

**Before the
UNITED STATES COPYRIGHT OFFICE
Library of Congress**

Notice of Proposed Rulemaking)	
)	37 C.F.R. Parts 201
)	
Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies)	Docket No. RM 2008-8
)	
)	

REPLY COMMENTS OF CTIA – The Wireless Association®

On behalf of:
CTIA – The Wireless Association®
1400 16th Street NW, Suite 600
Washington, DC 20036

Submitted by:
Bruce G. Joseph
Karyn K. Ablin
Jennifer L. Elgin
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
202-719-7258

Michael F. Altschul
Senior Vice President & General Counsel
Andrea D. Williams
Vice President of Law
CTIA – The Wireless Association®
1400 16th Street NW, Suite 600
Washington, DC 20036
202-785-0081

March 2, 2012

During the initial round of Comments in this proceeding, CTIA – The Wireless Association® opposed proposed the exemption for classes 6A, 6B, and 6C (collectively the “Cell Phone Unlocking Exemption” or the “Exemption”). *See* Comments of CTIA – The Wireless Association® (Feb. 10, 2012) (“CTIA Comments”). The few Comments filed by others in support of the Exemption add nothing to the debate or to the initial submissions of the original proponents of the Exemption (the “Proponents”). To the contrary, the paucity of the comments underscores the complete lack of relevant, cognizable evidence supporting the Exemption.

I. THE COMMENTS SUPPORTING THE CELL PHONE UNLOCKING EXEMPTION DO NOT CONTRIBUTE TO THE SHOWING REQUIRED TO MEET THE STRICT SECTION 1201 BURDEN OF PROOF.

Of the nearly 700 comments filed during the initial round, only sixteen comments that were identified by the Copyright Office as addressing classes 6A, 6B, or 6C (collectively, “class 6”) and might be construed as supporting the Exemption.¹ None of these comments even attempts to explain how anyone’s ability to make fair use or other noninfringing use of copyrighted operating system firmware or software in cell phones that are locked to a particular carrier’s network has been or is likely to be adversely affected by the statutory prohibition against circumventing the technological protection measure locking those phones to a particular network. Moreover, none discusses the statutory factors of 17 U.S.C. § 1201(a)(1)(C) that the Librarian is required to consider in determining whether to grant an exemption. Indeed, fifteen of these sixteen comments devote less than one page to discussing proposed class 6, often offering only a paragraph or two. None of the comments comes close to providing – or even contributing to – the requisite support that was lacking in the initial submissions of the proponents of the class.

Fully eight of the comments do not discuss the proposed Cell Phone Locking Exemption at all, but instead discuss such topics as access to DirecTV programming (No. 252), encryption (No. 600), the proposed Class 5 “jailbreaking” exemption (Nos. 105, 192, 277, 332, and 451), or, in one case, no topic at all (No. 263). Another four express naked opinions, with no information

¹ *See* Comment Nos. 6 (New America Foundation’s Open Technology Initiative), 69 (Arpad Goreity), 105 (Bruce Leban), 142 (Christopher Meacham), 192 (Dianna Dowd-Lebow/Dixon Styres), 208 (Edwin Wiles), 252 (Gene Desotell), 263 (Harry), 277 (Jacob Armstrong Sheridan), 332 (John Chattin), 433 (Manoj Thadani), 451 (Matthew Farmer), 529 (Richard Warren), 530 (Richard Witt), 538 (Robert Blum), and 600 (Steve Roggenkamp).

whatsoever to support those opinions (Nos. 69, 208, 433, 538). Yet another comment (No. 530) is, frankly, incomprehensible.

Two of the remaining three commenters attempt to inject personal experiences into their remarks, but fail to tie those experiences to the issues relevant to this rulemaking. One states that he unlocks his phone when he travels to Europe (No. 529), but he fails to explain why unlocking is his only viable option, what hardship he would suffer if he could not, or whether a prohibition on circumvention would affect his conduct during the relevant three-year period (given that his phone is apparently already unlocked). The other commenter (No. 142) claims that he has “a first generation Apple iPhone” that “cannot be used on the T-Mobile cellular network without modified firmware” and that he would need to circumvent “if such firmware had been, or is, originally encrypted.” He is silent, however, about whether the firmware was encrypted; whether he has already modified the firmware such that no further circumvention is needed during the relevant three-year period; whether T-Mobile is his carrier; or even that he would like to switch to T-Mobile. Nor does he state whether his iPhone could be used on T-Mobile’s network even if it were unlocked given the different frequency bands used by the different carriers, or why he needs to unlock his phone given his ability to acquire an unlocked iPhone or other phone for use on T-Mobile. Moreover, even if those two commenters did provide relevant evidence (and they do not), the bottom line is that two isolated anecdotes do not come close to showing that the prohibition on circumvention will have “a substantial adverse effect” on noninfringing uses. *See* CTIA Comments Part IV.

II. THE COMMENTS OF NEW AMERICA FOUNDATION SIMILARLY DO NOT DEMONSTRATE A NEED FOR THE PROPOSED CELL PHONE UNLOCKING EXEMPTION.

The New America Foundation (“NAF”) took its role as a commenter somewhat more seriously than the other fifteen supporters, but its comments (No. 6) similarly fail to provide meaningful support for the Cell Phone Unlocking Exemption. NAF attempts to tie its support of the Exemption to its “Wireless Commotion Project,” but the Exemption appears to be at most tangential to that project. From what can be discerned from NAF’s comments, the focus of “Commotion” is the creation of a peer-to-peer Wi-Fi “mesh” that would enable Wi-Fi devices to communicate with each other without central control. NAF Comments at 2-3. NAF does not

argue that the Exemption is necessary to create that “mesh”; indeed, NAF does not even attempt to show that the cellular network locks at issue affect the ability of devices to communicate with each other over Wi-Fi. Its comments relating to the “mesh” are, rather, directed to the Class 5 “jailbreaking” exemption. *Id.* at 2-3. With respect to the Cell Phone Unlocking Exemption, NAF argues only that the Exemption would further an additional feature of the project: the ability to use carriers’ wireless networks to “allow[] anonymous phone calls and text[] messages to devices on the network including unlocked mobile devices.” *Id.* at 3.

A. NAF’s Comments Demonstrate that the Focus of Project Commotion Is Overseas, Not the United States, and Is Beyond the Scope of this Proceeding.

The NAF Comments make clear that Commotion is directed to the use of wireless devices overseas, among other things, to (1) Prevent hostile governments from surveilling, disrupting, or shutting down communications; (2) Enhance security among democratic activists by enabling direct peer-to-peer communications; and (3) Implement open source and open tech solutions that facilitate continued adaptation, enhancement, and implementation of these technologies by democratic activists and programmers around the globe. *See* http://events.ccc.de/camp/2011/wiki/CommOTIon_Wireless_Project (last visited Mar. 1, 2012). The focus of these efforts is to ensure democratic activism in those countries where communications are at risk: describing situations “where governments have attempted to silence democratic communication by limiting or shutting off communications networks, such as Tunisia, Egypt, and Libya, as well as in disaster recovery scenarios where central communications infrastructure is lacking or has been destroyed.” NAF Comments at 3; *accord* www.tech.chambana.net/projects/commotion (“As recent events in Tunisia, Egypt, and Libya have illustrated (and Myanmar demonstrated several years prior), democratic activists around the globe need a secure and reliable platform to ensure their communications cannot be controlled or cut off by authoritarian regimes.”) (last visited Mar. 1, 2012). As stated by one of its founders, Josh King: “We’re developing Commotion primarily because we see a great need, in efforts like the Arab Spring protests, for activists to have the ability to communicate securely and anonymously in a local fashion, as well as share sparse sources of Internet connectivity.” www.intelligence-strategique.eu/2011/commotion-wireless-interview-of-josh-king/ (last visited

Mar. 1, 2012).² But this rulemaking does not concern conduct overseas. It concerns only acts of circumvention occurring in the United States.

NAF admits that domestic use of its project is currently limited to “field testing” in Washington, D.C. and Detroit, Michigan. Comments at 3. The reason for this is not, as NAF implies, to deploy the project in the United States. Rather:

In addition to making it easy to set up a MANET, Commotion needs to make sure that the ad hoc networks are secure and anonymous so that citizens can use them without being afraid of persecution. To do this, Commotion will be adding a piece of software called Tor, which masks the sources and destinations of network traffic, and testing it in urban areas in the United States, such as Detroit, Washington, D.C., and Philadelphia. “Before we put people’s lives on the line, we want to test this out in a real-world setting.”

<http://spectrum.ieee.org/telecom/internet/building-a-subversive-grassroots-network> (quoting Sascha Meinrath, the initiative’s director) (last visited Mar. 1, 2012). NAF’s Comments are silent on the possibility of functional deployment in the United States, the need for circumvention in the United States, or whether any potential user (such as a disaster agency) has been unable to implement Commotion due to cell phone network locks. Moreover, NAF offers no reason that its field testing is not proceeding on pace, or that it cannot proceed using the wide array of already unlocked phones. *See* CTIA Comments at 4-5.

B. NAF Fails To Demonstrate that Any User Will Be Inhibited in the Ability To Make Lawful Use of a Copyrighted Work by the Prohibition on Unlocking Cell Phone Network Locks.

In any event, aside from describing Commotion, NAF makes no attempt to connect the prohibition on the circumvention of cell phone network locks to any lawful use of a copyrighted work during the relevant three-year period. In fact, NAF says nothing about the status of its project (other than that some part of it is being field tested in two domestic markets, *see supra*);

² The investment in Commotion from the U.S. Department of State (NAF Comments at 3) highlights its foreign focus. The State Department apparently wishes to support the effort to “deploy ‘shadow’ Internet and mobile phone systems that dissidents can use to undermine repressive governments that seek to silence them by censoring or shutting down telecommunications networks.” www.nytimes.com/2011/06/12/world/12internet.html?_r=2&pagewanted=all (last visited Mar. 1, 2012). The State Department, of course, has no role in fostering domestic insurrection. In any event, if the State Department believed that a Cell Phone Unlocking Exemption were necessary to protect its interests, it would have spoken for itself.

when such networks might exist and who might be interested in using them in the United States; or how, or indeed whether, anyone would be significantly adversely affected by the existence of carrier phone locks on certain GSM phones during the relevant three-year period.

To the extent that NAF's project relates to the use of cell phone networks, it is not even clear that NAF is proposing lawful activity. NAF says it wants to permit "anonymous phone calls and text[] messages" over GSM networks without the authorization of the network operator. NAF Comments at 3. It says nothing about how such calls or messages would be made or whether they would be lawful under U.S. law. Moreover, to the extent that NAF seeks to allow connections without the consent of the operator of the wireless network, *id.* at 8-9, it appears to seek to add a second level of free-riding to the efforts of the Proponents to free-ride on the carriers' investments in subsidized wireless phones. NAF essentially asks that the carrier that invested in building and bringing a network to the public be subject to having its network used without its consent. There is no justification for the Register or Librarian to foster such use, and such use certainly cannot be considered "fair."

Further, such access would flout the Librarian's finding in two prior rulemakings that the cell phone unlocking exemption should "ensure that individuals or firms could not use the exemption to illegally connect to a wireless network, that is, to connect to a network without the permission of the operator of that network." *See 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* at 167 (June 11, 2010). NAF, however, inexplicably requests the Unlocking Exemption in order to condone users connecting to GSM networks without authorization. NAF Comments at 9 ("Open GSM base-stations, such as those used by Commotion, do not require authorization and can allow end users to establish the connection themselves."). This argument contravenes the underlying principles of section 1201.

C. NAF's Attempts To Piggyback on the Unsupported Assertions of the Proponents in Seeking a Broad Exemption Fail.

Although NAF endorses certain arguments of the Class 6 Proponents, NAF fails to provide any evidentiary support or independent argument to add to the justifications offered by

those Proponents – essentially relying only on a “me, too” approach. Thus, NAF’s submission adds nothing to the Proponents’ unsupported applications for exemption.

First, NAF argues that “wireless telephone handsets . . . do[] not reflect the range of devices that can [sic] and are locked to mobile devices.” *Id.* at 7. NAF says nothing, however, about why its Commotion project needs an exemption for any devices, much less devices other than telephone handsets. Moreover, NAF says that it desires an exemption for unlocking to facilitate anonymous “phone calls and text[] messages,” *id.* at 3 – precisely the communications that are made on wireless telephones. Similarly, NAF provides no reason why the exemption should extend beyond “wireless telecommunications networks” to “wireless communications networks” more generally, or how such expansion would affect NAF or Commotion, other than to say that the exemption should apply to information services. *Id.* at 9. (citing Comments of Consumers Union).

NAF also states that it “agrees” with certain Proponents that the exemption should apply to new devices as well as used devices. *Id.* at 8 (citing Comments of Consumers Union). Again, however, it provides no reason that such an exemption is necessary or that cell phone locks have interfered or will interfere with fair use of copyrighted works. Indeed, NAF openly admits that some device manufacturers sell unlocked devices directly to consumers. *Id.* at 8 and n.21.

Finally, NAF also explicitly free-rides on, but adds nothing to, the Proponents’ arguments that cell phone unlocking does not infringe copyright. *Id.* at 9-10 (citing Comments of Consumers Union, RCA, MetroPCS, and Youghioghny Communications). These arguments are addressed in CTIA’s opening Comments. CTIA Comments at 30-38.

CONCLUSION

For the foregoing reasons and for the reasons set forth in its February 10, 2012 Comments, CTIA respectfully requests that the Copyright Office reject Proposed Exemptions 6A, 6B, and 6C.

Respectfully submitted,

/s/ Bruce G. Joseph _____

Bruce G. Joseph
Karyn K. Ablin
Jennifer L. Elgin
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
202-719-7258

Michael F. Altschul
Senior Vice President & General Counsel
Andrea D. Williams
Vice President of Law
CTIA – The Wireless Association®
1400 16th Street NW, Suite 600
Washington, DC 20036
202-785-0081

March 2, 2012