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**
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	)	
	)	

COMMENTS OF CTIA – The Wireless Association®

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TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY

A. Identification of Opposed Proposed Exemptions and Summary of Position

These comments address and oppose four proposed exemptions:

Proposed Exemption 5B, submitted by MetroPCS;

Proposed Exemption 5C, submitted by Pocket Communications ("Pocket");

Proposed Exemption 5D, submitted by The Wireless Alliance, LLC ("Wireless Alliance"), ReCellular, and Flipswap, Inc. ("Flipswap") (collectively "WA Commenters");

each of which propose expanded variations of the exemption adopted in 2006 for firmware that enables wireless telephone handsets to connect to wireless telephone networks; and

Proposed Exemption 5A, submitted by the Electronic Frontier Foundation ("EFF");

which seeks to exempt the circumvention of technological protection measures ("TPMs") that control access to computer programs that execute application software on wireless telephone handsets.

CTIA – The Wireless Association® opposes the foregoing proposed exemptions on the grounds, among others, that:

- Proponents[1] have failed to meet their burden of adducing any evidence, let alone evidence that is "highly specific, strong and persuasive," that the section 1201(a)(1) prohibition on circumvention will cause a "substantial adverse effect," relying instead on unsupported policy arguments and speculation;

- The free-riding business interests of MetroPCS, Pocket, and WA Commenters, and the additional interests EFF seek to advance, are, in the words of the Register, concerns that are "unrelated to the types of uses to which Congress instructed the Librarian to pay particular attention, such as criticism, comment, news reporting, teaching, scholarship, and research as well as the availability for . . . nonprofit archival, preservation, and educational purposes." Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68,472, 68,478 (Nov. 27, 2006) ("2006 Final Rule") (rejecting an exemption for decryption of CSS, which sought to vindicate an individual fair use right far closer to those identified by Congress);

- The consumer and public interests Proponents assert they are advancing are, in fact, being advanced by the wireless industry, which has (i) made a wide array of handsets with varying capabilities available at highly subsidized low cost, (ii) developed wireless handsets and services as a new platform for the use and enjoyment of copyrighted works,

[1] MetroPCS, Pocket, WA Commenters, and EFF are collectively referred to in these comments as "Proponents."

and (iii) undertaken extensive efforts to foster recycling, all goals that would best be advanced by denial of the proposed exemptions;

- Three of the comments – those of MetroPCS, Pocket, and WA Commenters – are seeking improperly to leverage a section 1201(a)(1) exemption to cover the provision of circumvention services, which are the subject of the prohibition in section 1201(a)(2) and which are beyond the scope of this proceeding, and EFF's proposed exemption also relies heavily on the use of products and services that are prohibited by section 1201(a)(2); and

- The availability of other means to accomplish the goals Proponents purport to advance obviates the need for any exemption.

Notwithstanding the foregoing, in light of the facts that (i) Congress established this rulemaking primarily to protect noncommercial individual conduct and (ii) CTIA members do not wish to target individuals who are bona fide customers of wireless carriers and who are acting lawfully for their own noncommercial ability to use their own handset on another carrier's network or with another carrier's service, CTIA would not oppose a narrowly tailored and carefully limited exemption directed to such individuals – specifically:

> Computer programs in the form of firmware in wireless telephone handsets that restrict the handset from connecting to a wireless telephone communications network, when circumvention is accomplished by an individual customer of a wireless service provider for the sole noncommercial purpose, and with the sole effect, of lawfully connecting to a wireless telephone communications network or service other than that of the service provider, provided that (i) the individual complies with all of his or her contractual obligations to the service provider, and (ii) the individual does not thereby obtain access to works protected under this title beyond those necessary to connect to such a network or service.

This narrow exemption is discussed in Part VI below.

B. Summary of CTIA's Interests

CTIA – The Wireless Association® ("CTIA") is an international organization representing all sectors of wireless communications – cellular, personal communication services, and enhanced specialized mobile radio. A nonprofit membership organization founded in 1984, CTIA represents providers of commercial mobile radio services ("wireless telecommunications carriers"), mobile virtual network operators, aggregators of content provided over wireless networks, equipment suppliers, wireless data and Internet companies and other contributors to the wireless universe. A list of CTIA's members appears at http://www.ctia.org/membership/ctia_members.

As part of its ordinary functions, CTIA frequently participates in administrative proceedings to represent the interests of its members. Among other proceedings, CTIA recently filed comments with the Copyright Office in connection with the Office's July 16, 2008 Notice

of Proposed Rulemaking on the scope of the section 115 statutory license.[2] CTIA also has filed numerous amicus briefs in federal courts on behalf of the wireless industry on a variety of issues, including copyright issues. *See, e.g.*, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *United States v. ASCAP (In re Application of Am. Online, Inc.)*, 485 F. Supp. 2d 438 (S.D.N.Y. 2007) (holding that downloads are not public performances).

CTIA and its members have a substantial interest in four of the Proposed Exemptions, which threaten to alter fundamentally the way wireless devices and services, and the software operating thereon, are made available to the public. The wireless marketplace has developed into a vibrant, competitive one, offering consumers extensive choice in service and devices and access to a wide variety of copyrighted works. One feature of the marketplace, which has fostered the widespread availability of handsets, software and services, as well as the extraordinary diversity of functionality available on handsets, is the ability of carriers to subsidize handsets and to offer those handsets and their accompanying software to consumers at prices well below the prices that otherwise would need to be charged. Those subsidies depend on ensuring that the handset will be used, as contemplated, on the carrier's service, and a significant means of ensuring that, in turn, is the use of technological means to prevent access to software on the handset for uses other than authorized uses. Proponents of the proposed exemptions identified above seek leave to circumvent such technological protections for commercial gain, which will have significant adverse effects on the wireless industry and on the public.

C. Background of the Wireless Industry and Applicable Technological Protection Measures

Wireless communications devices long ago ceased being luxury items and are now important tools both for consumers to communicate with family and friends, and for transacting business. More importantly, wireless phones are often the primary lifeline to call for assistance in an emergency. The most recent annual report by the FCC to Congress on wireless competition, released on January 16, 2009, notes that the wireless penetration rate in the United States is now at 86%, and that "Mobile phones are an integral part of American culture; they are everywhere." FCC, *Thirteenth Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, DA 09-54, ¶ 228 (2009) ("*Thirteenth Report*").

Fortunately for consumers, the wireless industry in the United States is highly competitive, with more than 95% of Americans living in areas covered by at least three competing wireless service providers and 60% of the population in areas covered by at least five competing providers. *Thirteenth Report*, ¶ 2. This competition has led to wide consumer choice both in service plans and in an enormous array of handsets, from relatively basic telephones to handsets boasting combinations of Internet connectivity, email, text and image messaging, cameras, full QWERTY keyboards, touch screens, gyroscopic orientation, navigation services, and a diverse entertainment offerings, from streaming video to music and ringtone downloads.

[2] Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, Notice of Proposed Rulemaking, 73 Fed. Reg. 40,802 (July 16, 2008).

Although this robust competition also has helped drive prices down, wireless providers have developed strategies for making service accessible to everyone. Most wireless subscribers in the United States pay for their service after they have incurred the charges ("post-paid" service), but the credit requirements and requirement to pay for service every month puts wireless service out of reach for some consumers. In response, most wireless providers now also offer pre-paid service, allowing customers to pay in advance for their airtime, which can be purchased in small increments, and does not require a credit check, a recurring monthly fee, or a service term commitment. Pre-paid plans have proven extremely popular, and are growing in numbers of subscribers at three times the rate of post-paid plans. *Id.* ¶ 117.

Another key component to keeping wireless service accessible and affordable involves minimizing the cost for consumers to acquire wireless handsets. According to a recent survey, 36% of wireless customers received a free phone from their carrier, and many more received heavily subsidized handsets. J.D. Power and Associates, *U.S. Wireless Mobile Phone Evaluation Study* (2007). Carrier subsidies range from a low of $20 to nearly $200 for some handset models, and nonsubsidized models are available for purchase by consumers from most carriers and directly from the handset manufacturers at a significantly higher cost.

Carriers subsidize the cost of handsets in exchange for a commitment from the customer that the phone will be used on that carrier's service (and/or that it will not be used elsewhere), so the subsidy can eventually be recouped through payment of usage charges. For post-paid service, carriers have several ways to protect their "investment" in a customer's subsidized handset, including contractual term service commitments, early termination fees, and electronic locks on the phones to protect against transfer to another carrier in violation of the customer's agreement. With pre-paid service, however, there are no term commitments and no early termination fees – carriers must rely on handset locks to protect their subsidies. A recent analysis by a Washington think-tank concluded that carrier policies to require term contracts and handset locks provide carriers with an incentive to subsidize equipment and "effectively make wireless services affordable to more Americans," but "if regulation prohibits those activities, then prices must rise and, in turn, consumers would be harmed." George S. Ford, PhD, et al., *Consumers and Wireless Carterfone: An Economic Perspective,* Phoenix Center Policy Bulletin No. 21 at 5-6 (Sept. 2008).

Events over the past few years have borne out carriers' concerns about protecting their subsidy investments in handsets. Individuals and companies involved in large scale phone trafficking operations have begun purchasing bulk quantities of subsidized pre-paid phones, hacking out the various protective locks and repackaging and reselling the unlocked phones overseas in countries where carriers do not subsidize handsets. *See* Andrew Welsh-Huggins, *Cell Phone Makers Fight Resales*, The Associated Press (Sept. 12, 2006). These organizations profit by, in effect, stealing the subsidies that the carriers intended to benefit consumers.

Some carriers have taken aggressive action to try to stop the traffickers, and preserve their ability to keep wireless service affordable for consumers. TracFone Wireless, AT&T Mobility ("AT&T"), T-Mobile USA ("T-Mobile"), and Virgin Mobile USA ("Virgin Mobile") have all filed lawsuits against traffickers, as have wireless equipment manufacturers Nokia and Motorola. The lawsuits assert, among other things, that the traffickers' unlocking of handsets, or conspiring with others who unlock handsets, violates the Digital Millennium Copyright Act

("DMCA"). To date, more than fifty-five (55) consent and default judgments and permanent injunctions have been entered by federal courts across the country finding the traffickers' conduct unlawful and, in many cases, awarding millions of dollars in damages. (Copies of all of the judgments entered since 2006 are available online at http://www.stopcellphonetrafficking.com/court-cases/.) Many of those decisions have also held that the DMCA exemption enacted in 2006 for unlocking wireless phones did not preclude liability for traffickers who were engaged in unlocking for profit. *See TracFone Wireless, Inc. v. Dixon,* 475 F. Supp. 2d 1236 (M.D. Fla. 2007); *TracFone Wireless, Inc. v. GSM Group, Inc.,* 555 F. Supp. 2d 133 (S.D. Fla. 2008).

In addition to traffickers who unlock and resell subsidized pre-paid phones overseas, several smaller wireless service providers have begun offering unlocking services as a means of obtaining new customers using phones subsidized by their competitors. One of those companies, Proponent MetroPCS, has asserted in a federal court complaint that the exemption for wireless phone unlocking amounts to approval by the federal government of unlocking wireless phones and preempts any and all claims that unlocking is improper. *See MetroPCS Wireless, Inc. v. Virgin Mobile USA, L.P.*, Case No. 08CV1658-D, N.D. Tex. (complaint filed Sept. 19, 2008) (Ex. A hereto).

At the same time, wireless carriers are willing to unlock handsets in appropriate circumstances. One of the nation's largest carriers, for example, does not lock its phones on post-paid contracts, which represent the vast majority of the phones on its service. Other carriers unlock phones after a contract has ended, when a customer wishes to travel overseas, or after a bona fide customer has been on the carrier's service for a relatively brief period of time. Thus, just as consumers have wide choice in handset characteristics and service offerings, customers are freely able to seek out and acquire service from carriers who do not lock their phones or who unlock them.

The various proposed exemptions related to wireless handset unlocking pose a real threat to the accessibility of wireless service to consumers and to the continued robust development and dissemination of copyrighted works used in connection with mobile handsets.

II. THIS RULEMAKING IS NARROWLY DIRECTED TO VINDICATING DEMONSTRATED INTERESTS OF INDIVIDUAL USERS THAT LIE AT THE CORE OF THE FAIR USE DOCTRINE, NOT TRAFFICKING OR OTHER COMMERCIAL ACTIVITIES OF CIRCUMVENTERS.

This rulemaking has a narrow focus and purpose. It was added to the DMCA by the House Commerce Committee specifically to address the concern that individuals be permitted to circumvent access control technologies that were depriving them of the ability to engage in conduct at the core of the fair use doctrine. Moreover, this rulemaking applies only to section 1201(a)(1), which prohibits the act of circumventing an access control technology – it has no effect on the separate prohibitions on the performance of circumvention services or the trafficking in circumvention technology found in sections 1201(a)(2), for access control technologies, and 1201(b), for other technologies. Any proposed exemptions should be considered in light of the narrow and targeted nature of this proceeding.

A. Congress Created this Rulemaking To Address Concerns that Access Control Technologies Would Interfere with Fair Use.

Anticircumvention bills reported out of the House and Senate Judiciary Committees in May 1998 provided for no rulemaking at all to create exemptions to the ban on the act of circumventing access-control TPMs. *See The Digital Millennium Copyright Act of 1998*, S. Rep. No. 105-190, at 86 (1998) (reflecting bill text reported on May 11, 1998 by Senate Judiciary Committee, with no provision for this rulemaking); *WIPO Copyright Treaties Implementation and Online Copyright Infringement Liability Limitation*, H.R. Rep. No. 105-551, pt. 1, at 4 (1998) ("House Judiciary Committee Report") (reflecting bill text reported on May 22, 1998 by House Judiciary Committee, with no provision for this rulemaking). It was only in July 1998 that the House Commerce Committee included a provision to establish periodic rulemaking proceedings to determine whether exemptions to the ban on circumventing access-control TPMs are warranted. *See Digital Millennium Copyright Act of 1998*, H.R. Rep. No. 105-551, pt. 2 at 2-3 (1998) (the "Commerce Committee Report") (reflecting bill text reported on July 22, 1998 by House Judiciary Committee and including rulemaking provision).

In adding in the rulemaking provision, the Commerce Committee was explicit that it was doing so specifically to address concerns about individuals' ability to continue to engage in fair uses of copyrighted works. The Committee stated that it "devoted substantial time and resources to analyzing the implications of [the broad prohibition on the circumvention of access control technologies] on the traditional principle of 'fair use.'" *Id.* at 25. Asserting that it modified the section that became 1201(a)(1) to strike a balance of interests, it emphasized that it considered "it particularly important to ensure that the concept of fair use remains firmly established in the law." *Id.* at 26.

The Committee identified as the "dilemma" surrounding the prohibition on circumvention that digital technology "could be exploited to erode fair use." *Id.* at 25. It twice cited concerns that the prohibition on circumvention "would undermine Congress' long-standing commitment to the concept of fair use." *Id.* at 26; *see also id.* at 35. It cited a letter from Consumers' Union expressing concerns that: "These newly-created rights will dramatically diminish public access to information, reducing the ability of researchers, authors, critics, scholars, teachers, students, and consumers to find, to quote for publication and otherwise make fair use of them." *Id.* at 26.

Discussing the prohibition on circumvention, the Committee acknowledged the Internet's "significant positive impact on the access of American students, researchers, consumers, and the public at large to informational resources that help them in their efforts to learn, acquire new skills, broaden their perspectives, entertain themselves, and become more active and informed citizens." *Id.* at 35. But it nevertheless said it "is concerned that marketplace realities may someday dictate a different outcome, resulting in less access, rather than more, to copyrighted materials that are important to education, scholarship, and other socially vital endeavors." *Id.* at 36 (emphasis added).

Thus, the Committee established the rulemaking proceeding as a "fail-safe" mechanism" that would "allow the enforceability of the prohibition against the act of circumvention to be selectively waived, for limited time periods, if necessary to prevent a diminution in the

availability to individual users of a particular category of copyrighted materials." *Id.* at 36; *see also* 144 Cong. Rec. S9935 (daily ed. Sept. 3, 1998) (statement of Sen. Ashcroft) ("In the Commerce Committee's version of the bill, the Secretary of Commerce would have authority to address the concerns of libraries, educational institutions, and others potentially threatened with a denial of access to categories of works in circumstances that otherwise would be lawful today.").

In the bill text reported in conjunction with the subsequent Conference Report, the rulemaking provision was maintained in substance (although certain aspects were amended somewhat). *See Digital Millennium Copyright Act*, H.R. Conf. Rep. No. 105-796, at 5-6 (1998). Members made clear in the floor debate on the Conference Report that fair use rights continued to be the driving force behind the section 1201(a)(1) rulemaking. *See*, *e.g.*, 144 Cong. Rec. H10621 (daily ed. Oct. 12, 1998) ("[T]he conferees maintain the strong fair use provision the Commerce Committee crafted, for the benefit of libraries, universities, and consumers generally.") (statement of Rep. Klug); 144 Cong. Rec. E2166 (Oct. 14, 1998) (describing rulemaking as "ensur[ing] that the legislation's prohibition against circumvention of copy protection technologies in digital works does not thwart the exercise of fair use and other rights by all users") (statement of Rep. Boucher); 144 Cong. Rec. S11887 (daily ed. Oct. 8, 1998) ("I trust that the Librarian of Congress will implement this provision in a way that will ensure information consumers may exercise their centuries-old fair use privilege to continue to gain access to copyrighted works.") (statement of Sen. Ashcroft); *see also United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1119 (N.D. Cal. 2002) ("Through the DMCA, Congress sought to prohibit certain efforts to unlawfully circumvent protective technologies, while at the same time preserving users' rights of fair use."); *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 322-23 (S.D.N.Y. 2000) (describing rulemaking as one way by which Congress "struck a balance among the competing interests" of "the exclusive rights of copyright owners" and the principle of fair use), *aff'd sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

The Copyright Office likewise has recognized that the motivation behind this rulemaking was Congress' desire to preserve fair use of copyrighted works to support education, scholarship, and other nonprofit endeavors. For example, it observed in both 2003 and 2006 that the rulemaking was established "in response to concerns that section 1201, in its original form, might undermine Congress's commitment to fair use if developments in the marketplace relating to use of access controls result in less access to copyrighted materials that are important to education, scholarship, and other socially vital endeavors." 2006 Final Rule at 68,472-73; Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies: Final Rule, 68 Fed. Reg. 62,011, 62,012 (Oct. 31, 2003) ("2003 Final Rule") (same); Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies: Final Rule, 65 Fed. Reg. 64,556, 64,557 (Oct. 27, 2000) ("2000 Final Rule") ("The Commerce Committee was concerned that section 1201, in its original form, might undermine Congress' commitment to fair use.").

The enumerated factors that Congress requires the Librarian to consider in determining whether a particular exemption from the prohibition on circumvention is appropriate similarly confirm that Congress was primarily concerned with preserving fair use. Section 1201(a)(1)(C) specifies that:

In conducting such rulemaking, the Librarian shall examine –

(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.

17 U.S.C. § 1201(a)(1)(C). Notably, three of these five factors specifically identify considerations that are central to the fair use analysis, which identifies "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." *Id.* § 107. Whether a use of a work is commercial is a factor expressly militating against a finding of fair use. *Id.* The Register has confirmed the fair-use-oriented nature of this inquiry, observing that "the types of uses to which Congress instructed the Librarian to pay particular attention" are "criticism, comment, news reporting, teaching, scholarship, and research as well as the availability for use of works for nonprofit archival, preservation and educational purposes." 2006 Final Rule at 68,478.

Nowhere in the House Commerce Committee Report or elsewhere does the legislative history identify the desire to support the business models of commercial concerns as a factor animating its decision to relax the section 1201(a)(1) anticircumvention ban by establishing a rulemaking proceeding. This is consistent with the traditional notion of fair use, which grants far greater leeway for the noncommercial activities of individuals than for commercial business models. *See, e.g., Princeton Univ. Press v. Michigan Document Servs.* 99 F.3d 1381 (6th Cir. 1996); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y 1991); *Los Angeles News Service v. Tullo*, 973 F.2d 791 (9th Cir. 1992).

B. Congress Limited the Scope of the Rulemaking to the Section 1201(a)(1) Prohibition on Individuals Engaging in the Act of Circumvention; the Rulemaking Expressly Does Not Apply to Those Who Provide Circumvention Services or Technology.

This rulemaking is expressly confined to considering exemptions for the conduct prohibited by section 1201(a)(1) – *i.e.*, the act of circumventing TPMs that control access copyrighted works. It does not, under any circumstances, provide a defense to any other violations of Chapter 12, including violations of sections 1201(a)(2) or 1201(b), which prohibit the performance of circumvention services or trafficking in circumvention products, components or technologies. Section 1201(a)(1)(E) explicitly states that:

> Neither the exception under subparagraph (B) from the applicability of the prohibition contained in subparagraph (A), nor any determination made in a rulemaking conducted under subparagraph (C), may be used as a defense in any action to enforce any provision of this title other than this paragraph.

17 U.S.C. § 1201(a)(1)(E) (emphasis added). To be clear, consistent with the ordinary construction of statutory subdivisions, "this paragraph" means paragraph (1) of subsection (a) of section 1201 – the paragraph that prohibits the act of circumvention. Paragraph (2) of subsection (a) prohibits the performance of circumvention services and trafficking in circumvention technology. *See* Commerce Committee Report at 38 (providing that exemption determination "is inapplicable in any case seeking to enforce any other provision of this legislation, including the manufacture or trafficking in circumvention devices that are prohibited by Section 102(a)(2) or 102(b)(1)"); H. Comm. on the Judiciary, 105th Cong., *Section-by-Section Analysis of H.R. 2281 As Passed by the United States House of Representatives on August 4, 1998*, at 8 (Comm. Print 1998) (the "House Manager's Report") ("Subparagraph (E) provides that the exception contained in subparagraph (B) from the application of the prohibition contained in subparagraph (A) may not be used as a defense in any suit brought to enforce any provision of this title other than those contained in paragraph (1). For example, it would not provide a defense to a claim based on the manufacture or sale of devices under paragraph (2) or section 1201(b), or to a copyright infringement claim.").

The Copyright Office has recognized this explicit congressional limitation on its authority. In its Notice of Inquiry announcing the commencement of this rulemaking proceeding, it observed that the "Librarian of Congress has no authority to limit either of the anti-trafficking provisions contained in subsections 1201(a)(2) or 1201(b)." Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies: Notice of Inquiry, 73 Fed. Reg. 58,073, 58,074 (Oct. 6, 2008) (the "NOI"); *accord* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies: Notice of Inquiry, 70 Fed. Reg. 57,526, 57,527 (Oct. 3, 2005) (the "2006 NOI") (same); Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies: Notice of Inquiry, 67 Fed. Reg. 63,578, 63,579 (Oct. 15, 2002) (the "2003 NOI") (same). Indeed, the Librarian previously has rejected proposals that attempted to apply an exemption to section 1201(a)(2). *See* 2003 Final Rule at 62,018. Thus, whatever the exemptions established in this proceeding, they will have no effect on the unequivocal statutory ban on trafficking in circumvention products or services.

III. THE PROPONENTS HAVE FAILED TO MEET THEIR BURDEN OF PROVING THE NEED FOR ANY EXEMPTION.

A. There Is a Presumption in Favor of the Prohibition Against Circumvention that Proponents of an Exemption Must Overcome, Even for Previously Exempted Classes of Works.

It is a bedrock principle in this rulemaking that "[p]roponents of an exemption have the burden of proof." *See*, *e.g.*, 2006 Final Rule at 68,473; 2003 Final Rule at 62,012 (same). Congress enacted a general prohibition on the circumvention of access-control technologies in section 1201(a)(1), and, as the Copyright Office repeatedly has held, "[t]here is a presumption

that the section 1201 prohibition will apply to any and all classes of works, including previously exempted classes, unless a new showing is made that an exemption is warranted." NOI at 58,075; *accord* 2006 NOI at 57,528 ("[T]he prohibition is presumed to apply to all classes of works unless an adverse impact has been shown."); 2003 NOI at 63,579 (same).

Moreover, "[t]he regulatory prohibition is presumed to apply to any and all kinds of works, including those as to which a waiver of applicability was previously in effect." Commerce Committee Report at 37. "[O]n each occasion, the assessment of adverse impacts on particular categories of works is to be determined de novo." *Id.* The Librarian repeatedly has recognized as much, finding that "[a]lthough a similar class was exempted in the first rulemaking, proponents are required to make their case anew every three years." 2003 Final Rule at 62,013; *accord* 2006 Final Rule at 68,478 ("[P]roponents of renewal of an existing exemption must make their case de novo . . . ."); NOI at 58,075 ("Exemptions are reviewed de novo and prior exemptions will expire unless sufficient new evidence is presented in each rulemaking that the prohibition has or is likely to have an adverse effect on noninfringing uses.").

The Librarian has applied this principle in past proceedings to limit and reject a previously accepted exemption to the prohibition. Specifically, in 2000, the Librarian recognized an exemption for "Compilations consisting of lists of websites blocked by filtering software applications." 2000 Final Rule at 64,574. In 2003, however, the evidence only supported a narrower version of that exemption, and the Librarian restricted the exemption. *See* 2003 Final Rule at 62,013. In 2006, the Librarian rejected this same exemption outright on the ground that "proponents made no attempt to make any factual showing whatsoever, choosing instead to rest on the record from three years ago and argue that the existing exemption has done no harm, that nothing has changed to suggest the exemption is no longer needed, and that if anything, the use of filtering software is on the rise." 2006 Final Rule at 68,478. The Librarian observed that "one cannot assume that the elements of the case that was made three years ago remain true now" and rejected the six-year-old exemption. *Id.*

The foregoing precedent demonstrates unequivocally that the 2006 exemption for cell phone unlocking firmware cannot be used to support continuation of that exemption now, as Proponents attempt to do by characterizing their proposals as a "renewal" or "continuation" of the exemption. *See*, *e.g.*, Comments of MetroPCS Communications, Inc. on the Notice of Inquiry, Docket No. RM 2008-8 at 1-3, 6, 9, 12, 13, 15, 20 (Dec. 2, 2008) ("MetroPCS Comments"); Pocket Communications, Comments on DMCA Exemptions, Docket No. RM 2008-8 at 2 (Dec. 2, 2008) ("Pocket Comments"); Comments of The Wireless Alliance, LLC, ReCellular, and Flipswap, Inc., Docket No. RM 2008-8 at 3, 12 (Dec. 2, 2008) ("WA Comments"). There is no such thing as a renewal under the statute or in past proceedings; classes of works that were previously exempted enjoy no special status. The presumption of prohibition remains, and the burden of proof must be met anew with new evidence for each category of exempted works.

B. The Burden of Proof To Demonstrate Entitlement to a Section 1201(a)(1) Exemption Is Demanding and Requires Proponents To Show that the Prohibition Has a "Distinct, Verifiable, and Measurable" Adverse Effect on Noninfringing Uses.

The burden of proof to overcome the presumption that all circumvention of access control technologies is prohibited is demanding. Proponents must show that "the prohibition has or is likely to have a substantial adverse effect on noninfringing uses of a particular class of works." NOI at 58,075 (emphasis added); *accord* Commerce Committee Report at 6 ("The focus of the rulemaking proceeding must remain on whether the prohibition on circumvention of TPMs (such as encryption or scrambling) has caused any substantial adverse impact on the ability of users to make non-infringing uses."); 2006 Final Rule at 68,473 ("[P]roponents must show by a preponderance of the evidence that there has been or is likely to be a substantial adverse effect on noninfringing uses by users of copyrighted works."); 2003 Final Rule at 62,012 (same); Recommendation of the Register of Copyrights in RM 2002-4, at 177 (Oct. 27, 2003) ("2003 Register's Recommendation") ("The role of this rulemaking process is to determine whether noninfringing uses of particular classes of works are adversely affected by the prohibition on circumvention of technological measures that control access to works."); 2000 Final Rule at 64,558 ("The legislative history makes clear that a determination to exempt a class of works from the prohibition on circumvention must be based on a determination that the prohibition has a substantial adverse effect on noninfringing use of that particular class of works.").

As these statements show, the pivotal question is whether the prohibition would create harm; a focus on whether the exemption creates harm is misplaced. *See*, *e.g.*, NOI at 58,074 ("[F]or a proposed exemption to be considered in this rulemaking, there must be a causal connection between the prohibition in 1201(a)(1) and the adverse effect on noninfringing uses."). This distinction is an important part of the presumption that circumvention is illegal unless an exemption is justified. *See supra* Part III.A.

The House Commerce Committee has spelled out in its report what the legislation means by "substantial adverse impact," stating that "the rulemaking proceeding should focus on distinct, verifiable and measurable impacts" and "should not be based upon *de minimis* impacts." Commerce Committee Report at 37. The Copyright Office, taking direction from the legislative history, applies this "distinct, verifiable and measurable impacts" standard. *See*, *e.g.*, NOI at 58,075 (quoting 2003 Final Rule at 62,013); *accord* 2006 NOI at 57,528; *see also* 2000 Final Rule at 64,563 ("The legislative history reveals that Congress anticipated that exemptions would be made only in exceptional cases.").

Moreover, "[a]dverse impacts that flow from other sources – including marketplace trends, other technological developments, or changes in the roles of libraries, distributors or other intermediaries – or that are not clearly attributable to such a prohibition, are outside the scope of the rulemaking. So are mere inconveniences, or individual cases, that do not rise to the level of a substantial adverse impact." House Managers' Report at 6; *accord* Commerce Committee Report at 37; *see also*, *e.g.*, Recommendation of the Register in RM 2005-11 at 69 (Nov. 17, 2006) ("2006 Register's Recommendation") (rejecting various proposed exemptions for space shifting because "in most cases it was unclear whether the commenters were referring to access controls or copy controls, or simply to incompatibility of formats"); *id*. at 84-85 (rejecting a

proposed exemption for all works available for purchase for more than one year because it "appears to be simply a statement of the commenter's policy view regarding the scope and duration of copyright"). The rigorous nature of this inquiry is consistent with the general principle that exceptions to statutory rules should be construed narrowly. *See Tasini v. New York Times Co.*, 206 F.3d 161, 168 (2d Cir. 2000); *accord* 2000 Final Rule at 64,558.

Importantly, beneficial impacts of prohibiting circumvention of a particular TPM, as well as adverse impacts, must be considered in determining whether an exemption is appropriate:

> In assessing the impact of the implementation of technological measures, and of the law against their circumvention, the rulemaking proceedings should consider the positive as well as the adverse effects of these technologies on the availability of copyrighted materials. The technological measures – such as encryption, scrambling and electronic envelopes – that this bill protects can be deployed, not only to prevent piracy and other economically harmful unauthorized uses of copyrighted materials, but also to support new ways of disseminating copyrighted materials to users, and to safeguard the availability of legitimate uses of those materials by individuals. These technological measures may make more works more widely available, and the process of obtaining permissions easier.

House Manager's Report at 6.

In sum, there must be "sufficient evidence" to support an exemption in light of the overall situation. NOI at 58,075; *cf.* 2006 NOI at 57,528 (same). Isolated or anecdotal evidence is not sufficient, nor is evidence of convenience or efficiency. *See* NOI at 58,075. Moreover, evidence must be more than rhetoric, more than good policy, and more than conjecture. *See* 2006 Register's Recommendation at 38 ("[P]roponents must do more than present legal and policy arguments why the exemption is desirable."). "If the rulemaking has produced insufficient evidence to determine whether there have been adverse impacts with respect to particular classes of copyrighted materials, the circumvention prohibition should go into effect with respect to those classes." Commerce Committee Report at 38.

Harm caused by the prohibition can be shown in only two ways: either the proponent must show sufficient evidence – preferably "based on first-hand knowledge" – that there currently is "actual harm" to the copyright users' ability to make noninfringing use of copyrighted works, or he must show that such harm is "likely to occur in the ensuing 3-year period." NOI at 58,075 ("Actual instances of verifiable problems occurring in the marketplace are generally necessary in order to prove actual harm. The most compelling cases of actual harm will be based on firsthand knowledge of such problems."); *see also* 2006 NOI at 57,528 (same); 17 U.S.C. § 1201(a)(1)(B) (providing for exemption for copyright users who "are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses" of particular class of copyrighted work).

Proposed exemptions have been rejected because the proposals were not accompanied by sufficiently specific evidence of harm. In the 2006 proceeding, for example, one commenter proposed an exemption for computer programs restricted to a particular platform or operating system, but, like the Proponents here, only made his case by claiming that in order "to use these

old programs, users must reverse engineer and often circumvent technological protection measures in order to make the programs to work." 2006 Register's Recommendation at 76. Because "he offered no actual examples," his proposal was rejected. *Id*.

In this case, none of the Proponents attempted to show that they have actually been harmed by the prohibition on circumvention.[3] Nor have any Proponents shown actual harm by the differences between the current exemption and the expansions that they seek.

In the absence of any proof of actual harm, Proponents must instead demonstrate that harm is "likely" to occur in the next three years. Exemptions based on "likely" adverse impacts should be made "only in extraordinary circumstances in which the evidence of likelihood of future adverse impact during that time period is highly specific, strong, and persuasive. Otherwise, the prohibition would be unduly undermined." House Managers' Report at 6 (emphasis added); *cf*. NOI at 58,075 (citing same). Moreover, the Librarian cannot create an exemption based on "speculation alone" or "[c]onjecture alone." NOI at 58,075. Rather, the exemption proponent must demonstrate with facts and evidence – not with assumptions or predictions – that "the expected adverse effect is more likely than other possible outcomes." *Id*. In the past, proposed exemptions have been rejected for the very reason that there was no firm evidence to show that the predicted consequences would actually ensue. *See*, *e.g.*, 2003 Register's Recommendation at 36-37 (rejecting a formulation of the exemption for software controlled by dongles where the evidence showed not that "the technological measure was actually preventing access to the computer program, but rather that, based on experiences in the past, one might expect that it would prevent access at some time in the future"). As shown below, none of the proponents have come remotely close to demonstrating the requisite "likely" adverse impact on noninfringing uses sufficient to justify their requested exemption.

C. None of the Proponents Has Made the Required Showing.

1. MetroPCS (Proposed Exemption 5B) Offers No Evidence of Harm and Admits that it Seeks an Exemption in Furtherance of Circumvention Services Beyond the Scope of this Proceeding.

In nearly twenty pages of comments, MetroPCS offers absolutely no evidence that a prohibition on circumvention of handset locks that limit the networks on which a wireless telephone can be used is likely to harm anyone. When the rhetoric and economic policy arguments are stripped away, MetroPCS is left with a few passages speculating that consumers may be confused or may not be able to afford one of MetroPCS's handsets for use with MetroPCS's service if its proposed exemption is not granted. But such speculation is not

[3] With respect to conduct by individual users in a noncommercial context, Proponents could not make such a showing, as an exemption for such conduct has been in place for the past three years; "the case [can] not be made that users of an exempted class of works are currently adversely affected by the prohibition, because the prohibition does not currently apply to that class of works." 2006 Register's Recommendation at 40 n.113. In an analogous situation, prior to the 2000 proceeding, the prohibition on circumvention was not yet effective, so no commenter could demonstrate actual harm; thus, the Register was not surprised that the number of justified exemptions was so small. 2000 Final Rule at 64,563. The section 1201(a)(1) prohibition on circumvention did not become effective until two years after it was enacted by Congress in October 1998. *See* 17 U.S.C. § 1201(a)(1).

evidence, and it certainly is not evidence that meets the burden applicable to this proceeding. Moreover, most of MetroPCS's speculation focuses on the impact of the lack of an exemption on its "MetroFLASH" service, which is within the ken of section 1201(a)(2) and, as such, is not properly within the scope of this proceeding, which is limited to section 1201(a)(1).

a. MetroPCS's Comments Offer No Evidence that any Individual Is Likely To Be Harmed by the Prohibition on Circumvention.

MetroPCS's comments focus on erroneous economic policy and legal arguments that will be addressed below. But the comments are devoid of any evidence that the prohibition on individual acts of circumvention is likely to harm anyone. Nothing in MetroPCS's comments provides evidence of "distinct, verifiable, and measurable impacts" from the prohibition. Nothing even alleges (if an allegation were sufficient, which it is not) that without an exemption, a user would be harmed in the next three years in his or her ability to make a noninfringing use of a copyrighted work by the prohibition on the act of circumvention. Nothing meets the requirement of "extraordinary circumstances in which the evidence of likelihood is highly specific, strong, and persuasive." House Manager's Report at 6.

MetroPCS speculates, variously, that (i) "many of MetroPCS's potential subscribers . . . may not be able to afford to initiate service with MetroPCS," MetroPCS Comments at 6 (emphasis added); (ii) "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," *id.* at 11 (emphasis added); (iii) the need to purchase a MetroPCS handset "could act as a barrier," *id.* (emphasis added); and (iv) eliminating the exemption "may create confusion for customers already participating in programs like MetroFLASH," *id.* at 13 (emphasis added). But "may not," "should expect," "could act," and "may create" are not words of evidence; they are terms of speculation, precisely what Congress said could not meet the burden of proof in this proceeding.

Nor, even if speculation could pass for evidence, are these considerations properly within the scope of this proceeding. In the introductory portion of its comments, MetroPCS quotes the five statutory factors which must be considered, 17 U.S.C. § 1201(a)(1)(C), and makes the conclusory assertion that its comments "demonstrate that all of these factors, when applicable, weigh strongly in favor of the proposed exemption," MetroPCS Comments at 2, but never thereafter does it even mention, let alone systematically address, the statutory factors. No evidence is presented about the effect of the prohibition or the proposed exemption on the availability of works; that the prohibition on circumvention is interfering in any way with the use of works for nonprofit archival, preservation, and educational purposes; that the prohibition on circumvention is interfering with criticism, comment, news reporting, teaching, scholarship, or research; or that permitting circumvention will not harm the market for or value of copyrighted works, including mobile phone software and operating systems. Without any evidence of harm to the interests specified in the factors, an exemption may not be granted.

b. MetroPCS's Desire To Use this Proceeding To Immunize its Circumvention Services Is Misplaced, and Further Confirms the Lack of Evidence of Harm from the Prohibition on the Individual Act of Circumvention.

The primary focus of MetroPCS's argument, and the primary motivation for its request for an exemption, appears to be that a section 1201(a)(1) exemption is necessary to promote and protect its "MetroFLASH" service. Unfortunately for MetroPCS, it is asking for relief that cannot be given here and raising arguments beyond the scope of this proceeding.

MetroFLASH pervades MetroPCS's comments. Under the 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."[4] MetroPCS Comments at 6. MetroPCS claims to have "unlocked a significant number of phones" with this service, *id*. at 12, and a press release touting the service's launch is attached to MetroPCS's comments. *Id*. Attach. 1. The comments characterize MetroPCS's proposed exemption as necessary to the continuation of the MetroFLASH service, and speculate that customers might be reticent to participate in such a program were the exemption not granted. *See id*. at 13 (stating that the prohibition "may create confusion for customers already participating in programs like MetroFLASH").

MetroFLASH is a circumvention service provided by MetroPCS for its potential customers. Thus, it is an activity prohibited by section 1201(a)(2), and, as discussed in Part II.B, *supra*, activities prohibited by subsection (a)(2) are expressly beyond the scope of this proceeding. Section 1201(a)(2) prohibits, among other things, providing or offering to the public a service whose purpose is the circumvention of access-control technologies – precisely the kind of service MetroFLASH is. *See* 17 U.S.C. § 1201(a)(2). MetroFLASH is a circumvention service, designed as such, with no other purpose, and marketed as such. It easily qualifies under each of section 1201(a)(2)(A), (B) and (C), although it need qualify only under one of the three for liability to attach.

If anything, MetroPCS's emphasis on the MetroFLASH service confirms that individuals do not engage in circumvention themselves, but rather need to rely on commercial circumvention services, such as MetroFLASH, for that service. Thus, the assertions that "a significant number" of consumers use MetroFLASH and other circumvention services, MetroPCS Comments at 12, undermines any implication that the prohibition in section 1201(a)(1) has interfered with any individual.[5]

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[4] It is ironic that elsewhere in its comments, MetroPCS criticizes other carriers for possibly charging a fee to unlock the phones they have sold to a consumer, but MetroPCS will gladly charge a fee to unlock someone else's phone. *See* MetroPCS Comments at 11.

[5] Moreover, these individuals have used the MetroFLASH service despite the existence of the section 1201(a)(2) prohibition, further undermining any claim that the existence of the section 1201(a)(1) prohibition would have an adverse effect on lawful use.

Indeed, MetroPCS does not offer even a single example of any user who took advantage of the existing exemption during the past three years to circumvent any access control, let alone evidence that such circumvention was significant. *See* 2006 Register's Recommendation at 69 ("[A] record that reveals no use of an existing exemption tends to indicate that the exemption is unnecessary."). In short, MetroPCS offers no evidence to support its requested exemption.

c. The Broadened Exemption Proposed by MetroPCS Is Not Supported by any Evidence.

MetroPCS asserts that its requested exemption "would have the effect of renewing the prior exemption," MetroPCS Comments at 3, and would contain a limitation "similar" to the "sole purpose" limitation in the 2006 exemption, *id.* at 15. In fact, however, these assertions are not true. MetroPCS is seeking a significant expansion of the 2006 exemption in at least two respects. First, the 2006 exemption was carefully limited to "computer programs in the form of firmware that enable wireless telephone handsets to connect to a wireless telephone communication network." MetroPCS seeks an exemption vaguely applicable to all "computer programs that operate wireless telecommunications handsets." Second, the 2006 exemption was carefully limited to the sole purpose of "lawfully connecting to a wireless telephone communication network." MetroPCS would drop the requirement that the act of connecting to another network be lawful, thus using this proceeding to further illegal activities.

The first expansion is broad and vague enough arguably to encompass all software on the handset, as any software on the handset in some sense "operates" the handset. That would include all of the applications on the handset, including applications that govern Internet access, email, text messaging, downloads of sound recordings, and streaming of video, to name just a few. Nor is MetroPCS's proposal limited to handsets that function as telephones, despite the fact that the only type of devices discussed in its comments are telephones. The second expansion would allow circumvention for the purpose of unlawfully connecting to a network. MetroPCS makes no showing that circumvention should be allowed to permit unlawful connections. Taken together, the proposed expansions could be read to authorize hacking into a phone and bypassing authorization software used to control downloads or streaming of copyrighted content by means of a connection to a wireless network.

Because MetroPCS presented no evidence of any kind in support of its requested exemption, it follows *a fortiori* that it presented no evidence to justify any expansion beyond the 2006 exemption. But MetroPCS does not even discuss the expansion or present any explanation for it, hiding instead behind its claim that its proposed exemption is in "effect" a renewal of the 2006 exemption. Nothing in the MetroPCS comments supports the broad language requested by MetroPCS. The Register should not recommend, and the Librarian should not grant, such an exemption.

2. Pocket Communications (Proposed Exemption 5C) Offers No Evidence of Harm and Similarly Seeks To Perform Circumvention Services Beyond the Scope of this Proceeding.

Pocket Communications ("Pocket"), like MetroPCS, offers no evidence that any individual has been or is likely to be harmed by the prohibition on circumvention. Moreover,

while Pocket is more circumspect in its presentation here, it, too, provides circumvention services that are beyond the scope of any exemption that may be granted in this proceeding.

a. Pocket's Comments Offer No Evidence that any Individual Is Likely To Be Harmed by the Prohibition on Circumvention.

Pocket has failed to provide any actual evidence that anyone has been or is likely to be adversely affected in his or her ability to make a noninfringing use of a wireless phone because of the prohibition on circumvention. It certainly has not presented any evidence of "distinct, verifiable, and measurable impacts," or likely impacts, from the prohibition. Such a showing is the crux of this proceeding, and Pocket has failed to meet its burden.

Pocket's comments make nothing but vague assertions such as "A problem is raised if the handset has a carrier lock to tie the handset to the customer's prior carrier," or "So long as a carrier lock is not circumvented, it prevents the new carrier from accessing programs that control what carriers and/or networks the handset can connect to." Pocket Comments at 2, 3. It offers no specific evidence or examples of individuals seeking to circumvent the carrier lock. *See* 2006 Register's Recommendation at 76 (rejecting proposed exemption because of lack of "actual examples").

In this case, an exemption currently exists, so "the case could not be made that users . . . are currently adversely affected by the prohibition, because the prohibition does not currently apply to [this] class of works." 2006 Register's Recommendation at 40 n.113. But neither is there any evidence given to support a claim that such adverse effects are more likely than not to occur in the next three years without an exemption. Pocket fails to provide any evidence that a substantial number of individuals have actually made use of the exemption during the past three years. *See* 2006 Register's Recommendation at 69 ("[A] record that reveals no use of an existing exemption tends to indicate that the exemption is unnecessary.") The closest Pocket comes is its assertion that "[m]any customers come to Pocket and other carriers like us after having their service discontinued with a larger carrier," Pocket Comments at 2-3, but this is not evidence that customers have reflashed their own phones before coming to Pocket, which is doubtful in light of the reflashing services that Pocket provides (but did not mention in its Comments). *See infra* Part III.C.2.b.

Pocket says that "with the ability to unlock their own handsets, consumers are able to choose amongst numerous discount option [*sic*] in order to save money and minimize waste." Pocket Comments at 3. But the fact that the exemption enables customers to unlock their handsets does not prove that they actually do so.

Pocket argues that without an exemption, users will "abandon the non-infringing rights" and either throw the handset away or "reinstate service with the former carrier." *Id.* at 4. But sweeping arguments and unsupported assertions are not evidence, and these are not the only alternatives available to users, *see infra* Part III.E. Pocket offers no actual evidence that consumers are more likely than not to be harmed in their ability to make noninfringing uses of copyrighted works. *See* 2003 Register's Recommendation at 36-37 (rejecting a particular formulation of the dongle exemption because it was too speculative).

While Pocket does not allege harm to any individuals if the exemption is not granted, the harm it asserts that it will suffer as a business has nothing to do with the fair use interests that form the basis for this proceeding. *See supra*, Part II.A. Indeed, Pocket does not even mention the statutory factors that Congress directed the Register to consider in this proceeding. *See* 17 U.S.C. § 1201(a)(1)(C). As Pocket has not even attempted to show that the prohibition would cause harm to the public interests listed in the statute, an exemption would be improper.

Further, to the extent Pocket is engaging in activities that hinge on reflashing – such as providing cellular service to customers who have reflashed their own phones – the only harm Pocket alleges is that it will have "substantial risks and uncertainties" because "mega-carriers [may] minimize competition and discourage innovation in the mobile communication market." Pocket Comments at 4-5. In other words, if an exemption is not granted, Pocket fears that it might suffer a competitive disadvantage in its business market. This result is speculative and is contradicted by Pocket's emphasis on selling new phones rather than providing service to reflashed phones. *See* http://www.pocket.com/index.php/phones. Pocket's concerns also are beyond the scope of interests to be protected by this proceeding.

b. Pocket's Efforts To Shield Circumvention Services Should Be Rejected.

Pocket is more subtle than MetroPCS in its comments – it does not disclose or discuss its own circumvention services in its comments; however, it engages in the same activities. To the extent Pocket is seeking an exemption to protect itself in its business of reflashing phones for customers – its "Houdini" service – the exemption should be rejected out of hand; section 1201(a)(1)(B) exemptions do not apply to violations of section 1201(a)(2).

Pocket's own website makes it clear that it offers reflashing services to the public. The "Frequently Asked Questions" page contains information about what reflashing is, how much it costs to have Pocket reflash a phone, and what kinds of phones Pocket is able to reflash. *See* FAQ's, Handsets – Flashed Phones, http://www.pocket.com/index.php/faq/6 (last visited Jan. 30, 2009). The reflashing services have also been touted in Pocket's press releases. *See*, *e.g.*, Press Release, Pocket Communications Hits Major Milestone … Now 250,000 Subscribers Strong!, (Feb. 29, 2008), http://www.pocket.com/index.php/news/article/13 (last visited Feb. 2, 2009) ("Pocket is also the first wireless operator to open up its network and allow customers to bring their own phones and put them on Pocket's network. Using a handset unlocking software product called Houdini, customers eliminate the need to buy a new phone."); Press Release, Flurry Of Holiday Subscribers Push Pocket Past 200,000 Customers, Jan. 7. 2007, http://www.pocket.com/index.php/news/article/16 (last visited Feb. 2, 2008) ("[C]ustomers even kept their old phone by taking advantage of the Houdini flash service that allows you to switch networks on an existing handset.").

In other words, Pocket, like MetroPCS, has submitted comments in this proceeding at least in part (if not principally) seeking to preserve its business model of providing and offering services that circumvent access control technologies. But to the extent Pocket is engaging in such activities, this proceeding cannot provide a safe harbor. Pocket's desire to attempt improperly to leverage a section 1201(a)(1) exemption to cover activities within the scope of section 1201(a)(2) is not a permissible justification for an exemption.

c. There Is No Justification for Pocket's Proposed Expansions of the 2006 Exemption Language.

Pocket's particular phrasing of the proposed exemption includes two changes that would broaden the scope of its proposed exemption as compared to the language that was implemented as an exemption in 2006. First, it proposes that the class of works be defined in terms of "firmware or software," whereas the 2006 exemption specified only "firmware." Second, it proposes language specifying that the exempted programs reside on "mobile communication handsets," as opposed to "wireless telephone handsets." Pocket Comments at 1-2. Neither of these changes is supported by any evidence. Although the Register should reject the proposed exemption entirely for the reasons explained herein, if the Register does decide to recommend an exemption, she should not use the language put forward by Pocket.

Pocket offers no evidence to support the need for the inclusion of "software" in the proposed exemption. It offers exactly one sentence of explanation: "Handset locking measures are included not just by a handset's manufacturer (hence, in what is classically considered the firmware), but also in programs utilizing more volatile memory such as software added in the handset flash memory." *Id.* at 1.[6] Pocket offers no evidence that any mobile devices are directed to a particular wireless carrier by means of non-firmware software other than its say-so. It provides no examples of such software and offers no explanation as to why such software would not be covered under a formulation that exempted only "firmware." Thus, it is unclear what works beyond "firmware" as that term is commonly understood Pocket intends to exempt by its proposal. Without further explanation, the proposal must be rejected. *See*, *e.g.*, 2006 Register's Recommendation at 80 (rejecting proposal where "commenters have not articulated a sufficient class or provided sufficient evidence of adverse effects by the prohibition on noninfringing uses that would allow the articulation of a cognizable class").

There is even less support for the proposal to expand the exemption to include all mobile handsets. Pocket makes a token assertion that non-telephone handsets do exist ("[A] number of products that represent substantial commerce in the marketplace utilize communication handsets that may not qualify as telephone handsets." Pocket Comments at 2), and even attempts to identify two examples ("Beepers and text devices, for example, are significant exceptions that are well known in the marketplace." *Id.*). But Pocket never bothers even to assert that beepers and text devices contain firmware or software that directs them to a particular wireless carrier, or that the prohibition on circumventing such locks has harmed or will harm anyone. Moreover, it does not attempt to define what the scope of its proposed term "mobile communications handsets" would and would not include. Are GPS devices included? Are walkie-talkies? Given that there is no evidence that an exemption might even be applicable or necessary, the proposal must be rejected. *See*, *e.g.*, 2006 Register's Recommendation at 77 ("The brief comments submitted on this issue failed to present sufficient evidence from which to conclude that technological measures that control access to works are interfering with the ability of users of copyrighted works to make noninfringing uses. In fact, it is not at all clear whether access controls are even implicated in the cases cited by the commenters. . . . No exemption can be

[6] Pocket's point is not clear, as flash memory is typically not considered "volatile."

recommended in this case because insufficient information has been presented to understand the nature of the problem or even the relevance of § 1201(a)(1).").

3. Wireless Alliance Commenters (Proposed Exemption 5D) Offer No Evidence of Harm and Seek To Foster Commercial Circumvention.

The commenters subscribing to Proposed Exemption 5D (collectively, "WA Commenters") fare no better in satisfying the statutory burden of proof than the other Proponents. Nowhere do WA Commenters allege that anyone will be, or is likely to be, harmed in the next three years in their ability to make noninfringing uses of copyrighted works by reason of the prohibition on circumvention of access-control technologies. Instead, they improperly attempt to shift the burden of proof to opponents of the exemption and raise irrelevant arguments relating to non-copyright policy and the fear of litigation that have nothing to do with the statutory showing Congress and the Register have required them to make. As such, WA Commenters have failed to meet their burden of proof in demonstrating entitlement to the proposed exemption, and the exemption should be rejected.

a. Wireless Alliance Commenters Fail To Make the Required Showing of Harm.

Not once do WA Commenters even assert – much less present any evidence – that the prohibition on circumvention is likely to harm users in their ability to make noninfringing uses of copyrighted works. They certainly have not presented any evidence of "distinct, verifiable, and measurable" adverse copyright impacts, or likely adverse copyright impacts, from the prohibition. That shortcoming, in and of itself, renders WA Commenters' proposal fatally deficient.

WA Commenters' only contention remotely alleging any harmful effects at all from the prohibition is their claim that "[t]he prohibition on circumventing locking software inhibits customers from using their handsets on other networks." WA Comments at 9. But such a general, unsupported assertion is not evidence, and, in any event, the ability of customers to transfer their handsets to another network has nothing whatsoever to do with the copyright interests at issue in this proceeding. As such, this statement is entirely irrelevant to the Register's statutory inquiry.

Instead of demonstrating the types of copyright-related harms arising from the prohibition that are the focus of the Register's inquiry, WA Commenters improperly endeavor to shift its burden of proof to opponents of the exemption by asserting that "[t]here is no evidence over the past three years that the exemption has harmed copyright interests" and that "there has been no suggestion over the past three years that the exemption has resulted in any infringement of copyrighted materials on a cell phone." WA Comments at 10. But these are precisely the types of statements that the Librarian and Register have made clear are insufficient to support renewal of an existing exemption. *See* 2006 Final Rule at 68,478 (rejecting exemption because "proponents made no attempt to make any factual showing whatsoever, choosing instead to rest on the record from three years ago and argue that the existing exemption has done no harm"); 2006 Register's Recommendation at 68.

WA Commenters, like MetroPCS, devotes much of their comments to policy arguments that are irrelevant to the statutory burden of proof. Specifically, they contend that the bundling of services conflicts with federal communications policy (WA Comments at 5-6, addressed in Part IV.B.1, below) and argue that discarding phones is bad for the environment and for developing countries (*id*. at 7). Again, none of these arguments has anything to do with the standard set out by Congress in the statute or the guidance provided by the Copyright Office in the Notice of Inquiry. WA Commenters simply have not made the required showing. Therefore, their proposed exemption should be rejected.

b. Wireless Alliance Commenters' Proposed Exemption Seeks Inappropriately To Insulate Commercial Services Within the Scope of Section 1201(a)(2).

Like MetroPCS and Pocket, Wireless Alliance, ReCellular, and Flipswap are engaged in commercial, for-profit businesses that focus on unlocking and reselling cell phones for a profit, and their comments are directed primarily toward protecting that business model. To the extent that the unlocking is carried out without the authority of the copyright owner, they are in violation of section 1201(a)(2), which prohibits, *inter alia*, "offer[ing] to the public, provid[ing], or otherwise traffic[king] in any technology, products, service, device, component, or part thereof" that is designed for circumvention, has limited purpose or use other than circumvention, or is marketed for circumvention. 17 U.S.C. § 1201(a)(2). WA Commenters' activities in acquiring used cell phones, reflashing them without the authority of the copyright owner, and offering them to the public for a profit are the performance of services, within the scope of that prohibition. As discussed in Part II.B, above, it is entirely inappropriate and ineffective for these commenters to use this proceeding to protect this business model – any exemptions established in this proceeding will not sanitize activities unlawful under section 1201(a)(2).[7]

c. The Exemption Process Should Not Be Used To Address Speculative Fears of Litigation.

WA Commenters also assert that their requested exemption is needed "To Remove Any Doubts About The Legality Under Section 1201 Of Commenters' Businesses" in light of TracFone's numerous successful lawsuits against bulk reflashers and resellers. WA Comments at 10-11; *see also*, *e.g.*, *TracFone Wireless, Inc. v. Dixon*, 475 F. Supp. 2d 1236 (M.D. Fla. 2007); *TracFone Wireless, Inc. v. GSM Group, Inc.*, 555 F. Supp. 2d 1331 (S.D. Fla. 2008). Putting aside the fact that WA Commenters' requested exemption would do nothing to shield them from a section 1201(a)(2) claim, this unfounded concern is the very definition of speculation and conjecture. WA Commenters do not pretend to know that TracFone will sue them. Indeed, TracFone has sued only bulk purchasers of new phones, who take those phones and sell them, frequently overseas, for unauthorized use. TracFone has never sued those who

[7] These commenters claim that in some cases, their activities are authorized by the cell phone carriers themselves or their representatives. *See* WA Comments at 2 (asserting that "ReCellular partnered with [CTIA's] Wireless Foundation on the original Donate a Phone charitable recycling program"); http://www.thewirelessalliance.com/pressroom_background.html (asserting that Wireless Alliance "maintain[s] accounts with the nation's largest carriers and stores including: Verizon, Cingular, Triton PCS, [and] Midwest Wireless"). But authorized circumvention is not at issue in this proceeding, and is not prohibited by section 1201.

engage in the "recycling and resale of used handsets" (WA Comments at 11) and has no intention of doing so. Bulk purchasers of new phones are not recyclers; they are thieves of TracFone's subsidies, which make TracFone's phones available inexpensively to those who otherwise would not have access to wireless service. Nor do new phones sitting on Wal-Mart's shelves pose any environmental hazard of the kind WA Commenters claim to address.

The Librarian and Register previously have made clear that speculative and unfounded fears provide no basis for granting a requested exemption. In 2003, for example, the Register rejected a proposed exemption for circumventing the broadcast flag when it was uncertain the flag would be implemented: "The evidence produced . . . fails to support an exemption because it is entirely speculative." 2003 Register's Recommendation at 170; *see also* 2003 Final Rule at 62017 (observing that "[t]he Register cannot recommend such an exemption" and that "the broadcast monitors' fears relating to the broadcast flag . . . are speculative"); 2000 Final Rule at 64,574 (rejecting proposed exemption for public broadcasting entities because the question of whether they would encounter access control difficulties was entirely speculative). In this case, WA Commenters' claim amounts to the very sort of inappropriate risk-abatement guesswork that the Librarian and Register have rejected as a basis for an exemption.

d. Wireless Alliance Commenters' Requested Modification to the 2006 Exemption Would Not Differentiate Them from the Bulk Commercial Reflashing Companies Targeted by TracFone.

Finally, it is worth noting that WA Commenters' requested expansion of the 2006 unlocking exemption to including the phrase "regardless of commercial motive" would not differentiate them from the bulk commercial reflashers targeted by TracFone. *See* WA Comments at 2-3, 11. Although WA Commenters claim that their "businesses . . . differs [*sic*] markedly from the business of the bulk purchasers and resellers of new phones" that have been the target of TracFone's lawsuits, *id.* at 11, they fail to explain how the addition of the words "regardless of commercial motive" would distinguish them from those bulk reflashers given that all three of the WA Commenters also are admittedly commercial, for-profit businesses, *id.* Rather, they apparently believe that their requested exemption should – and would – shield all such bulk reflashers from anticircumvention liability.

Moreover, given WA Commenters' own admission that the current exemption "provides little security" in light of their own for-profit status, *id.*, it renders WA Commenters' failure of proof even more stark. If WA Commenters have been operating without a section 1201(a)(1) exemption, then presumably they should have been able to demonstrate "distinct, verifiable, and measurable" actual adverse impacts on the ability of users to make noninfringing uses of copyrighted works. The fact that WA Commenters have failed to provide any such evidence, *see supra* Part III.C.3.a, shows yet again why their comments cannot form the basis for establishing any such exemption now.

4. EFF (Proposed Exemption 5A) Bases its Proposal on Insufficient Evidence and Speculation.

The Electronic Frontier Foundation ("EFF") proposed a substantially broader, but related, exemption than the other five Proponents, but it, too, fails to offer sufficient support for it.

Rather than an exemption that would allow the circumvention of TPMs on cell phone firmware for the purposes of redirecting the cell phone to another carrier's network, EFF proposes an exemption that would allow the circumvention of TPMs on cell phone firmware for the purpose of enabling the cell phone to run certain third-party software applications, a process that EFF calls "jailbreaking." In addition to permitting the kind of applications that EFF discusses in its comments, however, its proposed exemption is framed so broadly that it also would permit the loading of software that would permit a handset to be used on an unauthorized network, or even the loading of Internet communications software that would allow the handset to be used as a telephone at Wi-Fi hotspots or other locations, rather than as contemplated. In short, the EFF proposal suffers from all of the defects of the narrower proposals, and more.

a. EFF Offers No Evidence that any Individual Is Likely To Be Harmed by the Prohibition on Circumvention.

The only smartphones whose firmware that EFF alleges have been the subject of circumvention efforts are Apple's iPhone and T-Mobile's G1. No numbers or specific evidence are presented with regard to the G1, and the data on the demand for jailbroken iPhones is indirect at best. These two examples, even if accepted, do not demonstrate a compelling need for an exemption.

In fact, EFF's comments demonstrate that the prohibition on circumvention has had no substantial adverse effect on anyone, because if EFF's numbers are to be believed, it is being widely ignored. EFF claims that "more than 350,000 iPhone owners have taken advantage" of unlawful circumvention tools to access non-Apple software for their iPhone. Comments of the Electronic Frontier Foundation, Docket No. RM 2008-08 at 5, 7 (Dec. 2, 2008) ("EFF Comments"). But EFF offers no evidence that the prohibition is having a substantial adverse effect on anyone who wishes to circumvent the Apple TPMs. EFF's presentation is devoid of any information of the effect of the TPMs used on any phone other than the iPhone. This is not concrete, specific evidence of a substantial adverse effect.

Beyond that, EFF relies on speculation, claiming that "[a]s more smart phones come on the market to compete with the iPhone, consumers will discover other technological protection measures that restrict their freedom to run software of their choosing. These protection measures will almost certainly operate, at least in part, by restricting access to the smart phone's firmware." *Id.* at 7. There is no basis for this statement other than conjecture. EFF can point to no future protection measures that restrict the software that will run on future smartphones; it can barely point to protection measures on current ones. The exemption should be rejected because there is not sufficient, conclusive support for the proposition that users are harmed by the prohibition.

b. EFF Seeks To Foster Circumvention that Relies on Violations of Section 1201(a)(2).

EFF's comments effectively concede that the 350,000 individuals that it claims have "jailbroken" their iPhones have taken advantage of the "literally dozens of tools" that exist to "jailbreak the various iterations of the iPhone." EFF Comments at 7. While EFF does not identify most of these "tools," the fact that they "exist to jailbreak" the iPhone strongly suggests

that they are circumvention devices proscribed by section 1201(a)(2). The one tool it does identify, PwnageTool, appears to be a tool designed specifically to circumvent the iPhone operating system locks. *See*, *e.g.*, http://blog.wired.com/gadgets/2008/07/pwnage-20-relea.html. The Register should be reluctant to exempt violations of section 1201(a)(1) that rely on the use of technology proscribed by section 1201(a)(2).

c. EFF's Proposed Exemption Is So Broad that It Would Swallow the Other Class 5 Exemptions.

In addition to its own specific defects, the proposed EFF exemption is so broadly worded that it would include the programs that lock wireless handsets to a particular communications network. Where "the lawfully obtained software applications" referenced in the proposed exemption are applications that enable connection with a wireless network other than the one for which the phone was sold, the EFF exemption would permit the circumvention of the handset lock that would preclude such software from operating the phone. It also would permit circumvention to allow the loading of Internet communications software, such as Skype, that would directly compete with the uses for which the phone was acquired.

For these reasons, EFF's proposal suffers from the same defects as the defects in the other proposals. Moreover, such uses have nothing to do with the "jailbreaking" discussed in EFF's proposal. Thus, there is no evidence or even any discussion to support an exemption that would permit such uses of a mobile handset.

D. Proponents Either Ignore the Statutory Factors Altogether or Misapply Those Factors.

Proponents' failure to meet their burden of proof is particularly apparent in their wholly misguided – or, in some cases, nonexistent – attempt to address the mandatory statutory considerations in section 1201(a)(1)(C). As discussed in Part II.A, these factors are aimed at protecting the fair use rights of individuals to copyrighted works and were expressly identified by Congress as relevant to the consideration of the propriety of a section 1201(a)(1) exemption. Proponents' failure to address these factors in any meaningful way confirms their complete failure of proof in demonstrating justification for the requested exemption.

Pocket does not mention the statutory factors at all. MetroPCS simply asserts, conclusorily, that "all of these factors, when applicable, weigh strongly in favor of the proposed exemption," MetroPCS Comments at 2, but then fails to conduct any factor-by-factor analysis whatsoever to bolster its assertion. Neither commenter presents any evidence that the prohibition is (i) decreasing the availability of works, (ii) interfering in any way with the use of works for nonprofit archival, preservation, and educational purposes, or (iii) interfering with criticism, comment, news reporting, teaching, scholarship, or research. Nor do they adduce evidence that permitting circumvention will not harm the market for or value of copyrighted works, including mobile phone software and operating systems.

Even WA Commenters and EFF, which at least purport to analyze the factors, distort and misapply them. For example, with respect to "the availability for use of works for nonprofit . . . purposes," WA Commenters conclusorily assert that "[t]here is no reason to

believe that the availability (or lack of availability) of phone firmware for nonprofit uses would be harmed by" the proposed exemption. WA Comments at 12-13. EFF includes a nearly identical statement. EFF Comments at 11. These statements, of course, not only provide no supporting evidence demonstrating that this factor favors the exemption, but they improperly attempt to shift the burden of proof to opponents of the exemption instead of the proponents, where it rightly belongs. *See supra* Part III.A-B. WA Commenters and EFF provide similar, vacuous, burden-shifting statements with respect to the factor requiring analysis of the impact of the prohibition "on criticism, comment, news reporting, teaching, scholarship, or research." WA Comments at 13; EFF Comments at 11. Of course, such "[c]onjecture alone is insufficient to support a finding of 'likely' adverse effect." NOI at 58,075.

Moreover, in making these assertions, WA Commenters and EFF address the wrong question. The consideration identified by Congress focuses on whether the "prohibition on the circumvention of technological protection measures" will adversely affect the identified uses. *See*, *e.g.*, 17 U.S.C. § 1201(a)(1)(C)(iii) (requiring Librarian to consider "the impact that the prohibition on circumvention . . . has" on listed uses). WA and EFF fail to adduce any evidence that the prohibition on circumvention will have any adverse effect on the identified uses. Thus, they have failed to meet their burden.

With respect to "the availability for use of copyrighted works," WA Commenters assert that "there is no evidence to suggest that the availability of firmware for phones would be adversely affected by the proposed exemption," WA Comments at 13, but this statement again improperly turns the burden of proof on its head. It also argues that "[t]he use of access controls has made cell phone firmware less available to customers" and that "[t]he vast majority of current and future mobile phone customers cannot unlock their phones without" violating section 1201(a)(1), *id.* But these assertions, ignore, of course, that cell phone firmware is fully available to customers in the manner that they contracted for – on the phone that they purchased and for use with the carrier that they chose to be their cell phone service provider.

EFF's analysis of this factor, like WA Commenters', also improperly shifts the burden of proof, focusing erroneously on the effect the proposed exemption would have on the availability for use of copyrighted works.[8] It alleges that "[t]he availability of firmware for smart phones would not be adversely affected by an exemption," EFF Comments at 10, but the relevant question is whether the prohibition would adversely affect it. EFF offers no evidence to suggest that it would.

When EFF does belatedly discuss the effects of the prohibition, it does not claim that the availability of works is harmed, but rather that the ability of firmware X to run software Y will be harmed. *Id.* But the Copyright Act gives no one the absolute right to use a given work on a given hardware or software system, and the Librarian repeatedly has made clear that this

[8] EFF also erroneously suggests that because the access controls are not being used to directly protect copyright interests, "the importance of the four factors recedes." EFF Comments at 10. There is no such directive in the statute, which mandates unconditionally that "the Librarian shall examine" the effect of the statutory factors. 17 U.S.C. § 1201(a)(1)(C). The passage from the 2006 Register's Recommendation EFF quotes was not a softening of the statutory factors, but rather a consideration of the fifth, open-ended factor (and, as shown in Part V.A, the Register's analysis was incomplete).

provides no basis for an exemption. In 2006, for example, the Librarian rejected for the third time a proposal that would have exempted the circumvention of DVD region coding TPMs because, among other reasons, "Consumers who wish to view non-region 1 DVDs have a number of inexpensive options other than circumvention, including obtaining DVD players, including portable devices, set to play DVDs from other regions and obtaining DVD-ROM drives for their computers, and setting those drives to play DVDs from other regions." 2006 Final Rule at 68,478; *see also* 2006 Register's Recommendation at 76 (quoting 2003 Register's Recommendation at 120-24). Likewise, in that same proceeding, the Librarian rejected another proposal for an exemption that would allow users of Linux-based computers to circumvent TPMs that prevented DVDs from playing on such systems, stating:

> Due to these alternative options for access and use by consumers, there is no reason to conclude that the availability for use of the works on DVDs is adversely affected by the prohibition. An exemption is not warranted simply because some uses are unavailable in the particular manner that a user seeks to make the use, when other options are available.

2006 Final Rule at 68,478; *see also* 2006 Register's Recommendation at 74. EFF's concern can similarly be ameliorated by obtaining hardware upon which the desired software will run.

With respect to the effect of an exemption on the market value of the copyrighted work, WA Commenters assert that there would be "little to no adverse [e]ffect" because cell phone service providers could collect a "hefty early termination penalty" if a customer unlocks the phone and shifts to another network. *Id.* at 14. But this statement ignores the fact that early termination fees do not apply at all on pre-paid phone service and that, even on post-paid service, the fees can be difficult to collect. Nor do WA Commenters offer any evidence to support this proposition.

Likewise, while EFF asserts that permitting circumvention would increase the marketability of third-party software that can only run on a jailbroken phone, EFF Comments at 9, 12, it offers no evidence to support this proposition, and it fails to recognize that the exemption would decrease the marketability and value of the software that was originally authorized to run on the phone and, possibly, of the operating system software as well.

In sum, Proponents have either misapplied the statutory factors or ignored them altogether. Their distortion of the factors is particularly apparent in their attempts to shift the burden of proof in their discussion of some factors to those opposing a particular exemption. Their treatment – or lack thereof – of these factors confirms their failure to meet their burden of proof in demonstrating entitlement to the requested exemption.

E. The Availability of Other Means of Access Obviates the Need for any Exemption.

In addition to Proponents' failure to demonstrate any relevant harm, the so-called harm that they do allege not only is unrelated to copyrighted interests, but it amounts to no more than a "mere inconvenience" that does not support the imposition of an exemption to the general prohibition against circumvention. *See* 2006 Final Rule at 68,473 ("De minimis problems,

isolated harm or mere inconveniences are insufficient to provide the necessary showing."); 2003 Final Rule at 62,012 (same). As is clear from Proponents' comments, Proponents primarily are interested in customers' ability to freely choose their wireless carrier. Alternatives are available to individuals seeking to use a phone on a particular network that, while perhaps more inconvenient and costly, can achieve the same or similar ends without requiring the circumvention of access controls.

As the Librarian and Register have repeatedly made clear, the availability of alternatives to meet the needs of the user is fatal to the grant of an exemption. *See* 2006 Final Rule at 68,478 ("An exemption is not warranted simply because some uses are unavailable in the particular manner that a user seeks to make the use, when other options are available."). Past rulemakings have rejected myriad proposed exemptions because circumvention was not necessary to achieve the noninfringing purposes of the user. For example, various DVD-related proposals have been rejected because the copyrighted works protected by CSS and other access controls were readily available in other formats, such as VHS, or by using different DVD players or software. *See*, *e.g.*, 2006 Final Rule at 68478 (rejecting proposed exemption for DVDs that cannot be viewed on Linux operating systems because "Linux-based DVD players currently exist," "there are many readily available ways in which to view purchased DVDs," "Linux users can create dual-boot systems on their computers in order to use DVD software that is compatible with, for example, the Microsoft operating system," and "[t]here are also alternative formats in which to purchase the motion pictures contained on DVDs"); *id*. (rejecting proposed exemption for DVD region coding on ground that "[r]egion coding imposes, at most, an inconvenience rather than actual or likely harm, because there are numerous options available to individuals seeking access to content from other regions"); 2000 Final Rule at 64,568 (rejecting proposed exemption to circumvent DVD CSS technology in part because "[t]he reasonable availability of alternate operating systems (dual bootable) or dedicated players for televisions suggests that the problem is one of preference and inconvenience").

These determinations establish that an exemption will not be granted if there are alternatives that will allow the user to do what he or she is trying to do. Only when there are no such alternatives will the exemption be granted.

Here, the specific purpose of the user is to connect a phone to a particular network. Unlike the film professors' purpose, this purpose can be achieved without resorting to circumvention of access controls. Because perfectly viable alternatives are available, the proposal should be rejected.

First, circumvention of TPMs is not the only way to access the firmware on any given handset. The House Judiciary Committee, in describing section 1201(a), compared the circumvention of access-control technologies to "breaking into a locked room in order to obtain a copy of a book." House Judiciary Committee Report 105-551 at 17. But one may also obtain access to a book in a locked room by asking the book's owner for a key. The Proponents have presented nothing to indicate that wireless carriers will not unlock their phones for their customers if asked to do so. Indeed, as discussed below, in Part IV.B.2, CTIA members will unlock the phones of bona fide customers in appropriate circumstances. Moreover, virtually all of the major wireless carriers expressly permit phone unlocking in cooperation with various authorized cell phone recyclers. *See infra* Part IV.C. Even MetroPCS, in its comments,

recognizes it as a "fact" that "carriers can . . . unlock the handset" although "customers often are unaware that they can ask the carrier to [unlock their phone]." MetroPCS Comments at 10.[9] In other words, a key to the lock is available, so there is no need to authorize the breaking of the lock.

In an analogous situation, the Copyright Office repeatedly has allowed an exemption for software whose access is controlled by a hardware dongle, but only when the required dongle is obsolete and unavailable in the commercial marketplace. *See* 2006 Final Rule at 68,475; 2003 Final Rule at 62,013-14; 2000 Final Rule at 64,564-65. In cases where a dongle – the key to the locked room – is available in the marketplace, the solution is not an exemption to the prohibition on circumvention, but rather the purchase of a new dongle. *See* 2003 Register's Recommendation at 38 ("Indeed, the record does not support an exemption that would cover all malfunctioning dongles, since in many cases the manufacturer will readily replace or repair the dongle."); 2003 Final Rule at 62,013 ("The exempted class includes only that software that actually cannot be accessed due to a damaged or malfunctioning dongle, and only when the dongle cannot be replaced or repaired."). The same applies here. As no showing has been made that the codes or cards necessary to unlock the handsets' firmware are obsolete or unavailable from the vendors, there should be no exemption allowed.

Second, in many cases, no "key" is needed because there are carriers that do not lock their phones. For example, Verizon Wireless, one of the nation's largest carriers, does not lock any of its post-paid phones (roughly 96% of all of its phones).[10] Pocket Communications, one of the Proponents in this proceeding, says it permits users freely to transfer its phones to another network. *See* Pocket Comments at 3; *accord* MetroPCS Comments at 10 (stating that "some unlocked phones may be available for purchase"). Indeed, despite its opposition to phone locks, the sale of phones appears to be a significant element of Pocket's business. *See* http://www.pocket.com/index.php/phones (last visited Jan. 30, 2009) (showing the phones Pocket offers for sale). If a user wishes to make a noninfringing use of phone firmware specifically by changing the firmware to direct the phone to a particular carrier, he can do so without having to circumvent TPMs simply by purchasing an unlocked phone from Pocket or a similar vendor and directing it to the carrier of his choice. The proposed exemption, when applied to this situation, would be meaningless and unnecessary. Again, the cost and inconvenience of purchasing a new device are no barriers to rejection of the exemption. See 2006 Final Rule at 68,473.

Third, circumvention of the access control technology on a particular handset is not the only way to achieve the purposes of the consumer. If a consumer seeks to connect to a preferred

[9] MetroPCS continues its argument by speculating that carriers might "charg[e] an excessive amount for unlocking or insist[ ] that the customer give other consideration to the carrier (such as staying in service for an additional period of time)" and using ominous terminology such as "monopoly rents" to suggest that this cost to the consumer provides a reason for an exemption. MetroPCS Comments at 11. But section 1201(a)(1)(B) was not enacted in order to save consumers money, and, in any event, MetroPCS offers no evidence of such "excessive" charges.

[10] Technically, Verizon Wireless sets the Service Programming Code at a default value and then publishes that code in its Customer Agreement. *See* http://www.verizonwireless.com/b2c/globalText?textName= CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp.

wireless carrier, phones that will enable him or her do so are readily available in the marketplace for a fee. In such a case, there is no reason to create an exemption to the statutory prohibition simply to enable the user to keep using the old phone – "there is no unqualified right to access works on any particular machine or device of the user's choosing." 2000 Final Rule at 64,569; *see also* 2006 Registers' Recommendation at 75-76 (confirming decisions in 2000 and 2003 that there should be no exemption for circumvention of DVD region coding, because consumers have the alternative of "obtaining DVD players, including portable devices, set to play DVDs from other regions and obtaining DVD-ROM drives for their computers, and setting those drives to play DVDs from other regions"); *see also Universal City Studios v. Corley*, 273 F.3d 429, 459 (2001) (observing that there is no "guarantee of access to copyrighted material in order to copy it by the fair user's preferred technique, or in the format of the original").

Because Proponents make no showing that the only way to obtain access to a phone's firmware, or that the only way to connect to a preferred carrier, is to circumvent the TPMs, the proposed exception should be rejected. Consumers have other options to unlock their existing phone or to get connected to their preferred network with a different phone. The cost, inconvenience, and harm to the environment in doing so – which is alleged but not proven by the Proponents – is not a cognizable rationale for an exemption in this proceeding, which is concerned only with abating harm to the ability to make noninfringing uses of copyrighted works.

F. Proponents' Lawful Use Arguments Are Wrong and Miss the Point.

Several Proponents argue that handset unlocking is a noninfringing activity. *See, e.g.,* WA Comments at 9-10; MetroPCS Comments at 7-8. That, however, is a red herring. The act of circumvention is often not infringement. *See* Commerce Committee Report pt. 2 at 24 ("The anticircumvention provisions (and the accompanying penalty provisions for violations of them) would be separate from, and cumulative to, the existing claims available to copyright owners."). If circumvention were infringement, there would be no need for a separate prohibition on the act of circumvention in section 1201(a)(1). Anyone engaged in circumvention would be liable as a copyright infringer. Section 1201(a)(1) exists precisely because circumvention is often not, itself, infringement.

Whether the uses contemplated by the proponents of an exemption are lawful uses is a prerequisite for an exemption. But a demonstration that a use is a lawful use is just the first step in the analysis; it is not dispositive. Proponents still must meet the burden to demonstrate that the prohibition on circumvention would cause substantial harm. As discussed in Part III.C above, they have failed to make that showing.

Further, as demonstrated in Part II.A, above, the legislative history makes clear that the type of noninfringing use in which Congress was most interested was use in the nature of fair use – most notably uses that fall within the factors identified in subparagraph (C). And, as discussed below, in Part IV.A, Proponents' interests in promoting their free-riding businesses and the alleged environmental interests in promoting recycling are far beyond the concerns that Congress identified for this proceeding. As the Copyright Office observed, in denying an exemption to permit circumvention that would allow CSS-encrypted DVDs to be used on Linux computers, the concerns are "unrelated to the types of uses to which Congress instructed the Librarian to pay

particular attention, such as criticism, comment, news reporting, teaching, scholarship, and research as well as the availability for nonprofit archival, preservation, and educational purposes." 2006 Final Rule at 68,478.

The Proponents also misconstrue section 117. Section 117 only permits modifications that are essential to make software work on a device as intended. It does not permit modification of software that works perfectly well on the device for which it was intended, in order to make that software work in a manner that was not authorized or intended.

Finally, the unauthorized use of wireless handset operating systems on unauthorized networks or services would violate contractual obligations and infringe trademark rights. The Copyright Office should not adopt exceptions to the prohibition on circumvention that promote breach of contract and trademark infringement.

1. Proponents Have Failed To Show that Their Circumvention Activities and Resulting Uses Are Not Infringing.

Because Proponents bear the burden of proving that "the prohibition has or is likely to have a substantial adverse effect on noninfringing uses of a particular class of works," NOI at 58,075, it necessarily follows that Proponents must demonstrate that their proposed uses are, in fact, noninfringing. They have not done so.

For the most part, Proponents focus on the act of circumvention rather than the statutorily mandated relevant question of the uses circumvention will enable. *Compare* 17 U.S.C. § 1201(a)(1)(C) (observing that relevant question is ability of user "to make noninfringing uses under this title of a particular class of copyrighted works") *with* Pocket Comments at 4; MetroPCS Comments at 7-8; WA Comments at 9; EFF Comments at 8-10 (all discussing whether circumvention involves infringement).

Only WA Commenters address the statutory issue and they offer only an unsupported, conclusory assertion, with no demonstration or evidence, that the customer "is not copying the firmware, nor is he exercising any exclusive right the copyright owner has in the mobile firmware." WA Comments at 9. But the issue of infringement depends on variables not addressed by WA Commenters, including whether the software is licensed or sold, the terms of the user agreements under which the software is provided,[11] whether operation of the phone requires copyrighted software to be reproduced in the booting process, and whether the circumvented software has been modified in such a way that it qualifies as a derivative work. WA has offered no evidence on any of these points.

Nor, to the extent it is relevant, do Proponents satisfy their burden of proof on the question they do address – whether circumvention is infringement. Proponents are largely silent on the means they use to circumvent and on how they derive the information necessary to circumvent. Moreover, there are numerous different types of phone locks and different ways to circumvent those locks. Proponents do not discuss, for example, boot sector locks that prevent the phone from operating at all if certain codes are modified, firmware hash codes, or systems

[11] *See, e.g., DSC Commc'ns Corp. v. Pulse Commc'ns, Inc.*, 170 F.3d 1354 (Fed. Cir. 1999).

such as TracFone's proprietary pre-paid engine, which controls access to the phone's software and to the network.

EFF, for its part, only discusses the specific example of the iPhone, yet it confirms that iPhone software is distributed under a license to use the software on a single iPhone and " not to 'decrypt, modify, or create derivative works of the iPhone Software.'" EFF Comments at 8. EFF asserts that "some jailbreaking methods may not transgress this limitation," *id.*, implicitly conceding that others do. Nor do any of the Proponents except for EFF even argue that circumvention is fair use, which is unsurprising given that each of these Proponents are commercial, for-profit enterprises that engage in unlocking to make money. *See* 17 U.S.C. § 107 (identifying first factor in fair use analysis as "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes"). EFF hinges its fair use claim on the fourth factor, but offers only the simplistic non sequitur that because firm operating system software is sold in a bundle with the phone, jailbreaking cannot affect the market for the bundle. It is not clear why that would be so. If anything, bundling would add complexity to the analysis of the relevant market.

2. Section 117 Does Not Authorize the Circumvention Advanced by Proponents.

Each of the Proponents also invokes section 117 to argue that their unauthorized unlocking and jailbreaking activities are not infringement. Pocket Comments at 4; MetroPCS Comments at 8; WA Comments at 10; EFF Comments at 8-9. But section 117 does not protect Proponents' activities for multiple reasons.

First, section 117 permits adaptation or copying of software only as an "essential step in the utilization of the computer program" and only when "it is used in no other manner." 17 U.S.C. § 117(a)(1). Here, wireless handset users already are successfully using the firmware "in conjunction with a machine" – *i.e.*, their handsets – with their current service provider and with authorized software, and the device is operating as intended. Under the plain terms of the statute, circumvention is not an "essential step in the utilization of" that firmware "in conjunction with a machine."

The legislative history for section 117 confirms that this section does not cover unlocking or jailbreaking. When Congress first enacted this provision in 1980, it made clear that it was merely implementing the recommendations of the "Final Report of the National Commission on New Technological Uses of Copyrighted Works" ("CONTU Report"). H.R. Rep. No. 1307, 96th Cong., 2d Sess., pt. 1, at 23 (1980) (observing that section 117 "embodies the recommendations of [the CONTU] with respect to clarifying the law of copyright of computer software"); *see Sega Enters. v. Accolade*, 977 F.2d 1510, 1519 n.5 (9th Cir. 1992) ("Subsequent Congresses, the courts, and commentators have regarded the CONTU Report as the authoritative guide to Congressional intent.").

The CONTU Report makes clear that section 117 was addressing situations where a copyright owner might seek "to force a lawful owner or possessor of a copy to stop using a particular program" and where "one who rightfully acquires a copy of a program frequently cannot use it without adapting it to that limited extent which will allow its use in the possessor's

computer." CONTU Report at 13. It observed that "[o]ne who rightfully possesses a copy of a program . . . should be provided with a legal right to copy it to that extent which will permit its use by that possessor" and that "[t]his would include the right to load it into a computer." *Id.* It concluded that "a right to make those changes necessary to enable the use for which it was both sold and purchased should be provided." *Id.* (emphasis added).

In short, section 117(a)(1) insulates from infringement liability only those software modifications necessary to enable the software to operate with the purchaser's machine in the manner "for which it was both sold and purchased." It does not provide an open-ended invitation to modify already-functioning firmware to permit a handset to operate with another carrier or with other software with which it was not intended or designed to operate. *Accord Apple Computer Inc. v. Formula Int'l, Inc.*, 594 F. Supp. 617, 622 (C.D. Cal. 1984) (providing that "'[e]ssential' means indispensable and necessary," not merely "convenient"); *Madison River Mgt. Co.*, 387 F. Supp. 2d. at 537-38 (finding that copying to help user "more effectively utilize" software "as a matter of logic and of definition forecloses it from being necessary or absolutely essential" and that thus "the exception contained in § 117 of the Copyright Act does not apply"); *Micro-Sparc, Inc. v. Amtype Corp.*, 592 F. Supp. 33, 35 (D. Mass. 1984) ("The permission to copy stated in subsection (1) [of section 117(a)] is strictly limited to inputting programs."); *Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596, 600 n.1 (9th Cir. 2000) (observing that section 117 exemption exists because "[a]ny purchaser of a copyrighted software program must copy the program into the memory of a computer in order to make any use at all of the program"); *In re Independent Services Organizations Antitrust Litigation*, 964 F. Supp. 1469, 1475 (D. Kan. 1997) ("[T]he only copying by [defendant] which could be termed an 'essential step to use' is [defendant's] reproduction of diagnostic software from a lawfully obtained disk into the RAM of the copier or printer."). Unlocking and jailbreaking stray far afield of this limited scope of copying protected by section 117.[12]

Finally, at least some of the Proponents are seeking to apply section 117 to activities that are specifically outside the scope of the statute, which limits use of section 117(a)(1) adaptations to personal, internal use and forbids the transfer of such adaptations to third parties. Section 117(b) clearly provides that adaptations prepared in accordance with section 117(a)(1) "may be transferred only with the authorization of the copyright owner." 17 U.S.C. § 117(b). WA Commenters claim that they "take ownership of handsets and . . . unlock them to make them more marketable and put them back into the stream of commerce." WA Comments at 3. Because the changes authorized by section 117 are for in-house and personal use only, any such commercial distribution of modified firmware in and of itself removes the firmware adaptations

[12] *Krause v. Titleserv, Inc.*, 402 F.3d 119 (2nd Cir. 2005), relied upon by both EFF and WA Commenters, *see* EFF Comments at 8-9; WA Comments at 10, actually is consistent with the principle that section 117 exempts only modifications permitting modifications essential to use the software on the machine in the manner intended by both buyer and seller. In *Krause*, the defendant had purchased computer programs that had been designed exclusively for use in its business and had made certain modifications to them to enable their continued use in his business. 402 F.3d at 120-21, 125. Although *Krause* takes a more expansive view of the meaning of the statutory term "essential" than do many other courts, *id.* at 126-29, this interpretation is the minority view. 2 MELVILLE B. AND DAVID NIMMER, NIMMER ON COPYRIGHT § 8.08[B][1][b], at 8-136 (2008) (observing that *Krause* is "a more liberal construction than other courts' requirement that a step be 'absolutely essential' to qualify under the statutory language").

from the scope of section 117. *See* CONTU Report at 13 (allowing users to "modify their copies to suit their own needs" (emphasis added)); *Apple Computer*, 594 F. Supp. at 620, 622 (rejecting section 117 defense where computer and copied software were offered for sale to the public and not for defendant's own use); *CMAX/Cleveland, Inc. v. UCR, Inc.*, 804 F. Supp. 337, 356 (M.D. Ga. 1992) (rejecting section 117 defense where intent was not to keep changes in-house).

3. Circumvention Often Violates Contractual Obligations.

Wireless service providers typically sell their handsets with contractual provisions prohibiting the use of the device on other systems. For example, one CTIA member, which offers pre-paid service and subsidizes its phones to make them more affordable to consumers, contractually obligates the purchasers of its phones to use those phones only in connection with its service and prohibits tampering with the phone to enable use with another service.

Another major CTIA member's Wireless Service Agreement expressly provides "You agree that you will not make any modifications to the Equipment or programming to enable the Equipment to operate on any other system." The agreement goes on to provide that the service provider may, in its discretion, modify the phone, and provides contact information if the customer is interested in using his or her phone on another system. A third large carrier, which primarily only locks its pre-paid phones, includes in its pre-paid contract a provision that states "[y]our wireless phone . . . cannot be used with any other wireless service even if it's no longer used to receive our service." A similar disclosure appears on the phone's box.

Another large carrier's Terms and Conditions provides that a "T-Mobile Device is designed to be used only with T-Mobile service; however, you may be eligible to have your Device reprogrammed to work with another carrier, but you must contact us to do so." The same Terms and Conditions prohibit "tampering with or modifying your Device," and "reselling T-Mobile Devices for profit, or tampering with, reprogramming or altering Devices for the purpose of reselling the Device."

In other words, circumvention of handset locks to allow a handset to be used on another carrier's service is often addressed in the contract to which the customer agrees when acquiring a subsidized device at a cost well below the value of the device. Circumvention often violates those contracts.[13]

Moreover, customers are not forced to take phones subject to such contracts; they voluntarily do. As noted above, Verizon Wireless, one of the largest carriers in the country, simply does not lock its phones on post-paid contracts, and others allow their customers to unlock their phones if certain minimum criteria are met. Thus, customers have a wide array of choices. They are not forced to acquire inexpensive, subsidized phones.

[13] The Copyright Office recognized the significance of such contractual obligations in its 2006 rulemaking, where it twice noted that its concern related to those who could not use the phone with another carrier "even after fulfilling his or her contractual obligations to the carrier that sold the phone." 2006 Final Rule at 68,476. In general, however, due to the deep subsidy that greatly reduces the cost of the phone, carrier contracts typically prohibit other uses of the phone unless the subsidizing carrier consents to such use.

4. Circumvention Also Violates Trademark Rights.

Most wireless carriers include various trademarks on their wireless devices or on the interfaces between the handset and the user. Thus, for example, carrier logos appear on the front or back of most phones they sell, and "splash screens" with the carrier's marks appear on the phone's display every time the phone is turned on or off. When the protection measures on a device are circumvented and the device is altered to connect to a different service, the trademarks of the original service provider remain. As a result, anyone using the device is likely to be misled about the identity of the service being provided.

Moreover, in many cases, a handset's programming and settings must be adjusted for optimum quality on a given network. When the handset is used on a different network, quality often suffers, damaging the reputation of the carrier whose mark appears on the handset. Further, the buttons and other physical features of many handsets are specifically configured for the service for which the device is designed. When the protections are circumvented and the phone is placed on a different service, it is not uncommon for many of the features and functions on the phone to cease to work. This, too, causes consumer confusion and damages the reputation of the carrier whose name is on the phone.

Anyone who circumvents a handset lock and offers a phone to the public on a service different than the one that is identified on the phone is violating the trademark rights of the original carrier. The Register should not endorse circumvention that results in infringement of an intellectual property right.

IV. THE ALLEGED BENEFITS ADVANCED BY THE PROPONENTS ARE BEING PROVIDED BY WIRELESS CARRIERS WITHOUT AN EXEMPTION AND, IN FACT, ARE BEST FURTHERED BY THE REJECTION OF THE PROPOSED EXEMPTIONS.

A. The Alleged Benefits Advanced by the Proponents Are Not Properly Considered in this Proceeding.

As discussed above, Proponents have failed to demonstrate any actual or likely substantial adverse impact on consumers' ability to make noninfringing uses of copyrighted works. *See supra* Part III.C. They also have either ignored the congressionally mandated statutory factors altogether or failed to show that those factors favor a flashing exemption. *See supra* Part III.D. Instead, Proponents point to a number of alleged "benefits" regarding competition, the environment, assisting lesser-developed nations and charitable organizations. But these considerations have nothing to do with copyright or fair use interests and thus are not properly considered in this proceeding.

Pocket, for example, claims that with the exemption, "barriers to competition come down, innovative start-up carriers are able to enter the market, and free market factors start allowing customers cost savings as well as choice." Pocket Comments at 3. EFF claims that locking operates "to the Detriment of Competition, Consumer Choice, and Innovation." EFF Comments at 5. MetroPCS refers to "the pro-competitive and cost savings benefits of these re-flashing services," MetroPCS Comments at 13, and alleges that "[r]eusing wireless handsets

results in a cleaner environment," *id.* at 17. It also claims that "[u]nlocked handsets can be donated to provide a major source of revenue for charitable organizations or given to at-risk citizens for emergency use." MetroPCS Comments at 19. WA Commenters claim that prohibiting unlocking "is anti-competitive and adversely [affects] consumer choice in handsets and providers." WA Comments at 15. They also assert that unlocking has a beneficial effect "on the environment and on international poverty," *id.* at 14, "could prevent thousands of tons of toxic waste every year," *id.* at 15, and "could contribute favorably to economic growth in developing nations," *id.*

Of course, none of these alleged "benefits" have anything to do with copyright or fair use interests but instead evidence a kitchen sink attempt to promote free-riding business models. In the Register's words, they are "unrelated to the types of uses to which Congress instructed the Librarian to pay particular attention, such as criticism, comment, news reporting, teaching, scholarship, and research as well as the availability for nonprofit archival, preservation, and educational purposes." 2006 Final Rule at 68,478. As such, they are irrelevant to the exemption analysis and should be disregarded.

B. Consumer Choice and Affordable Wireless Service are Best Promoted by Ensuring that Carriers Continue To Have the Incentive To Subsidize and Promote the Development of Diverse Handsets.

Even assuming, arguendo, that the alleged benefits advanced by Proponents were relevant to this rulemaking, Proponents have failed to demonstrate that those benefits would result from their proposed exemptions. In fact, the wireless industry is highly competitive, offers consumers extensive choice in hardware, functionality, service, and payment models, and already has extensive programs in place to foster the authorized recycling of used handsets, *see infra,* Part IV.C. If granted, the proposed exemptions would undermine the industry's efforts to accomplish these goals. The primary result of the proposed exemptions would be to promote business models that seek to free-ride on the handset subsidies that have allowed consumer choice to flourish.

1. The Wireless Industry Is Highly Competitive and Offers Wide Consumer Choice.

The wireless telecommunications industry is healthy, strong, and growing, thanks to robust competition in the arena. Each year the FCC submits a report to Congress on wireless competition, and the most recent report, issued January 19, 2009, notes that the wireless penetration rate in the United States is now at 86%. *Thirteenth Report* ¶ 228. The report also notes that 99.6% of the population lives in a census block where at least one wireless carrier offers service, 95.8% live where at least three carriers operate, and 60% live where at least five carriers operate. *Id*. ¶¶ 2, 42. Clearly, consumers have a choice when it comes to choosing a wireless provider – one of the benefits of what has been characterized as "robust competition" in the wireless industry. *In re Wireless Tel. Servs. Antitrust Litig.*, 385 F. Supp. 2d 403, 412 (S.D.N.Y. 2005). The FCC found several indications of healthy competition in the industry, such as low horizontal concentration, *Thirteenth Report* ¶¶ 29-50; relatively low spectrum-based barriers to entry, *id*. ¶ 68; and intense price and non-price rivalry among providers, *id*. ¶¶ 110-76.

Consumers benefit from this competition. The FCC studied three indicators of price for its Thirteenth Report and concluded that "all of the indicators show that the cost of mobile telephone service fell in 2007." *Id*. ¶ 189. On top of that, the major carriers have spent billions of dollars to develop extensive networks that provide high-quality coverage across the nation. The industry offers consumers a dizzying array of handsets, ranging from basic telephones to full-featured devices that offer full QWERTY keyboards, touch screens, email services, text messaging, ringtones, access to high quality video and audio through downloads and streaming, and other functions. *See In re Wireless Tel. Servs. Antitrust Litig.*, 385 F. Supp. 2d at 430 n.40. High-end handsets are constantly evolving, and are made available to consumers at affordable prices through the use of subsidies provided by the carriers that are only recouped over time in connection with the provision of wireless service.

While the most common form of service agreement is a post-paid contract, which typically is billed monthly, wireless services also are available through pre-paid arrangements that allow the consumer to acquire an inexpensive, subsidized device and the ability to buy only so much service as the consumer expects to use. Pre-paid services frequently feature inexpensive handsets that are subsidized by the carrier, so that the resulting up-front cost to the consumer is nominal. For example, TracFone handsets are available for as little as around $10. TracFone Phones, http://www.tracfone.com/phones.jsp?task=phones&subTask=allPhones (last visited Feb. 2, 2009). Similarly, AT&T "Go Phones" cost as little as $10. AT&T GoPhone Pay As You Go Deals, http://www.wireless.att.com/cell-phone-service/go-phones/pyg-plans-phones.jsp (last visited Feb. 2, 2009). Consumers are free to pick the handsets and service plans that best meet their needs.

Proponents assert baldly that the carriers' practice of subsidizing phones and seeking to recover that subsidy through the sale of their wireless services is anticompetitive and contrary to consumers' interests. However, they offer no economic analysis or evidence that the carriers' practices, either with post-paid service contracts or pre-paid service is not in the consumers' interests. Simply saying it is so does not make it so.

WA Commenters misrepresent an old FCC decision in an effort to concoct an argument that handset bundling is "Contrary to Explicit U.S. Telecommunications Policy." WA Commenters incorrectly rely on a decision from the year 1992 – before many people even knew what a cell phone was – and argue that in that case, the FCC found that the bundling of handsets and service contracts is a dangerous and disfavored practice. *See* WA Comments at 5-6. But WA Commenters misrepresent the language of the FCC Order they quote. The Commission did raise the question of whether bundling handsets with service contracts raised significant concerns about competition in the wireless marketplace, but it concluded definitively that it did not. The Commission found that no single carrier would be able to restrict competition in the industry, and that bundling actually "has benefited consumers." *In re Bundling of Cellular Customer Premises Equipment & Cellular Serv.*, 7 F.C.C.R. 4028 ¶¶ 13-14 (F.C.C. June 10, 1992) (emphasis added). In direct contradiction to WA Commenters' characterization, the FCC said that "clarifying our policy to allow the bundling of cellular CPE and cellular service furthers the Commission's goal of universal availability and affordability of cellular service and thus promotes the continued growth of the cellular industry." *Id*. ¶ 20.

Moreover, the FCC's most current statement on the topic comes out in favor of the practice of bundling as well. The report on wireless competition released by the FCC just two weeks ago, on January 16, 2009, found with approval that many wireless carriers have now adopted some sort of contract-free pre-paid plan as an alternative to traditional post-paid plans. *Thirteenth Report* ¶ 116. Further, to the extent handsets and service contracts are still sold together, the report looks at such bundling as a good thing for consumers: "[P]roviders use longterm contracts and ETFs [early termination fees] to subsidize handset costs; absent contracts and ETFs, consumers might have to pay higher prices for handsets upfront." *Id*. ¶ 185. Consumers and regulators alike recognize that the experience is better when handsets are subsidized by the cost of a service plan.

In fact, contrary to the claims of Proponents, handset subsidies allow the carriers to work with handset manufacturers to offer consumers ever-improving devices, with higher quality and greater functionality than otherwise would be available, for a fraction of the price that they otherwise would need to charge. For example, it is not uncommon for handset manufacturers and carriers to work together to develop the hardware and software for a new handset on the condition that the carrier either will commit significant marketing dollars to introduce the new device or that the carrier will commit to certain minimum purchases of the device in order to ensure that the manufacturer's investment in the device is justified. Such arrangements are feasible where the carrier has an exclusive arrangement for the device. No carrier would devote substantial marketing to a device available through other carriers. Nor would a carrier be able to make the same kind of a volume commitment for a non-exclusive device.

More generally, handset subsidies allow manufacturers and carriers to develop and provide consumers with more complex, full-feature handsets than would otherwise be possible. If carriers were not able to subsidize devices, the cost of many highly desirable full-feature devices would discourage consumers from buying them, reducing quantities sold. This in turn, would undermine the incentive to develop such devices and the software for them, and carriers would, in turn, be required to provide cheaper devices with fewer features, functions and, possibly, lower quality. In other words, as a general rule, handset subsidies permit the carriers and manufacturers to develop and market devices and copyrightable software that otherwise would not be developed.

Subsidies on phones used in pre-paid services make wireless service available to many who could not afford that service or otherwise obtain the credit necessary to enter into post-paid contracts. Pre-paid services are typically made available on heavily subsidized phones, offered for very low cost, which, in turn, makes the service available to those who cannot afford higher-priced phones and those whose credit would not qualify them for post-paid service. One CTIA member that specializes in pre-paid service reports that more than 1/3 of its customers come from households with incomes under $35,000 per year, and that its other customers are value conscious consumers and credit challenged persons. As MetroPCS itself admits, such customers "are especially sensitive to the cost of a handset." MetroPCS Comments at 5.

The import of these subsidies is not lost on Proponents, who seek to free ride on them. MetroPCS, for example, implicitly recognizes the benefits to consumers of these handset subsidies, commenting that it "generally does not subsidize the cost of handsets to the same extent as its competitors. A customer who wants MetroPCS's service will have to purchase a

handset – which could act as a barrier." *Id.* at 11. In other words, MetroPCS argues that the Copyright Office should adopt an exemption in order to allow MetroPCS's potential customers to acquire inexpensive handsets that have been heavily subsidized by other carriers and then appropriate for itself the benefit of that subsidy. Free-riding is not an interest that Congress created this proceeding to foster.

2. Unlocking Is Permitted and Assisted by the Wireless Carriers in Appropriate Circumstances, Offering Wide Consumer Choice.

Many of the nations' largest carriers voluntarily unlock phones when asked to do so by a bona fide customer. One of the major carriers will unlock a bona fide customer's phone if the customer is in good standing and has been a customer for at least 90 days. Another carrier will unlock a customer's phone at the end of the customer's contract term and in certain other circumstances.

Indeed, there is no shortage of consumer choice. As noted above, one of the largest CTIA member carriers, Verizon Wireless, does not use locks on any of its post-paid phones, choosing voluntarily to rely on service contracts and other means to protect its investment in its subsidies.

In short, there is no legitimate claim that consumers need the right to circumvent handset locks in order to obtain phones capable of use on another carrier's network. Such phones are fully available in the marketplace from the carriers themselves.

C. The Wireless Carriers Are, Themselves, Fostering Recycling Without the Need for any Exemption.

Proponents' arguments concerning handset recycling are another red herring. Each of the major carriers and CTIA, itself, actively promotes recycling and offers means for customers to recycle their phones. The choice is not, as Pocket claims (Pocket Comments at 4), to "throw the handset into a local landfill."

CTIA has been at the forefront of wireless recycling for years. The Association led industry efforts in establishing a nationwide recycling campaign called "Wireless . . . The New Recyclable," in 2003, with recycling guidelines, promotional material, an informational website, and coordination among its members. Today, thousands of drop-off locations, including all major carrier retail stores, accept all makes and models of wireless phones and accessories for authorized recycling.

The carriers themselves also foster authorized recycling in numerous ways, including by providing their customers with pre-paid envelopes in which to return used phones, contracting with authorized recycling services, and accepting recycled handsets at their retail stores and other national retailers, dealers and agents throughout the country. For example:

- AT&T's Reuse & Recycle Program invites consumers to bring unwanted wireless phones, PDAs and batteries, regardless of manufacturer or carrier, to AT&T stores and authorized dealers for recycling.[14]

- Verizon Wireless's HopeLine Program collects no-longer-used wireless phones, batteries and accessories from any wireless service provider at Verizon Wireless Communications Stores nationwide and turns them into support for victims of domestic violence.[15]

- T-Mobile's Handset Recycling Program promotes the recycling and reuse of all brands of old wireless devices, allowing them to be dropped off at any T-Mobile retail store. All of the net proceeds from handset recycling now benefit the charitable efforts of the *T-Mobile Huddle Up* program.[16]

Contrary to the pleadings of Proponents, their issue is not whether circumvention is needed to foster handset recycling; it is whether circumvention is needed to help Proponents create a business out of recycling. This rulemaking is not the appropriate forum in which to address the environmental and commercial interests in the recycling of handsets.

D. The Proposed Exemptions Will Foster Bulk Unlocking Arbitrage, Which Is Especially Pernicious and Undermines Consumer Choice.

There appears to be general agreement that the bulk purchase of new phones in order to free-ride on carrier subsidies by the reprogramming and arbitraged sale of those phones either in the United States or abroad is wrong and destructive. It is, essentially, theft of the phone subsidy by a profit-seeking free-rider. Such theft destroys the ability of a service provider to subsidize its phones, resulting in higher costs and less choice for consumers.

CTIA members have spent tens of millions of dollars attempting to stop this activity, which has caused hundreds of millions of dollars in losses to the industry. WA Commenters and Pocket both mention the suits brought by TracFone, WA Comments at 10-12; Pocket Comments at 4, and TracFone is not alone in its efforts to combat this theft. Since 2005, more than eighty (80) lawsuits have been filed against alleged subsidy thieves in federal courts throughout the country by at least five wireless service providers (AT&T, T-Mobile, TracFone, Virgin Mobile, and IDT) and two wireless equipment manufacturers (Nokia and Motorola). The defendants have not prevailed in any of those cases. Fifty-six final judgments have been entered in favor of the plaintiffs, and 25 cases currently remain pending in federal courts in Florida, Texas, California, and New York. The final judgments, all of which have been entered by consent or default, permanently enjoin the defendants from bulk unlocking and include findings that the bulk unlocking schemes, *inter alia*, violate the DMCA, infringe trademarks and copyrights, violate wireless service contracts, and constitute an unlawful conspiracy, unjust enrichment, and

[14] http://www.wireless.att.com/about/community-support/recycling.jsp.

[15] http://aboutus.vzw.com/communityservice/hopeLine.html.

[16] http://www.t-mobile.com/Company/Community.aspx?tp=Abt_Tab_HandsetRecycling.

unfair competition. *See, e.g., TracFone Wireless, Inc. v. Dixon,* 475 F. Supp. 2d 1236 (M.D. Fla. 2007).

Although the CTIA members thus far have prevailed in every lawsuit, the litigation has been extremely expensive and has not succeeded in stopping subsidy theft. In fact, some defendants continue their improper activity in violation of injunctions entered against them. In one case, a defendant in Houston was found guilty of criminal contempt of court and sentenced to fifty-seven months in prison for twice violating a federal injunction by continuing to traffic in unlocked prepaid wireless phones. *U.S. v. Mubashir*, Case No. 4:06CV02444-001 (S.D. Tex. Oct. 31, 2008).

In addition to litigation, CTIA members have employed other approaches in their efforts to stop bulk unlocking and subsidy theft, including hiring private investigators, coordinating with law enforcement authorities, and engaging in public relations campaigns. TracFone has even launched a website – *http://www.stopcellphonetrafficking.com* – that seeks to inform the public about the dangers of subsidy theft and to deter perpetrators (the website also contains copies of every judgment entered against bulk unlockers). Wireless providers also work with retailers to limit the number of phones that can be purchased at a time, and the perpetrators have responded by hiring teams of "runners" who spend their days traveling from store to store buying the maximum allowed number of phones before moving on to the next store. *See* John Pacenti, *Cell Phone Resales Prompt Lawsuits*, South Florida Daily Business Review (Aug. 25, 2008).

Pocket acknowledges that bulk unlocking schemes are "questionably-legal" and "should not fall within the scope of the proposed exemption." Pocket Comments at 4. WA Commenters, recognizing the problem with bulk unlocking schemes, attempt to distinguish themselves, claiming "Commenters' businesses, the recycling and resale of used handsets, differs markedly from the business of the bulk repurchasers and resellers of new phones that TracFone has sued." WA Comments at 11. But WA Commenters make no attempt to distinguish themselves from bulk repurchasers in their proposed exemption – they seek to allow reflashing regardless of commercial motive. According to WA Commenters, the fact that their proposed exemption will make it easier for bulk repurchasers to claim the exemption is unfortunate, collateral damage – "the distinction TracFone tries to draw . . . provides little security to the commenters, who, like the bulk resellers, are for-profit businesses." *Id.*

While WA Commenters may view the use of the exemption by free-riding thieves merely to be "unfortunate," the Copyright Office should not adopt regulations that, even implicitly, foster such activity.

V. THE TECHNOLOGICAL MEASURES USED IN THE WIRELESS INDUSTRY FURTHER COPYRIGHT INTERESTS AND ARE PROPERLY WITHIN THE SCOPE OF SECTION 1201.

Several of the Proponents attempt to argue that the technologies for which they seek an exemption "primarily are used by carriers not to protect any legitimate copyright interest, but rather as a means to protect their business model." MetroPCS Comments at 6-7; *see* WA Comments at 4; EFF Comments at 5. This argument is both procedurally improper and substantively wrong.

A. Proponents' Claims that the TPMs They Seek To Circumvent Are Not Subject to Section 1201 Are Not Properly Part of this Proceeding.

As an initial matter, it is not properly the role of the Librarian or the Register to determine whether particular technological measures fall within the scope of section 1201. As discussed above, this is a narrow proceeding, which is complicated and burdensome enough when kept within its proper bounds. The Librarian's exclusive statutory responsibilities are to determine whether persons "are, or are likely to be in the succeeding 3-year period, adversely affected by the [section 1201(a)(1)] prohibition . . . in their ability to make noninfringing uses under this title of a particular class of copyrighted works" and to establish exemptions to the prohibition in the limited instances where proponents have demonstrated that they are warranted. 17 U.S.C. § 1201(a)(1)(C), (D).

It is not the Librarian's responsibility to determine whether particular TPMs fall within the scope of the statute to begin with. Rather, this rulemaking contemplates that the Librarian must assume that a particular access-control TPM falls within section 1201(a)(1) and consider whether an exemption to the ban on circumventing that TPM is appropriate. Ironically, if the proponents were correct that a phone-locking TPM does not fall within the scope of section 1201, then there would be no need for them to consume the Copyright Office's resources seeking an exemption.

The Librarian suggested in the 2006 rulemaking that a belief that "the access controls do not appear to actually be deployed in order to protect the interests of the copyright owner or the value or integrity of the copyrighted work" implicated the fifth statutory factor set forth in section 1201(a)(1)(C) – "such other factors as the Librarian considers appropriate." 2006 Final Rule at 68,476. This statement was made in the context of an exemption that was, essentially, unopposed and untested. The statement also is contrary to the clear statutory mandate, which places the burden of proof squarely on the Proponent and makes clear that the focus of this proceeding is on whether the application of a TPM will cause substantial harm to protected fair use interests.

The proper forum for consideration of whether a TPM is one covered by the section 1201 prohibitions is the courts. There are a variety of measures used to lock phones, from simple unlock codes, to proprietary billing and customer management software, complex measures embedded in the operating system, and boot sector firmware, and the applicability of section 1201 to each is likely to be a mixed question of law and fact that is different from the question presented in this rulemaking. The courts are well-suited for such inquiries.

Numerous courts already have made precisely such determinations concerning the applicability of section 1201 to particular TPMs in individual cases. *See*, *e.g.*, *Pearl Invs. LLC v. Standard I/O Inc.*, 257 F. Supp. 2d 326, 350 (D.Me 2003) (rejecting claim that the virtual private network at issue "should not be considered a 'technological measure'" as that term is defined in 17 U.S.C. § 1201); *Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey*, 497 F. Supp. 2d 627, 643 (E.D. Pa. 2007) ("[I]n this situation, the robots.txt file qualifies as a technological measure effectively controlling access to the archived copyrighted images of Healthcare Advocates."); *Sony Computer Entertainment Am., Inc. v. Divineo, Inc.*, 457 F. Supp. 2d 957, 965 (N.D. Cal. 2006) (rejecting defendants' assertion "that the PlayStation authentication

process is not a 'technological measure' within the meaning of the DMCA"); *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1095 (N.D. Cal. 2004) ("It is evident to this Court, as it has been to previous courts, that CSS is a technological measure that both effectively controls access to DVDs and effectively protects the right of a copyright holder."); *Universal City Studios, Inc.*, 111 F. Supp. 2d at 317-18 (rejecting defendants' contention that CSS encryption system "is not protected under this branch of the statute at all" and finding that "under the express terms of the statute, CSS 'effectively controls access' to copyrighted DVD movies" and "does so, within the meaning of the statute, whether or not it is a strong means of protection"). Proponents' attempt to expand the Register's and the Librarian's role – which is already complicated enough to begin with in considering exemptions – is inappropriate.

B. In any Event, Proponents Are Incorrect; the TPMs at Issue Foster Copyright Interests and Protect Copyrighted Works.

In any event, Proponents are incorrect. The TPMs employed on wireless handsets do foster the creation of copyrighted works and protect the integrity of copyrighted works. As such, they fall squarely within the scope of section 1201 as a substantive matter.

1. Handset Locks Help Ensure that Wireless Carriers and Manufacturers Will Invest in the Development of New Handsets, with New Features and New Copyrightable Operating Systems and Applications.

As discussed above, handset development, including the development of both hardware and copyrightable software, is a cooperative activity of the wireless carriers and handset manufacturers. Carriers work with the manufacturers to include desired features and functionality on handsets designed for their service. These features and functions require software to work – software that must be developed at significant cost. Wireless carriers would not invest in this development absent assurance that they, not others, will benefit from the investment. The manufacturers, in turn, would not invest in this development absent assurance that they will sell sufficient numbers of handsets to recover their investment. The carriers often provide assurances of minimum sales quantities, assurances that they can only give if they subsidize and promote the handset. Of course, the carriers, in turn, would not subsidize a handset if it is common for the subsidy to be appropriated by a free-rider claiming to be a "competitor."

More generally, handset subsidies allow manufacturers and carriers to develop and provide consumers with more complex, full-feature handsets, with more complex software, than otherwise would be possible. If carriers were not able to subsidize devices, the cost of many highly desirable full-feature devices would discourage consumers from buying them, reducing quantities sold. This in turn, would undermine the incentive to develop such devices and the software for them, and carriers would, in turn, be required to provide cheaper devices with fewer features, functions and, possibly, lower quality. In other words, as a general rule, handset subsidies permit the carriers and manufacturers to develop and market devices and copyrightable software that otherwise would not be developed – increasing the availability of copyrighted works.

Handset locks are one means that carriers use to ensure that these handset subsidies and marketing commitments can be recouped, which, in turn, ensures that the operating systems that are needed to operate a wide array of handsets with diverse functionality will be created. In this regard, the TPMs have a comparable effect on the creation of copyrighted works to TPMs applied to copyrighted entertainment works.

2. Handset Locks Protect Copyrighted Works on Handsets.

The memory on wireless handsets contains a wide array of copyrighted works, from the operating system software discussed above, to applications that perform functions such as email, Internet browsing and photography, to sound recordings and audiovisual works that have been downloaded to the phone. Depending on the technology used, handset locks may prevent access to the entire memory of the phone, thus protecting against unauthorized access to all of these copyrighted works. When many types of handset locks are circumvented, the circumventer obtains access to all of this copyrighted software, access that he or she was not intended to have.

For example, TracFone uses a proprietary, copyrighted pre-paid engine in its phones that must authenticate that the phone is being used on TracFone's service before the phone will work. Circumvention of certain of the technologies used by TracFone provides access to this copyrighted software.

Likewise, Virgin Mobile sells its handsets with software and content that is created by the handset manufacturer, Virgin Mobile and others. The handset's operating system typically employs a user interface that was customized by and is owned by the carrier. In addition, the handsets contain applications, such as an address book back-up application owned by the carrier. Certain forms of circumvention provide access to, and permit unauthorized use of, this software.

3. EFF's Comments Confirm that Operating System Limitations Protect the Interest of the Copyright Owner of the Operating System Software.

EFF's own comments confirm that the operating system locks that it wishes to subject to a circumvention exemption are locks applied by the copyright owner of the operating system to protect the interests of that copyright owner. In EFF's ubiquitous iPhone example, EFF does not dispute that Apple owns the operating system copyright or that Apple applies the TPM to protect its copyright interests, as well as other interests (such as the interest in ensuring that applications used on the iPhone meet appropriate quality standards). EFF may not like the model under which Apple has chosen to distribute and license its operating system, but it does not argue that such distribution is other than an effort by a copyright owner to use an access control technology to protect its rights and the rights of those with whom it deals.

VI. CTIA WOULD NOT OPPOSE AN EXEMPTION THAT IS NARROWLY TAILORED TO ALLOW BONA FIDE INDIVIDUAL CUSTOMERS TO CIRCUMVENT IN ORDER ONLY TO USE THEIR OWN PHONES ON A DIFFERENT NETWORK, AND THAT MAKES CLEAR THAT IT DOES NOT CONDONE COMMERCIAL CIRCUMVENTION.

As discussed above, the proper focus of the section 1201(a)(1) rulemaking is on individual, noncommercial conduct. This focus coincides with the fact that the greatest threat from circumvention is from circumvention by phone traffickers and services that are attempting to free-ride on handset subsidies. CTIA's members do not foresee a situation in which they would bring a section 1201 action against a bona fide individual customer who circumvented a handset lock solely in order to use his or her own phone on another service. For that reason, CTIA would not object to a narrowly targeted exemption to permit such circumvention.

It is, however, essential that the exemption be carefully limited so that it cannot be used to foster destructive free-riding commercial activity, undermine exclusive distribution agreements, or facilitate bulk theft of handset subsidies through trafficking in new subsidized phones. Such limitations must be express. Free-riders have attempted to misuse the Librarian's 2006 Rule to argue that the circumvention of handset locks is federal policy, preempting all other possible claims. For example, one of the Proponents here, MetroPCS, has sued Virgin Mobile for a declaratory judgment, claiming that the 2006 Rule has extraordinarily broad effect and import, protecting its MetroFLASH service from a variety of causes of action. *See* Complaint, *MetroPCS Wireless, Inc. v. Virgin Mobile USA, L.P.*, Case No. 08CV1658-D (N.D. Tex. filed Sept. 19, 2008) (Ex. A hereto). Among other things, MetroPCS argues that the purpose of the 2006 exemption "is to ensure that customers have the freedom to switch wireless communications service providers" and that Virgin Mobile's user contracts "are thus pre-empted by the exemption in the DMCA." *Id*. ¶¶ 39, 40. MetroPCS makes a similar preemption claim with respect to tortious interference with contractual relations and prospective business advantage. *Id*. ¶¶ 47, 53. Moreover, any such exemption should not condone breach of contract or allow circumvention that gives access to copyrighted works beyond the works needed to allow use of the phone on the chosen network.

Specifically, CTIA would not oppose an exemption that is no broader than the following:

> Computer programs in the form of firmware in wireless telephone handsets that restrict the handset from connecting to a wireless telephone communications network, when circumvention is accomplished by an individual customer of a wireless service provider for the sole noncommercial purpose, and with the sole effect, of lawfully connecting to a wireless telephone communications network or service other than that of the service provider, provided that (i) the individual complies with all of his or her contractual obligations to the service provider, and (ii) the individual does not thereby obtain access to works protected under this title beyond those necessary to connect to such a network or service.

CONCLUSION

For the foregoing reasons, CTIA respectfully requests that the Copyright Office reject Proposed Exemptions 5A, 5B, 5C, and 5D.

Respectfully submitted,

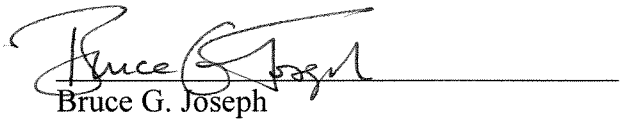

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Exhibit A

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

METROPCS WIRELESS, INC.,

Plaintiff,

v.

VIRGIN MOBILE USA, L.P.,

Defendant.

Civil Action No. 3-08CV1658-D

JURY TRIAL DEMANDED

25257

ORIGINAL COMPLAINT

Plaintiff MetroPCS Wireless, Inc. ("MetroPCS"), files this Complaint against Defendant Virgin Mobile USA, L.P. ("Virgin Mobile"), and respectfully states as follows:

I. PARTIES

1. Plaintiff MetroPCS is a corporation organized under the laws of the State of Delaware that has its principal place of business in Dallas County at 2250 Lakeside Boulevard, Richardson, Texas 75082. MetroPCS, through certain of its subsidiaries, is engaged in the business of providing wireless telecommunications services and goods in a number of major metropolitan areas in the United States, and in particular providing commercial mobile radio services and hardware in, among other metropolitan areas, the Dallas-Fort Worth metroplex.

2. Upon information and belief, defendant Virgin Mobile is a limited partnership organized under the laws of the State of Delaware with its principal place of business located at 10 Independence Boulevard, Warren, New Jersey 07059. The registered agent for service of process on Virgin Mobile is located at the Corporation Trust Center, 1209 Orange Street, in

Wilmington, Delaware 19808. The registered agent for service of process on Virgin Mobile in the State of Texas is located at the Corporation Trust Center, 350 North St. Paul Street, Dallas, TX 75201. Virgin Mobile is engaged in the business of providing wireless telecommunications services and goods, and in particular providing CMRS services and goods to its customers, throughout the United States via a resale arrangement with Sprint-Nextel.

II. JURISDICTION AND VENUE

3. This Court has jurisdiction over the parties and subject-matter involved in this dispute and MetroPCS provides goods and services in the district. Virgin Mobile regularly conducts business and sells products and services in this district. Virgin Mobile also has sent demand letters to MetroPCS in Texas creating uncertainty over the legal rights of the parties and threatening legal action and has voluntarily and purposefully availed itself of the rights, privileges, and duties associated with doing business in the State of Texas. Thus, Virgin Mobile could reasonably foresee being sued in Texas for claims arising from its business and litigation threats in Texas, and exercising jurisdiction over Virgin Mobile would not offend traditional notions of fair play and substantial justice.

4. This Court has subject-matter jurisdiction over this dispute because this is an action arising under the trademark laws of the United States, Title 15, United States Code, as implemented by 28 U.S.C. §1338(a), which gives the federal courts exclusive jurisdiction over trademark disputes. Subject matter jurisdiction also is proper under 28 U.S.C. §1331 and under the Lanham Act, 15 U.S.C. § 1051 et. seq. In addition, this Court has jurisdiction over this dispute under the Federal Declaratory Judgments Act, 28 U.S.C. §§2201 and 2202.

5. Venue is proper in this judicial district and division under 28 U.S.C. §§1391(b)(1) and 1391(c) because Virgin Mobile regularly conducts business in this district and division. Specifically, Virgin Mobile sells its products through retailers such as Target, Wal-Mart, CVS,

Walgreens, and 7-Eleven located throughout this district and division. MetroPCS also conducts business in this district and division.

6. Venue also is proper in this judicial district and division under 28 U.S.C. §1391(b)(2) because a substantial part of the alleged events or omissions giving rise to the claims occurred in this judicial district and division.

III. FACTUAL BACKGROUND

7. MetroPCS, through its subsidiaries, provides wireless communications services using its own wireless network. MetroPCS, through its subsidiaries, has acquired authorization from the Federal Communications Commission ("FCC") to provide its services and MetroPCS has spent over $2 billion on such authorizations over the years. MetroPCS offers its customer wireless broadband personal communication services on a MetroPCS wireless network in selected major metropolitan areas in the United States, including in the Dallas-Fort Worth metroplex. MetroPCS has spent billions of dollars building its wireless network.

8. MetroPCS offers its customers service plans that do not require customers to sign a long-term contract. Instead, MetroPCS offers wireless broadband services on monthly service plans that charge a flat rate for unlimited minutes during that month. MetroPCS requires its customers to pay for their services in advance. The MetroPCS plans allow customers to place unlimited wireless calls from within MetroPCS's service areas and to receive unlimited calls from any area under simple, affordable, flat rate monthly plans. Because the MetroPCS service plans are pay in advance, MetroPCS does not check credit. Accordingly, many who do not have credit use MetroPCS's services.

9. Since MetroPCS began offering its innovative wireless service (no long-term contract, flat rates, unlimited minutes) in 2002, it has become one of the fastest growing wireless

providers in the United States in terms of growth in subscribers and revenue and has more than 4.6 million subscribers as of June 30, 2008.

10. Virgin Mobile is a competing wireless communications provider. Unlike MetroPCS, Virgin Mobile does not have its own a wireless network or hold FCC authorizations. Instead, even though Virgin Mobile customers receive a handset with a Virgin Mobile mark on it, those customers actually receive their wireless communications service from the Sprint Nextel wireless network via a resale arrangement between Sprint-Nextel and Virgin Mobile. Therefore, when a customer purchases a handset with a Virgin Mobile mark on it, that customer will receive his wireless service from Sprint Nextel.

11. On its website and advertisements, Virgin Mobile represents to customers that it has "no annual contracts" or "long-term contracts" for wireless telecommunications service and instead has only month-to-month agreements or pre-paid arrangements. In other words, Virgin Mobile allows customers to pay on a month-to-month basis for as many or as few months as the customer wishes. In addition, under Virgin Mobile's pre-paid plans, customers pay for the minutes used, rather than a fixed amount for a period of time. A Virgin Mobile customer can freely terminate use of a Virgin Mobile handset by not paying the service fee for the next month or when their pre-paid account no longer has any money. In addition, if a customer fails to use their pre-paid minutes within a certain period of time, the service is terminated. In all circumstances, there is no cancellation fee.

12. Upon information and belief, Defendant Virgin Mobile is the exclusive licensee of U.S. Trademark Registration Nos. 2,689,098 for the mark VIRGIN; 2,770,776 and 2,770,775 for the mark VIRGIN MOBILE.

13. On November 27, 2006, the United States Copyright Office released rules that included an exemption to certain provisions of the Digital Millennium Copyright Act, 17 U.S.C. § 1201 ("DMCA"). The relevant exemption, codified at 37 C.F.R. § 201.40(b)(5), allows wireless communications service providers to unlock software installed on wireless handsets manufactured or sold by competitors so long as the sole purpose of unlocking the software is to allow the handset to connect to another wireless network. The purpose of this exemption is to ensure that customers have the freedom to switch wireless communications service providers. The process of unlocking wireless handset to work on another company's network is known as "reflashing."

14. Subsequent to the issuance of the DMCA exemption, on June 26, 2008, MetroPCS announced the launch of a service called MetroFLASH. The MetroFLASH service allows a potential customer to have their non-MetroPCS Code Division Multiple Access (CDMA) handsets reflashed to receive wireless telecommunications service on MetroPCS's network. In order to reflash a handset, a software program is used which unlocks the handset and changes certain values in the handset's memory to allow it to work on MetroPCS's network. Not all handsets can be reflashed to work on MetroPCS's network. For example, non-CDMA handsets cannot be reflashed to work on MetroPCS's network. In addition, not all CDMA handsets can be reflashed using the software used by MetroPCS.

15. MetroPCS has offered its MetroFLASH service to customers and is prepared to continue offering its MetroFLASH service to potential new customers. MetroPCS has, at a customer's request, reflashed at least one CDMA handset previously on Virgin Mobile's network.

16. MetroPCS reflashes non-MetroPCS CDMA wireless handsets only at the request of the handset's owner. When an owner of a non-MetroPCS CDMA handset requests that MetroPCS reflash the handset, the owner is aware that MetroPCS will be the new wireless communications service provider. The owner is also aware that the previous wireless communications service provider will no longer be able to provide service for the handset absent the handset being reflashed back to the prior services provider's network..

17. Before reflashing a customer's handset, MetroPCS obtains written confirmation from the customer that the customer has no ongoing agreements with any other service provider.

18. Virgin Mobile recently created a live dispute between the parties by challenging MetroPCS's right to continue the MetroFLASH program. On July 2, 2008, Virgin Mobile sent MetroPCS a letter ("Virgin Mobile Letter") asserting that if MetroPCS allowed any customer to use MetroPCS services through a handset originally purchased from Virgin Mobile, then MetroPCS's reflashing and activation of the customer's handset would "constitute tortious interference with Virgin Mobile's contractual relations and prospective business relations." Virgin Mobile claimed in the letter that terms on box-tops of Virgin Mobile handsets created contractual agreements with the customers that purportedly restricted for all time the customers' right to use Virgin Mobile handsets on a service network other than the network provided by Virgin Mobile.

19. Virgin Mobile's claim of a contract that permanently restricts its customers' ability to use the Virgin Mobile handsets with a different service provider directly contradicts the written representations by Virgin Mobile to, and thus the expectation of, Virgin Mobile's customers that Virgin Mobile does not impose long-term or annual contracts on its customers.

20. In the Virgin Mobile Letter, Virgin Mobile also claimed that MetroPCS is infringing Virgin Mobile's rights in the Virgin Mobile marks and threatening to enforce the Virgin Mobile marks against MetroPCS. The letter demanded, among other things, that MetroPCS "cease and desist from reflashing Virgin Mobile-branded handsets and activating them for use with MetroPCS services." A true and correct copy of the July 2, 2008 letter is attached as Exhibit A.

21. On August 5, 2008, MetroPCS responded to Virgin Mobile's July 2, 2008 letter and refuted Virgin Mobile's claims in several respects. MetroPCS invoked the exemption under the DMCA and argued that the exemption defeated Virgin Mobile's allegations. MetroPCS also noted that MetroPCS is not buying or selling any handsets with the Virgin Mobile marks. Thus, any handsets reflashed using MetroFLASH are at all times, and remain, the property of the existing handset owner because MetroPCS does not reflash any phones for resale. Moreover, MetroPCS has in place policies which prohibit employees and dealers from directing potential customers to purchase handsets from Virgin Mobile to be reflashed to be used on the MetroPCS network. Additionally, MetroPCS explained that there is no possibility of confusion in the public as to the source or origin of the service provided for the reflashed handset because the customer who owns the reflashed handset at all times clearly knows which wireless communications service provider he is using. A true and correct copy of the August 5, 2008 response letter is attached as Exhibit B.

22. Virgin Mobile continued to create uncertainty surrounding the MetroFLASH program and challenge MetroPCS's right to reflash handsets in its next letter, dated August 14, 2008. Virgin Mobile again asserted that MetroPCS's actions "constitute tortious interference with Virgin Mobile's contractual relations and prospective business relations." In the same

letter, Virgin Mobile also claimed that MetroPCS's conduct "dilutes Virgin Mobile's valuable trademarks" and threatened to enforce the Virgin Mobile marks against MetroPCS. The letter again demanded, among other things, that MetroPCS "cease and desist from re-flashing Virgin Mobile-branded handsets and activating them for use with MetroPCS services." A copy of the August 14, 2008 letter is attached as Exhibit C.

23. Virgin Mobile's assertions that MetroPCS is infringing and/or diluting Virgin Mobile's rights in the Virgin Mobile marks and tortiously interfering with Virgin Mobile's contracts with its customers have placed a cloud of uncertainty over MetroPCS's business. Virgin Mobile's legal threats have created uncertainty as to the parties' respective rights, status, and legal relations. A declaratory judgment is appropriate where the judgment would clarify rights, status, and legal relations between parties and would resolve uncertainty giving rise to an immediate dispute. Virgin Mobile's threats have had a chilling effect on MetroPCS. Many of MetroPCS's customers are completely new to wireless and may be unable to purchase wireless telecommunications services from others. Virgin Mobile's assertions and legal challenges will continue to affect MetroPCS's business unless the Court issues a declaratory judgment clarifying the parties' rights, status, and legal relations.

24. An actual controversy of a justiciable nature exists between Virgin Mobile and MetroPCS regarding: (1) whether the reflashing of Virgin Mobile handsets by MetroPCS infringe or dilute any Virgin Mobile marks; (2) whether reflashing Virgin Mobile handsets by MetroPCS constitutes tortious interference with Virgin Mobile's existing or prospective contractual relationships; (3) whether Virgin Mobile's customer contracts are preempted by the exemption in the DMCA. To resolve the legal and factual questions raised by Virgin Mobile and

to afford relief from the uncertainty and controversy that Virgin Mobile's assertions have precipitated, MetroPCS seeks a declaratory judgment of its rights under 28 U.S.C. §§2201-2202.

IV. COUNT ONE
VIRGIN MOBILE CANNOT ESTABLISH A CLAIM FOR TRADEMARK INFRINGEMENT AGAINST METROPCS UNDER LANHAM ACT

25. The allegations of Paragraphs 1 to 24 above are incorporated by reference.

26. Virgin Mobile has created uncertainty between the parties as to MetroPCS's right to continue its MetroFLASH program by alleging that the program infringes the Virgin Mobile marks. Virgin Mobile's contentions and threats to take legal action based upon those contentions have created uncertainty and an immediate case or controversy between the parties. This uncertainty will continue unless the Court issues a declaratory judgment clarifying the parties' rights, status, and legal relations.

27. To establish MetroPCS's liability for trademark infringement under the Lanham Act, Virgin Mobile must prove that: (1) Virgin Mobile owns a mark; (2) MetroPCS used Virgin Mobile's mark in commerce; (3) and the use of that mark creates a likelihood of confusion among consumers as to the origin of the goods.

28. Virgin Mobile cannot establish MetroPCS's liability for trademark infringement under the Lanham Act because MetroPCS does not engage in any use of Virgin Mobile's mark in commerce. MetroPCS's MetroFLASH service only permits customers to bring their non-MetroPCS CDMA handsets to MetroPCS for the sole purpose of reflashing these handsets and activating them to receive wireless communications service on MetroPCS's network. MetroPCS does not purchase or sell any handsets using the Virgin Mobile marks nor does MetroPCS offer its services to any persons engaging in any scheme to purchase-flash-re-sell handsets with Virgin Mobile marks. MetroPCS also does not engage in any advertising or any other acts in interstate commerce using Virgin Mobile's marks.

29. MetroPCS is also not liable for trademark infringement under the Lanham Act because Virgin Mobile cannot establish that MetroPCS creates a likelihood of confusion as to the source of any Virgin Mobile goods. When an owner of a non-MetroPCS CDMA handset requests that MetroPCS reflash the customer's CDMA handset and activate it on MetroPCS's service, the owner is aware that MetroPCS will be the new wireless communications service provider. The owner is also aware that the previous wireless communications service provider will no longer provide service for the handset.

30. MetroPCS therefore respectfully requests, and is entitled to, a declaration that the reflashing and activation of customer CDMA handsets with the Virgin Mobile mark by MetroPCS for use with MetroPCS's wireless communications network does not and will not infringe or contributorily infringe any Virgin Mobile marks.

V. COUNT TWO

VIRGIN MOBILE CANNOT ESTABLISH A CLAIM FOR TRADEMARK DILUTION AGAINST METROPCS UNDER LANHAM ACT

31. The allegations of Paragraphs 1 to 30 above are incorporated by reference.

32. Virgin Mobile has created uncertainty between the parties as to MetroPCS's right to continue its MetroFLASH program by alleging that the program dilutes the Virgin Mobile marks. Virgin Mobile's contentions and threats to take legal action based upon those contentions have created uncertainty and an immediate case or controversy between the parties. This uncertainty will continue unless the Court issues a declaratory judgment clarifying the parties' rights, status, and legal relations.

33. To establish MetroPCS's liability for trademark dilution under the Lanham Act, Virgin Mobile must prove that: (1) Virgin Mobile owns a mark; (2) Virgin Mobile's mark is famous and distinctive; (3) MetroPCS used Virgin Mobile's mark in commerce in a manner that

creates the impression of association between the Virgin Mobile's mark and MetroPCS; (4) and any such association impairs the distinctiveness or harms the reputation of Virgin Mobile's mark.

34. Virgin Mobile cannot establish MetroPCS's liability for trademark dilution under the Lanham Act because Virgin Mobile's marks are not famous.

35. Virgin Mobile cannot establish MetroPCS's liability for trademark dilution under the Lanham Act because MetroPCS does not engage in any use of Virgin Mobile's mark in commerce. MetroPCS does not sell, advertise, or engage in any other act in interstate commerce using Virgin Mobile's mark. The MetroFLASH program also does not create the impression of association between the Virgin Mobile mark and MetroPCS because when an owner of a non-MetroPCS CDMA handset requests that MetroPCS reflash their handset, the owner is aware that MetroPCS will be the new wireless communications service provider. The owner is also aware that the previous wireless communications service provider will no longer provide service for the handset.

36. MetroPCS therefore respectfully requests, and is entitled to, a declaration that the reflashing and activation of non-MetroPCS CDMA handsets with Virgin Mobile marks by MetroPCS for use with MetroPCS's wireless communications network does not and will not dilute the Virgin Mobile marks.

VI. COUNT THREE

VIRGIN MOBILE'S AGREEMENTS PREEMPTED BY DMCA EXEMPTION

37. The allegations of Paragraphs 1 to 36 above are incorporated by reference.

38. In its letters to MetroPCS, Virgin Mobile claims that its product packaging, shrink wrap agreements, box-top contract, and terms of service restrict its customers' right to switch wireless communication service providers and thereby creates a contract with its customers with which MetroPCS's MetroFLASH program tortiously interferes. Virgin Mobile's contentions

and threats to take legal action based upon those contentions create uncertainty and an immediate case or controversy between the parties over the enforceability of Virgin Mobile's product packaging, shrink wrap agreements, and terms of service. Further, this uncertainty may chill competition by deterring customers from reflashing and activating their non-MetroPCS CDMA handsets on the MetroPCS network. This uncertainty will continue unless the Court issues a declaratory judgment clarifying the parties' rights, status, and legal relations.

39. The DMCA exemption, codified at 37 C.F.R. § 201.40(b)(5), allows wireless communications service providers to unlock or re-flash wireless handsets so long as the sole purpose of the reflashing is to allow the handset to connect to another wireless network. The purpose of this exemption is to ensure that customers have the freedom to switch wireless communications service providers.

40. Virgin Mobile's attempt to restrict its customers' right to switch wireless communications service providers through its product packaging, shrink wrap agreements, box-top contract, and terms of service conflict with, and are thus pre-empted by the exemption in the DMCA that expressly provides customers the right to unlock their wireless handsets for use on another wireless network.

41. MetroPCS respectfully requests, and is entitled to, a declaratory judgment that Virgin Mobile's product packaging, box-top, shrink wrap agreements, and terms of service are preempted by the DMCA to the extent that they purport to prohibit MetroPCS from unlocking or re-flashing and activating any non-MetroPCS CDMA handset with a Virgin Mobile mark for a customer for the purpose of allowing the phone to use MetroPCS's wireless system, when those customers (1) do not have or never had a wireless service contract with Virgin Mobile; and/or (2) legally terminated any wireless service contract they had with Virgin Mobile.

VII. COUNT FOUR
METROPCS DID NOT TORTIOUSLY INTERFERENCE WITH VIRGIN'S CONTRACTUAL RELATIONS

42. The allegations of Paragraphs 1 to 41 above are incorporated by reference.

43. In its letters to MetroPCS, Virgin Mobile claims that its product packaging, shrink wrap agreements, box-top contract, and terms of service restrict its customers' right to switch wireless communication service providers and thereby creates a contract with its customers with which MetroPCS's MetroFLASH program tortiously interferes. Virgin Mobile's contentions and threats to take legal action based upon those contentions create uncertainty and an immediate case or controversy between the parties over the enforceability of Virgin Mobile's product packaging, shrink wrap agreements, and terms of service. These threats chill competition because they may deter potential customers from reflashing their existing handsets and using MetroPCS's service. This uncertainty will continue unless the Court issues a declaratory judgment clarifying the parties' rights, status, and legal relations.

44. To establish MetroPCS's liability for tortious interference with contractual relations, Virgin Mobile must prove: (1) the existence of a valid contract that is subject to interference by MetroPCS; (2) willful or intentional act of interference by MetroPCS; (3) that proximately caused Virgin Mobile to lose its contracts; (4) and Virgin Mobile suffered actual damages.

45. Virgin Mobile cannot establish MetroPCS's liability for tortious interference with contractual relations because the terms on Virgin Mobile's purchase packaging, box-top agreements, and shrink-wrap agreements do not create a valid contract with its customers. Virgin Mobile represents to its customers that Virgin Mobile does not impose on its customers any long-term or annual contracts. Contrary to these representations, Virgin Mobile seeks to permanently restrict its customers' ability to use wireless network providers other than the

network provider provided by Virgin Mobile with terms on the box-top, purchase-packaging, and shrink-wrap agreements. These terms, which constitute proposals for additional terms by Virgin Mobile, are in direct conflict with the expectations of Virgin Mobile customers created by Virgin Mobile's representations of no long term contracts, and are never expressly assented to by Virgin Mobile's customers. Moreover, the lack of consideration for the additional restrictions on Virgin Mobile's customers' ability to use the handsets belies Virgin Mobile's claims of a valid contract to restrict that use.

46. Virgin Mobile cannot establish MetroPCS's liability for tortious interference with contractual relations because Virgin Mobile does not have a valid contract to provide wireless service with any customer for whom MetroPCS reflashes a customer owned handset. Virgin Mobile offers only pre-paid or month-to-month contracts for wireless service, and has no long-term or annual contracts with any of its customers. Moreover, MetroPCS secures a written agreement from its customers that they do not have a service contract with another wireless carrier prior to re-flashing and activating any phones under the MetroFLASH program.

47. Virgin Mobile cannot establish MetroPCS's liability for tortious interference with contractual relationships because the DMCA exemption, codified at 37 C.F.R. § 201.40(b)(5), allows wireless communications service providers to unlock or reflash handsets so long as the sole purpose of the unlocking or reflashing is to allow a customer's handset to connect to another wireless network. MetroPCS therefore has the right to reflash and activate customer's handsets which may have been on other wireless carrier's network, and any such re-flashing and activating undertaken by MetroPCS is a justified exercise of MetroPCS's rights to compete for customers.

48. Virgin Mobile cannot establish MetroPCS's liability for tortious interference with contractual relationships because Virgin Mobile cannot prove that MetroPCS's MetroFLASH program proximately caused the breach of any Virgin Mobile contract. Virgin Mobile offers its customers only pre-paid or month-to-month contracts for wireless service which customers may, and do in fact, terminate at their will or are terminated through the failure to use the service..

49. MetroPCS therefore respectfully requests, and is entitled to, a declaration that reflashing and activating of customer owned handsets with Virgin Mobile marks by MetroPCS for customers who (1) have legally terminated their use of wireless services with Virgin Mobile handsets and/or (2) do not have or never had a wireless service contract with Virgin Mobile, does not and will not interfere with Virgin Mobile's contractual relations.

VIII. COUNT FIVE
METROPCS DID NOT TORTIOUSLY INTERFERENCE WITH VIRGIN'S PROSPECTIVE BUSINESS RELATIONS

50. The allegations of Paragraphs 1 to 49 above are incorporated by reference.

51. In its letters to MetroPCS, Virgin Mobile claims that its product packaging, shrink wrap agreements, box-top contract, and terms of service restrict its customers' right to switch wireless communication service providers and thereby creates the expectation that the customers will use the service provider provided by Virgin Mobile. Virgin Mobile's contentions and threats to take legal action based upon those contentions create uncertainty and an immediate case or controversy between the parties over the enforceability of Virgin Mobile's product packaging, shrink wrap agreements, and terms of service. These threats have a chilling effect on competition by deterring customers from reflashing their phones and purchasing services from MetroPCS. This uncertainty will continue unless the Court issues a declaratory judgment clarifying the parties' rights, status, and legal relations.

52. To establish MetroPCS's liability for tortious interference with prospective business relations, Virgin Mobile must prove: (1) the reasonable probability of a prospective business relationship; (2) independently tortious or unlawful act of interference by MetroPCS; (3) done with knowledge, or conscious desire to prevent prospective business relationship; (4) and Virgin Mobile suffered actual damages.

53. Virgin Mobile cannot establish MetroPCS's liability for tortious interference with prospective business relations because any re-flashing and activating undertaken by MetroPCS is not independently tortious or unlawful. The DMCA exemption, codified at 37 C.F.R. § 201.40(b)(5), allows wireless communications service providers to unlock or reflash and activate handsets so long as the sole purpose of the reflash and activation is to allow the handset to connect to another wireless network. In addition, MetroPCS has the legal right to compete for customers with its MetroFLASH program.

54. MetroPCS therefore respectfully requests, and is entitled to, a declaration that reflashing of non-MetroPCS handsets which have the Virgin Mobile marks by MetroPCS for customers who have (1) legally terminated their use of wireless services with Virgin Mobile and/or (2) do not have or never had a wireless service contract with Virgin Mobile, does not and will not interfere with Virgin Mobile's prospective business relations.

IX. JURY DEMAND

55. MetroPCS hereby demands a jury trial.

X. PRAYER

WHEREFORE, MetroPCS respectfully requests that

(A) MetroPCS be awarded its costs and reasonable attorney fees incurred herein;

(B) The Court declare and a judgment be entered that reflashing and activation of non-MetroPCS handsets with the Virgin Mobile mark by MetroPCS for use with MetroPCS's wireless communications network does not and will not infringe, contributorily infringe, or dilute the Virgin Mobile marks;

(C) The Court declare and a judgment be entered that reflashing and activation of non-MetroPCS handsets with the Virgin Mobile mark by MetroPCS for customers who have (1) legally terminated their use of wireless services with Virgin Mobile and (2) do not have an ongoing wireless service contract with Virgin Mobile, does not and will not interfere with Virgin Mobile's contractual relations and prospective business relations;

(D) The Court declare and a judgment be entered that Virgin Mobile's product packaging, shrink wrap agreements, and terms of service are preempted by the DMCA to the extent that they purport to prohibit MetroPCS from unlocking or reflashing and activating the customer's handset solely for the purpose of allowing the phone to connect to MetroPCS's wireless network, when those customers have (1) legally terminated their use of wireless services with Virgin Mobile and (2) do not have an ongoing wireless service contract with Virgin Mobile; and that

(E) The Court declare and a judgment be entered that Virgin Mobile, its officers, agents, servants, employees, representatives, successors, and assigns, and any and all persons in acting concert or participation with or under authority from Virgin Mobile, either separately or jointly, are enjoined from interfering with, or threatening to interfere with, the reflashing of non-MetroPCS handsets with the Virgin Mobile mark for customers by MetroPCS, its related companies, successor or assigns, in connection with its business.

Date: September 19, 2008

By: _____

Brian E. Robison
State Bar No. 00794547
William D. Sims
State Bar No. 18429500
W. Scott Brown
State Bar No. 03177090
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ATTORNEYS FOR PLAINTIFF METROPCS WIRELESS, INC.

JS 44 (Rev. 12/07) ORIGINAL

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

METROPCS WIRELESS, INC.

(b) County of Residence of First Listed Plaintiff Dallas
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

VINSON & ELKINS, L.L.P., 2001 Ross Avenue, Suite 3700, Dallas, TX 75201, 214-220-7700

DEFENDANTS

VIRGIN MOBILE USA, L.P.

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury

PERSONAL INJURY
- ☐ 362 Personal Injury - Med. Malpractice
- ☐ 365 Personal Injury - Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 444 Welfare
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 440 Other Civil Rights

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence

Habeas Corpus:
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition

FORFEITURE/PENALTY
- ☐ 610 Agriculture
- ☐ 620 Other Food & Drug
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 630 Liquor Laws
- ☐ 640 R.R. & Truck
- ☐ 650 Airline Regs.
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 730 Labor/Mgmt.Reporting & Disclosure Act
- ☐ 740 Railway Labor Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 463 Habeas Corpus - Alien Detainee
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☒ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 875 Customer Challenge 12 USC 3410
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 895 Freedom of Information Act
- ☐ 900Appeal of Fee Determination Under Equal Access to Justice
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (**Do not cite jurisdictional statutes unless diversity**):
15 U.S.C. § 1051 et. seq, 28 U.S.C. §§2201 and 2202,28 U.S.C. §1338(a)

Brief description of cause:
Action Seeking Declaratory Judgment of Non-infringement of U.S. Trademarks and

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER F.R.C.P. 23

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE 09.19.08

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____