed, many of the customers taking advantage of the exemption change services to RCA members, which include some of the largest wireless carriers. In addition, since the requested exemption has been repeatedly renewed in the past, no doubt some supporters felt it to be unnecessary to weigh in. Thus, support for the exemption is broader than the comments alone might indicate.

similar facts have been presented.”⁹ In this case, the arguments presented by the proponents are not only similar to those made in past proceedings which persuaded the Copyright Office, they are enhanced. Therefore, contrary to CTIA’s worn and tired arguments, “the Register’s prior determinations have some precedential value.”¹⁰

A comparison of CTIA’s 2009 claims and arguments with CTIA’s 2012 claims and arguments reveals the remarkable degree of similarity between the two sets of claims – which is curious in light of the Register’s and Copyright Office’s 2010 findings unequivocally dismissing these arguments in the last proceeding. The 2010 Register findings specifically concluded that: (1) the proposed unlocking exemption is squarely within the scope of the Rulemaking; (2) the Register’s prior determinations have precedential value; (3) the proponents of the unlocking exemption had met the required burden of proof; (4) the limited availability of unlocked devices, or of unlocking by carriers, does not obviate the need for the exemption; (5) the exemption does not promote “bulk unlocking”; (6) the scope of the exemption is clearly limited to Section 1201(a)(1) and proponents do not seek to expand it; and (7) changes to the underlying mobile wireless device operating system code are permissible pursuant to 17 U.S.C. § 117(a)(1). These findings – and the precedential weight they should be accorded given the similar facts presented by MetroPCS and others in this proceeding – remain conclusive and the Copyright Office should dismiss CTIA’s arguments as repetitive and “asked and answered.” The following charts, with

(...Continued)

⁸ Comments of CTIA – The Wireless Association on the Notice of Proposed Rulemaking, Copyright Office, Docket No. RM 2011-07, at Section IV.C. (filed Feb. 10, 2012) (“CTIA 2012 Opposition”).

⁹ *Recommendation of Register of Copyrights in RM 2008-8*, at 115 (Jun. 11, 2010) (emphasis removed) (“2010 Recommendation of Register”).

¹⁰ *Id.*

accompanying explanations, offer a side-by-side comparison showing the Register’s dismissal of CTIA’s past arguments, and CTIA’s revival of these same arguments in this proceeding.

A. The Register’s prior determinations have precedential value

CTIA 2009 Claim	Register’s 2010 Finding	CTIA 2012 Claim
<p>“There is a presumption in favor of the prohibition against circumvention that proponents of an exemption must overcome, even for previously exempted classes of works.”¹¹</p>	<p>“While a proponent of a class of works is required to provide new evidence to support her request for the renewal of a class of works, such as in the case here, the Register’s prior determinations have some precedential value and, unless persuaded otherwise, the Register is likely to reach a similar conclusion <i>when similar facts have been presented</i>.”¹²</p>	<p>“There is a presumption in favor of the circumvention prohibition and against Section 1201 exceptions – past decisions have <u>no</u> precedential value.”¹³</p>

Despite the Register’s clear conclusion to the contrary in 2010, CTIA argues that “there is no such thing as a ‘renewal’ or ‘extension’ [of an exemption] . . . [C]lasses of works that were previously exempted enjoy no special status.”¹⁴ However, as referenced above, the Register has directly rejected CTIA’s argument and it is plainly obvious that, as here, where similar evidence is presented with respect to the renewal of an exemption, “the Register’s prior determinations have some precedential value” and the “Register is likely to reach a similar conclusion.”¹⁵

¹¹ Comments of CTIA – The Wireless Association on the Notice of Proposed Rulemaking, Copyright Office, Docket No. RM 2011-07, at 9 (filed Feb. 2, 2009) (“CTIA 2009 Opposition”).

¹² 2010 Recommendation of Register 115.

¹³ CTIA 2012 Opposition 17.

¹⁴ *Id.* at 18.

¹⁵ 2010 Recommendation of Register 115.

Indeed, the Register repeatedly refers to a “renewal” of 2006 exemptions in her 2010 findings,¹⁶ and, in the context of the unlocking exemption, specifically discusses proponents’ “request for the renewal of a class of works, such as in the case here.”¹⁷ Moreover, CTIA practices selective amnesia with respect to whether the Register’s prior findings have precedential value or not. When it comes to arguments that MetroPCS advances, such precedent carries no weight, but when it is convenient for CTIA, the Register’s prior findings are *repeatedly* cited as weighty authority.¹⁸ CTIA must not be allowed to speak from both sides of its mouth, and the Register should confirm that her prior determinations have precedential value when, as is the case here, similar facts are presented.¹⁹

Additionally, CTIA’s contention that “[t]he Register’s and the Librarian’s findings relating to the unlocking exemption granted by the 2010 rulemaking did not comply with the well-established and demanding burden of proof . . . [and] [i]t therefore is invalid and should be accorded no precedential weight”²⁰ is patently absurd. The Register’s 2010 Recommendation and the Copyright Office’s *Final Rule* were the result of countless hours of research and the review of many hundreds of pages of advocacy and related legal research, as well as four days of hearings and live testimony in Washington, DC and Palo Alto, CA. CTIA chose not to appeal or otherwise challenge the *Final Rule*, and thus should not now be heard to claim that the decision was contrary to law. To now suggest that the proceeding granting the exemption – not once, but

¹⁶ See, e.g., *Id.* at 115, 145, 146, 152, n. 513, 161, n.529.

¹⁷ *Id.* at 115.

¹⁸ See, e.g., CTIA 2012 Opposition 43-44 (citing “[p]ast rulemakings” relating to DVD exemptions as support for contention); 49 (relying on Register’s 2010 findings relating to bulk resellers); 53 (citing the Register’s prior findings relating to the application of the unlocking exemption to other wireless devices); 55 (relying on Register’s 2010 findings with respect to Section 117).

¹⁹ American jurisprudence is based on the notion of precedent as a way to ensure that judicial and administrative bodies are not required to decide the same issues over and over. Here, the prior decisions and determinations – both for and against the exemptions – should be given precedential value.

twice – is “invalid” is ill-informed, not appropriate, and should be dismissed as a last-gasp attempt by CTIA at improperly limiting the Register’s prior findings.

B. The exemption is properly within the scope of this Rulemaking

CTIA 2009 Claim	Register’s 2010 Finding	CTIA 2012 Claim
<p>“This rulemaking is narrowly directed to vindicating demonstrated interests of individual users that lie at the core of the fair use doctrine, not trafficking or other commercial activities of circumventers.”²¹</p>	<p>“As she did three years ago, the Register recognizes that the proponents’ requests fall within the zone of interest subject to this rulemaking.”²²</p>	<p>“The proper scope of this rulemaking is narrowly directed to vindicating demonstrated interests of individual users that lie at the core of the fair use doctrine, not trafficking or other commercial activities of circumventers”²³</p>

As it did in 2009, CTIA once again argues that the unlocking exemption is sought by the proponents somehow outside the scope of this Rulemaking. However, it fails to consider that the Copyright Office and the Register – not CTIA – are the arbiters of what exemptions do or do not fall within the scope of this proceeding. Indeed, it seems particularly strange for CTIA to once again make this argument considering that the Register has recognized that “the proponents’ requests fall within the zone of interest subject to this rulemaking” on *two separate occasions*.²⁴ Because the facts surrounding the proponents’ request remain substantially similar, and similar

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²⁰ CTIA 2012 Opposition 24.

²¹ CTIA 2009 Opposition 5.

²² *2010 Recommendation of Register* 115.

²³ CTIA 2012 Opposition 10.

²⁴ *2010 Recommendation of Register* 115; see also *Recommendation of Register of Copyrights in RM 2005-11*, at 53 (Nov. 17, 2006) (approving exemption).

evidence has been presented, the Register should make the same finding again and dismiss CTIA’s arguments.

C. Proponents have met the required burden of proof

CTIA 2009 Claim	Register’s 2010 Finding	CTIA 2012 Claim
<p>“The burden of proof to demonstrate entitlement to a Section 1201(a)(1) exemption is demanding and requires proponents to show that the prohibition has a ‘distinct, verifiable, and measurable’ adverse effect on noninfringing uses.”²⁵</p>	<p>“[T]he Register finds that the proponents have presented a <i>prima facie</i> case that the prohibition on circumvention has had an adverse effect on non-infringing uses of firmware on wireless telephone handsets. . . . The material submitted in this rulemaking shows that the locks have a substantial adverse effect on the use of the handset.”²⁶</p>	<p>“The rigorous burden of proof on proponents requires a showing of ‘distinct, verifiable, and measurable’ adverse effect on noninfringing uses.”²⁷</p>

As discussed in detail in Section IV below, MetroPCS and the other proponents of an unlocking exemption renewal have provided ample evidence of the “distinct, verifiable, and measurable” adverse effect on noninfringing uses that would accrue to consumers if the unlocking exemption is not renewed. For instance, wireless customers, just like in 2006 and 2010 still are prevented from connecting to the wireless network of their choice because of the continued employment of wireless device locks to perpetuate the business models of certain wireless carriers.²⁸ As the Register found in 2010, “ability of a mobile phone consumer to use her phone on alternative wireless networks, a noninfringing act, is indeed adversely affected” by

²⁵ CTIA 2009 Opposition 11.
²⁶ 2010 Recommendation of Register 116.
²⁷ CTIA 2012 Opposition 19.

device locking.²⁹ The evidence offered by MetroPCS and other proponents is just as voluminous and compelling as the evidence submitted previously that led the Register to conclude that the proponents had met their burden of proof. Because MetroPCS and others have presented similar – if not greater – evidence of the harms that will arise absent a continued exemption, the Register should once again dismiss CTIA’s argument and find that the exemption proponents have presented a *prima facie* case in favor of a continued exemption.³⁰

D. The limited availability of unlocked devices, or of unlocking by carriers, does not obviate the need for the exemption

CTIA 2009 Claim	Register’s 2010 Finding	CTIA 2012 Claim
<p>“Unlocking is permitted and assisted by the wireless carriers in appropriate circumstances, offering wide consumer choice.”³¹</p>	<p>“[T]he record evidence demonstrates that there are no real alternatives for the relief an exemption would provide. . . . [W]ireless industry unlocking ‘efforts’ do not adequately permit the non-infringing use desired by the proponents.”³²</p>	<p>“The alleged benefits that proponents claim result from an unlocking exemption . . . are already provided by wireless carriers.”³³</p>

(...Continued)

²⁸ See MetroPCS Comments 9-10.

²⁹ 2010 Recommendation of Register 154.

³⁰ CTIA also perplexingly accuses MetroPCS and the other proponents of a “failure to address [the five 1201(a)(1)] factors in any meaningful way.” CTIA 2012 Opposition 39. Quite to the contrary, MetroPCS Comments proposing the instant class of works spent five pages on a robust discussion of the Section 1201(a)(1) statutory factors. Further, MetroPCS made a similar showing in 2010, which the Register found met MetroPCS’ burden of proof.

³¹ CTIA 2009 Opposition 38.

³² 2010 Recommendation of Register 154.

³³ CTIA 2012 Opposition 45.

Despite the fact that carrier behaviors with respect to wireless device locking have, if anything, gotten worse,³⁴ CTIA once again attempts to convince the Copyright Office that the carriers' harmful actions are mitigated by limited carrier-permitted unlocking, which in many cases is not well-known or well-publicized. As discussed below, AT&T – one of the two largest carriers in the United States – continues to provide locked handsets, unlocking them only under certain conditions, and sometimes not at all. As the Register found in 2010, “the record evidence demonstrates that there are no real alternatives for the relief an exemption would provide,”³⁵ which, as MetroPCS and others have shown once in this proceeding again by presenting similar facts, remains true today. As Consumers Union notes, “[c]arriers enforce customer lock-in by charging customers hefty fees for early service contract termination and by locking mobile devices so that customers cannot easily take those devices to a different network.”³⁶ Further, since the carriers do not publicize their unlocking programs, and customers are largely uneducated about them, these programs cannot substitute for customers being able to unlock devices on their own behalf through the exemption. Then, as now, “wireless industry unlocking ‘efforts’ do not adequately permit the non-infringing use desired by the proponents,”³⁷ and the Register’s prior findings remain valid, favoring a renewal of the unlocking exemption.

³⁴ This is particularly true as the largest carriers begin locking tablets and other wireless devices to their networks. For a full discussion of this growing problem, see *infra*, Section V.

³⁵ *2010 Recommendation of Register* 154.

³⁶ Comments of Consumers Union, Copyright Office, Docket No. RM 2011-07, at 18 (filed Dec. 1, 2011) (“Consumers Union Comments”).

³⁷ *2010 Recommendation of Register* 154.

E. The exemption does not promote bulk unlocking, and proponents and the Register explicitly have stated that such activities are not covered by the exemption.

CTIA 2009 Claim	Register’s 2010 Finding	CTIA 2012 Claim
<p>“The proposed exemptions would foster bulk unlocking arbitrage, which is especially pernicious and undermines consumer choice.”³⁸</p>	<p>“[T]he designation of this class will not benefit those who engage in the type of commercial activity that is at the heart of the objections of opponents of the proposed exemption: the ‘bulk resellers’ who purchase new mobile phone handsets at subsidized prices and, without actually using them on the networks of the carriers who market those handsets, resell them for profit.”³⁹</p>	<p>“[T]he proposed exemptions would foster bulk unlocking arbitrage, which is especially pernicious and undermines consumer choice.”⁴⁰</p>

MetroPCS and the other proponents, as they stated in the 2010 proceeding, have no interest in undertaking or promoting “bulk reselling” of unlocked wireless devices.⁴¹ Indeed, the Register devoted a meaningful portion of her 2010 Recommendation to discussing the potential harms associated with bulk reselling of unlocked wireless devices.⁴² Taking CTIA and others’ concerns into account, the Register determined that the exemption, as modified by the Register, would foreclose the ability of bulk resellers to “take advantage of the exemption after purchasing new mobile devices *en masse* at retail establishments and immediately unlocking them to be sold

³⁸ CTIA 2009 Opposition 39.

³⁹ 2010 Recommendation of Register 174.

⁴⁰ CTIA 2012 Opposition 49.

⁴¹ See, e.g., MetroPCS Comments 9, 28, n.52; Comments of Youghioghenny Communications, LLC, Copyright Office, Docket No. RM 2011-07, at 5 (filed Dec. 1, 2011) (“Youghioghenny Communications Comments”).

outside the United States.”⁴³ With respect to any suggestion that an unlocking exemption would somehow shelter illicit activities, the Register found that “the designation of this class will not benefit those who engage in the type of commercial activity that is at the heart of the objections of opponents of the proposed exemption: the ‘bulk resellers.’”⁴⁴ MetroPCS and others continue to support an exemption that excludes bulk resellers, and CTIA has cited no changed circumstances that would suggest that a renewed exemption – virtually identical to the one adopted in 2010 – is more likely than it was in 2010 to promote bulk reselling.⁴⁵ The Copyright Office should reject CTIA’s bulk reselling diversion as asked and answered.

Indeed, CTIA’s own representations conclusively demonstrate that the previously granted exemptions have not served to promote the trafficking of bulk resellers in unlawfully unlocked headsets. CTIA states that “[t]o date, more than fifty-five (55) consent decrees and default judgments and permanent injunctions have been entered by federal courts across the country finding the traffickers’ conduct unlawful and, in many cases, awarding millions of dollars of damages.”⁴⁶ Notably, these decrees and judgments were entered while a substantially similar exemption to the one now requested was in place. Thus, this admission conclusively demonstrates that the Register is correct in finding that the exemption does not shelter illicit activity.

(...Continued)

⁴² See *2010 Recommendation of Register* 153, 155, 157-58, 163-64 and 168-69.

⁴³ *Id.* at 169.

⁴⁴ *Id.* at 174.

⁴⁵ Interestingly, it appears that the carriers’ efforts to curtail bulk reselling are bearing fruit as the opponents to the exemption have not cited increased bulk reselling occurring as a result of the 2010 exemption. The Register, not CTIA, appears to be right that the exemption has not led to the parade of horrors cited by opponents in the last proceeding.

⁴⁶ CTIA 2012 Opposition at 7.

F. The scope of this Rulemaking is clearly limited to Section 1201(a)(1) and proponents do not seek in any way to expand it to cover Section 1201(a)(2) services

CTIA 2009 Claim	Register’s 2010 Finding	CTIA 2012 Claim
<p>“[T]he primary motivation for [MetroPCS’] request for an exemption appears to be that a section 1201(a)(1) exemption is necessary to protect its ‘MetroFLASH’ service.”⁴⁷</p>	<p>“The Register does not agree that the proponents’ proposed classes of works are aimed solely or even principally at bringing [Section 1201(a)(2)] circumvention services under the umbrella of a Section 1201(a)(1) exemption.”⁴⁸</p>	<p>“It is once again clear that at least some of the Proponents are attempting to use this proceeding to promote the unlawful provision of unlocking services.”⁴⁹</p>

Neither MetroPCS nor the other proponents seek to expand this Rulemaking beyond its proper 1201(a)(1) scope. The Register stated in 2010 that she did not agree that “proponents’ proposed classes of works are aimed solely or even principally at bringing circumvention services under the umbrella of a Section 1201(a)(1) exemption” because “the main business of certain supporters of the exemption . . . is to sell new phones to new wireless subscribers, not to unlock and resell old mobile phones.”⁵⁰ As was the case in 2010, MetroPCS today still “concentrates on selling new handsets and services to new customers, and only offers to reflash phones under certain conditions.”⁵¹ The Register found that the 2010 unlocking exemption did not exceed the scope of 1201(a)(1), and should find similarly with respect to the comparable

⁴⁷ CTIA 2009 Opposition 15.

⁴⁸ 2010 Recommendation of Register 170.

⁴⁹ CTIA 2012 Opposition 46.

⁵⁰ 2010 Recommendation of Register 170.

⁵¹ *Id.* MetroPCS customers seeking to have their phones unlocked must affirm that they “(1) do not have a contract with any other wireless service provider, (2) are not participating in a scheme to acquire bulk quantities of subsidized handsets to resell at higher prices, and (3) will not use the original provider’s trademarks in selling, offering for sale,

(Continued...)

exemption sought by proponents. Therefore, CTIA’s renewed suggestion that MetroPCS or others are seeking to expand the scope of this Rulemaking to encompass Section 1201(a)(2) simply is false and should once again be ignored.

G. Any changes to the underlying mobile wireless device operating system code are permissible pursuant to 17 U.S.C. § 117(a)(1)

CTIA 2009 Claim	Register’s 2010 Finding	CTIA 2012 Claim
<p>“[S]ection 117 permits adaptation or copying of software only as an ‘essential step in the utilization of the computer program’ and only when ‘it is used in no other manner.’ 17 U.S.C. § 117(a)(1). Here, wireless handset users already are successfully using the firmware ‘in conjunction with a machine’ – <i>i.e.</i>, their handsets – with their current service provider and with authorized software, and the device is operating as intended.”⁵²</p>	<p>“[T]he Register must conclude that those mobile phone owners may take advantage of Section 117 privileges to make copies and adaptations of that software.”⁵³</p> <p>“[These] changes would be privileged under Section 117, which permits the making of ‘a new copy or adaptation’ that is created as an essential step in the utilization of the computer program in conjunction with a machine.”⁵⁴</p>	<p>“Section 117 permits adaptation or copying of software only as an ‘essential step in the utilization of the computer program . . . [and] in no other manner.’ 17 U.S.C. § 117(a)(1). Here, wireless handset users already are successfully using the firmware ‘in conjunction with a machine – <i>i.e.</i>, their handsets – with their current service provider and with authorized software, and the handset is operating as intended.”⁵⁵</p>

CTIA’s main objection to the Register’s proper determination in 2010 appears to be that the Register did not see eye-to-eye with CTIA. CTIA complains that “[i]n her 2010

(...Continued)

distributing, or advertising their handsets.” *Id.* (citing *MetroPCS Wireless, Inc. v. Virgin Mobile USA L.P.*, C.A. No. 3:08-CV- 1658-D, (N.D. Tex. Sept. 25, 2009), at 4-5, n. 4.)

⁵² CTIA 2009 Opposition 31.

⁵³ *2010 Recommendation of Register* 133.

⁵⁴ *Final Rule* 4831.

⁵⁵ CTIA 2012 Opposition 37.

Recommendation, the Register did not discuss the cases cited by CTIA, and instead relied on a Second Circuit Court of Appeals decision, *Krause v. Titleserv, Inc.*, 402 F.3d 119, 128 (2nd Cir. 2005).”⁵⁶ The fact that the Register, an expert in copyright law, previously dismissed CTIA’s strained reading of the copyright case law is hardly reason for the Copyright Office to revisit its prior position. Indeed, CTIA cites no new authority or changed circumstances that would alter the Register’s well-reasoned determination on this issue. The Register properly relied on *Krause* in 2010, and the Copyright Office found in its *Final Rule* that the subject changes to wireless device software or firmware “would be privileged under Section 117, which permits the making of ‘a new copy or adaptation’ that is created as an essential step in the utilization of the computer program in conjunction with a machine.”⁵⁷ Given that the facts and the law surrounding this determination, as presented by MetroPCS and the other proponents, remain the same, the same conclusion that was reached in 2010 is warranted now.

CTIA’s argument that customers of the four nationwide carriers do not “own” the software on their wireless devices is similarly unavailing. As an initial matter, the Register in 2010 found that an exemption was warranted in part because “the record fail[ed] to contain [evidence regarding whether customers were ‘owners’ or ‘licensees’ of their mobile device software] with respect to all wireless carriers.”⁵⁸ While CTIA has provided some additional information regarding the licensing policies of certain wireless carriers, there remain more than 100 other carriers unaccounted for. Because the exemption is not carrier-specific, the exemption would remain equally applicable to all of these remaining carriers about which CTIA provides no information. Furthermore, as the Register has recognized, “[t]he Second Circuit in *Krause*

⁵⁶ *Id.* at 38.

⁵⁷ *Final Rule* 4831.

confirmed that [the] determination of ownership is not based solely on formal title, but rather on the ‘various incidents of ownership.’”⁵⁹ While formal title may be relevant, the Second Circuit has looked to a number of factors to determine the status of a copy of a work, “some of which suggest that the owner of the [device] also owns the copy of the software.”⁶⁰ CTIA’s material does not demonstrate that the licensing rules or policies have changed such that the Register’s prior finding is no longer valid.

CTIA also cites *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010), for the proposition that the transfer of a copy of mobile device software does not necessarily transfer title.⁶¹ However, based on the plain text of the decision, mobile devices fail to meet the *Vernor* test that “a software user is a licensee rather than an owner of a copy.”⁶² A user is a licensee rather than an owner of a copy where the copyright owner “(1) specifies that the user is granted a license; (2) significantly restricts the user’s ability to transfer the software; **and** (3) imposes notable use restrictions.”⁶³ By using the word “and” in this list of requirements, the Ninth Circuit clearly indicates that a copyright owner must do *all three* of the above in order to render software subject to a license as opposed to the transfer of a copy of the software. However, it is clear that mobile devices – and the software that powers them – are easily transferred among users, and there is no restriction on a wireless device owner’s ability to sell, transfer, lease or otherwise provide a wireless device to a third party. The carrier typically only limits whether a customer

(...Continued)

⁵⁸ 2010 Recommendation of Register 128.

⁵⁹ 2010 Recommendation of Register 126 (citing *Krause*, 402 F.3d at 123).

⁶⁰ *Id.* at 129.

⁶¹ CTIA 2012 Opposition 35.

⁶² *Vernor*, 621 F.3d at 1111.

⁶³ *Id.* (emphasis supplied).

can transfer the service rather than the device.⁶⁴ To MetroPCS' knowledge, no wireless provider has taken the position that customers are unable to sell devices that they no longer use, or transfer them to a spouse, child or friend.⁶⁵ Nor are device owners required to wipe the operating system software from the device's memory to effect such a transfer – which would essentially render the device useless. Indeed, such a process would be difficult, if not impossible, to undertake since the operating system is often embedded in the handset's firmware. Unlike a personal computer where the operating system is separate and can be separately licensed, the software for wireless devices is essentially part of the device and is not separately licensable. Because wireless device owners are not restricted by the carriers from transferring ownership of the device and its underlying software to other parties, wireless devices do not meet the *Vernor* test indicating that owners of such devices are licensees of the software, rather than owners of a copy.

III. THE AVAILABILITY OF UNLOCKED DEVICES, OR DEVICES UNLOCKED UNDER STRINGENT CONDITIONS, DOES NOT OBTAIN THE NEED FOR A RENEWAL OF THE EXEMPTION

Despite the Register's prior findings that an exemption is necessary to allow consumers the benefits of device unlocking, CTIA continues to argue that "wireless providers already provide these benefits apart from any such exemption."⁶⁶ However, MetroPCS clearly demonstrated the fallacy of this argument in its Comments,⁶⁷ pointing out that the fact that certain carriers *may* unlock devices of customers who have fulfilled their contracts does not

⁶⁴ Indeed, post sale transfer restrictions would be highly unusual for consumer devices such as wireless devices and might well run afoul of applicable laws and regulations.

⁶⁵ A quick Internet search reveals many used wireless devices available for sale over Craigslist, eBay and other websites offering to connect interested parties for the sale of used goods. In addition, many organizations request the donation of wireless devices for charitable purposes – another permissible transfer of ownership. *See, e.g.*, 911 Cell Phone Bank (<http://www.911cellphonebank.org/>); D.C. Metropolitan Police Department Cell Phone Donations for Victims of Domestic Violence (http://mpdc.dc.gov/mpdc/cwp/view,a,1242,q,567906,mpdcNav_GID,1523,mpdcNav,%7C.asp).

⁶⁶ CTIA 2012 Opposition 46.

eliminate the need for the exemption. In 2010 the Register specifically found that the “wireless industry’s unlocking ‘efforts’ do not adequately permit the non-infringing use desired by proponents.”⁶⁸ Because these industry “efforts” remain the same as in 2010, the Register’s finding should remain unchanged. If anything, the need for an exemption has increased from prior years as customers are spending more to purchase their wireless devices, making the desire for continued use greater. The rise of smartphones has created a whole new class of wireless handsets that provide greater utility and cost more than the feature phones of the past. Interestingly, a number of these new smartphones use the Android operating system, which is licensed by Google, and are therefore not subject to many of the licensing restrictions that are placed on other operating systems.

The fact that carriers may in certain circumstances unlock a device falls far short of a customer having the right, without having to go back to the existing carrier, to use his or her device on other networks. This is particularly true because carriers do not make it readily known that they will unlock their phones or what the terms are for their unlocking, which is not surprising behavior. As MetroPCS pointed out, “existing carriers have every reason not to educate their customers about available unlocking services, since the carrier wants to keep the customer in service, and keeping customers in the dark regarding their choices furthers this goal.”⁶⁹ The Register previously found that it “seems clear that the primary purpose of the locks is to keep customers bound to their existing networks.”⁷⁰ This fact remains true today, as noted

(...Continued)

⁶⁷ MetroPCS Comments 19.

⁶⁸ *2010 Recommendation of Register* 154.

⁶⁹ MetroPCS Comments 20.

⁷⁰ *2010 Recommendation of Register* at 154.

in the evidence submitted by MetroPCS and others, and such behavior may increase as the costs associated with providing smartphones continue to rise.

Even if carriers may be willing to unlock certain devices, anti-competitive carrier policies still frequently limit a carrier's willingness to unlock the most advanced devices, which are most attractive to consumers. For example, AT&T still retains its blanket policy of locking wireless devices to their network – which would include the newest and most advanced LTE smartphones.⁷¹ While certain devices may be unlocked after customers jump through enough hoops, AT&T flatly refuses to unlock *all* devices that are exclusive to AT&T, a policy that likely results in the refusal to unlock the most popular devices under any circumstances.⁷² The availability of unlocked phones also only offers consumers a choice in advance and fails to account for any changes in circumstance. A customer may like his or her carrier and choose to purchase a subsidized device in anticipation of retaining the customer-carrier relationship, only to later move to an area with poor coverage, or no coverage at all, by that carrier – or be subjected to some other adverse change in service or rates, such as a newly-imposed data cap or throttling⁷³ – and be stuck with a locked device that is no longer useful. Such a customer must have the right to unlock the device at his or her own discretion in order to have the option to connect to a preferred network.

Furthermore, CTIA's argument regarding the availability of unlocked phones fails to consider the Register's prior determination that "there are no real alternatives for the relief an

⁷¹See AT&T FAQ on device unlocking, *available at*

<http://www.att.com/esupport/article.jsp?sid=55002&cv=820&title=What+is+the+unlock+code+for+my+phone%3F#fbid=o-GBb0GQWpH>.

⁷² AT&T's website states that it will not provide the unlock code for any devices "sold exclusively by [AT&T]." *Id.*

⁷³ For example, AT&T has imposed data caps on all new customers, and has instituted a policy of throttling data use for grandfathered "unlimited" customers that exceed certain data limits. See Kevin Fitchard, "AT&T boosts mobile

(Continued...)

exemption would provide.”⁷⁴ The Register noted in 2010, and it remains true today, that “AT&T a major wireless carrier with millions of subscribers, still sells its phones in locked mode.”⁷⁵ Even the fact that “Verizon now sells its postpaid mobile phones in unlocked mode hardly resolves the issue,” because “[t]here are still legacy phones connected to the Verizon wireless network that are locked and cannot be used on an alternative wireless network.”⁷⁶ These legacy phones exist on the Verizon network today as they did in 2010, favoring an exemption to permit them to be unlocked.⁷⁷ The selling of unlocked postpaid phones also fails to account for Verizon prepaid phones, which appear to still be locked by the carrier, hamstringing the ability of a significant number of consumers to change to their preferred wireless network.⁷⁸ Lastly, just because a carrier may have a certain policy in effect today does not allay concerns that such a policy may be changed in the future. Indeed, AT&T and Verizon each drastically increased early termination fees on short notice,⁷⁹ and without renewing the unlocking exemption to constrain anti-consumer behaviors, these carriers will have the incentive to restore more restrictive locking policies.

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data caps but hikes prices as well,” Gigaom (Jan. 18, 2012), *available at* <http://gigaom.com/mobile/att-boosts-mobile-data-caps-but-hikes-prices-as-well/>.

⁷⁴ 2010 Recommendation of Register 154.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ The Register should also be puzzled by the opposition to the exemption if some of the largest carriers allow certain of their phones to be unlocked. This suggests that the documents advanced by CTIA may have more to do with those few carriers who want to use the locking process to perpetuate their business model rather than to protect the interests of copyright owner.

⁷⁸ According to its most recent 10-K, Verizon has approximately 4.6 million retail prepaid subscribers who presumably connect to Verizon’s service using locked devices. *See* Verizon 10-K, *available at* <http://investing.businessweek.com/research/stocks/financials/drawFiling.asp?docKey=136-000119312512077846-7RHMCG5AOVCNCGV0SJEL1VFS3&docFormat=HTM&formType=10-K>. The fact that Verizon locks the phones on certain plans but not the same phone on other plans tells volumes about the true reasons for locking – it is not to protect copyright interests, but rather the carrier’s business model.

⁷⁹ *See* Chloe Albanesius, “Verizon Ups Early Termination Fee to \$350,” PC Magazine (Nov. 5, 2009), *available at* <http://www.pcmag.com/article2/0,2817,2355493,00.asp>; John Paczkowski, “AT&T’s new early-termination fee for

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IV. METROPCS AND OTHERS HAVE PROVIDED SUBSTANTIAL EVIDENCE THAT THE FACTS SURROUNDING WIRELESS DEVICE LOCKING REMAIN THE SAME AND A RENEWAL OF THE UNLOCKING EXCEPTION IS NECESSARY

As discussed above, “unless persuaded otherwise, the Register is likely to reach a similar conclusion” with respect to a renewed exemption “when similar facts have been presented.”⁸⁰ In 2006, the Copyright Office found the unlocking exemption to be warranted, and in 2010 further found that “there is more evidence in support of designating a class of works now than there was in 2006 when the class was first approved by the Librarian.”⁸¹ With this strong base of evidence from two prior proceedings as background, MetroPCS and the other proponents have once again provided significant evidence to show why an exemption is justified in order for consumer to receive the full benefit of their wireless devices. For example, Consumers Union⁸² cited a recent Consumer Reports study showing that

[c]onsumers oppose having their phones locked as part of the lock-in scheme. This year, Consumer Reports® found that 59% of mobile device users with long-term contracts would like to take their existing devices with them, and that 96% feel that they should at least be able to do this.⁸³ 88% of contract holders say that their mobile device should work on any carrier’s service network.⁸⁴

And, despite CTIA’s suggestion otherwise, Youghioghny Communications demonstrates that “[m]ega-carriers typically include some form of carrier lock embedded in the programming for the devices that they sell to their customers.”⁸⁵ RCA – The Competitive Carriers Association, which represents more than 100 competitive wireless providers, noted that “[u]nlocking is

(...Continued)

the iPhone: \$325,” CNet News (May 21, 2010), available at http://news.cnet.com/8301-1035_3-20005684-94.html.

⁸⁰ *2010 Recommendation of Register* 115 (emphasis removed).

⁸¹ *Id.* at 116.

⁸² Consumers Union Comments 19.

⁸³ Consumers Union, *Cell Phone Handset Interoperability Poll* 9, 10 (Apr. 12, 2011).

⁸⁴ *Id.* at 11, n. 48.

⁸⁵ Youghioghny Communications Comments 3.

particularly important for rural and regional carriers that lack the scope and scale to gain access to the latest, most iconic devices directly from the equipment manufacturer, which, in turn, prevents rural consumers from accessing the latest devices.”⁸⁶ RCA further noted the Federal Communications Commission’s (“FCC’s”) recent finding that “the cost of purchasing a new device represents a significant deterrent to consumers wishing to switch wireless providers.”⁸⁷

As MetroPCS and others have noted, the facts surrounding the state of carrier locking of wireless devices has remained, at best, unchanged since the most recent exemption was adopted in 2010. And, “unless persuaded otherwise, the Register is likely to reach a similar conclusion” with respect to a renewed exemption “when similar facts have been presented.”⁸⁸ If anything, with the growing popularity of tablets and other connected wireless devices, the problem of device locking has only grown more acute.

V. GIVEN THE CONTINUED EVOLUTION OF COMMUNICATIONS SERVICES, THE EXEMPTION SHOULD PROPERLY ENCOMPASS ALL WIRELESS DEVICES

In addition to wireless handsets, other wireless devices, such as tablets, netbooks and wireless USB modems, are fast becoming a popular, if not the preferred, method of communication for consumers. This represents a significant industry change since the record upon which the 2010 exemption was based was compiled. Indeed, “in 2009 and 2010, several service providers began offering a range of new data-only devices, including devices to facilitate mobile Internet access on computers – wireless data cards, mobile Wi-Fi hotspots, and netbook

⁸⁶ Comments of RCA – The Competitive Carriers Association, Copyright Office, Docket No. RM 2011-07, at 3 (filed Dec. 1, 2011) (“RCA Comments”).

⁸⁷ RCA – The Competitive Carriers Association Comments 3 (citing *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Fifteenth Report, 26 FCC Rcd 9664 ¶¶ 254-55 (2011) (“Fifteenth Report”).

⁸⁸ *2010 Recommendation of Register* 115 (emphasis removed).

computers with embedded modems – as well as tablet devices and e-readers.”⁸⁹ As MetroPCS previously has noted, “[i]n the ever-converging wireless ecosystem, a number of products (such as tablets, netbooks, laptop aircards and others) operate over wireless communications networks, and should enjoy comparable anti-locking protection without a debate whether they qualify as telephone handsets.”⁹⁰

As discussed by the FCC in the *Fifteenth Report*, since the record for the 2010 exemption was compiled there has been a substantial “convergence of mobile wireless handsets and portable computing technologies.”⁹¹ This has meant that consumers may be communicating via email on their tablet as often – or more often – as they are by talking on their smartphone. New devices are emerging every day, many of which confound the definition of “wireless telephone handsets.” Indeed, one device announced just days ago at the Mobile World Congress is touted as a “a phone that can transform into a tablet, before transforming into a laptop.”⁹² Given that the current exemption only applies to “wireless telephone handsets,” MetroPCS is concerned that carriers could use this definition to make mischief with locking restrictions. Importantly, these tablets and other devices also operate as voice communications tools through interconnected VoIP services, meaning that customers are treating wireless handsets and other wireless devices in an increasingly interchangeable manner.⁹³

⁸⁹ *Fifteenth Report* ¶ 145.

⁹⁰ MetroPCS Comments 5.

⁹¹ *Fifteenth Report* ¶ 143.

⁹² Stuart Miles, “What will your next mobile phone look like?” CNN (Feb. 28, 2012), *available at* http://edition.cnn.com/2012/02/28/tech/mobile/mobile-trends-mwc/index.html?hpt=hp_c2.

⁹³ VoIP applications, such as Skype, can be used over many netbooks, smartphones and tablets and represent a growing portion of voice traffic. Mobile VoIP alone is projected to represent 83 million voice lines by 2015. “Significant mobile-VoIP growth predicted,” *Cabling Installation & Maintenance* (Aug. 16, 2011), *available at* <http://www.cablinginstall.com/index/display/article-display/0539464960/articles/cabling-installation-maintenance/news/wireless/2011/8/Significant-mobile-VoIP-growth-predicted.html> (citing Amy Cravens, “The Business of Mobile VoIP: IP Voice Communications in the Enterprise,” *In Stat* (Jan. 2011)).

Such devices are growing increasingly similar to wireless handsets in myriad ways. For example, these devices are being sold by the carriers, which have an incentive to restrict the free flow of these devices to perpetuate their own business model. The operating system on these devices also is typically embedded in the hardware just like wireless handsets. In addition, customers desire the freedom to change service providers for these devices for the same reasons that they desire such freedom for wireless handsets. Finally, as discussed below, there is substantial convergence between these devices and traditional wireless handsets. One example is the Samsung Galaxy Note, offered by AT&T, which is a tablet that is slightly larger than a traditional handset, which is also a phone.⁹⁴ Under the current definition, the Register may be called upon to draw even finer lines on what would constitute a wireless handset, which may exclude other wireless communications devices that consumers rely upon.

Despite – or perhaps because of – their growing importance to consumers, the largest wireless carriers, as they continue to do with wireless handsets, are locking tablets and other devices to their own networks. For example, AT&T locked the popular Dell Streak 5 Android tablet to its network – even in cases where a customer had paid the full, unsubsidized price and did not sign a wireless contract with the carrier.⁹⁵ AT&T has also announced that it will continue to lock other wireless devices to its network, such as the hotly anticipated PlayStation Vita 3G, a combination wireless communication, media and gaming device.⁹⁶ Simply put, the wireless

⁹⁴ The Samsung Galaxy Note is exclusive to AT&T and will be locked to their network – with no plans to offer an unlocked version in the United States. See Ginny Mies, “Samsung Galaxy Note for AT&T LTE: First Look,” PCWorld (Jan. 9, 2012), available at http://www.pcworld.com/article/247527/samsung_galaxy_note_for_atandt_lte_first_look.html.

⁹⁵ Darren Murph, “Off-contract Dell Streak is still SIM-locked to AT&T, wrongs still being done in the world,” Engadget (Aug. 12, 2010), available at <http://www.engadget.com/2010/08/12/off-contract-dell-streak-is-still-sim-locked-to-atandt-wrongs-sti/>.

⁹⁶ Ross Miller, “PlayStation Vita 3G is carrier-locked, says AT&T,” The Verge (Jan. 11, 2012), available at <http://www.theverge.com/2012/1/11/2701217/playstation-vita-3g-carrier-locked-att>.

device world has changed since the current unlocking exemption was granted in 2010, but the decision of many carriers to use locking as a means to perpetuate their business model has not. Given consumers' increasing reliance on these devices as a means of both voice and data communication, and the fact that they still remain locked in many instances by the largest carriers, the exemption should be expanded to include all wireless devices. Only by expanding the scope of the wireless device unlocking exemption can the Copyright Office capture the full panoply of communications tools used by consumers and properly deserving of DMCA exemption protection.

VI. THE METROPCS CLARIFYING CHANGES TO THE EXEMPTION THAT ARE OPPOSED BY CTIA ARE NECESSARY AND JUSTIFIED

As it earlier noted, “MetroPCS proposes some minor clarifying changes to the prior exemption . . . [which] do[] not fundamentally alter the substance, scope or intent behind the Copyright Office’s existing exemption.”⁹⁷ While CTIA argues that “there is no evidence . . . that anyone ever seeks to circumvent a TPM protecting ‘data used by’ the relevant software or firmware,”⁹⁸ the *Final Rule* clearly recognized that, in some circumstances, “specific codes or digits are altered to identify the new network” to which the device will connect.⁹⁹ Thus, MetroPCS merely seeks to clarify that device owners are permitted to circumvent any TPM that may protect this data, which could be used by the software for the purpose of connecting to a network or receiving services from that network. Such a clarification will provide additional certainty for device owners with respect to the procedures that they may employ to unlock devices.

⁹⁷ MetroPCS Comments 4.

⁹⁸ CTIA 2012 Opposition 59.

⁹⁹ *Final Rule* 4381.

CTIA also opposed MetroPCS' recommendation that the current exemption be expanded to include all wireless devices, and not merely "wireless telephone handsets"¹⁰⁰ based on CTIA's contention that "no case has been made that an unlocking exemption should encompass devices other than cell phones."¹⁰¹ Quite to the contrary, MetroPCS has discussed this proposed expansion at length both in its initial Comments,¹⁰² and in this pleading.¹⁰³ Through that discussion, MetroPCS has provided substantial evidence that consumers increasingly are using other mobile devices for voice communications, as well as for other types of communication that substitute for voice, and that the lines between wireless handsets and other wireless devices are increasingly converging. In addition, MetroPCS has shown that wireless providers have and *are currently* artificially restricting the ability of tablets and other wireless devices to operate over competing wireless networks through locking mechanisms, in some cases even when the customer does not enter into a long term contract.¹⁰⁴ Expanding the current exemption to include other wireless devices, such as tablets and netbooks, that fill these hybrid roles will more closely align the Section 1201 exemption with the converging realities of the wireless marketplace.

VII. CONCLUSION

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

¹⁰⁰ CTIA 2012 Opposition 53-55.

¹⁰¹ *Id.* at 53.

¹⁰² MetroPCS Comments 4-6.

¹⁰³ *See supra*, Section V.

¹⁰⁴ *See, e.g.*, Darren Murph, "Off-contract Dell Streak is still SIM-locked to AT&T, wrongs still being done in the world," Engadget (Aug. 12, 2010), available at <http://www.engadget.com/2010/08/12/off-contract-dell-streak-is-still-sim-locked-to-atandt-wrongs-sti/>.

Respectfully submitted,

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ATTACHMENT A

Redline of Current Exemption

Computer programs, in the form of firmware or software, including data used by those programs, that enable ~~used~~ wireless ~~telephone handsets~~ devices to connect to a wireless ~~telecommunications~~ communications network, when circumvention is initiated by the owner of the copy of the computer program solely in order to connect to a wireless ~~telecommunications~~ communications network and access to ~~the~~ such communications network is authorized by the operator of ~~the~~ such communications network.