

Before the

**U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS**

In the matter of exemption to prohibition on circumvention
of copyright protection systems for access control technologies

Docket No. 2014-07

**Reply Comments Submitted on Behalf of
Petitioner Institute of Scrap Recycling Industries, Inc.**

**Proposed Class 11:
Unlocking—Wireless Telephone Handsets**

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INTRODUCTION

Petitioner Institute of Scrap Recycling Industries, Inc. (“ISRI”) submits these reply Comments in support of its February 27, 2015 Comment requesting an exemption for Proposed Class 11: Unlocking – Wireless Telephone Handsets. ISRI’s initial Comment fully satisfies all the legal and factual criteria for an exemption under § 1201(a)(1) for individual and bulk circumvention of used devices by or at the direction of the device’s lawful owner. In particular, ISRI’s Comment demonstrated that its members and other legitimate recyclers provide important public and economic benefits by efficiently buying, refurbishing, reselling, and recycling devices that they lawfully acquired individually from consumers and in bulk from organizations. The Comment also established that the proposed unlocking exemption will effectuate Congress’s clear intent in the Unlocking Consumer Choice and Wireless Competition Act (“Unlocking Act”),¹ to promote competition in the wireless device and carrier marketplaces, increase the choices available to consumers, and allow recyclers to again efficiently and economically enable those choices, all without negatively impacting any legitimate copyright interests.

ISRI’s proposed exemption is not opposed by any of the four major wireless carriers or by any wireless equipment manufacturer. The *sole opposition* to ISRI’s request (and to the handset unlocking requests of the three other Class 11 proponents) comes from TracFone Wireless, Inc., a prepaid wireless service provider.² But TracFone’s Comment makes clear that the Technological Protection Measure (“TPM”) it seeks to protect from circumvention is used solely to protect its particular subsidized business model of locking consumers into a particular wireless network, *not* to protect any legitimate copyright interests. As ISRI’s initial exemption request explained, “keep[ing] consumers bound to their existing networks” is precisely the sort of activity that has “nothing whatsoever to do with the interests protected by copyright.”³ The Librarian has previously found avoiding such restrictions by unlocking phones to be noninfringing and qualifying for a § 1201 exemption.⁴ TracFone’s opposition provides no reason to conclude differently this time.

TracFone’s only real concern with the proposed phone unlocking exemptions is that TracFone thinks they might allow “traffickers” to unlock its prepaid phones for the purpose of wholesale illegal, criminal trafficking. TracFone acknowledges that it *supports* an unlocking exemption that expressly excludes any provision that could be exploited by illegal traffickers “to steal subsidies

¹ Pub. L. No. 113-144, 128 Stat. 1751 (Aug. 1, 2014).

² See Long Comment of TracFone Wireless, Inc. (“TracFone Comment”).

³ Comment of ISRI on Proposed Class 11 (“ISRI Comment”) at 6-7 (quoting Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68472, 68476 (Nov. 20, 2006) (formerly codified at 37 C.F.R. 201.40); 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, 134 (June 11, 2010) [hereinafter 2010 Recommendation], available at www.copyright.gov/1201/2010/initialed-registers-recommendation-june-11-2010.pdf).

⁴ *Id.*

and harm consumers.”⁵ Thus the only real disagreement at this stage of the Rulemaking is over the precise scope and wording of an unlocking exemption. To be clear, ISRI condemns illegal trafficking of new phones and said so directly in its initial Comment.⁶ TracFone’s concerns about trafficking, however, not only are misplaced as copyright concerns but, as explained below, are eliminated by the carefully crafted language of ISRI’s requested exemption. That language expressly and effectively excludes such trafficking from its provisions while allowing noninfringing unlocking by consumers and legitimate bulk recyclers.⁷

The adverse impacts of not having an unlocking exemption that ISRI established in its initial Comment are real, substantial and, contrary to TracFone’s suggestions in its Comment, not speculative. ISRI’s demonstrated noninfringing uses are not countered by TracFone’s arguments, and the § 1201 statutory factors weigh in favor of the proposed exemption. It should be granted.

I. TracFone, The Sole Objector, Seeks to Protect Only Its Business Model of Locking Consumers to Its Network, Not Any Interests Protected By Copyright

TracFone alone opposes the Class 11 unlocking requests. No other company in the wireless industry—no other carrier (including the four major wireless carriers that TracFone asserts account for 96% of the nation’s 2013 wireless services revenue),⁸ no equipment manufacturer, no industry association, and no one else—has submitted an opposition. And TracFone’s Comment makes clear that the TPM its opposition seeks to shield from circumvention is used solely to protect its particular subsidized business model of locking consumers into a particular wireless network,⁹ *not* to protect any legitimate copyright interests. TracFone acknowledges repeatedly in its Comment that it utilizes TPMs to prevent consumers and others from using TracFone handsets on different carriers. Far from protecting the software itself, TracFone admits its concern is that an exemption “would hinder wireless providers’ ability to innovate with new *subsidy and discount programs*.”¹⁰ Even TracFone’s proposed alternative exemption language is designed to explicitly protect a business model, mentioning the term “subsidy” no less than three times.¹¹

⁵ TracFone Comment at 3.

⁶ *See* ISRI Comment at 15.

⁷ As explained below, ISRI believes its proposed exemption is properly drafted to permit noninfringing unlocking by both consumers and bulk recyclers while fully addressing TracFone’s trafficking concerns. However, if the Register is considering exemption language in Class 11 proposed by the other proponents, CCIA, Consumers Union, or eBay, Inc. and Gazelle, Inc., ISRI requests that the Register ensure that any final language includes the elements embodied in ISRI’s exemption, especially permitting bulk unlocking by legitimate recyclers and unlocking of unsubsidized devices.

⁸ TracFone Comment at 15.

⁹ TracFone subsidizes the prices of its locked handsets so they are priced below cost, and recovers the subsidies through its prepaid usage charges. *Id.* at 2.

¹⁰ *Id.* at 3 (emphasis added).

¹¹ *Id.* at 3-4.

In effect, TracFone seeks to prevent consumers and bulk recyclers from unlocking phones used on the networks of carriers that account for over 96% of wireless revenue simply to protect TracFone's particular lock-in business model.

TracFone explicitly states that it opposes the proposed phone unlocking exemptions because they "could be interpreted to provide loopholes for traffickers intending to steal the subsidies offered by providers like TracFone and thus imperil TracFone's ability to offer subsidized phones to consumers."¹² It also indicates that it sues traffickers under the DMCA for one reason: to ensure that wireless service revenue keeps flowing to TracFone and not to competing wireless providers. Notably, TracFone's suits against phone traffickers do not appear to be motivated by protecting the integrity of the copyrighted work itself. Nor does TracFone worry that the underlying software will be exploited for its creative value by reproduction, creation of derivative works, distribution, or public performance. Instead, TracFone objects because, if competing wireless providers can collect revenue from service on handsets that were expected to produce revenue only for TracFone, its business model becomes less profitable.¹³

ISRI absolutely does not condone illegal trafficking. But the DMCA does not exist to enable a wireless provider to keep its customers locked into its network on their lawfully owned handsets, no matter how much the wireless provider invested in those handsets.

As ISRI showed in detail in its initial Comment, these are well-established principles that need not and should not be relitigated in this proceeding.¹⁴ The Register and Librarian have determined in multiple previous rulemakings, and Congress agreed in enacting in the Unlocking Act, that using the software or firmware on a phone to unlock it so it can be used on a different network does not infringe any rights under 17 U.S.C. § 106. The purpose of such TPM is to lock consumers into a particular network rather than to protect copyright interests, and thus, modifying the locking software is not a use that infringes or implicates copyright in the first instance.

In these situations, the Librarian has appropriately recognized the absence of "copyright infringement or . . . an activity that in any way implicates copyright infringement or the interests of the copyright holder."¹⁵ Similarly, the Register's 2010 recommendation could not have been more clear:

[T]he primary purpose of the locks is to keep consumers bound to their existing networks, rather than to protect the rights of copyright owners in their capacity as

¹² TracFone Comment at 7. TracFone asserts that traffickers have bought TracFone handsets in bulk, unlocked them, and sold them for use on other wireless networks. *Id.* at 2. Trafficking prevents TracFone from recovering its subsidies because trafficked phones do not bring in revenue for TracFone through usage charges. *Id.*

¹³ TracFone Comment at 3.

¹⁴ ISRI Comment at 6-7.

¹⁵ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68472, 68476 (Nov. 20, 2006) (formerly codified at 37 C.F.R. 201.40) [hereinafter 2006 Final Rule].

copyright owners. . . . [T]here appear to be no copyright-based reasons why circumvention under these circumstances should not be permitted [U]nlocking a mobile phone to be used on another wireless network does not ordinarily constitute copyright infringement and . . . Section 1201(a)(1), a statute intended to protect copyright interests, should not be used to prevent mobile phone owners from engaging in such noninfringing activity.¹⁶

The fact that the only opposition to ISRI's proposed exemption came from TracFone and was based on its inability to profit from TPM-protected exclusivity further underscores the lack of copyright interests affected by unlocking. Even more revealing is that TracFone actually supports a phone unlocking exemption, but only one that is explicitly conditioned on TracFone being able to recover its subsidies.¹⁷ TracFone's position would create the disturbing result that breaking a TPM to unlock one's phone *does not violate copyright law unless it prevents the wireless provider from making its expected profit on that phone*. TracFone should be and is able to enforce its business models and recover its subsidies through a variety of other legal tools, including contracts, early termination fees, and, where necessary, lawsuits raising a variety of other legal claims. But not through misusing copyright law.

II. ISRI's Proposed Exemption Will Not Immunize the Criminal Trafficking TracFone Describes

TracFone's Comment makes plain that its only real concern with ISRI's and the other proposed phone unlocking exemptions is that they might allow "traffickers" to unlock its new prepaid phones for the purpose of wholesale illegal trafficking.¹⁸ Its opposition is *not* directed at legitimate bulk recyclers of used phones like ISRI's members, or at consumers, but instead at "a sophisticated operation based on purchasing thousands of handsets, unlocking them immediately, and then reselling them," or "illicit operations, some with known associations with criminal and terrorist organizations, illegally attempting to profit by stealing the subsidies paid for by handset providers."¹⁹

To be completely clear, ISRI and its members do not in any way condone illegal trafficking of new phones. ISRI members themselves engage in nothing resembling trafficking. TracFone does not assert otherwise. Instead, TracFone's only real objection is that ISRI's proposed exemption is somehow drafted in an unspecified way that might permit criminal trafficking. As explained below, it will not. As a result, it would be not only unwarranted but also anti-consumer and

¹⁶ 2010 Recommendation at 152-53.

¹⁷ TracFone Comment at 3 (proposing language that would allow unlocking only if "all obligations to the Original Network service provider associated with the provision of [any subsidy, discount, or other incentive program] have been satisfied").

¹⁸ TracFone asserts that traffickers have bought TracFone handsets in bulk, unlocked them, and sold them for use on other wireless networks. *Id.* Trafficking activity prevents TracFone from recovering its subsidies because trafficked phones do not bring in revenue for TracFone through usage charges. *Id.*

¹⁹ *Id.* at 6.

anticompetitive to exclude legitimate recyclers and their bulk recycling of used handsets from the scope of an unlocking exemption.

TracFone's Comment in fact expressly *supports* a "pro-consumer" exemption that permits consumers to unlock their phones "so long as the exemption expressly excludes any provision that could be exploited by traffickers to steal subsidies and harm consumers."²⁰ The exemption proposed by ISRI, while applying to both direct consumers and legitimate bulk recyclers, is carefully crafted to "expressly exclude any provision that could be exploited by traffickers," and it effectively achieves that exclusion.

ISRI's initial Comment explained that "[b]ulk unlocking is no different than individual consumer unlocking at the copyright level, but is significantly different on the level of consumer benefit."²¹ Treating bulk unlocking by legitimate recyclers as lawful to the same extent as individual unlocking is an important means to achieve valuable, pro-consumer goals including ensuring more unlocked devices of a greater variety for consumers to choose from at lower prices in the market, as well as increased competition between new and used devices and between wireless networks.

A. ISRI's Exemption Is Carefully Crafted to Exclude Traffickers from Its Scope

ISRI's member companies purchase or receive donated used phones. They do not purchase new, unused handsets from carriers or retailers, but rather only used phones from prior individual or corporate owners. ISRI's proposed exemption, and its accompanying definition of "used" handsets, were carefully and explicitly crafted to distinguish between this legitimate bulk unlocking of true used devices and the criminal trafficking of new phones that TracFone invokes in its Comment.²²

As ISRI explained in its initial Comment:

Importantly, Petitioner's focus on unlocking of used mobile devices, and the proposed definition of "used" above, eliminates any concern about phone traffickers misusing the proposed exemption. Traffickers purchase new, typically low cost handsets that are either subsidized or prepaid, then unlock the handsets and sell them in the United States and or other countries without the handset ever being activated on a network or the subsidy being repaid. Petitioner and its members do not condone this type of activity. The definition of "used" proposed here includes the requirement that a phone have been "activated on the wireless network" in order to exclude this sort of arbitrage from the scope of the requested exemption. The Register in 2010 concluded that similar limitations "ensure that the designation of this class will not benefit those who . . . purchase *new* mobile

²⁰ *Id.* at 3.

²¹ ISRI Comment at 13.

²² *Id.* at 14-15.

phone handsets at subsidized prices and, without actually using them on the networks of the carriers who market those handsets, resell them for profit.”²³

ISRI’s carefully crafted, narrow language could not be further from the “very broadly worded exemptions with virtually no limitations” that TracFone alleges all of the proposed Class 11 exemptions to be,²⁴ and TracFone does not address ISRI’s limiting of its proposed exemption to “used” devices *at all*.

TracFone acknowledges that its concerns about “loopholes for traffickers intending to steal the subsidies offered by providers like TracFone” could be obviated by “official comments in the record making clear that the intent of the exemption is not to benefit traffickers”²⁵ or by ensuring that the “exemption should explicitly state that it is not intended to immunize the activities of traffickers or, at the very least, the official record of the proceeding should make clear that the exemption is not intended to preclude DMCA actions against traffickers.”²⁶ ISRI’s proposed language accomplishes precisely these goals, but ISRI would not be opposed to an accompanying statement in the record to this effect, so long as the exemption language and the statement were clear that the exemption permitted bulk unlocking of used phones by legitimate recyclers like ISRI’s members.

B. TracFone’s Extensive Litigation History Demonstrates that It Will Continue to Have Ample Legal Tools to Protect Against Phone Traffickers

TracFone expresses concern that the proposed exemption—rather than permitting actual copyright infringement—could hinder TracFone’s ability to bring successful DMCA lawsuits against phone traffickers.²⁷ TracFone has made extensive use of lawsuits against illegal phone traffickers raising a variety of legal claims, including the DMCA, to protect its subsidies. Its Comment expresses concern that ISRI’s proposed exemption “could be construed to immunize illegal activities of phone traffickers.”²⁸ The exemption will do no such thing.

First, because the proposed exemption expressly excludes illegal trafficking, DMCA claims will still be available to TracFone when it seeks to stop such activity.²⁹ The bulk unlocking covered by the proposed exemption is of a different character from the conduct of illegal phone

²³ *Id.* at 15 (quoting 2010 Recommendation at 43,831-82 (emphasis added)) (footnotes omitted).

²⁴ TracFone Comment at 7.

²⁵ *Id.* at 7.

²⁶ *Id.* at 7-8 n.15.

²⁷ *Id.* at 3.

²⁸ *Id.* at 3.

²⁹ While ISRI’s members do not engage in illegal trafficking and ISRI does not seek an exemption that covers such behavior, ISRI would note that circumventing TPM for carrier unlocking purposes simply is not a copyright or DMCA issue.

traffickers, who do not deal in handsets that are “lawfully acquired and activated on the wireless telecommunications network of a carrier.”³⁰

Second, even if it became more difficult for TracFone to assert DMCA claims, TracFone’s successful litigation strategy against phone traffickers has not depended and need not depend on the DMCA. TracFone has demonstrated that it does not believe copyright and the DMCA are essential to maintaining its business model by filing at least two lawsuits against traffickers in which it asserted no claims under copyright law or the DMCA,³¹ one just a few months ago in December 2014.³² And in at least one of these lawsuits, which reached a judgment, TracFone won permanent injunctions and damages based solely on the non-copyright, non-DMCA claims.³³

TracFone has many other legal tools available to stop trafficking. When TracFone asserts a DMCA claim against a trafficker, the DMCA claim is just one of many successful causes of action in the same case. Of the 72 cases against traffickers that TracFone cited in its opposition, *not one of them* was filed or won solely based on copyright or the DMCA. In every case containing a DMCA claim, TracFone also asserted at least five other claims,³⁴ and in some cases as many as 13.³⁵ TracFone routinely asserts a variety of other claims *in addition to* DMCA and copyright claims, including claims in the general categories of breach of contract, trademark infringement, trademark dilution, unfair competition, tortious interference, unjust enrichment, conspiracy, fraud, and other claims under state and federal law. In every case that reached a judgment, the court found for TracFone on all of anywhere between five and 11 claims unrelated to copyright or the DMCA.³⁶

Thus, even if the proposed exemption somehow made pursuing DMCA claims against illegal traffickers more difficult, TracFone would still be able to assert, with likely success, a plethora of non-DMCA claims, many of which present simpler and more common legal standards that will be easier for district courts to correctly apply than copyright and the DMCA. Furthermore, TracFone’s business objectives are more accurately addressed by many of these other legal

³⁰ ISRI Comment at 14; *see supra* Part III.A.

³¹ *TracFone Wireless, Inc v. GCA Electronics, LLC*, Case No. 1:07-cv-03084-TCB (N.D. Ga. Oct. 9, 2008); First Amended Complaint for Damages and Injunctive Relief and Demand for Jury Trial, *TracFone Wireless, Inc. v. Mohamed*, Case No. 4:14-cv-00685 (N.D. Fla. Feb. 3, 2015)

³² Complaint, *TracFone Wireless, Inc. v. Mohamed*, Case No. 4:14-cv-00685 (N.D. Fla. Dec. 28, 2014).

³³ *TracFone Wireless, Inc v. GCA Electronics, LLC*, Case No. 1:07-cv-03084-TCB (N.D. Ga. Oct. 9, 2008).

³⁴ *TracFone Wireless, Inc. v. Riedeman*, Case No. 6:06-CV-01257-ORL-18-JGG (M.D. Fla. Sept. 8, 2007).

³⁵ *TracFone Wireless, Inc. v. Loochan*, Case No. 3:07-CV-1771-B (N.D. Tex. Jan. 15, 2009).

³⁶ *See, e.g., TracFone Wireless, Inc. v. Dixon*, 475 F. Supp. 2d 1236, 1237-38 (M.D. Fla. 2007) (finding for TracFone on its claims of federal trademark infringement, copyright infringement, DMCA circumvention, domain name misuse, federal unfair competition, state unfair competition and false advertising, tortious interference, fraud, civil conspiracy, and unjust enrichment).

theories than by copyright. Unlike copyright and the DMCA, the legal theories behind claims of unfair competition, tortious interference, conspiracy, and fraud are meant to target the *intentionally* tortious conduct of phone traffickers.

C. *TracFone’s Proposed Alternative Exemption Language Would Prohibit Good Faith, Pro-Consumer Unlocking of Used Phones by Legitimate Recyclers and Is Not Needed to Exclude Traffickers from the Scope of the Exemption*

TracFone in fact *supports* an exemption for phone unlocking and proposes alternative language it finds acceptable for such an exemption.³⁷ This language would allow unlocking only if

(a) such unlocking is not for the purpose of profiting from any subsidy, discount, installment plan, lease, rebate or other incentive program (collectively, “Subsidy”), (b) all obligations to the Original Network service provider associated with the provision of the Subsidy have been satisfied or waived, and (c) such unlocking is not for any unlawful purpose, including, but not limited to, obtaining unauthorized access to a wireless network.³⁸

As TracFone admits, this language is meant to ensure that no unlocking exemption will “exempt unlocking of handsets prior to the time the service provider has recovered its subsidy investment in the device.”³⁹ But this alternative language would exclude legitimate recyclers from unlocking used phones for the purpose of reselling in good faith to consumers. Although recyclers do not unlock “for the purpose of profiting from any subsidy,” it would be impossible for a recycler to determine for any particular phone whether the wireless provider has recovered its subsidy or the previous owner has satisfied all obligations to his carrier. Given the wide variety of wireless service plans and competing providers, recyclers cannot know whether each used handset qualifies as having allowed the original provider to recover its subsidy. The recycler has no knowledge of the size of the provider’s investment in the handset, how much profit the provider makes for specific wireless services, which wireless services the original owner purchased and in what quantity and what the terms of any contract were.

More importantly, such a requirement is not necessary to protect TracFone or other carriers. As ISRI demonstrated in its initial Comment:

[T]here is no reason for concern under [ISRI’s] definition for phones initially sold at lower prices where the full cost is subsidized through a fixed-period contract with the carrier, even where the initial owner of the phone chooses to sell or give it away before the expiration of the contract. While the requested exemption would allow such used phones to be unlocked, the carrier would still recover the

³⁷ TracFone Comment at 3.

³⁸ *Id.*

³⁹ *Id.*

full price of the phone through enforcement of its contract with the initial buyer, related early termination fees, and similar mechanisms.”⁴⁰

Additionally, TracFone’s final requirement that “unlocking is not for any unlawful purpose, including, but not limited to, obtaining unauthorized access to a wireless network” is unnecessarily broad. The only type of unlawful purpose TracFone discusses in its Comment is criminal trafficking, but such trafficking already is excluded from the scope of ISRI’s proposed exemption. And ISRI’s proposed exemption matches the scope of circumvention that was restored by the Unlocking Act⁴¹ through its requirement that circumvention be done solely in order to enable an owner or purchaser “to connect to a wireless telecommunications network *when such connection is authorized by the operator of such network.*”⁴² TracFone’s alternative language would give consumers and recyclers no guidance as to what other “unlawful purpose” would qualify for this requirement, or how proximate the independently unlawful conduct (which could be engaged in by a subsequent purchaser) should be to the circumvention to warrant DMCA liability.

D. Including Legitimate Bulk Recyclers Like ISRI’s Members in Any Unlocking Exemption Is Critical for Consumer Benefits and Wireless Competition

Any unlocking exemption that the Register recommends must include legitimate bulk unlocking because the recycling industry plays an essential role in helping consumers both buy and sell used phones and in increasing valuable competition between new and used devices and between wireless networks.⁴³ As ISRI’s initial Comment explained, in considering the Unlocking Act, Congress contemplated that the exemption it restored would include bulk unlocking of used devices.⁴⁴ It remains essential to ensure that any new unlocking exemption permit legitimate

⁴⁰ *Id.* at 15 n.69.

⁴¹ Unlocking Act §§ 2(c) (providing that unlocking “may be initiated by the owner of any such handset or other device, by another person at the direction of the owner, or by a provider of a commercial mobile radio service or a commercial mobile data service at the direction of such owner or other person, solely in order to enable such owner or a family member of such owner to connect to a wireless telecommunications network, *when such connection is authorized by the operator of such network*”) (emphasis added).

⁴² ISRI Comment at 2 (emphasis added).

⁴³ See ISRI Comment at 12-15. It bears repeating that the White House described its goals in reinstating the unlocking exemption via the Unlocking Act as including “to ensure copyright law does not undermine wireless competition.” Office of the Press Secretary, Statement from the President on Unlocking Consumer Choice and Wireless Competition Act, WHITEHOUSE.GOV, <http://www.whitehouse.gov/the-press-office/2014/07/25/statement-presidentunlocking-consumer-choice-and-wireless-competition-a> (last visited Jan. 27, 2015)

⁴⁴ ISRI Comment at 14 (“In the final wording of the version of the Unlocking Act that became law, negotiators removed strongly criticized language from the House bill that might appear to limit bulk unlocking and replaced that language with a general savings clause that contained no suggestion of precluding bulk unlocking by resellers”) (citations omitted).

recyclers to unlock lawfully acquired wireless devices for the benefit of consumers and the recyclers' businesses, whether that unlocking is done individually or in bulk.

III. The Adverse Impacts of the Lack of an Unlocking Exemption Demonstrated in ISRI's Comment Are Substantial and Not Speculative

The absence of an unlocking exemption has created real adverse impacts on consumers and recyclers. These harms are not merely speculative, as TracFone suggests.⁴⁵

The current mismatch between the supply of used, network-locked phones and the demand for used, unlocked phones has adversely affected (1) individuals and corporations wishing to sell their used phones, (2) consumers wishing to buy used phones, and (3) bulk recyclers who act as an intermediary between buyers and sellers. Bulk recyclers are unable to offer sellers a reasonable payout for their used phones because recyclers must choose between offering locked handsets to a smaller, restricted class of buyers, or unlocking and facing the threat of DMCA liability. Given the risk of liability, recyclers choose not to unlock except with wireless providers' permission or cooperation—a very difficult and uncertain process which ISRI detailed in its initial Comment. In turn, fewer sellers find it worthwhile to recycle their phones and fewer used phones are processed by recyclers. The recycler may not accept certain phones because the wireless provider refuses to cooperate in the unlocking procedure. The phones that are processed by a recycler are of a limited selection and supply, and they cannot be sold for their full value because only a fixed subset of buyers are looking for phones locked to any particular wireless network.

The proposed exemption would allow recyclers to accept more phones from sellers, increase the number and variety of used handsets available to buyers to meet demand, and in turn give sellers a larger portion of the full value of their used handsets. Allowing recyclers to unlock handsets in bulk would bridge the gap between supply and demand, giving consumers more handset options in an area where there has been longstanding need for more flexibility and choice.

But the benefits of the proposed exemption reach further than just increasing the payout for sellers and increasing the availability of used phones for buyers—unlocking creates additional utility where there was none before. Any given handset can provide more utility when unlocked, rather than tied to a particular wireless network, because it will be bought and used by the buyer who values the phone the most. Note that this buyer may not have a contract with the same wireless network to which the handset was locked. If the law allows bulk recycler unlocking, not only do consumers have more choices, but consumers can also find phones that give them the most utility for their preferences. And this additional utility was created from something that already existed—a used phone. Millions of used phones hold the potential to create additional consumer welfare with none of the accompanying production costs of a new phone.

As ISRI noted in its initial Comment, the inability of consumers to freely unlock their handsets also causes difficulty for consumers when they travel.⁴⁶ If U.S. residents cannot unlock their

⁴⁵ *Id.* at 3.

handsets and use them abroad on a foreign wireless network, they are often forced to pay usage charges on a phone line they cannot use during the time they are abroad. And since most wireless providers charge very high fees for international voice, text and data,⁴⁷ it is often impractical for U.S. residents to use their domestic handsets on roaming mode while abroad or to have others where they are traveling call them directly. Thus, the domestic wireless service that the consumer pays for is valueless and the consumer faces the difficulty of navigating the market for handsets in a foreign country. The proposed exemption would allow consumers to smoothly transition between countries using the same handset while traveling abroad.

TracFone mentions that it is redesigning its locking mechanism to allow consumers to unlock their phones after its subsidy is recovered. However, although TracFone has been selling prepaid handsets with a locking mechanism since about 2003,⁴⁸ it has offered no unlocking option at all during this period but has simply reaped the benefits of keeping its customers permanently locked in. TracFone's assertion that, someday, it will allow its customers to unlock their used handsets does not reduce the adverse impact that the lack of a § 1201 exemption is causing to recyclers and consumers today. And, even if eventually happens, TracFone's change in policy will do nothing to relieve the adverse impact of the inability to unlock phones from many other carriers.

TracFone also asserts that the four major wireless carriers "have signed on to" the 2013 voluntary unlocking policies,⁴⁹ but makes no attempt to refute the detailed demonstration made by ISRI in its initial Comment of the significant limitations and weaknesses of those voluntary policies. The limitations TracFone ignores include, in particular, that none of the policies accommodate or even address bulk unlocking.

TracFone attempts to label the real and ongoing impacts that ISRI demonstrated as speculative, noting that to its knowledge no consumer has *actually* been sued under the DMCA for unlocking.⁵⁰ But this assertion, even if accurate, says nothing about the potential legal risk consumers and recyclers face from § 1201 in the absence of an unlocking exemption and the powerful chilling effect of that risk. First, TracFone does not concede that it views unlocking by consumers as legal under § 1201, but rather only that it "has no interest whatsoever in incurring the legal expenses necessary to bring claims against individual consumers."⁵¹ TracFone's current

⁴⁶ *Id.* at 3.

⁴⁷ See, e.g., Scott McCartney, *Stuck with a \$10,000 Phone Bill*, WALL ST. J. (Apr. 18, 2012), available at <http://www.wsj.com/articles/SB10001424052702304331204577351824213467562> (describing how exorbitant roaming charges imposed by major wireless providers for voice, text and data service affect consumers traveling abroad).

⁴⁸ We estimate based on the date of publication on TracFone's copyright registration for the locking software. U.S. Copyright Registration No. TX0006515894 (filed Sept. 15, 2006). TracFone has likely sold phones with some kind of locking mechanism since 1996 when the company was founded, and TracFone has been suing phone traffickers under the DMCA since 2005. TracFone Comment at 3.

⁴⁹ *Id.* at 15.

⁵⁰ *Id.* at 3, 8.

⁵¹ *Id.* at 8.

willingness to forego spending money to sue unlocking consumers provides little comfort. Second, TracFone's cost-benefit choices about consumer lawsuits do nothing to remove the very substantial concerns about potential legal liability for legitimate recyclers such as ISRI's member companies who, without an exemption, simply cannot take the risk of engaging in otherwise valuable, pro-consumer and procompetitive unlocking. And third, the lack of suits is at least partly a *result* of the adverse impact: many who would otherwise unlock their phones simply choose not to out of fear of DMCA liability. It cannot be the case that a lack of actual lawsuits against the few unlockers is sufficient to render adverse impacts on their actions speculative. These impacts are real and significant.

IV. ISRI Has Demonstrated that Access for Unlocking Is Noninfringing Under § 117 and Is a Noninfringing Fair Use

Modifying the software within a mobile device for the purpose of unlocking the device for use on another carrier does not, as explained above, infringe the copyright in any copyrightable work. As Professor Rebecca Tushnet has analogized, "erasing, removing, and disabling software doesn't . . . implicate any exclusive rights of a copyright owner, any more than my recycling of my old newspapers does."⁵² Unlocking also qualifies as a noninfringing fair use under 17 U.S.C. § 107 and is noninfringing under 17 U.S.C. § 117.

A. ISRI Demonstrated that Mobile Device Unlocking Is Exempt Under § 117

ISRI carefully demonstrated that mobile device unlocking is exempt under § 117. Instead of engaging in a proper § 117 counter analysis, TracFone simply offers cursory summaries of *Vernor* and *Krause* and summarily dismisses those cases because they are factually different and thus somehow inapplicable.⁵³ However, the *Vernor* court "prescribe[d] three considerations that [it] may use to determine whether a software user is a licensee, rather than an owner of a copy."⁵⁴ Likewise, the *Krause* court declared "courts should inquire into whether the party exercises sufficient incidents of ownership over a copy of the program to be sensibly considered the owner of the copy for purposes of § 117(a)."⁵⁵ Notably missing from both of these *general* tests is any suggestion that these tests are limited to the facts of their case. Accordingly, TracFone's arguments to the contrary are inapt.

⁵² Rebecca Tushnet, *TracFone Resellers Held Liable for DMCA Violations*, REBECCA TUSHNET'S 43(B)LOG, <http://tushnet.blogspot.com/2007/03/tracfone-resellers-held-liable-for-dmca.html> (Mar. 5, 2007) (noting that the Register and Librarian determined in the 2006 rulemaking that "firmware-imposed restrictions on switching networks have nothing to do with the incentives at which copyright is directed, so copyright owners as such have no interest in maintaining firmware locks.").

⁵³ TracFone Comment at 9.

⁵⁴ *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1110 (9th Cir. 2010).

⁵⁵ *Krause v. Titleserv, Inc.*, 402 F.3d 119, 124 (2d Cir. 2005).

Especially misplaced is TracFone’s argument that, because ownership of software on a phone may not be the same in every situation, any reliance on § 117(a) to identify a non-infringing use can warrant only an exemption that is “limited to situations in which appropriate findings are made by courts on a case-by-case basis.” This is a wholly infeasible suggestion, of course, and would completely undermine the certainty for the public that a § 1201 exemption is meant to provide. Congress certainly did not intend any such case-by-case exemption when it passed the Unlocking Act and expressly permitted circumvention by phone owners with no mention of the owner of the device’s underlying software.⁵⁶

ISRI stands by its arguments in its initial Comment that lawful owners of mobile devices satisfy the software ownership requirements of § 117 under both *Vernor* and *Krause*. Given TracFone’s failure to even engage with the legal analysis requested by the Register—much less respond to ISRI’s arguments—ISRI respectfully submits that TracFone, not ISRI, has “fallen far short”⁵⁷ of its § 117 analysis.

B. ISRI Demonstrated that Mobile Device Unlocking Is a Fair Use Under § 107

Unlocking a lawfully owned mobile device for use on another carrier is a fair use under § 107.⁵⁸ As detailed above, ISRI’s carefully limited proposed exemption for “used” devices will not permit, as TracFone fears, “illicit traffickers seeking to profit by stealing the subsidies paid for by the original handset supplier.”⁵⁹ Indeed, ISRI specifically clarified that its proposed exemption would *by definition* exclude the sort of illicit trafficking activity described by TracFone.⁶⁰ As ISRI explained in its initial Comment: “Petitioner’s focus on unlocking of used mobile devices, and the proposed definition of “used” above, eliminates any concern about device traffickers misusing the proposed exemption . . . *Petitioner and its members do not condone this type of activity.*”⁶¹

ISRI has no quarrel with the ability of the initial mobile device distributor to recoup the full price for its subsidized devices. As explained in detail above, carriers are able to recover their subsidies through enforcing contracts, requiring early termination fees, and other non-DMCA mechanisms. Recouping of devices’ subsidies in these ways will redress any alleged damage done to the value of TracFone’s proprietary lock software.

Finally, contrary to TracFone’s assertions, the technological methods often necessary to unlock mobile devices qualify as fair use. While TracFone correctly suggests determining an unlock code or reflashing a device *sometimes* requires making a copy of the software,⁶² that copy is made solely to analyze the functional aspects of the software that would allow device unlocking.

⁵⁶ See Unlocking Act § 2(c)(2).

⁵⁷ TracFone Comment at 10.

⁵⁸ See ISRI Comment at 7-9.

⁵⁹ TracFone Comment at 10.

⁶⁰ ISRI Comment at 14.

⁶¹ *Id.* at 15 (emphasis added).

⁶² TracFone Comment at 12-13.

Courts have found such copying solely for functional analysis to be a non-infringing fair use, despite the creation of an interim copy of the underlying software.⁶³ These cases are far more persuasive than those default judgments—devoid of any meaningful analysis—offered by TracFone as evidence to the contrary.⁶⁴ From a practical perspective, any such copies are often made only in the development of the unlocking tool. Once that tool is created, no additional copies are made—users simply interact with the functional portions of the software by entering the unlock codes. This remains true for bulk unlocking as well, where lawful owners of phones would simply circumvent on a larger scale.

V. The § 1201 Statutory Factors Weigh in Favor of Granting an Exemption

As explained in its initial Comment, the § 1201 statutory factors each weigh in favor of granting ISRI's proposed exemption.⁶⁵

A. *An Exemption Would Increase Availability for Use of Copyrighted Mobile Software*

Petitioner ISRI emphasizes that the proposed exemption would increase access to mobile software. If recyclers like ISRI's member companies can unlock the used handsets they recycle, those used handsets can be sold to a broader group of consumers. Specifically, a consumer who cannot afford to pay retail price for the newer handsets would be able to buy an unlocked phone without the extra hurdle of finding a suitable one that was originally activated on the consumer's current wireless network. The unlocked, used phone will have better software capabilities than the consumer's previous phone, and thereby the consumer will be able to access new mobile apps that were not previously available to him. Thus, shielding bulk recyclers from DMCA

⁶³ See ISRI Comment at 7-8; *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1520 (9th Cir. 1992) (“Because . . . disassembly is the only means of gaining access to those unprotected aspects of the program, and because Accolade has a legitimate interest in gaining such access (in order to determine how to make its cartridges compatible with the Genesis console), we agree with Accolade.”); see also *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 602-03 (9th Cir. 2000) (“We conclude that, under the facts of this case and our precedent, Connectix's intermediate copying and use of Sony's copyrighted BIOS was a fair use for the purpose of gaining access to the unprotected elements of Sony's software.”).

⁶⁴ TracFone Comment at 13. Neither of the two cases TracFone cites to support its argument that reflashing is an infringing act can be relied upon for any legal rule. One case was a default judgment in which the defendant made no attempt to rebut the TracFone's legal and factual allegations, and thus the court's findings on copyright infringement and circumvention cannot be relied on as legal precedent. *TracFone Wireless, Inc. v. SND Cellular, Inc.*, 715 F. Supp. 2d 1246, 1251 (S.D. Fla. 2010). In the other case, all defendants appeared pro se and likely made no effort to contest the copyright and DMCA claims. *TracFone Wireless, Inc. v. Dixon*, 475 F. Supp. 2d 1236, 1236 (M.D. Fla. 2007).

⁶⁵ ISRI Comment at 21-24.

liability will make it easier for consumers to access mobile software, especially newer and more sophisticated software.

B. The Availability of New Unlocked Phones Does Not Reduce the Need for an Exemption

Contrary to TracFone's assertion, the fact that some wireless providers have begun to offer a limited selection of unlocked handsets does not obviate the problem of potential DMCA liability suppressing the supply of affordable, used, unlocked phones on the secondary market.

The secondary market allows consumers to derive additional value from previously owned handsets that would otherwise be destroyed or sent to a landfill. As ISRI demonstrated in its initial Comment, no number of new, unlocked phones can compensate for the loss of consumer choice and value caused by the inability of recyclers to meet demand for used phones by unlocking millions of existing used handsets.⁶⁶ Nor can an emerging supply of new, unlocked phones correct the dramatic imbalance of locked to unlocked devices that will persist at least over the next three years before the next Triennial.⁶⁷ As providers continue to offer subsidized handsets alongside unlocked handsets, the need will persist for recyclers to unlock those subsidized handsets for sale on the secondary market. Thus, the unlocking exemption remains essential to consumers and recyclers.

Even if the supply of new, unlocked phones could affect the value created by secondary market, unlocked phones sold new by providers remain far from widely available. These handsets are limited in selection and limited by the consumer's current wireless provider contract. For instance, a consumer cannot buy an unlocked iPhone 5s from Apple if he has committed by contract to using either Sprint's or Verizon Wireless' network.⁶⁸ Apple only sells unlocked versions of the iPhone 5s, 5c, and 6, and not the iPhone 4 and 4s handsets that consumers want to buy used. TracFone itself does not sell unlocked handsets of any model.

C. Unlocking Does Not Decrease the Value of the Underlying Software

The proposed exemption would not, as TracFone argues, decrease the value of the underlying software to the copyright holder. The only copyrighted work TracFone has identified as its own seems to be a simple piece of unit tracking software, the sole function of which is to allow the user to buy and use prepaid units from TracFone⁶⁹ and which appears to be old and of little creative value.

⁶⁶ ISRI Comment at 21.

⁶⁷ *Id.*

⁶⁸ *Apple Store*, <http://store.apple.com/us/buy-iphone/iphone5s>, (click "Learn more about the unlocked iPhone") ("The unlocked iPhone 5s will not work with CDMA-based carriers, including Sprint and Verizon Wireless.").

⁶⁹ U.S. Copyright Registration No. TX0006515894 (filed Sept. 15, 2006).

TracFone suggests in its Comment that, if an unlocking exemption is granted, it will be forced to reduce its subsidies and increase phone prices to compensate for money lost to trafficking and failure to recover its subsidies, thus reducing the value of its software.⁷⁰ As already noted, however, ISRI's proposed exemption will not lead to increased trafficking. In addition, even if TracFone decided to change its subsidy model *and* this change led to reduced revenue, that reduction would be the result of TracFone's chosen business model and the value of its services, not the value of its software.

CONCLUSION

ISRI's members and other bulk recyclers already benefit consumers by facilitating the transfer of used handsets from the original owners, who no longer need them, to buyers on the secondary market, who need affordable phones. If the proposed exemption is granted, ISRI's members will be able to increase consumer welfare *even more* by freely unlocking the handsets they recycle to make them usable by all potential buyers. Consumers will benefit from expanded choices on the secondary market and potential sellers will receive more of the full value of their used handsets, should they choose to use a recycler. The proposed exemption will allow millions of used handsets across the country to be efficiently refurbished and utilized by new owners to access new mobile software.

TracFone's concerns about protecting its particular business model are not an appropriate object of copyright or the DMCA. Petitioner ISRI's proposed exemption will not in any way permit illegal phone trafficking, and TracFone will remain well-equipped to protect against traffickers using a variety of laws. Because, for all of the reasons discussed above and in ISRI's initial Comment, ISRI has fully satisfied all of the substantive legal and evidentiary requirements for granting an exemption set forth in DMCA § 1201(a)(1), its proposed exemption should be granted.

⁷⁰ TracFone Comment at 17.