Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, DC

In the Matter of	)	
	)	
Exemption to Prohibition on Circumvention	)	Docket No. RM 2011-7
of Copyright Protection Systems for Access	)	
Control Technologies	)	

COMMENTS OF RCA–THE COMPETITIVE CARRIERS ASSOCIATION

RCA–The Competitive Carriers Association ("RCA") hereby submits these comments in response to the Copyright Office's recent Notice of Inquiry in the above-captioned proceeding.[1] As an association representing more than 100 competitive wireless providers, most of whom serve fewer than 500,000 customers, RCA has a keen interest in ensuring that all consumers—and not merely those served by AT&T and Verizon—can take advantage of the cutting-edge handsets and devices available today. With the existence of exclusive handset arrangements by the largest wireless carriers, many RCA members cannot gain access to the newest handsets their customers want. The current exemption for allowing customers to unlock their phones to use them on a different network has proven very popular with customers and promotes consumer choice. Accordingly, RCA strongly supports extending, with slight modifications, the current exemption allowing consumers to unlock their wireless devices and associate those devices with the wireless network of their choosing. The modifications RCA proposes to the exemption are intended to ensure that it covers the full range of devices, data, and networks used by consumers in today's dynamic wireless communications marketplace, and to close any loopholes that could be exploited to frustrate the purpose of the exemption.

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[1] *See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 76 Fed. Reg. 60398 (Sep. 29, 2011).

INTRODUCTION AND SUMMARY

In July 2010, the Librarian of Congress, acting on the recommendation of the Register of Copyrights, issued an order adopting several exemptions from Section 1201(a)(1)(A) of the Copyright Act, which prohibits the circumvention of technological access controls protecting copyrighted works.[2] One of those exemptions clarified that consumers may circumvent access controls related to the following class of works:

> Computer programs, in the form of firmware or software, that enable used wireless telephone handsets to connect to a wireless telecommunications network, when circumvention is initiated by the owner of the copy of the computer program solely in order to connect to a wireless telecommunications network and access to the network is authorized by the operator of the network.[3]

In adopting this exemption—which had appeared in a slightly different form in a 2006 order on exemptions from Section 1201(a)(1)(A)[4]—the Librarian permitted consumers to "unlock" the handsets they purchase from wireless carriers (or their authorized dealers) in order to use them on other carriers' wireless networks. The exemption thus allows, for instance, an AT&T customer to switch to another carrier while keeping the handset he or she purchased from AT&T. As with the other exemptions adopted in that order, the current "unlocking" exemption applies for a three-year period.[5]

The unlocking exemption was plainly justified in 2010, and the Copyright Office should recommend extending the unlocking exemption, with some slight modifications, for at least another three-year period. The adoption of the current exemption was a profoundly positive

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2 *See Exemption to Prohibition on Circumvention of Copyright Protection Systems fir Access Control Technologies,* 75 Fed. Reg. 43825 (Jul. 27, 2010) ("*2010 Exemption Order*").

3 *Id.* at 43830.

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

5 *2010 Exemption Order* at 43826.

development for competition and consumers, allowing wireless users across the country to switch providers while retaining their wireless devices, and those benefits will continue if the exemption is extended. Unlocking is 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. Conversely, a failure to extend the exemption would have a substantial "adverse effect on noninfringing uses" of wireless devices and their associated firmware, software, and data.[6] Indeed, given the harmful effects of allowing the unlocking exemption to expire, the Copyright Office should revisit its determination that proponents bear the burden of proof for *extending* a preexisting exemption, and instead adopt a presumption that the exemption remains valid and require opponents of the exemption to prove otherwise. Such an approach would be consistent with the Copyright Act and would minimize uncertainty for users of wireless devices in the future. Finally, in extending the unlocking exemption, the Copyright Office should slightly modify the wording to clarify the types of works the exemption covers, to ensure that the exemption keeps pace with ongoing technological innovation, and to close unnecessary loopholes in the current framing.

DISCUSSION

I. THE COPYRIGHT OFFICE SHOULD RECOMMEND EXTENDING THE CURRENT EXEMPTION FOR "UNLOCKING" WIRELESS DEVICES

For the same reasons articulated by the Library of Congress and the Copyright Office in 2010, prohibiting consumers from unlocking their wireless devices would have "a substantial adverse effect on noninfringing uses" of the firmware, software, and data stored on those

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6 *Id.* at 43830.

devices.[7] As an initial matter, the act of connecting a wireless device to a wireless network does not, in itself, implicate the copyright laws and thus does not infringe on the rights of any copyright holder. Moreover, as the Library of Congress and the Copyright Office have explained, a consumer does not violate the copyright laws when he modifies the device's firmware, software, or data to connect to a new wireless network. Owners of mobile devices "also own the copies of the software" on their devices, and their modifications to those copies fall squarely within the privileges set forth in Section 117 of the Copyright Act, which allows owners to modify a copyrighted program when done "as an essential step in the utilization of the computer program in conjunction with a machine."[8] And even if those modifications were not privileged under Section 117, they still would not infringe any copyrights, as the alteration of "specific codes and digits . . . to identify the new network" does "not implicate any of the exclusive rights of copyright owners."[9] Accordingly, unlocking a wireless device "to be used on another wireless network does not ordinarily constitute copyright infringement," and therefore involves a "noninfringing use" of the firmware, software, and data stored on the device.[10] This

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7 *Id.*; *see also Recommendation of the Register of Copyrights in RM 2008-8; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, Jun. 11, 2010, at 116 ("*2010 Register Recommendation*") ("[T]he Register finds that the proponents have presented a *prima facie* case that the prohibition on circumvention has had an adverse effect on non-infringing uses of firmware on wireless telephone handsets.").

8 *2010 Exemption Order* at 43831 (citing 17 U.S.C. § 117(a)); *see also 2010 Register Recommendation* at 132 ("[O]wners of mobile phones are also the owners of the copies of the software that are fixed on those phones and that as owners they are entitled to exercise the Section 117 privilege.").

9 *2010 Exemption Order* at 43831; *see also 2010 Register Recommendation* at 134 (analogizing the alteration of variable codes and digits to the insertion of a name in the "Happy Birthday" song, and explaining that "[t]he name is not a part of the work, but rather the work is intended to include a variable so that alternate names can be inserted to achieve the purpose of the song").

10 *2010 Exemption Order* at 43831.

determination was correct in 2010, and nothing has changed in the past year to warrant revisiting it.

Moreover, device locks continue to have "a substantial adverse effect" on noninfringing uses. By design, these locks bind wireless devices to specific carriers, not for the purpose of protecting copyrighted material, but rather to enforce their business models, and therefore significantly hinder a consumer's freedom to choose his or her wireless provider. If a consumer with a locked device wishes to switch to a new wireless provider, the consumer must abandon the locked device—often along with all of the materials previously licensed by the user, such as applications and related information, as well as contacts, personal information, and customizations stored on the device—and purchase a new one at significant cost. Earlier this year, the Federal Communications Commission ("FCC") found that the cost of purchasing a new device represents a significant deterrent to consumers wishing to switch wireless providers.[11] The largest wireless providers use these high switching costs to their advantage; they know that by locking the wireless devices they sell to consumers, they can prevent customers from migrating to competitive wireless providers in response to an increase in price or a decline in quality. As the Library of Congress pointed out last year, the locks operate merely "to preserve a business model" and "to keep consumers bound to their existing networks, rather than to protect the rights of copyright owners in their capacity as copyright owners."[12] RCA applauds the Library of Congress and the Copyright Office for recognizing these adverse effects when adopting the current unlocking exemption.

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11 *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 FCC Wireless Competition Report*").

12 *2010 Exemption Order* at 43831.

The empirical benefits of the unlocking exemption—as well as the dangers of allowing it to expire—are evident from the current exemption's effect on the wireless marketplace. Recent statistics compiled by the FCC show that the exemption has unleashed consumer choice by reducing wireless customers' switching costs.[13] Before 2006, when the Library of Congress and the Copyright Office adopted the first unlocking exemption, "[c]hurn rates had been decreasing for a number of years," as more and more consumers, facing the significant (and escalating) cost of purchasing new devices when switching wireless providers, opted to stay with their current provider.[14] Since then, industry-wide churn rates have increased, now that consumers can unlock their wireless devices and use them on other networks.[15] Renewing the unlocking exemption will continue to foster competition in the wireless marketplace. In contrast, if the exemption were allowed to expire, larger carriers would almost certainly revert to past practices and frustrate competition by preventing consumers from using their devices on competing carriers' networks.

Given the substantial consumer harm that would result if the exemption were not extended, as well as the uncertainty generated by the need to renew the exemption every three years, the Library of Congress and the Copyright Office should adopt a presumption that the unlocking exemption remains valid beyond the traditional three-year period. The Librarian has asserted that a proponent "must make a *prima facie* case in each three-year period" in order to extend a previously adopted exemption.[16] Such a requirement is nowhere to be found in Section 1201 of the Copyright Act, however. Instead, the statute merely requires the Librarian to

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13 *See Fifteenth FCC Wireless Competition Report* ¶¶ 261-62.

14 *Id.* ¶ 261.

15 *Id.* ¶¶ 261-62.

16 *2010 Exemption Order* at 43826.

conduct a rulemaking regarding possible exemptions "during each . . . 3-year period," and does not require proponents to affirmatively justify an extension to a preexisting exemption every three years.[17] Nor does the legislative history of Section 1201 indicate any preference for forcing proponents of the exemption to bear the burden of justifying such relief every three years. Past orders have cited the House Commerce Committee's Report on Section 1201, which suggests that the prohibition on circumvention "'is presumed to apply to any and all kinds of works, including those as to which a waiver of applicability was previously in effect, unless, and until, the [Librarian] makes a new determination that the adverse impact criteria have been met with respect to a particular class.'"[18] But the Report does not preclude a streamlined approach that would include a renewal expectancy to establish more certainty for consumers.

II. THE COPYRIGHT OFFICE SHOULD RECOMMEND SLIGHT MODIFICATIONS TO CLARIFY THE SCOPE OF THE EXEMPTION AND ELIMINATE POSSIBLE LOOPHOLES

When the Copyright Office recommended extending the original unlocking exemption in 2010, it correctly determined that minor modifications were necessary to ensure that the exemption kept pace with rapid developments in the wireless communications industry. In the same spirit, RCA proposes further alterations to the current exemption, as reflected in the wording below:

> 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

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17 17 U.S.C. § 1201(a)(1)(C).

18 *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 65 Fed. Reg. 64556, 64558 (Oct. 27, 2000) (quoting Report of the House Committee on Commerce on the Digital Millennium Copyright Act of 1998, H.R. Rep. No. 105–551, pt. 2, at 37 (1998)).

~~the~~ **such communications** network is authorized by the operator of ~~the~~ **such communications** network.

This revised exemption differs in three material respects from the current exemption: first, by adding the bolded phrase "including data used by those programs"; second, by changing "used wireless telephone handsets" to "wireless devices"; and third, by changing "telecommunications network" to "communications network." As discussed in greater detail below, each of these revisions is intended to eliminate loopholes and to ensure that the exemption covers the full range of devices, data, and networks used by consumers in today's dynamic wireless communications marketplace.

Adding "including data used by those programs." The text of the current exemption expressly includes "firmware or software," but does not specify whether it includes the data used by those programs when connecting to and accessing information from wireless communications networks. While not expressly mentioned, data is implicitly covered by the current exemption. For example, as the Copyright Office noted in its 2010 recommendation, "the computer program looks for, and interacts with, data in certain spaces or placeholders designed to contain variable information related to interoperability with mobile networks."[19] Like the underlying firmware and software, this data must be modified in order to allow the device to access a different wireless network. The Copyright Office also explained that, because of the data's inherently "variable" quality, changes made to this data "do not constitute infringement of the right to make derivative works based on the computer program."[20] The Copyright Office's reasoning strongly suggests that the exemption's reference to "firmware or software" already includes the data used by those programs to access wireless networks. However, the omission of "data" from the

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19 *2010 Register Recommendation* at 134.

20 *Id.*

express wording leaves the scope of the exemption ambiguous. All parties benefit from a clear and unambiguous exemption since violations carry substantial penalties. In keeping with the Copyright Office's earlier reasoning, the renewed exemption should add the phrase "including data used by those programs" to eliminate any doubt that the exemption covers any necessary alterations to that data when connecting to a new wireless network.

Changing "used wireless telephone handsets" to "wireless devices." The current exemption appears to limit the types of unlockable devices to "telephone handsets" that have been "used." But these limitations do more harm than good. Continuing to restrict the exemption to "telephone handsets" would needlessly ignore entire categories of wireless devices in this rapidly evolving marketplace. Today, consumers use "smart" phones, tablets, and a wide array of other devices to access wireless communications networks, and the line between handsets and tablets (or other computers) is increasingly blurring. As the FCC pointed out in its latest mobile competition report, "consumers are now more likely to use more than one mobile device—particularly non-voice devices, such as Internet access devices (*e.g.*, wireless modem cards, netbooks, and mobile Wi-Fi hotspots), e-readers, tablets, and telematics systems—that commonly are assigned telephone numbers."[21] The rationale for exempting traditional telephone handsets applies with equal force to these other wireless devices, which larger wireless providers can "lock" to their networks just as easily as traditional "telephone handsets."

Similarly, the renewed exemption also should not be limited to "used" devices. As an initial matter, the meaning of "used" in this context is ambiguous; whether a device must be activated for only a few instants or for some longer period is unclear. The "used" limitation thus does very little to address the issue that prompted its inclusion in the exemption in the first place:

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[21] *Fifteenth FCC Wireless Competition Report* ¶ 2.

the ability of so-called "bulk resellers" to "tak[e] advantage of the exemption after purchasing new mobile devices *en masse* at retail establishments and immediately unlock[] them" for resale.[22] At most, the "used" limitation merely invites these bulk resellers to "use" the device for a very short time before reselling it. Moreover, the "used" limitation appears to be motivated not by an interest in protecting a carrier's copyrights, but rather by a desire to prevent "commercial ventures" from "trafficking" in mobile devices.[23] While this desire may be understandable, it is not the concern of the Copyright Office. Wireless providers can address these concerns through other methods, such as by requiring customers who purchase devices to agree that they will not engage in bulk reselling. Indeed, as the Library of Congress noted in the *2010 Exemption Order*, "a wireless carrier's 'Terms of Purchase' and 'Terms of Service,' which are binding contracts, still impose use restrictions on consumers notwithstanding the designation of this class," and still allow wireless carriers to "seek a remedy by asserting a claim of breach of contract."[24] In short, the "used" limitation is neither necessary nor sufficient to prevent the bulk reselling of wireless devices.

Changing "telecommunications network" to "communications network." Finally, the renewed exemption should replace references to "telecommunications" with the broader term "communications." The 1996 Telecommunications Act defines "telecommunications" narrowly,[25] and the FCC continues to face difficult questions as to whether certain emerging

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22 *2010 Register Recommendation* at 169.

23 *Id.*

24 *2010 Exemption Order* at 43832.

25 *See* 47 U.S.C. § 153(50) (defining "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received").

technologies meet the statutory definition of a "telecommunications service."[26] Using the word "telecommunications" creates an ambiguity, potentially allowing a carrier to unlock devices for voice services, but not for data services. The Copyright Office can avoid this regulatory quagmire by using "communications" instead of "telecommunications" in the text of the exemption. The term "communications network" more than adequately captures the full range of wireless networks that consumers can access using wireless devices, and is flexible enough to encompass future network technologies that may not meet the technical definition of "telecommunications" under the 1996 Act.

CONCLUSION

For the foregoing reasons, the Copyright Office should recommend extending the unlocking exemption, with minor modifications, for at least another three-year period. The legal and factual predicates for the unlocking exemption remain true today, and the modifications RCA proposes would ensure that the exemption keeps pace with rapid innovation in the wireless industry.

Respectfully submitted,

/s/ Steven K. Berry

Steven K. Berry
Rebecca Murphy Thompson
RCA–THE COMPETITIVE CARRIERS ASSOCIATION
805 Fifteenth Street NW, Suite 401
Washington, DC 20005

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[26] For instance, the FCC recently acknowledged that it has yet to resolve whether interconnected voice-over-Internet-Protocol ("VoIP") services should be classified as "telecommunications services" or "information services." *See Connect America Fund; Developing a Unified Intercarrier Compensation Regime*, WC Docket No. 10-90, CC Docket No. 01-92, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, ¶ 718 (rel. Nov. 18, 2011) ("[W]e acknowledge that the Commission has not classified interconnected VoIP services as 'telecommunications services' or 'information services.'").