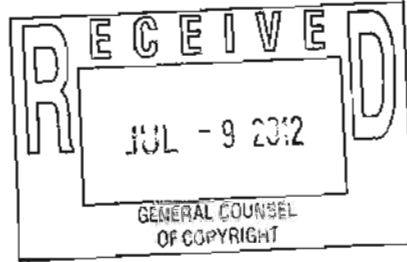




The Competitive Carriers Association



June 29, 2012

Via U.S. & Electronic Mail

Mr. David Carson
General Counsel
U.S. Copyright Office
P.O. Box 70400
Washington, DC 20024

Re: Requested Response of Steven Berry, RCA – The Competitive Carriers Association, Docket No. RM 2011-7

Dear Mr. Carson:

This letter is being submitted in response to a request for additional information made by the Copyright Office on June 21, 2012 (the "Request") in connection with the May 31, 2012 Hearing regarding the *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies* (the "Hearing"). Pursuant to the Request, RCA is responding to Questions 1, 2, 4 and 5. The following is respectfully submitted:

**I. Response to Request 1:
Even if Firmware/Software of a Device is Not Protected Under Copyright Law, An Unlocking Exemption Is Still Necessary to Use a Mobile Phone On a Competing Wireless Network**

Although RCA did not advance this argument, and does not necessarily support it, Consumers Union argued that "the aspect of mobile device firmware or software that enables a device to connect to a communications network" may be found to be unprotectable under copyright law.¹ Regardless of whether the federal courts find that this is the case, RCA agrees that an exemption is still necessary to use a mobile phone on a competing wireless carrier because "to unlock a mobile device, a consumer may have to circumvent a protection measure that controls access to the entire mobile device operating system," which may include protectable content such as ringtones and wallpapers.² Therefore, even though the underlying software may or may not be copyrightable, when a device is locked, the software, along with any copyrighted material, gets locked as well, and the only way a user may access his or her lawfully acquired copyrighted material is through circumventing a protective measure.

When a carrier places a software lock on a device, that device becomes locked to the network. MetroPCS Communications, Inc. ("MetroPCS"), a member of RCA, and supporter of

¹ Comments of Consumers Union, in Docket No. RM 2011-7, 8-10 (filed Dec. 1, 2011).

² Consumers Union Comments, at 10.

the proposed RCA exemption, provided a discussion in its Comments on the ways that software locks artificially prevent wireless devices from accessing competing carriers' networks.³ MetroPCS argues, and RCA agrees that "[s]oftware locks chain wireless devices to one network and are used by carriers not to protect any legitimate copyright interest, or to protect their interest in copyrighted works, but rather primarily as a means to protect their particular business model."⁴

Furthermore, absent an exemption, once a phone is locked to a network, it is extremely difficult, if not impossible, for the consumer to switch wireless carriers. The importance of this exemption has only increased since the 2009 copyright proceeding due to the creeping elimination of device subsidies from carriers' business models. For example, T-Mobile USA Chief Marketing Officer, Cole Brodman, recently argued that device subsidies were hurting the wireless industry.⁵ In response to this belief, T-Mobile, introduced its "Value Plans" that "break with the subsidy model" as customers pay full price for a device, or set up low, monthly installments in return for a rate plan.⁶ Under these plans, T-Mobile also allows customers to bring their own devices to the T-Mobile network.⁷ In a communications industry without subsidies, consumers are required to pay more upfront for the mobile devices they purchase.⁸ Disappearing subsidies may prevent some consumers, especially low-income consumers, from being able to purchase new devices. Therefore, an unlocking exemption takes on increased importance. Absent an exemption, these consumers may find themselves trapped on undesirable networks, as they will be unable to afford a new device on a new network, and unable to transfer their current device to the new network due to the unlocking exemption's expiration.

II. Response to Request 2: RCA's Concerns Regarding CTIA's Proposed Exemption

In what amounts to a thinly-veiled attempt to eviscerate the practical application of the unlocking exemption, CTIA has proposed the following "compromise" exemption:

Computer programs, in the form of firmware or software, that enable used wireless telephone handsets to connect to a wireless telecommunications network, when circumvention is undertaken by an individual customer of a wireless service provider who owns ~~initiated by the owner of~~ the copy of the computer program solely for noncommercial purposes in order to connect to a wireless

³ Comments of MetroPCS Communications, Inc. On The Notice of Inquiry, in Docket No. RM 2011-07, 14 (filed Dec. 1, 2011) ("MetroPCS Comments")

⁴ Comments of MetroPCS Communications, Inc. On The Notice of Inquiry, in Docket No. RM 2011-07, 14 (filed Dec. 1, 2011) ("MetroPCS Comments")

⁵ Phil Goldstein, "T-Mobile CMO blasts device subsidies, but says they won't go away" (Mar. 9, 2012) <http://www.fiercewireless.com/story/t-mobile-cmo-blasts-device-subsidies-says-they-wont-go-away/2012-03-09>.

⁶ Cole Brodman, Chief Marketing Officer, T-Mobile, "The Hidden Cost of Device Subsidies" T-Mobile Issues & Insights Blog (Mar. 12, 2012) <http://blog.t-mobile.com/2012/03/12/the-hidden-cost-of-device-subsidies/>.

⁷ *Id.*

⁸ For example, currently Verizon Wireless offers a 16 GB Apple iPhone 4S for \$199.99 with a 2-year contract. The full retail price of the device, without the 2-year contract (or subsidy offering) is \$649.99. Apple iPhone 4S - 16 GB, <http://www.verizonwireless.com/b2c/store/controller?item=phoneFirst&action=viewPhoneDetail&selectedPhoneId=5773>.

telecommunications network other than that of the service provider and access to the network is authorized by the operator of the network.⁹

This proposal is substantially similar to the exemption CTIA proposed (and the Register declined to adopt) in the 2010 proceeding.¹⁰ Unlike RCA, CTIA has failed to provide new evidence or cite to changed circumstances to support its proposed departure from the unlocking exemption that is currently in place.

When one considers how real-world handset unlocking is actually accomplished, CTIA's exemption, as proposed, is unacceptable. The proposed exemption raises multiple concerns and RCA urges the Register to recognize the planted "Trojan Horses" that, if adopted, would undermine the intent of the exemption,¹¹ and strip consumers of the ability to receive the full benefits that wireless communications services can offer. These concerns are outlined below.

1) "*undertaken by an individual customer of a wireless service provider*"

RCA warns that this addition to the exemption is unnecessarily narrow and will provide needlessly restrictive limitations that will undermine the intent of the exemption, and prevent consumers from reaping the full benefit of their wireless devices. This proposed language limits the ability to unlock a wireless device for use on a different network to the *actual customer* of the original carrier, rather than to the individual in possession of the wireless device. This would substantially increase consumer confusion, as it is not at all obvious that a device would need to be unlocked by the customer having the relationship with the original wireless carrier *prior* to its transfer. Under this limitation, the customer will be prevented from selling or transferring a device to a spouse, family member, or friend that uses a different wireless network, without having taken the time and effort to unlock it first. This needlessly curtails the ability of consumers to lawfully transfer devices, without any resulting benefit to the original wireless carrier. In the same manner, such a limitation will also curtail or even eliminate charitable opportunities and other social benefits that result from donated mobile phones.¹²

2) "*who owns*"

CTIA's filing plainly states that it believes that "the user is granted a *license to, not ownership of*, the software . . ."¹³ By slipping this "who owns" language into its proposed exemption, CTIA is, in essence, arguing against the application of its exemption in its own filing. Pursuant to *Vernor v. Autodesk, Inc.*, RCA submits that mobile device owners, and thus, software

⁹ Comments of CTIA – The Wireless Association in Docket No RM 2011-7, 64 (filed Feb. 10, 2012) ("CTIA Comments"). RCA notes that CTIA mislabeled the docket number as RM 2008-8 in its filing, and in this citation, RCA corrects the docket number to avoid confusion.

¹⁰ Compare Comments of CTIA – The Wireless Association in Docket No. RM 2008-8, 2, 4 (filed Feb. 2, 2009) with CTIA Comments, 64. Both proposals include the 'Trojan Horses' that RCA warns of in this letter: (1) limiting the exemption to an "individual customer of a wireless service provider;" (2) limiting the exemption to noncommercial use; and (3) limiting the exemption to apply to connections to wireless networks "other than that of the service provider." *Id.*

¹¹ The exemption was created "[i]n order to ensure that the public will have continued ability to engage in noninfringing uses of copyrighted works." *Recommendation of the Register of Copyrights*, 4 (rel. Jun. 11, 2010).

¹² As MetroPCS discussed in its comments, "unlocked wireless devices can be donated to organizations that sell the devices to secondary-market consumers and distribute the proceeds to charitable organizations." Such organizations include, but are not limited to, *Cell Phones for Soldiers*, *National Coalition Against Domestic Violence*, and *Phones for Life*. See MetroPCS Comments, 30 – 31.

¹³ CTIA Comments, 27 (emphasis added).

users, are owners of a copy, and not licensees, of the software.¹⁴ CTIA's position that wireless device owners are merely licensees of the software on their devices means that few, if any, consumers would actually meet the "who owns" standard under CTIA's legal theory. Thus, following CTIA's line of reasoning, the addition of the "who owns" language in the CTIA-proposed exemption means that CTIA has proposed an exemption that is essentially applicable to no one. Adopting such an exemption – with absolutely no, or at best extremely limited, applicability – would be a waste of valuable Copyright Office time and resources, and should be rejected as an attempt by CTIA to eliminate the practical application of this important exemption.

3) "*for noncommercial purposes*"

CTIA also adds a "noncommercial" limitation to its proposed exemption. RCA submits that such a proposal is in direct contrast of the 2010 Recommendation of the Register of Copyrights regarding this exemption. The 2010 Recommendation *expressly allowed* some commercial activity with certain guidelines. It stated that "[t]he type of commercial activity that would be permitted would be the resale of used handsets after the owners of the handsets have used them and then given or sold them to somebody else, who then resells them just as a used bookstore sells used books."¹⁵ By adding in this limitation, CTIA is further attempting to diminish the intent of the exemption by eliminating lawful opportunities for consumers to engage in noninfringing uses of copyrighted work in order to access their preferred wireless network. The Register should reject this proposed addition and continue to permit commercial activity with respect to wireless handsets, and as discussed in RCA's previous filing, other wireless devices.¹⁶

4) "*other than that of the service provider*"

When CTIA's proposed exemption is viewed in full, it is limited to merely allowing an individual customer to take their phone from one wireless network and use it on a different wireless network. As stated above, this diminishes any form of social benefit as charitable

¹⁴ MetroPCS Communications, Inc. ("MetroPCS"), a member of RCA, and supporter of the proposed RCA exemption, provided an analysis of the impact of *Vernor* on this proceeding on pages 16-17 of its Reply Comments. MetroPCS Reply Comments, 16-17. RCA agrees with the conclusion that "based on the plain text of the decision, mobile devices fail to meet the *Vernor* test that 'a software user is a licensee rather than an owner of copy.'" *Id.* at 16 (quoting *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1111 (9th Cir. 2010)). The Ninth Circuit found that if a copyright owner "(1) specifies that the user is granted a license; (2) significantly restricts the user's ability to transfer the software; and (3) imposes notable use restrictions" then the user is a licensee rather than owner of copy. MetroPCS correctly emphasized that "[b]y using the word 'and' in this list of requirements, the Ninth Circuit clearly indicates that a copyright owner must do *all three* of the above in order to render software subject to a license as opposed to the transfer of a copy of the software." Mobile devices, along with the software associated with them, can easily be transferred among users, and to RCA's knowledge, no wireless provider has taken the position that customers are restricted from selling devices that they no longer use, or transferring them to a spouse, family member or friend. Therefore, RCA agrees with MetroPCS that "[b]ecause wireless device owners are not restricted by the carriers from transferring ownership of the device and its underlying software to other parties, wireless devices do not meet the *Vernor* test indicating that owners of such devices are licensees of the software, rather than owners of a copy." Accordingly, while *Vernor* may have provided certain clarification around the edges of the owner/licensee question, the findings in that case are not dispositive on the issues before the Copyright Office. RCA continues to believe that, under the *Vernor* test, owners of wireless devices are owners of copies of the underlying operating system software for the purposes of Section 117.

¹⁵ *Recommendation of the Register of Copyrights*, 174.

¹⁶ See RCA Comments, 9-10; see also MetroPCS Comments, 4-6; MetroPCS Reply Comments, 22-25.

organizations will not be able to use the phones, and family members and friends of the customer will also be prevented from using the device. The final proposed modification – “other than that of the service provider” – only further solidifies this outcome. With the addition of this language, CTIA further limits the exemption to ensure that the only way a device may be re-used, is if the customer wants to change networks. Once again, this prevents any form of charitable use of the device, as it will be unable to be used on whatever network it originated on. This final addition, along with the preceding proposals by CTIA should be rejected by the Copyright Board as this narrow proposal does not align with the intent of the exemption due to its severe limitations.

RCA's Proposed Changes:

In direct contrast to CTIA's overly-restrictive proposed changes, RCA's proposed changes to the exemption will allow for greater consumer benefit from wireless services, and thus serve the underlying, pro-competitive intent of the exemption. The exemption proposed by RCA closely resembles the current exemption, but contains minor modifications to ensure that the “full range of devices, data, and networks used by consumers in today's dynamic wireless communications marketplace” are covered.¹⁷ RCA maintains that these changes are necessary to clarify any ambiguities that could be taken advantage of by wireless carriers in efforts to continue to lock their devices, and ultimately, preventing consumers from receiving all of the benefits that wireless service offers.

RCA has previously stressed the importance of changing the “*wireless telephone handset*” language to read “*wireless devices*” in order to encompass the ever-changing technology in the communications industry.¹⁸ RCA has warned that the current exemption may limit the types of unlockable devices to “telephone handsets”, thus failing to recognize that “[t]oday, consumers use ‘smart’ phones, tablets, and a wide array of other devices to access wireless communications networks” with the line between handsets and tablets becoming increasingly blurry.¹⁹ Wireless providers have already begun to take advantage of this limitation, and they currently lock tablet devices which potentially fall outside of the definition of “wireless telephone handsets.” In response to this trend, MetroPCS demonstrated that tablets, netbooks and laptop aircards all operate over wireless communications networks and therefore “should enjoy comparable anti-locking protection without a debate whether they qualify as telephone handsets.”²⁰ Furthermore, these non-handset devices are considered “interchangeable with traditional devices because they typically offer the same or similar functionality as telephone handsets, including interconnected VoIP services.”²¹ Therefore, due to the substantial overlap emphasized by both MetroPCS' and RCA's previous filings, the Copyright Office should consider changing the language to encompass those communications devices that operate over a wireless network.²²

To further ensure that wireless carriers do not lock these non-handset devices, RCA also has recommended that the current “*wireless telecommunication network*” language be changed to “*wireless communications networks*” to “eliminate any ambiguity surrounding whether data-

¹⁷ See RCA Comments, 8.

¹⁸ See MetroPCS Comments, 5; RCA Comments, 9; MetroPCS Reply Comments, 24 -26.

¹⁹ RCA Comments, 9.

²⁰ MetroPCS Comments, 5.

²¹ *Id.*

²² See e.g., MetroPCS Comments, 4-6; RCA Comments, 9-10; MetroPCS Reply Comments, 22-25.

centric devices (such as tablets) can be unlocked for the purpose of substantially operating over a competing carrier's data network."²³ As MetroPCS previously explained, in the communications field, "the term 'telecommunications' can be used to distinguish common carrier 'telecommunications services' such as interconnected voice services, from 'information services,' such as data, email and Internet access services" – something that can mean a world of difference in the communications statutory context.²⁴ The exemption language should be clarified to ensure that it applies to all traffic flowing over the wireless communications network, and not be subject to any regulatory classifications that the FCC may make during the exemption period.²⁵

Finally, by adding "*including data used by those programs*" to the current exemption, the Copyright Office will clarify that data is included in the scope of the exemption. Currently, as RCA points out, the exemption "expressly includes 'firmware or software' but does not specify whether it includes the data used by those programs."²⁶ By polishing this language to expressly include data, it eliminates any potential hidden traps that providers might use to argue in support of locking practices.

As a result of wireless providers taking advantage of these hidden traps in the current exemption, RCA continues to support the proposed changes to ensure that this exemption encompasses the current existing wireless devices, as well as any devices that might be introduced in the near future.²⁷ Doing so would allow consumers to receive the full benefit of wireless services and also preserve the intent and goals of the exemption and foundation of copyright law.

III. Response to Request 4: Information on Sprint and Leap Wireless Prepaid iPhone Plans

According to publicly available information, Cricket (Leap Wireless) prepaid iPhones are locked to the Cricket/Leap network. To RCA's knowledge, such information is not publicly available with respect to Sprint.

IV. Response to Request 5: Information on Mobile Wireless Providers (other than AT&T, Verizon, Sprint and T-Mobile) that Use Mobile Phone Locks to Keep Customers On Their Respective Wireless Networks

As noted above, publicly available information indicates that prepaid iPhones are locked to the Cricket/Leap network. Several of its other members also lock their phones, but does not have specific, publicly available information regarding these carriers.

²³ MetroPCS Comments, 6.

²⁴ *Id.*

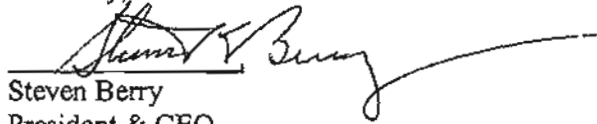
²⁵ See MetroPCS Comments, 6, n. 15 (noting a long-standing debate in the communications industry over whether VoIP services are telecommunications services and VoIP carriers are telecommunications carriers).

²⁶ RCA Comments, 8.

²⁷ As MetroPCS previously explained, when the exemption was initially adopted, tablets did not exist, and therefore, certain wireless providers took advantage of the limiting language of the exemption and locked these "non-handset" devices. See MetroPCS Comments, 5 n. 11.

Please direct any questions to the undersigned.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven Berry", is written over a horizontal line. The signature is fluid and cursive, extending to the right beyond the end of the line.

Steven Berry
President & CEO
RCA- The Competitive Carriers Association
Proponent of Proposed Class 6C

cc (email): "1201@loc.gov"
Robert Kasunic, Deputy General Counsel
Ben Golant, Assistant General Counsel
Stephen Rowe, Attorney Advisor
Maria Pallante, Register of Copyright