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UNITED STATES COPYRIGHT OFFICE

**EXEMPTION TO PROHIBITION ON CIRCUMVENTION OF COPYRIGHT
PROTECTION SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES**

**37 CFR Part 201
Docket No. RM 2005-11**

**PETITION FOR CONSIDERATION AND ENTRY OF REPLY COMMENTS
OF
TRACFONE WIRELESS, INC.**

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TABLE OF CONTENTS

I. Introduction and Summary	1
II. Statement Regarding TracFone Wireless, Inc.	2
III. Petition for Consideration of Reply Comments	3
A. TracFone only recently learned of the proposed exemption in its current form	3
B. The proposed exemption was narrowed after the Public Hearing from a general class to a narrow exemption for “software locks” that would specifically harm TracFone.	3
C. The proposed exemption, as currently contemplated, would have a significant adverse impact particularly on TracFone’s business model	4
IV. Opposition to Proposed Exemption from Section 1201(a)(1) for “Computer programs that operate wireless telecommunications handsets”	5
A. Proposed Exemption for “Computer programs that operate wireless telecommunications handsets”	5
B. Summary of the Argument in Opposition	5
C. Factual Basis Supporting the Opposition	5
i. The TracFone Prepaid Handsets	5
ii. Cellular Telecommunication Carriers and Their Network Locks	9
iii. Unlocked Cellphones are Available to the Public.	9
D. Argument in Opposition to the Proposed Exemption	10
i. TracFone could be put out of business if cellular device system locks are legally circumventable	10
a. The complete removal of the system lock allows copyright infringement	11
b. TracFone would have to dramatically increase the price of the TracFone handset to the public	11

ii. The Proponents for the Exemption Have Not Met Their Burden to Show a Substantial Adverse Effect upon Noninfringing Uses	11
a. The proponents do not address the TracFone devices and business model, or the specific harm that TracFone would suffer	12
b. The proposed exemption is unnecessary to advance the interests of cellular customers	12
c. The isolated incidents cited by the proponents are insufficient to warrant the requested exemption of all cellular device software locking mechanisms	13
d. The case law cited by the proponents fail to establish any harm caused by application of the DMCA	13
iii. Public Policy Strongly Disfavors the Removal of TracFone’s Software from Cellular Devices	14
a. The proposed exemption simply allows members of the public to avoid paying the full price for an unlocked cellphone.	14
b. There are many criminal enterprises that engage in the removal of the TracFone software	14
V. Conclusion	15

APPENDIX

Exhibit A-	TracFone Handset Price List (Web page capture, 9/3/2006)
Exhibit B-	“Profiteers Reselling Cell Phones Rankle Industry,” <i>Houston Chronicle</i> , Bus. Sect., Aug. 16, 2006.
Exhibit C-	“Cell Phones are New Terror Gadgets,” <i>Newsday.com</i> , Nation Sect., August 17, 2006.
Exhibit D-	1-800MOBILES.COM, Unlocked Cellphone Price List (Web page capture, 9/3/2006).
Exhibit E-	Crayton Electronics New and Used Unlocked Cellphone Price List (Web page capture, 9/3/2006).

I. Introduction and Summary

TracFone Wireless, Inc. (“TracFone”), submits this Petition for Consideration and Entry of Reply Comments for consideration by the Copyright Office in determination of the proposed exemption for “Computer programs that operate wireless telecommunications handsets. (Mobile firmware)” from Section 1201 of the Digital Millennium Copyright Act (DMCA). Written comments were due by December 1, 2005, and reply comments were due by February 2, 2006. Pursuant to Guidelines set forth in the 70 Fed. Reg. 57526 (2005), TracFone petitions to have its reply comments entered in opposition to the proposed exemption based upon the grounds more fully set forth herein.

A Public Hearing was held on March 23, 2006, at Stanford Law School, in Palo Alto, California. At the Public Hearing, debate was had on the merits of the proposed exemption which was initially titled “Computer programs that operate wireless telecommunications handsets. (Mobile firmware).” At that hearing, the focus of the potential exemption was made to “Computer firmware that enables wireless telecommunications’ handsets to connect to a wireless communication network.” [Hearing Transcript, pp. 45, 48]. Much discussion was also made in the hearing about the case of *TracFone Wireless, Inc. v. SOL Wireless*, 05-CV-23279 (S.D. Fla), and the functionality of the TracFone prepaid handsets. [See, e.g. Hearing Transcript, p. 54]

The Copyright Office solicited further additional comments through written request made August 14, 2006, to Jennifer Stisa Granick, Esq., representing The Wireless Alliance, and Steven Metalitz, Esq., representing numerous “Joint Reply Commenters.”¹ The requested comments of the Copyright Office specifically concern “whether software locks described in the comments and testimony of the Wireless Alliance are technological measures that effectively control access to works protected under [17 U.S.C. §1201(a)(3)(B)].”

TracFone was not aware of the proposed Rulemaking and the proposed exemption in its current form until August, 2006, when an e-mail from CTIA, the international association for the wireless industry, informed its members of the above events. Given the specific discussion of TracFone’s technology and severe impact upon TracFone’s business that the proposed exemption would have, TracFone seeks entry of these reply comments and evidence in opposition to the proposed exemption.

¹ Specifically, the ASSOCIATION OF AMERICAN PUBLISHERS, ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, THE AUTHORS GUILD, INC., BUSINESS SOFTWARE ALLIANCE, DIRECTORS GUILD OF AMERICA, ENTERTAINMENT SOFTWARE ASSOCIATION, INDEPENDENT FILM & TELEVISION ALLIANCE, MOTION PICTURE ASSOCIATION OF AMERICA, NATIONAL MUSIC PUBLISHERS’ ASSOCIATION, PROFESSIONAL PHOTOGRAPHERS OF AMERICA, RECORDING INDUSTRY ASSOCIATION OF AMERICA, SCREEN ACTORS GUILD, and the SOFTWARE AND INFORMATION INDUSTRY ASSOCIATION.

II. Statement Regarding TracFone Wireless, Inc.

TracFone Wireless, Inc., is America's largest prepaid wireless company². Established in 1996, the company was the first to introduce a "pay-as-you-go" wireless service with no term contracts and no monthly bills. TracFone Wireless, Inc. is a subsidiary of América Móvil (NYSE: AMX, Nasdaq: AMOV), Latin America's largest wireless company with over 100 million subscribers around the world.

To use TracFone's service, a customer purchases a TracFone wireless phone and Prepaid Wireless Airtime cards on-line or from any of 60,000 retailers nationwide. The wireless phone is locked down such that it can only operate using TracFone's billing software that is loaded on the phone. The customer activates the wireless phone either online or by calling a toll free number, and then can buy more TracFone prepaid wireless airtime cards as desired. To keep the TracFone service active, the customer must periodically purchase and add airtime.

TracFone provides an extremely valuable service to the community by making wireless service available to consumers who cannot meet the credit criteria for obtaining service from a traditional "post-paid" wireless provider, or who otherwise cannot afford such service. TracFone does not bill its customers and does not require its customers to remain on service for any length of time, and therefore does not need to impose any minimum credit standards or obtain a credit report on its customers. TracFone subsidizes the initial cost of its handsets, allowing them to be purchased for as little as \$19.99. See Ex. A. TracFone does not own a wireless network, but instead operates as a reseller or Mobile Virtual Network Operator ("MVNO"), reselling wireless service provided by more than 25 wireless carriers. TracFone is thus able to provide its customers with nationwide coverage on a variety of carriers, utilizing all of the commonly available wireless standards (GSM, CDMA, and TDMA).

TracFone's provision of this valuable service at an accessible price is only possible because of the protections afforded by its proprietary software loaded into every handset it sells. The exemption proposed in this proceeding would prevent TracFone from protecting its proprietary software from tampering, deletion, or unlocking, and poses a threat to the continued operation of TracFone's business.

² According to the Ovum, a leading analyst firm that specializes in the wireless industry.

III. Petition for Consideration of Late Reply Comments

As set forth in the Notice of Inquiry in the 70 Fed. Reg. 57526 (2005), “in the event that unforeseen developments occur that would significantly affect the Register's recommendation, an opportunity to petition the Register for consideration of new information will be made available after the deadlines specified. A petition, including proposed new classes of works to be exempted, must be in writing and must set forth the reasons why the information could not have been made available earlier and why it should be considered by the Register after the deadline.” While this rule does not state whether the right to petition applies to reply comments, the clear intent of this petition mechanism is to accommodate situations like the current one where TracFone learned of the proposed exemption and discussion surrounding the TracFone handsets far beyond the time limit to reply. TracFone therefore petitions and seeks entry of these late reply comments and evidence in opposition to the proposed exemption for “Computer programs that operate wireless telecommunications handsets. (Mobile firmware),” and its subsequent proposed modifications advocated at the Public Hearing on March 23, 2006.

A. TracFone only recently learned of the proposed exemption in its current form

TracFone was not aware of the proposed Rulemaking and the proposed exemption in its current form until August, 2006, when CTIA, the international association for the wireless industry, informed its members of the above events. TracFone relies upon its industry organizations to timely inform it of governmental developments, and especially rulemaking that affects the wireless communication industry. Before the CTIA email, TracFone was unaware of the proposed exemption made by The Wireless Alliance. Consequently, once TracFone learned of the proposed exemption and researched the substance and commentary regarding TracFone's handsets and actions, TracFone feels compelled to prepare and file these reply comments and evidence to have its official opposition to the proposed exemption made of record and provide correct information to the Copyright Office to better determine the merits of the sought exemption.

B. The proposed exemption was narrowed after the Public Hearing from a general class to a narrow exemption for “software locks” that would specifically harm TracFone

In its current proposed form, the sought exemption appears to be for “software locks that enable wireless telecommunications' handsets to connect to a wireless communication network.” The initial proposed exemption was for “Computer programs that operate wireless telecommunications handsets. (Mobile firmware),” which is a very general and ambiguous statement. Moreover, the pure manipulation of the “computer program” that operates the handset would be copyright infringement. TracFone's main concern is the removal of the “locks” that will allow persons to manipulate or modify the computer code resident on the software platform, and which also permits wholesale removal of the code such that the handset becomes a “blank” that can have a new operating system installed. This deprives TracFone the recoupment of their initial investment in subsidizing the sale of the phone, and also causes an illicit trade in blank phones that some have linked to supporting terrorism.

At the Public Hearing, during questioning of the Commenters, the Copyright Office expressly focused of the potential exemption for “Computer firmware that enables wireless telecommunications’ handsets to connect to a wireless communication network.” [Hearing Transcript, pp. 45, 48]. Even with the narrower definition, the proponents’ counsel Granick specifically stated that she did “not think that TracFone is entitled to DMCA anti-circumvention protection for the way they do things [.]” Hearing Transcript, p. 55. Furthermore, the Copyright Office solicited additional information on August 14, 2006, from the Commenters concerning “whether software locks described in the comments and testimony of the Wireless Alliance are technological measures that effectively control access to works protected under [17 U.S.C. §1201(a)(3)(B)].” The letter requesting additional information also noted that Mr. Metalitz did not represent “handset manufacturers, telecommunication service providers, or others directly involved in the activity that is the subject of the proposed exemption.” TracFone is exactly one of those delineated parties who would be directly affected by the proposed exemption.

As is more fully shown below in the description about the TracFone prepaid wireless handset, there are two “software locks” employed in the TracFone handset, one to limit access to the TracFone software resident on the handset, and the other to prevent access to the operating system. The latter is akin to what has been referred to as the “system operator code” (SOC) lock that prevents third parties from reprogramming the handset. On TracFone’s handset, there is no specific software lock that only controls access to the carrier’s wireless network. Therefore, even the proposed narrowed exception could permit removal of the system lock, which is the main defense TracFone has against phone “reflashers” such as SOL Wireless.

It should also be noted that much discussion was made during the Public Hearing about the case of *TracFone Wireless, Inc. v. SOL Wireless*, 05-CV-23279 (S.D. Fla), and the functionality of the TracFone prepaid handsets. [See, e.g. Hearing Transcript, p. 54]. TracFone seeks to correct the administrative record and clarify how TracFone’s prepaid handsets operate, how TracFone’s business model operates, and the substance surrounding TracFone’s litigation under 17 U.S.C. 1201.

C. The proposed exemption, as currently contemplated, would have a significant adverse impact particularly on TracFone’s business model

In its current form, the proposed exemption for “computer programs that operate wireless telecommunications handsets. (mobile firmware),” and its more narrowly discussed exemption of “computer firmware that enables wireless telecommunications’ handsets to connect to a wireless communication network,” if enacted, could essentially put TracFone out of business. The Copyright Office expressed concern over the harm the proposed exemption might have to the TracFone business model and to consumers if the choice TracFone offers is eliminated. Hearing Transcript, p. 80. As the Copyright Office noted, to entice customers to the wireless prepaid system, the handsets are sold at a discount and return is made from later prepaid airtime minutes. If TracFone cannot subsidize the initial purchase of the device because of the concern over hacking and reselling of the phone, they will undoubtedly suffer a significant business decline as there is no longer a competitive advantage to the prepaid cellular service. The increased cost of the handset would also hurt consumers unable to qualify for or afford contracts with the post-paid cellular carriers as even prepaid wireless would have a high barrier to entry.

IV. Opposition to Proposed Exemption from Section 1201(a)(1) for “Computer programs that operate wireless telecommunications handsets”

A. Proposed Exemption for “Computer programs that operate wireless telecommunications handsets”

The proposed exemption as filed by The Wireless Alliance and Robert Pinkerton was initially titled “Computer programs that operate wireless telecommunications handsets. (Mobile firmware).” The proposed exemption has since been modified to be for “Computer firmware that enables wireless telecommunications’ handsets to connect to a wireless communication network.” [Hearing Transcript, pp. 45, 48]. As is more fully set forth herein, TracFone opposes the proposed exemption in any form.

B. Summary of the Argument in Opposition

TracFone opposes the proposed exemption because of the harm that allowing persons to circumvent TracFone handset system locks would do to TracFone’s business. The complete removal of the system lock allows copyright infringement through alteration and selective deletion of TracFone’s software. Because of the initial subsidy for purchase of the TracFone handset, TracFone would have to dramatically increase the price of the TracFone handset to the public which would destroy sales to the target market of TracFone. Moreover, the proponents for the exemption admit their arguments do not apply to TracFone, and do not address the specific harm the sought exemption could have to the prepaid model. Finally, the proponents have not shown any adverse effect here--unlocked cellphones are readily available to the public, and carriers will unlock cellphones for their customers, as the proponents admit. The proposed exemption simply allows members of the public to avoid paying the full price for an unlocked cellphone through the alteration of copyrighted software, at TracFone’s expense.

C. Factual Basis Supporting the Opposition

i. The TracFone Prepaid Handsets

TracFone’s prepaid handsets are identical to a standard cellular service carrier’s except that the TracFone handset is loaded with TracFone’s billing software. That is, the amount of airtime based upon the available balance of prepaid time is stored on the computer platform of the handset. Basically, TracFone has accounts with the major cellular carriers and is billed for the TracFone prepaid handsets’ collective air time on those networks. The actual method of controlling the access of the individual TracFone handset to a specific cellular network can occur at the handset in a CDMA or TDMA configuration, or is set by the TracFone SIM in a GSM configuration. Consequently, it is critical to TracFone that the TracFone billing software remain intact at the handset or else the possibility for fraud from unbilled usage of TracFone airtime becomes significant.

At the time of sale to the consumer, the TracFone handset normally has two discrete computer programs resident on the computer platform: the TracFone billing software and the operating system code of the handset. The TracFone software is integrated into the operating

system at the time of manufacture. For purposes of copyright ownership, TracFone is the copyright holder of the billing software and any associated modules, and the operating system code is owed by the manufacturer, e.g. Nokia.

There are typically two “locks” on the TracFone handset, one is a lock that can be in software, firmware, or hardware, or a combination of these, that prevents access to the computer platform of the handset (akin to what the commenters refer to as a “system operator code” (SOC) lock). The other is a software lock that prevents access to the specific billing and control software of TracFone resident on the computer platform of the handset. In the TracFone handset, there is no specific lock that would meet the definition of “Computer firmware that enables [the] wireless telecommunications handset to connect to a wireless communication network.” In fact, the TracFone can change carrier networks the handset prefers via the customer inputting specific codes into the handset. To provide access to the network connection feature of a TracFone handset, one would have to remove the system lock.

The main concern of TracFone is the circumvention of the system lock to access the computer platform of the handset. Once circumvented, a person can “reflash” the memory of the computer platform of the phone and wipe away any portion of both TracFone’s software and the resident operating system. If all software is totally wiped from the handset, the person then reinstalls an operating system, and the “blank” cellphone can be resold for a profit above the subsidized initial cost of the phone. As the articles attached hereto as Exhibits B,C show, many illegal enterprises, to possibly include terror organizations, routinely engage in this practice.

Moreover, the TracFone handset cannot have the system lock removed such that access to another carriers network is possible. The TracFone billing software does not allow the handset to add an additional billing identification functionality, such as adding another carrier’s SIM card. Thus, the only way for a purchaser of a TracFone handset to purposely access a wireless network without TracFone billing software control is to reflash the handset and remove all of the initial software.

TracFone also wishes to address the specific questions asked of Ms. Granick and Mr. Metalitz in the August 14, 2006, letter in terms of the specific software locks of the TracFone handset. Below are the questions asked and TracFone’s responses:

(1) Explain how each of the types of software locks controls access to a copyrighted work.

For the two locks typically involved on the TracFone handset computer platform, as stated above, there is a “system lock” that prevents access to the computer platform of the handset. The other is a software lock that prevents access to the specific billing and control software of TracFone resident on the computer platform of the handset. In the TracFone handset, there is no specific lock that would meet the definition of “Computer firmware that enables [the] wireless telecommunications handset to connect to a wireless communication network.”

(2) Identify and describe the copyrighted work (or works) with respect to which access is controlled by the software lock.

At the time of sale to the consumer, the TracFone handset normally has at least two discrete computer programs which are integrated and resident on the computer platform: the TracFone billing software and the operating system code of the handset. For purposes of copyright ownership, TracFone is the copyright holder of the billing software which is integrated into the operating system code on the handset.

a. Who is the copyright owner of that copyrighted work?

The handset manufacturer typically is the owner of the operating system code. TracFone is the owner of the copyright in its proprietary billing and control code that is ultimately integrated on the handset.

b. If the software lock controls access to only a portion of the work(s), identify both the work(s) and the portion(s) of the work(s).

The system lock allows access to operating system of the handset, and not specifically to the TracFone billing program. However, the removal of the system lock does allow a person to remove some or all of the TracFone software. The TracFone billing software lock prevents specific programming access to the TracFone code.

(3) What information, process or treatment must be applied in order to gain access to that copyrighted work(s) (or the identified portion(s) of the work(s)).

The system lock must be circumvented, often via a computer serial connection or other hard electrical connection. Persons often do this with tools used to legitimately service handsets. Once access is had to the computer platform, the software lock of the TracFone software is typically an encryption lock.

(4) In what respect is access to that copyrighted work controlled by the software lock, including (but not confined to):

There is full access to the underlying software with removal of the system lock. Specific access to the TracFone billing software is only had by removal of the TracFone software lock. The only exception is that removal of the system lock does allow partial or full deletion of the TracFone code.

a. what is the nature of the access to the copyrighted work that is controlled by the software lock

Once the system lock is removed, one will have full access to the respective underlying code on the computer platform.

(5) How does the software lock control such access to the copyrighted work?

The system lock prevents any access to the computer code resident on the computer platform at all, to include access to the TracFone software lock. The TracFone software lock controls access only to TracFone's proprietary code.

(6) Describe whether and how the authority of the copyright owner of the copyrighted work is implicated in the operation of the software lock, including (but not confined to):

a. who (e.g., the firmware manufacturer, the handset manufacturer, or the telecommunications service provider) installs and/or activates the software locks on the cellular phone handsets;

The manufacturer installs the system locks on the handset at the time of installation of the operating system, and the software lock of the TracFone billing software is inherent with installation of billing software on the computer platform.

b. whether the software locks are applied "with the authority of the copyright owner";

The system lock and TracFone software lock are applied with the full authority of the respective copyright owners.

c. if the software locks are not installed by the copyright owner,

i. what is the relationship between the copyright owner and the person who installs the software locks;

In the TracFone handset, the manufacturer makes the handset under contract to TracFone. TracFone is the ultimate owner of the copyright of the handset-resident software.

ii. are (and if so, in what respect are) the software locks applied with the permission of the copyright owner; and

TracFone insists that the system lock be installed by the handset manufacturer. The software lock is put on the handset with the installation of the TracFone billing software.

d. In what respect has the copyright owner authorized the application of information, or a process or a treatment, to gain access to the work.

TracFone typically does not give access to third parties to the computer platform or TracFone billing code. Programming changes in the handset software can be made on the handset, if necessary.

(7) In what circumstances, if any, is access to the copyrighted work authorized by the copyright owner.

TracFone does not allow its customers to access either the operating system or the TracFone software resident on the TracFone handsets. This is because the possibilities of reflashing the handset or committing fraud through purposeful alteration of the TracFone billing software.

ii. Cellular Telecommunication Carriers and Their Network Locks

The proponents have stated that there are basically 4 classes of software locks on handsets they seek to have exempted. (1) “SPC”(service provider code) locks which are a number derived from an algorithm that uses the handset’s ESN (electronic serial number); (2) “SOC” (system operator code) locks which are a number assigned to a carrier and programmed into the handset that must match the code of the carrier providing service to the phone; (3) “Band Order Locking” that restricts the frequencies on which handsets will operate; and (4) “SIM” (subscriber identity module), where a SIM card is a small device that stores a customer’s identifying information in some handsets, especially GSM handsets and the card is easily removed and replaced to allow customers to select service providers by placing the appropriate card in the handset. These locks typically control access to the programs resident on the computer platform of the handset, and do not necessarily prevent “flashing” of the handset in the same manner that the TracFone system lock does.

TracFone agrees with the Proponent’s statement that “All these technological measures control access to the copyrighted software inside the mobile handset. Either these measures prevent the owner from reprogramming the firmware in his handset, or they stop the owner from operating the firmware inside the phone when he inserts a different SIM card.” Comments of Wireless Alliance, p. 13. The TracFone handsets are similar to the handsets sold by the carriers in that once the locks are removed, or in the case of the TracFone handset the “system lock,” access to the copyrighted software inside the handset is possible. But, TracFone also notes that the access is full access to the resident code, and not necessarily to any specific layer or module of software. While discussion has been given to a limited exemption of firmware or software that “enables wireless telecommunications’ handsets to connect to a wireless communication network,” such limited access is not possible as that functionality is not independently accessible through a separate “lock.”

iii. Unlocked Cellphones are Available to the Public

As shown in Exhibits hereto, the public is able to buy unlocked new and used cellular devices. Should a person want to own a phone that can be used in Europe or on different cellular networks, he or she can simply spend more on the unlocked cellular device than they would on a TracFone or other contract-purchased cellular device as an unlocked cellular device is not subsidized by the carriers or TracFone because they are not guaranteed any future income from the use of the cellular device. For example, as shown in the TracFone pricelist [Ex. A] the price for a Motorola V176 cellphone is \$59.99; a comparable unlocked cellphone, such as the Motorola V180, is available for purchase at \$129.99. [Ex. D] For very high-end cellular devices,

such as the Nokia 8800 or Palm TREO, the cost of an unlocked device can be well over \$500.00. [Ex. D] Therefore, the proposition that unlocked cellphones are unavailable to the public for domestic or international usage is simply untrue.

D. Argument in Opposition to the Proposed Exemption

i. TracFone could be put out of business if cellular device system locks are legally circumventable

The proponents of the proposed exemption argue that unlocked cellular handsets will serve the public interest by allowing consumers to switch carriers freely. TracFone suggests that this policy argument simply does not apply to TracFone's handsets—the network carrier for the cellular service is simply not chosen by the user of the phone. Instead, TracFone allows its handset to utilize a carrier's network as determined by TracFone, such network connectivity typically set by TracFone based upon where the handset is sold, the handset technology (e.g. CDMA, GSM, etc.), and other rate agreements with carriers. As the customer pre-pays TracFone for the airtime used, it is a fixed price to the customer regardless of which network the phone actually uses. Therefore, the main thrust of the proponents' arguments do not apply to TracFone. However, TracFone's handsets would fall within the language of the proposed exemption as it could permit removal of the system lock, and thus the proposed exemption is overbroad. TracFone provides a valuable service for its customers and provides a choice versus the post-paid cellular carriers, which is exactly what the proponents are seeking. Yet the proposed exemption's effects would be catastrophic for TracFone.

TracFone's business model relies on providing low-cost handsets to its customers. TracFone's target market includes college students, the elderly, and other individuals who are unwilling or unable to pay large, up-front costs associated with buying a cellular telephone. To keep these initial costs to the customer low, TracFone greatly subsidizes the cost of the handset and thereby allows the customer to purchase a TracFone handset for far less than its fair market value. TracFone subsidizes a handset's fair market value to entice customers into the TracFone system, with an average of a \$40-\$50 subsidy per phone. While this forces TracFone to accept an initial loss on the sale of that handset, TracFone anticipates that the customer will also purchase airtime from TracFone to operate the handset, and that the service fees and airtime purchases that the customer pays over the life of the handset will allow TracFone to recoup its initial subsidy.

TracFone faces a growing trend of individuals attempting to exploit its initial subsidy of its handsets. In a popular scheme, individuals purchase a TracFone handset at its subsidized, lower cost, and then defeat the security software that protects the handset's operating system from tampering. They delete the operating system from the handset ("reflashing") and then install another operating system onto the device. In this manner, an individual can create an unlocked, blank handset at the discounted cost of a subsidized TracFone handset. Because the subsidized cost is far less than the retail cost of an unlocked, blank handset, the individual conducting this scheme can resell the handset and reap an immediate windfall. By engaging in this scheme on a large scale, often involving hundreds or thousands of individual handsets, those engaging in this scheme can derive significant amounts of money at TracFone's expense. The

resale of these handsets is particularly popular in the Far East and Latin America because the handsets are compatible with local cellular networks and there is a significant demand for low-cost, unlocked handsets.

In short, the DMCA provides TracFone with recourse against those seeking to buy, remove the system lock, and then modify the handset, or reflash and resell its handsets. For this reason, TracFone brought a claim under the DMCA (among other claims) against a company conducting this type of operation in *TracFone v. Sol Enterprises*, a civil action filed in the Southern District of Florida. If the proposed exemption is granted, however, and TracFone is left without a significant tool to prevent this illicit conduct, TracFone will be forced to charge full retail value for its handsets. As stated above, this will significantly increase the cost of TracFone's handsets to customers. This will make TracFone's handsets prohibitively expensive for its target customers, and could effectively end TracFone's business.

a. The complete removal of the system lock allows copyright infringement

Once the system lock is removed, the components resident on the computer platform of the TracFone handset are all accessible, a person can then either remove one or more programs, flash the entire phone to make a "blank," or can alter the software or firmware to change the functionality of the phone. The proponents admit that full access to the resident software is needed to achieve their goals, as stated in their comments: "[c]ustomers who want to use their handsets on a different network must circumvent the locking software to access the computer program that allows the phone to operate." (emphasis added) [Comments of Wireless Alliance, p. 3]. Once the system lock is removed, full access the copyrighted code can be had, and the TracFone billing software and operating system components can be copied, altered, or partially or fully deleted, in violation of the TracFone's copyright. See, e.g. *US v Manzer*, 69 F.3d 222, 227 (8th Cir. 1995)(derivative computer program having 70% of copyrighted code held to be infringing).

b. TracFone would have to dramatically increase the price of the handset to the public

As shown above, TracFone subsidizes the cost of the TracFone handset to the consumer, such subsidy often exceeding \$100. (See, e.g. prices in Ex. A compared with prices in Exs. D,E) Without the ability to stop purchasers of the TracFone from altering the TracFone software and making blank handsets, TracFone could no longer afford to subsidize the initial sale of the handset.

ii. The Proponents for the Exemption Have Not Met Their Burden to Show a Substantial Adverse Effect upon Noninfringing Uses

To meet their burden to exempt a class of works from the prohibition on circumvention, the proponents must make a "a showing that the prohibition has or is likely to have a substantial adverse effect on noninfringing uses of a particular class of works." Notice of Inquiry, Federal Register: October 3, 2005 (Volume 70, Number 190). Further, "proponents of an exemption must provide evidence either that actual harm exists or that it is 'likely' to occur in the ensuing 3-year period. Actual instances of verifiable problems occurring in the marketplace are generally

necessary in order to prove actual harm.” *Id.* Here, the proponents have not shown any evidence of actual harm, and only made a general statement of harm to consumers and the environment. The proponents have simply not met their burden to support the requested exemption.

a. The proponents do not address the TracFone devices and business model, or the specific harm that TracFone would suffer

As discussed above, the arguments advanced by those supporting the proposed exemption simply to not apply to TracFone. During the Hearing, it was admitted by the Copyright Office that TracFone model “is a little different,” and the proponents counsel agreed. Hearing Transcript, pp. 54-55. TracFone does not limit its customers to obtaining cellular service from any particular carrier--the carrier is selected by TracFone and is unknown to the customer. TracFone merely restricts its customers by requiring that they purchase their cellular airtime from TracFone and, in exchange, TracFone subsidizes the cost of its handsets to make them affordable to its customers. The customer receives a handset at an artificially low cost; TracFone receives a potential customer for its services. The freedom of the prepaid model distinguishes TracFone from the contract based, post-paid cellular carriers telecommunications model who are the source of proponents’ complaints.

b. The proposed exemption is unnecessary to advance the interests of cellular customers.

Consumers of cellular services simply do not need the proposed exemption to obtain the freedoms that they seek. Instead, they currently have two available means at their disposal – (1) they can ask their carrier to unlock their handset; or (2) they can purchase an unlocked handset at full retail price.

The proponents of the proposed exemption have argued that the exemption is necessary to allow cellular customers to use their cellular handsets with a cellular carrier other than that which sold them the handset. Therefore, they argue, they should be allowed to defeat the security device that prevents the handset from accessing a competing carrier’s network at the customer’s sole discretion (which is something the TracFone handset cannot do because of the resident billing software). During the hearing on this proposed exemption, the proponents of the exemption conceded that cellular carriers will unlock their handsets at the customer’s request. See Hearing Transcript, pp. 18, 30. The customer might not know that cellular carriers make this option available to them, but no customer provided any evidence to suggest that carriers are unwilling to provide this service to their customers if asked. While TracFone does not unlock its handsets for customers due to its prepaid business model, many major carriers undisputedly do.

Additionally, unlocked cellular handsets are readily available to customers. If customers truly wish to obtain cellular handsets that allow the customer to change cellular carriers at will, the customer need only purchase an unlocked handset at full retail value. Numerous companies sell cellular handsets without limitations on the customer’s network choice in any way. See Exs. D,E. These handsets are not prohibitively expensive, however, and often require the customer to take the handset to a cellular carrier to gain access to the carrier’s network or purchase a separate SIM card. Most consumers ignore this option because they wish to avoid the high cost of the device, it requires the consumer to make an additional trip to the cellular carrier to activate the device, and, since the consumer will pay the service fees and rates for using the cellular carrier’s

network regardless of where the consumer obtained his handset, the consumer generally prefers to get the carrier-offered discount on the cost of the handset.

The proponents of the proposed exemption are being disingenuous. They do not truly seek freedom of choice in purchasing cellular handsets and service. They merely wish to obtain this freedom without paying for it. They argue that they should be able to take advantage of the subsidies and discounts made available by cellular carriers without assuming the corresponding obligations to the carriers that make those subsidies and discounts possible. The proponents wish to get something for nothing, and this desire does not justify an exemption from the prohibition.

c. The isolated incidents cited by the proponents are insufficient to warrant the requested exemption of all cellular device software locking mechanisms

The incidents cited by the proponents do not show actual harm. For example, the fact that commentator Pinkerton was unaware that unlocked GSM phones are available for purchase specifically for international usage does not show harm from handset software locks. Furthermore, the purported poor customer service of the carriers to unlock the handsets of their customers hardly is evidence of the carrier's refusing to do so. This evidence is insufficient to show either that actual harm exists or that it is likely to occur in the ensuing 3-year period after this rulemaking such that handset locks must be legally circumventable.

d. The case law cited by the proponents fail to establish any harm caused by application of the DMCA

Additionally, the case law cited by the proponents of the proposed exemption does not support the proponents' argument that the DMCA places the public at risk of legal liability. Confusingly, the proponents attempt to demonstrate this alleged harm by citing several cases in which courts have found that the defendant's conduct did not violate the DMCA. [Comments of Wireless Alliance, p. 9] See Chamberlain Group, Inc. v. Skylink Tech., Inc., 381 F.3d 1178 (Fed. Cir. 2004) (upholding the district court's grant of summary judgment in favor of the defendant on plaintiff's claim under the DMCA); Lexmark Int'l, Inc. v. Static Control Components, Inc., 387 F.3d 522, 554 (vacating the district court's grant of a preliminary injunction to the plaintiff because the plaintiff "failed to establish a likelihood of success on any of its claims, whether under the general copyright statute or under the DMCA."); Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc., 421 F.3d 1307, 1319 (Fed. Cir. 2005) (vacating the district court's grant of a preliminary injunction to the plaintiff because "[w]e conclude that it is unlikely that [plaintiff] will prevail on its claim" under the DMCA.). Because these cases did not involve violations of the DMCA, the court's application of the DMCA did not cause any defendant to suffer harm. At most, these cases might demonstrate that litigants assert claims under the DMCA in litigation. But they fail to show any actual harm suffered by any defendant as a result of claims under the DMCA that the courts have ultimately found to be meritless.

iii. Public Policy Strongly Disfavors the Removal of TracFone's Software from Cellular Devices

As described above, the proposed exemption would hinder TracFone in preventing those engaged in a scheme to buy TracFone handsets, defeat the security software contained on those handsets, reflash the handsets, and install a new operating system on them. The public has a clear interest in declaring this type of behavior illegal.

a. The proposed exemption simply allows members of the public to avoid paying the full price for an unlocked cellphone

Additionally, the public has an interest in ensuring the continued availability of TracFone's products. TracFone provides additional choices to consumers of cellular services. If consumers wish to pay the full retail cost of an unlocked, blank handset and use it on the network of their choosing, they may do so. See Exs. D,E. But if consumers wish to pay a lower, subsidized rate for a TracFone handset, and purchase airtime from TracFone, they may do that also. TracFone's business model thereby increases the options available to consumers. But if the proposed exemption is granted, and individuals are free to exploit TracFone's subsidy at will, TracFone will no longer be able to operate under its current business model, and consumers will lose the choice that TracFone currently provides.

b. There are many criminal enterprises that engage in the removal of the TracFone software

The reselling of "blank" TracFone handset creates a large black market and supports illegal endeavors. As several authorities have already identified, this scheme to unlock and resell TracFone's handsets represents an excellent method to raise illicit funds from the in blank handset trafficking. This particular funding mechanism has been implicated in supporting terrorism concerns. As with any black-market enterprise involving large amounts of unreported income, law-enforcement agencies have become increasingly suspicious of groups obtaining money through this scheme. See generally, Exs. B,C. This particular scheme is uniquely troublesome for law enforcement because the groups conducting it are not only deriving substantial funding through the black market, but also engaged in trafficking black-market goods across U.S. borders. The Department of Justice has already arrested several participants to identify whether they are connected to terrorist organizations or whether the illicit profits generated through their enterprises support terrorist activities. *Id.*

V. Conclusion

An exemption from the DMCA for “Computer programs that operate wireless telecommunications handsets. (Mobile firmware),” is not warranted. The proposed exemption simply allows persons to make an unlocked cellphone at the expense of TracFone or a carrier. Furthermore, allowing persons to circumvent the TracFone handset system locks would seriously harm TracFone’s business model and it’s customers. The proponents for the exemption have not met their burden and shown any substantial adverse effect upon noninfringing uses from the handset software locks, and requested exemption should not be granted.

Respectfully submitted:

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