

I. **PROPOSED CLASS EXEMPTION**

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.

II. **STATUTORY FACTORS**

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

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

The following MetroPCS Comments convincingly demonstrate that all of these factors, when applicable, weigh strongly in favor of the proposed exemption. The MetroPCS Comments demonstrate that it is likely that adverse effects are more likely than not to occur if the proposed exemption is not renewed.

III. **SUMMARY**

In response to the Copyright Office's October 6, 2008 *Notice of Inquiry*, MetroPCS proposes the following exemption from the 17 U.S.C. § 1201(a)(1) prohibition on the circumvention of technological methods to controlling access to copyrighted works:⁴

⁴ 17 U.S.C. § 1201(a)(1).

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.

The language of this exemption closely tracks the previously adopted exemption in 37 C.F.R. 201.40(b)(5), and would have the effect of renewing the prior exemption for an additional three years. The Copyright Office was correct in 2006 to adopt an exemption from the anticircumvention provisions of the DMCA for computer programs that operate wireless handsets,⁵ and MetroPCS strongly recommends that an exemption of this type be renewed for an additional three-year period. Software locks on wireless handsets are unnecessary for the protection of copyrighted works – the DMCA’s primary purpose. Such locks are used exclusively to bind handsets to specific carriers and consequently block consumers’ freedom of choice for wireless service. In fact, the adoption of this exemption by the Copyright Office in 2006 has allowed a significant number of United States consumers to utilize existing handsets to purchase competing services. A failure to renew this exemption would substantially harm consumers by allowing carriers to prevent customers from utilizing handsets which they have purchased to receive service on competing carriers’ networks. As demonstrated below, renewing the exemption will continue to foster competition in the wireless marketplace without adversely impacting copyrighted works.

IV. BACKGROUND

MetroPCS, which launched service in its first metropolitan area in 2002, is a facilities-based wireless provider and currently has over 5 million subscribers, making it the sixth largest wireless carrier in the nation. MetroPCS targets a mass market which is largely unserved by the

⁵ *Final Rule* at 68476.

other major wireless carriers. Unlike its national competitors who require long-term contracts, MetroPCS offers its services on a month-to-month basis and does not require its customers to sign a contract or have credit. MetroPCS is a new entrant in every metropolitan area it offers service and has launched service in over 12 major metropolitan areas in the last 6 years. Not only does MetroPCS bring competition to existing markets, but it also expands the market for wireless services by attracting new customers to wireless services. For example, a significant number of MetroPCS' users are first-time wireless users and a substantial portion of its subscribers use their MetroPCS wireless phone as their primary or exclusive telecommunications service.

MetroPCS focuses its services on major metropolitan areas and, through its affiliates and subsidiaries, owns or has access to licenses covering a population of approximately 149 million people in 14 of the top 25 largest metropolitan areas in the United States, including New York, Philadelphia, Boston, Miami, Orlando, Sarasota, Tampa, Atlanta, Dallas, Detroit, Las Vegas, Los Angeles, San Francisco and Sacramento. MetroPCS currently offers service in a number of these major metropolitan areas, including the Miami, Orlando, Sarasota, Tampa, Atlanta, Dallas, Detroit, Los Angeles, San Francisco, Las Vegas, Philadelphia and Sacramento metropolitan areas. MetroPCS has also been a substantial purchaser of spectrum. In 2006, MetroPCS spent over \$1.4 billion for spectrum in the Federal Communications Commission ("Commission" or "FCC") Auction No. 66 and was one of the largest purchasers of spectrum in that auction. As a result of MetroPCS' purchases of spectrum in Auction 66, MetroPCS acquired spectrum in, and MetroPCS is in the process of constructing and will launch service in, New York City and Boston next year.

MetroPCS' service offers a flexible, low-cost alternative to the plans offered by the large national wireless carriers. Its flat rate service allows customers to place and receive unlimited calls from within MetroPCS' service area under simple, affordable, and flexible flat rate service plans starting as low as \$30 per month. For an additional \$5 to \$20 per month, MetroPCS' customers may select a service plan that offers additional services, such as unlimited voicemail, caller ID, call waiting, enhanced directory assistance, unlimited text messaging, mobile Internet browsing, push e-mail, mobile instant messaging, picture and multimedia messaging, and the ability to place unlimited long distance calls from within MetroPCS' service area to any telephone number in the continental United States. For additional fees, MetroPCS provides international long distance, international text messaging, ring tones, ring back tones, downloads, games and content applications, location services, unlimited directory assistance and other value added services. MetroPCS' customers also use MetroPCS' service considerably more than the industry average. MetroPCS' customers use MetroPCS' service an average of 2,000 minutes per month.⁶ MetroPCS has increased the competition in each metropolitan area it has launched service. For example, as a result of MetroPCS' innovative service offerings, the large national carriers in late 2007 and early 2008 introduced their own flat rate unlimited wireless plans.

MetroPCS provides service to a significant number of lower income, credit challenged, underbanked and newly employed customers. These customers are especially sensitive to the cost of a handset, which makes the ability of these customers to use previously acquired handsets to receive service particularly attractive. In light of the ongoing national financial turmoil, this segment of the wireless consumer market will likely expand as displaced and struggling families look for ways to save money.

⁶ The industry average for the largest carriers is approximately 940 minutes of use per month.

In mid-2008, MetroPCS launched its “MetroFLASH” service, which allows customers with existing code division multiple access (“CDMA”) handsets to unlock – or re-flash – their handsets for use on MetroPCS’ service. Given the current economic downturn, an increasing number of subscribers have used MetroPCS’ MetroFLASH service to re-use their existing handsets. MetroPCS does not purchase handsets from the other carriers, or from any other sources, and bulk re-flash them. Rather, under MetroPCS’ MetroFLASH service, a customer brings its own compatible CDMA handset into a MetroPCS location and, after paying a fee to unlock the handset, the handset is re-flashed and placed in service on MetroPCS’ network. During the process of re-flashing the handset, no copies of the software or contents on the handset are made – the process is similar to flipping a switch or changing a variable in a particular “cell” of a spreadsheet. If the exemption were not renewed for an additional three years, many of MetroPCS’ potential subscribers who are now attracted by the possibility of reusing their existing CDMA-compatible handset may not be able to afford to initiate service with MetroPCS, and as a result many would not be able to join the wireless revolution.

V. SOFTWARE LOCKS ARTIFICIALLY PREVENT WIRELESS HANDSETS FROM ACCESSING COMPETING CARRIERS’ NETWORKS

Software locks tether wireless handsets to one network and primarily are used by carriers not to protect any legitimate copyright interest, but rather as a means to protect their business model. Without these software locks, most handsets are capable of being used to receive service on multiple compatible wireless providers’ networks; thus enabling end users to switch carriers without incurring the costs associated with a new handset. Wireless providers handcuff handsets to their networks using a variety of methods, including service provider code (SPC) locking, system operator code (SOC) locking, band order locking and Subscriber Identity Module (SIM)

locking.⁷ Certain of these locks prevent access to any portion of the software contained on the handset, while others lock the handset to certain restricted features on the handset. Software locks may serve some legitimate purposes, like preventing a customer from attempting to reset their own handset and harming it in the process, or ensuring that only a qualified technician is programming the phone. Despite the existence of legitimate uses, however, these locks are often used inappropriately to prevent a wireless handset from being used on compatible networks of other service providers.

VI. UNLOCKING WIRELESS HANDSETS FOR USE ON COMPETING NETWORKS IS A NONINFRINGEMENT USE

Customers who choose to unlock their handsets to obtain service on competing wireless networks – a practice commonly referred to in the industry as “re-flashing” the handset – are making a noninfringing, fair use of copyrighted works that they rightfully own. In the re-flashing process, the carrier is merely changing the variables in certain memory locations and updating the preferred roaming list to make the handset useable on the new network.⁸ In fact, in their native state, these handsets are capable of connecting to a vast range of wireless networks depending on the value of the pre-set variables. Neither customers, nor mobile phone companies that offer re-flashing services, are copying mobile software or using it for any unauthorized purpose.

⁷ CDMA handsets do not utilize SIM cards so CDMA carriers do not lock handsets using SIM card locking.

⁸ The information being changed on the handset during re-flashing is exactly the same information set by the carrier who initially places the handset in service sets, and such information – or input data – is intended by the software writer to be customized by the carrier to set carrier-specific values. For example, the carrier needs to set the network identification for the home system, whether the handset will be permitted to roam and on what networks. The preferred roaming list is a list of system identification codes of networks with which the carrier providing the service has agreements to allow the handset to be used. Each carrier has a different preferred roaming list based on its own networks and contractual agreements it has with third parties. This list is routinely changed by carriers as they establish or change relationships with third parties for roaming service.

A. Unlocking or Re-Flashing a Handset Does Not Create an Infringing Derivative Work

Re-flashing a handset does not change the underlying mobile phone software, but rather it merely changes underlying variables accessed by the program, variables intended by the software designer to be changed. A good analogy would be a user inputting revised data into the “cells” of a spreadsheet, while leaving unchanged formulas that determine expressly how the spreadsheet performs functions on the input data. At no time does the company unlocking the phone read the proprietary operating system code because re-flashing a wireless handset is purely a write (as opposed to read) operation.

Even if such a minor, write-only operation were to be construed as changing the underlying mobile phone operating system code, which it should not, such changes would be permitted so long as they were solely for the purpose of enabling the consumer to choose the carrier’s network to support use of his or her device. 17 U.S.C. § 117(a)(1) includes an exception for altering copyrighted computer programs provided that “such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner.”⁹ Since the changes being made to the handset software are identical to the ones made routinely by the selling carrier to make it operate on its network, there can be no serious argument that the re-flashing does not fit squarely within the exception.

⁹ 17 U.S.C. § 117(a)(1).

B. Altering Mobile Phone Software Does Not Implicate Copyrights Held by Wireless Providers

In general, the underlying mobile phone operating systems that some wireless providers purport to protect through handset locking are not copyrighted by those providers themselves. Rather, they are created and owned by handset manufacturers and have been at most customized for the wireless provider. Indeed, the software locks used by carriers often are not designed to protect the interests of the copyright owner – but rather to protect the wireless carrier’s own business interests – *e.g.*, to discourage customer migration. In the 2006 *Final Rule*, the Copyright Office determined that handset locks “offer no apparent benefit to the author or copyright owner...but simply offer[] a benefit to a third party who may use § 1201 to control use of the hardware.”¹⁰ Further, the Copyright Office found that access controls are not “deployed in order to protect the interests of the copyright owner...[but are] used by wireless carriers to limit the ability of subscribers to switch to other carriers, a business decision that has nothing to do with the interests protected by copyright.”¹¹ The facts underlying these Copyright Office determinations have not changed over the past two years and will remain true throughout the renewal period.

Since wireless carriers themselves make the same changes to the handset software that are made in order to make the handset useable on their own network, it is clear that wireless carriers are trying to use the anti-circumvention prohibitions as a means to keep customers tied to their networks rather than enforce their own copyright interests. In general, the anti-circumvention prohibition was designed to keep copyright owners from having their works duplicated, displayed, or used without their permission. Since the re-flashing of a phone does

¹⁰ *Final Rule* at 68476.

not cause a copy of the software to be made, and the user is not displaying or using the software except in connection with the handset, the purposes behind the anti-circumvention prohibition would not apply and neither should the prohibition. Certain wireless providers are simply using § 1201 as a back-door method for controlling customer turnover, not preventing improper access to the handset software. In addition, the copyrights that they purportedly protect are, in fact, not copyrights that the providers have any legal claim to defend.

VII. THE AVAILABILITY OF UNLOCKED PHONES FOR SALE IS INSUFFICIENT TO MEET THE NEEDS OF CONSUMERS

While some unlocked phones may be available for purchase, this prospect would not address the needs of the individual consumer who already has purchased a phone. Such a customer should not be forced to purchase a new handset, typically at the cost of several hundred dollars, in order to change wireless providers. Even if the handset was subsidized by the carrier, the customer has compensated the carrier by subscribing to the service for some period.¹² The customer owns the handset and should have the flexibility to be able to place that handset on the network of their choosing. The possibility that certain carriers *may* unlock handsets of customers who have fulfilled their contracts does not eliminate the need for the exemption. The fact that carriers can (and customers often are unaware that they can ask the carrier to) unlock the handset is not the same as the customer having the right, without having to go back to the existing carrier, to use his or her handset on other networks. Indeed, existing carriers have every reason to not 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

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¹¹ *Id.* at 68476.

¹² If the carrier's minimum service contract does not serve to recoup the subsidy, that is a voluntary business

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further this goal. Even if carriers do unlock handsets, there are no market forces that will keep the carrier from charging an excessive amount for unlocking or insisting that the customer give other consideration to the carrier (such as staying in service for an additional period of time). Absent an exemption, the carrier has a monopoly on unlocking handsets and the Copyright Office should expect that they will act as a typical monopolist, charging monopoly rents to provide services such as unlocking.

Some wireless providers previously argued that the subsidies they provide negate any equipment cost barrier to entry for switching networks.¹³ This is not true. Even a low-cost handset will prove to be a significant barrier to switching providers for low- or fixed-income consumers. These customers wonder why they are forced to pay for a new handset when they already possess one that would be fully functional on a competing system but for the carrier lock. Further, the subsidy argument incorrectly presupposes that all carriers offer the same service and subsidize their handsets to the same extent – which simply is not true. For example, MetroPCS offers unique service plans that are unmatched by their competitors, but generally does not subsidize the cost of handsets to the same extent as its competitors. A customer who wants MetroPCS’ service will have to purchase a handset – which could act as a barrier. Also, since many of MetroPCS’ customers are less able to afford to make initial cash outlays and to incur high recurring monthly expenses, and may not have credit to cover these expenses, the alternative being extended by the other carriers is hollow. Simply put, those customers would have to go without wireless service.

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decision that should not be allowed to outweigh the obvious benefits of allowing unlocking.

¹³ *Information Submitted on Behalf of CTIA – The Wireless Association; Complementing Response to Copyright Office Request of August 14, 2006 for Further Information* (hereinafter “*CTIA Comments*”), Docket No. RM 2005-11, Sept. 11, 2006 at 19.

The subsidy argument also fails to take into account the many additional and incidental costs associated with purchasing a particular handset that wireless providers do not subsidize. The cost of accessories for a new handset – such as car chargers, wall chargers, ear pieces, cases and holsters – can be significant. In many instances, these accessories are unique to a particular handset model and will not work if an end user has to acquire a different handset when changing carriers.¹⁴ In addition to the dollar cost of new accessories, there is an investment of time and energy associated with learning the new phone’s features and functions, transferring phone numbers, addresses and re-activating email accounts on a new phone. And, some consumers are resistant to having to relearn the features and functionalities of a new handset, preferring to retain a handset with which they are familiar. All of these act as a barrier to customers migrating from service provider to service provider and would be easily removed if the exemption were renewed.

VIII. THE BENEFITS TO CONSUMERS OF AN UNLOCKING EXEMPTION FAR OUTWEIGH THE POTENTIAL HARM TO COPYRIGHT HOLDERS

A. There is a Clear Desire for Re-Flashing Services Among Consumers

Since the Copyright Office granted the exemption for wireless handsets in the 2006 anticircumvention proceeding, a significant number of consumers have used the re-flashing services provided by competitive wireless service providers. MetroPCS, through its well-received MetroFLASH program,¹⁵ has unlocked a significant number of phones for its customers, many of them new customers to MetroPCS who might otherwise have been unwilling

¹⁴ It is MetroPCS’ experience that customers can on average spend upwards of \$40 on accessories for each new mobile phone that they purchase.

¹⁵ See Attachment 1.

or unable to switch wireless providers.¹⁶ If the exemption for unlocking mobile phones is not renewed for an additional three years in this proceeding, future wireless customers will not enjoy the pro-competitive and cost savings benefits of these re-flashing services.

With the continued consolidation of the wireless industry, and the continuing efforts of the dominant wireless providers to sign exclusive contracts with handset providers,¹⁷ flashing handsets enables customers to use services that they otherwise may be unable to access. When customers are “locked in” to one service, the serving carrier has far less incentive to expand and improve service in order to meet customer needs and to match competitive offerings. Additionally, eliminating the exemption for mobile phones may create confusion for customers already participating in programs like MetroFLASH. Consumers may wonder whether they now possess illegal phones, or whether their phones will stop working. Such concerns further chill the ability of consumers to switch wireless providers.

B. The law disfavors equitable servitudes on personal property

Once a customer has purchased a wireless handset, he or she owns that phone. While there may be some contractual obligations in the form of service agreements, those relate to the contract between a customer and the wireless provider, not to after-purchase use of the device. Once customers own the wireless handsets, the law dictates that they are able to do with them as they please. The common law disfavors restraints on alienation, particularly in the case of personal property, preferring that the free flow of commerce not be hindered by the “dead hand” requirements of the original owner. Legal scholars have observed, “Where chattels are

¹⁶ In addition, many of MetroPCS’ customers may be completely new to wireless and are not able to afford the price of a new handset.

¹⁷ Carriers are increasingly looking towards handset exclusivity as a method of “locking in” customers. Recent studies indicate that 24% of consumers make their wireless decisions based solely on handset availability, with

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involved...the policy in favor of mobility creates even stronger cause for courts to hesitate and scrutinize carefully factors of social desirability before imposing novel burdens on property in the hands of transferees.”¹⁸

The Supreme Court has recognized this principle, citing with approval language from the Sixth Circuit that held, “The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand.”¹⁹ This principle is not a mere relic of legal history, either. Justice Breyer cited the principle at oral argument in January, 2008, declaring, “[T]here’s a doctrine that you cannot impose equitable servitudes on chattel.”²⁰ Accordingly, the law disfavors the use of software locks in exactly the way the carriers are using them here and the carrier should not be heard requesting that the exemption be denied.²¹

C. Holders of Content Copyrights Are Still Protected

During the 2006 proceeding, the Copyright Office noted that holders of content copyrights expressed a concern that an unlocking exemption for mobile phones might permit the circumvention of access controls designed to protect works – such as games, music, ringtones or

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another 28% making decisions based on a combination of quality of service and available handset. See Chang, Rita “Proof that handset brands help sell wireless plans,” *RCR Wireless News*, Oct. 28, 2008.

¹⁸ Chafee, Jr., Zechariah, *The Music Goes Round and Round: Equitable Servitudes and Chattels*, 69 HARV. L. REV. 1250 (1956).

¹⁹ *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 404 (1911) quoting *John D. Park & Sons Co. v. Hartman*, 153 F. 24, 39 (6th Cir. 1907).

²⁰ Transcript of Oral Argument at 21, *Quanta Computer v. LG Electronics*, 128 S. Ct. 2109 (2008).

²¹ MetroPCS also believes that it is inappropriate for carriers to insert into their agreements that handsets may not be used on third party networks, or similarly limit the use of the software to provision the use of services on the carrier’s network. Such a limitation would be similar to a car manufacturer inserting a provision in the sales contract that a car may only be serviced at a dealer’s service locations. This would be an inappropriate restraint of trade and the Office should consider whether to pre-empt state law to the extent carriers try to use contract provisions to eliminate the rights being sought here. Otherwise, carriers could attempt to make any relief granted

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other programs – downloaded to handsets. At that time, the Copyright Office addressed this concern by making clear that it had no intention of allowing unauthorized access to those works, and the exemption was allowed for the “sole purpose of permitting owners of cellular phone handsets to switch their handsets to a different network.”²² MetroPCS agrees that a similar limitation must be part of the renewed exemption.

1. Content copyright holders will still be paid for the use of their content

When a user downloads a copyrighted work to a mobile phone, the license fee is paid and the user is entitled to make fair, noninfringing use of that content. Whether the user accesses a ringtone while connected to his or her original wireless network or a competing network, the fact remains that the copyright holder has been paid the license fee for that work for use on that handset, and the user deserves to enjoy the benefits of that ringtone for the life of the handset. Re-flashing allows the customer to have no greater use of the original copyrighted work than was originally licensed and in fact permits the customer to enjoy its authorized use of the copyrighted work. If the customer is required to change handsets, the customer in many instances is not be able to transfer the copyrighted work to the new phone and will be forced instead to repurchase the same ringtone for the new handset. Requiring licensees to have to purchase a new ring tone merely because the carrier on which the handset is receiving service wants to restrict migration of the customer by locking the handset is not appropriate. Further, since much of the content cannot be improperly transferred to other handsets even if the original

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here a hollow right easily defeated.
²² *Final Rule* at 68476.

handset is re-flashed, there is little chance that unlocking a phone makes licensed content more likely to be inappropriately duplicated or transferred.

Concern over copyrighted content that is subject to a per-use license fee is similarly misplaced. In order to charge customers for accessing a copyrighted work, a program must authenticate itself with the network and charge the consumer. In the case of per-use licenses, attempting authentication on a new network will cause the program to fail and the copyrighted work not to be available. At the very least, customers' access to this type of work will be cut off as soon as they cease to pay a license fee by virtue of their being connected to a competing network.

Copyright owners may also benefit from re-flashing by making their content more valuable. Currently, if a customer must repurchase content each time that they change handsets, they may be deterred from purchasing content in the later months of use of the handset, or at all. Allowing customers to keep using the content even if they change service providers will make the copyrighted content more valuable and will increase the utility of such copyrighted work to potential licensees.

2. There are no technological barriers to implementing separate locks for network access and downloaded content

Should content copyright holders wish to add extra protection for their copyrighted works, there are no technological barriers to placing specific software locks on these works. In fact, digital certificates are already in use on many handsets to protect many of these copyrighted works. Unlocking a wireless handset is akin to knowing the access password for a desktop computer. While having this password may allow you to access to the contents of the hard drive, each individual music file, video, program or game can be separately protected by its own individual access controls. Just as knowing the password to a desktop computer does not give a

user the unfettered ability (or license) to duplicate copyrighted works, unlocking a wireless handset for the purposes of networks access need not automatically allow unauthorized access to or copying of downloaded mobile content. Further, since the user in this instance who is accessing the copyrighted work is the licensee of the copyrighted work, there can be no legitimate reason to prevent such user from accessing their licensed copyrighted works.

Content copyright holders also should be expected to take reasonable steps to protect their works. Since wireless handset unlocking is both a commonly-used and beneficial new tool for wireless consumers, those in the mobile content industry are undoubtedly aware of its existence.²³ As they are aware that handsets can be, and frequently are, unlocked, failing to add a separate, narrowly-tailored layer of protection for copyrighted content that resides on these handsets is tantamount to a refusal by these copyright holders to reasonably protect their interests.

D. An Exemption for Unlocking Wireless Handsets Has Enormous Environmental and Social Benefits

An exemption that allows for the unlocking of wireless handsets not only creates tremendous benefits for wireless consumers as detailed above, but also significantly lessens the impact that the wireless industry has on the environment.

1. Reusing wireless handsets results in a cleaner environment

The Environmental Protection Agency (“EPA”) estimates that each year consumers discard over 100 million mobile phones.²⁴ Over half of these discarded handsets are from

²³ In fact, several mobile content providers submitted comments or testified during the Copyright Office’s 2006 anticircumvention proceeding. *See Final Rule* at 68476.

²⁴ “Recycle Your Cell Phone. It’s An Easy Call.” Environmental Protection Agency fact sheet EPA530-F-07-046, Jan. 2008.

consumers who are changing carriers.²⁵ Many of these consumers do not want to get rid of their functioning handsets, but find that they have no choice when the phones will not work on their new wireless network. As a result, fewer than 20 percent of these 100 million wireless handsets are reused or recycled.²⁶ These discarded wireless handsets and batteries present a significant environmental risk, as they contain “a variety of hazardous materials, including toxic metals such as antimony, copper, nickel, lead...[as well as] phthalates and brominated flame retardants, that could potentially leach into the environment after disposal and threaten human health.”²⁷ Studies estimate that discarded electronic devices will result in 454 million kilograms of lead entering the environment over the next decade. Wireless handsets represent a growing portion of this problem, as their small size makes them susceptible to disposal in landfills, and many consumers do not even recognize mobile phones as a category of toxic waste.²⁸ Further, the proportion of electronic waste represented by wireless handsets will undoubtedly increase as handset manufacturers shorten the life cycle of handsets by introducing new handsets in ever shorter periods of time.

While several wireless service providers and industry groups offer wireless handset recycling programs,²⁹ it is far better for the environment if these phones continued to be reused instead of discarded or recycled. Many customers do not wish to get rid of their phones, and an unlocking exemption enables consumers to travel with their phone from network to network,

²⁵ A conservative estimate is that of the 100 million handsets discarded each year over half, or approximately 58 million, result from customers changing wireless providers. This is based on a conservative 2.0% churn rate a month and approximately 241 million wireless subscribers. *See* 12th Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, FCC 08-28 (Released February 4, 2008).

²⁶ *Id.* Since non-bulk re-flashing is relatively new, it is likely that the 20% does not represent a double counting of the over half of the phones which are the result of customer churn. Accordingly, adding the customer churn percentage to the 20% reuse of handsets would result in over 70% of handsets being reused.

²⁷ Lincoln, John D., Ogunseitan, Oladele A., Shapiro, Andrew A. and Apohores, John-Daniel M., *Leaching Assessments of Hazardous Materials in Cellular Telephones*, 41 ENVIRON. SCI. TECHNOL. 2572 (Apr. 1, 2007).

taking millions of handsets out of the waste stream entirely. For those customers who do wish to get rid of their current handset, wireless handset recycling groups estimate that upwards of 65 percent of handsets can be repurposed, saving significant resources that are otherwise used to recycle them.³⁰ Allowing consumers to unlock their handsets makes it far easier for phones to be repurposed, as it is not necessary to match specific phones with specific user networks.

2. **Unlocked handsets can be donated to provide a major source of revenue for charitable organizations or given to at-risk citizens for emergency use**

Unlocked wireless handsets can be donated to organizations that sell the phones to secondary-market consumers and distribute the proceeds to charitable organizations. Unlocked handsets are easier for wireless recycling organizations to sell, as they do not have to be matched to a particular network – which means more money can be distributed to charities.³¹ Countless charitable organizations use this method of fundraising to great success, including “Cell Phones for Soldiers,” a group that uses the proceeds from selling used handsets to purchase phone cards that allow soldiers to call home from overseas.³² In addition, unlocked wireless handsets can be used by at-risk citizens in order to provide them with access to emergency services. Many organizations collect cell phones to distribute to victims of domestic violence or to senior citizens who may be unable to afford the safety and security that access to wireless communications brings. Organizations like the National Coalition Against Domestic Violence

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²⁸ *Id.* at 2572.

²⁹ *CTIA Comments* at 24.

³⁰ *Comments of The Wireless Alliance, LLC and Robert Pinkerton*, Docket No. RM 2005-11, Feb. 2, 2006 at pt. III(B)(1)(c).

³¹ *Id.*

³² “Cell Phones Offer Lifeline to Soldiers,” CBS Evening News, *available at* <http://www.cbsnews.com/stories/2007/04/03/eveningnews/main2643562.shtml> (last visited Dec. 1, 2008).

and Phones for Life count on these handsets to help them save lives – allowing wireless handsets to be unlocked simply makes their job easier and allows greater proceeds to be available to the needy.

IX. CONCLUSION

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

Respectfully submitted,

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ATTACHMENT 1

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Press Release

Unlimited Wireless Carrier MetroPCS Announces Launch of MetroFlash(TM)

Consumers Can Now Activate Their Existing CDMA Handsets on MetroPCS' Network, Offering the Freedom to Enjoy the Nation's Most Affordable and Flexible Wireless Service

DALLAS--(BUSINESS WIRE)--June 26, 2008--MetroPCS Communications, Inc. (NYSE: PCS), the nation's leading provider of unlimited, flat-rate wireless communications service, announces the launch of MetroFlash(TM), allowing consumers to bring their compatible CDMA handsets to be used on MetroPCS' network. Coupled with its low cost, flat-rate unlimited wireless service, MetroPCS is further broadening consumers' freedom to enjoy more cost efficient, flexible wireless options. MetroFlash(TM) will eliminate for many consumers the requirement of having to purchase a new handset when signing up for MetroPCS service.

Offering consumers the ability to join MetroPCS with their existing handset makes switching carriers easier - and more cost efficient - than ever, said Tom Keys, Chief Operating Officer of MetroPCS. Not since number portability have consumers been offered such a convenient option in switching service providers. With the rising cost of gas and food, consumers are looking for ways to reduce expenses and the launch of MetroFlash(TM), along with our flat-rate, unlimited low cost service plans, makes MetroPCS a more affordable wireless option.

Customers using MetroFlash(TM) will receive a free month of service, plus unlimited local, long distance, voicemail and text messaging for \$40 a month and pay a \$30 fee. The service will be available at all MetroPCS company owned stores and select authorized dealers in all MetroPCS markets, excluding Las Vegas and Shreveport/Bossier City. Consumers can go to www.metropcs.com or a MetroPCS company owned store to determine if their phone is compatible with MetroFlash(TM).

MetroPCS' unlimited, flat-rate wireless, no signed contract plans range from \$30 to \$50 per month and allow subscribers to talk all they want, 24-hours-a-day, seven days a week. Unlike most carriers, MetroPCS does not require a signed contract, which means that consumers can activate service without going through a credit check or paying a deposit. Many of the plans include unlimited features such as voicemail, caller ID, call waiting, three-way calling, text and picture messaging, push e-mail, mobile Internet browsing, mobile instant messaging, and Metro411, a voice-activated, premium directory assistance service. Additionally, MetroPCS offers unlimited family plans for an affordable low price.

With approximately 4.4 million subscribers nationwide, continued consumer demand for MetroPCS' affordable, flexible, predictable, unlimited, no signed contract, flat-rate wireless service has been the driving factor behind the company's expansion across the country.

Consumers can visit any of MetroPCS' authorized dealer locations and company-owned retail locations or visit MetroPCS' web site at www.metropcs.com to sign up for service plans, and choose from a lineup of wireless phones from the top handset manufacturers.

About MetroPCS Communications, Inc.

Dallas-based MetroPCS Communications, Inc. (NYSE: PCS) is a provider of unlimited wireless communications service for a flat-rate with no signed contract. MetroPCS owns or has access to licenses covering a population of approximately 149 million people in 14 of the top 25 largest metropolitan areas in the United States, including New York, Philadelphia, Boston, Miami, Orlando, Sarasota, Tampa, Atlanta, Dallas, Detroit, Las Vegas, Los Angeles, San Francisco and Sacramento. As of March 31, 2008, MetroPCS has approximately 4.4 million subscribers and offers service in the Miami, Orlando, Sarasota, Tampa, Atlanta, Dallas, Shreveport - Bossier City, Detroit, Los Angeles, San Francisco, Sacramento and Las Vegas metropolitan areas. For more information please visit www.metropcs.com.

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