

Tuesday, 2 December 2008



Office of the General Counsel
U.S. Copyright Office
James Madison Memorial Building
Room LM-401
101 Independence Ave., SE
Washington, DC 20559-6000

BY ELECTRONIC SUBMISSION
<http://www.copyright.gov/1201/comment-forms>

Re: Notice of Inquiry, 73 Federal Register 58073, 6 October 2008
Exemption to Prohibition on Circumvention of Copyright Protection Systems
Docket Number RM 2008-8

Dear Sirs:

I. PROPOSED CLASS OF COPYRIGHTED WORKS FOR WHICH EXEMPTION IS REQUESTED

Exemption from Section 1201(a)(1)(A) (the “Anticircumvention Provision”) of the Digital Millennium Copyright Act (DMCA) is requested for the following class of works within the statutory class of literary works:

“Mobile Network Connection Programs.” Computer programs in the form of firmware or software that enable¹ mobile communication handsets to connect to a wireless communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless communication network.

This proposed exemption for Mobile Network Connection Programs is worded substantially the same as the fifth class of works that was exempted by the Librarian of Congress in 2006,² with two exceptions as described below.

First, recognizing the ever-expanding strategies that are being used to control mobile handsets beyond what has been classically understood as “firmware,” we propose “firmware or software” as a broader, more accurate phrase with the same intent. 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. The broader, more accurate wording is intended to capture all types of programming in the class of literary works where locks are included to control access to the programs that operate the handset.

¹ The phrase “that enable” in this context is meant to describe any type of enabling, whether through direct or indirect unlocking, empowering, or facilitating, or through actual performance of steps to achieve the connection.

² 71 Fed.Reg. 68472, 68746 (November 26, 2006).

Likewise, recognizing technological evolution of communication handsets, we also propose an exemption that is broader than programs for just “telephone” handsets. Instead, we propose phraseology of “mobile” or “wireless” “communication handsets,” or the equivalent. Granted, the bulk of modern communication handsets still could be called “telephone” handsets, but a number of products that represent substantial commerce in the marketplace utilize communication handsets that may not qualify as telephone handsets. Beepers and text devices, for example, are significant exceptions that are well known in the marketplace.

II. COMMENTING PARTY -- YOUGHIOGHENY D/B/A POCKET COMMUNICATIONS

Youghiogheny Communications-Texas, LLC (“Pocket”) is a Delaware limited liability company doing business as Pocket Communications. Although much smaller than mega-carriers such as Sprint-Nextel, AT&T, T-Mobile or Verizon, Pocket is a regional carrier that provides prepaid, flat rate, unlimited use wireless voice and data services over its South Texas communication networks. While Pocket provides new handset equipment for many of its wireless customers, it is also willing, on request, to let customers continue to use handsets they already own.

III. ARGUMENT SUMMARY

Continued exemption is needed for Mobile Network Connection Programs because carrier locks that are commonly incorporated in such programs prevent them from being modified so the handsets can be used on other networks, thereby dramatically reducing competition and hurting American consumers as well as our landfills. While redirecting Mobile Network Connection Programs does not infringe the associated copyrights and yet cannot be accomplished without unlocking the carrier locks, the exemption remains imperative.

IV. FACTUAL SUPPORT / DETAILED ARGUMENT

A. The Prevented Activities & The Good They Represent

Many customers come to Pocket and other carriers like us after having their service discontinued with a larger carrier. If such a customer chooses to continue using a handset bought from their prior carrier, at some point before wireless service can be provided through the new carrier, the programming that controls the handset must be accessed and adjusted to connect to the new carrier’s network. A problem is raised if the handset has a carrier lock³ to tie the handset to the customer’s prior carrier. Mega-

³ Popular carrier locking strategies include: (i) SPC (service provider code) locking, which has been used by Verizon Wireless and Sprint-Nextel, employs codes derived from an algorithm that uses the handset’s electronic serial number (ESN) and prevents reprogramming of a handset unless the programmer first inputs the correct SPC code; (ii) SOC (system operator code) locking, which has been used by AT&T Wireless (formerly Cingular), requires the matching SOC code to be entered into the handset before it can be changed to another carrier’s SOC code; (iii) Band Order Locking, which restricts the frequencies on which handsets will operate to those licensed for the carrier that implements the lock; and (iv) SIM (subscriber information module) card locking, which is used by T-Mobile to prevent use of other carriers SIM cards on mobile phones that it sells, and

carriers typically include some form of carrier lock embedded in the programming for the handsets that they sell to their customers – with or without the customer’s knowledge or consent. 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. As a result, even though handset owners have the right to use their old handsets after legitimately switching from one carrier to another, they are not able to do so without circumventing the carrier locks.

As a carrier itself, Pocket Communications rejects the notion that carrier locks are needed to help protect margins in the mobile handset services market. Just the opposite, by allowing customers to find ways of properly unlocking their handsets (as permitted with the 2006 exemption and the expanded exemption proposed here), 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. Now, with the ability to unlock their own handsets, consumers are able to choose amongst numerous competing carriers whether to go for more features and service or whether to go for a discount option in order to save money and minimize waste. The result democratizes the wireless landscape and allows expansion of service to consumers at all income levels. The removal of barriers to competition, in turn, allows handset subsidization to become a choice rather than the *de facto* standard that has favored mega-carriers. Plus, consumers are able to choose amongst all competitors rather than being forced to only buy equipment from the network that they are tied to, again increasing competition and ultimately allowing customers to save on costs. Without unjust restraints in wireless markets, the overall cost of obtaining service is reduced, service becomes more and more available for low income consumers, and consumer choice increases both for handsets and for carrier services.

Fortunately, as a result of the 2006 DMCA exemptions and litigation settlement agreements pressured by application of those exemptions, at least one mega-carrier has reportedly started allowing customers to obtain access to their handset operating programs in order to switch a handset from one network to another.⁴ Nonetheless, this is the exception, and most consumers still cannot use their handset on another carrier network without circumventing a carrier lock, even after fulfilling his or her contractual obligations with the carrier that sold them the handset.

The 2006 exemption that allowed consumers to unlock their handsets is good for both the market and the consumers. Irrespective of whether there was improper intent in establishing a marketplace of customers tied to individual mega-carriers, carrier locks dramatically reduce the benefits of free market forces within each silo of customers that are captive to a particular carrier. Without realistic options for switching carriers, carrier locks leave captive customers with fewer options and ultimately having to pay higher prices from the sole source of supply that they are tied to.

which can be unlocked by entering an eight-digit code number so that the handset will then operate with a SIM card for any network.

⁴ Silva, Jeffrey, “Vzw, Sprint Nextel Ink Settlements In Handset Unlocking Lawsuits,” <http://www.rcrwireless.com/apps/pbcs.dll/article?AID=/20071030/FREE/71030008/1002/allnews#>, October 30, 2007 (Sprint settlement agreement to release unlock codes).

B. Prevented Activities Have No Connection to Potential Infringements

But for the prohibition of the Anticircumvention Provision, handset owners who wish to switch service providers would not infringe the copyright rights in the handset programming. Directing the Mobile Network Connection Programs to use a different network or carrier typically does not require duplicating the handset programming or exercising any of the other basic rights afforded by copyright. Rather, in the classic idea/expression context of copyright law, changing the network or carrier is more like changing the factual information included in a copyrighted work rather than changing the protectable expression of that work.

Moreover, even if any necessary reprogramming rises to the level of creating an adaptation of copyrighted handset programming, Section 117 of the Copyright Act provides that such adaptation does not infringe the associated copyrights. Particularly, Section 117(a)(1) expressly provides that “it is not an infringement for the owner of a copy of a computer program” to adapt it so long as the adaptation is created “as an essential step in the utilization of the computer program in conjunction with a machine.”⁵ The owner of equipment that contains a copy of a program, hence, has what has been called the “right of adaptation,” which includes the right to add features to the program that were not present at the time of acquisition, to suit her own needs. For Mobile Network Connection Programs, this means that the handset owner clearly has the non-infringing right to reprogram their handset in order to switch carriers.

C. Bulk Unlocking Schemes Are Different

Notwithstanding the above, it is important to distinguish legitimate network switches from bulk unlocking schemes, such as those that have been addressed in various court proceedings initiated by TracFone and other prepaid service providers over the last two years. Stereotypically, bulk unlocking schemes are questionably-legal, coordinated efforts to buy up hundreds or thousands of subsidized handsets for the purpose of unlocking them *en masse*, without any intent to ever use the handsets on the network that subsidized their purchase. Such unlocked handsets can then be resold in bulk quantities through wholesale distribution channels both domestically and overseas. Unlike the case of redirecting a handset’s individual network connection, we respectfully submit that bulk unlocking schemes should not fall within the scope of the proposed exemption because such access is not thought to be “for the sole purpose of lawfully connecting to a wireless communication network.”

D. Substantial Adverse Effects on Non-Infringing Uses

Without continuation and expansion of the requested exemption, a handset owner who stops using a mega-carrier’s service would typically only have two realistic options when that mega-carrier has embedded carrier locks in the handset programming – either (1) abandon the non-infringing rights and reinstate service with the former carrier, or (2) abandon the non-infringing rights and throw the handset into a local landfill. Either way, the impact to the non-infringing rights is terminal.

The resulting harm is substantial, not only through forced termination of the non-infringing activity, but also in presenting substantial risks and uncertainties for smaller

⁵ 17 U.S.C. §117(a)(1)(2007).

carriers like Pocket that let customers who want to save money continue use of their prior handsets rather than force them to buy new ones. Carrier locks allow mega-carriers to minimize competition and discourage innovation in the mobile communication market. As a result, customers get poorer service, higher prices and fewer solutions. Without the proposed exemption, the Anticircumvention Provision would have a critical adverse impact on the wireless communication network market, our environment, and our consumers, particularly on those who cannot continue paying for service with a mega-carrier during difficult financial times.


V. CONCLUDING REMARKS

The benefits of the 2006 exemptions in overcoming the problems outlined here and elsewhere more than demand a continuation of that exemption. Irrespective of whether mega-carriers appreciate the good in competition, the exemption has allowed non-infringing access to work for good all around – good for both consumers and carriers. Because handset unlocking is a non-infringing activity that serves such substantial needs in the marketplace, and because section 1201(a)(1)(A) would otherwise prohibit classic handset unlocking, we respectfully request grant of the proposed exemption.

We trust it will be remembered that the Anticircumvention Provision was promulgated for the purpose of creating a practical limit on activities that were precursors to copyright infringement. That, however, is not the case with the carefully tailored exemption presently proposed. Congress recognized the potential for adverse effects and chose to create the exemption rulemaking process as a “fail-safe mechanism,” to not just monitor the effect of the Anticircumvention Provision, but to remedy situations where a substantial adverse effect on non-infringing uses is demonstrated. In the present case, the prohibited switching of network carriers does not itself involve impermissible copyright infringement. To the contrary, reprogramming your handset’s copy of a Mobile Network Connection Program is a permissible non-infringing activity that, indeed, should be encouraged because of its benefits for the market, the consumers and the environment.

We respectfully request that the Librarian of Congress establish the proposed exemption for the next triennium under the DMCA provisions.

Youghioghny Communications, LLC

By: 
Paul Posner, President