

Assistant Secretary Larry Strickling  
National Telecommunications and Information Administration  
Herbert C. Hoover Building (HCHB)  
U.S. Department of Commerce / NTIA  
1401 Constitution Avenue, N.W.  
Washington, D.C. 20230

October 13, 2009

Dear Assistant Secretary Strickling:

The undersigned, collectively the *Ad Hoc* Public Interest Spectrum Coalition (PISC), urge you to support two proposed exemptions to the Digital Millennium Copyright Act (DMCA) relating to mobile phone handsets that are currently being considered by the U.S. Copyright Office.

The Librarian of Congress and U.S. Copyright Office will soon conclude the 2009 triennial DMCA rulemaking, as mandated by Congress in 17 U.S.C. § 1201(a)(1)(C). The statute requires the Copyright Office to consult with you prior to issuing its recommendations to the Librarian of Congress.

As explained further in the attached comments submitted by PISC to the Copyright Office, the proposed exemptions, identified as Classes 5A and 5D by the Copyright Office, would enhance consumer choice and promote competition in the wireless market. The exemption for Class 5A would make it clear that consumers need not fear DMCA liability for using the lawful applications of their choice on the phones they buy. The exemption for Class 5D would make it clear that consumers need not fear DMCA liability for “unlocking” their phones for use with the wireless carrier of their choice. Federal Communications Commission (FCC) Chairman Genachowski recently reiterated the FCC’s commitment to policies that promote open applications and open devices as key components of proper telecommunications policy for the Internet, and we believe these exemptions are a necessary part of that agenda.

These proposed DMCA exemptions will not, by themselves, solve all the problems created by handset exclusivity arrangements between carriers and handset manufacturers. But granting these exemptions is an essential part of the solution. Without these exemptions, dominant carriers and handset manufacturers can use the threat of DMCA liability to intimidate consumers, disadvantage independent and rural carriers, and hamper the efforts of the FCC to make policy in this area.

Thank you for your attention to this important issue.

Sincerely,

Mark Cooper, Consumer Federation of America

Joel Kelsey, Consumers Union

Ben Scott, Free Press

Andrew Jay Schwartzman, Media Access Project

Michael Calabrese, New America Foundation

Gigi Sohn, Public Knowledge

*Attachment: Reply Comment of the Ad Hoc Public Interest Spectrum Coalition, before the U.S. Copyright Office, Docket No. RM 2008-08.*

Cc Mr. Stacy Cheney, Counsel, NTIA

Mr. Daniel Weitzner, Associate Administrator, NTIA

Mr. Dennis Amari, Senior Policy Advisor, NTIA

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

*In the Matter of*  
**EXEMPTION TO THE PROHIBITION OF CIRCUMVENTION OF COPYRIGHT**  
**PROTECTION SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES**

**Docket No. RM 2008-08**

**Reply Comment of**  
**The *Ad Hoc* Public Interest Spectrum Coalition**

These reply comments are submitted on behalf of the *Ad Hoc* Public Interest Spectrum Coalition (PISC) in response to the Notice of Proposed Rulemaking (2008 NPRM) issued by the Copyright Office and Library of Congress regarding Exemptions to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies.<sup>1</sup>

PISC submits these reply comments in support of the following classes of works for which exemptions were proposed in the initial round of comments submitted in response to the NOI:

- *Computer programs that enable wireless telephone handsets to execute lawfully obtained software applications, where circumvention is accomplished for the sole purpose of enabling interoperability of such applications with computer programs on the telephone handset* (Comment #5A, proposed by Fred von Lohmann and Jennifer S. Granick of the Electronic Frontier Foundation).
- *Computer programs in the form of firmware that enable wireless telephone handsets to connect to a wireless telephone communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless telephone communication network, regardless of commercial motive* (Comment #5D, proposed by Jonathan Newman of the Wireless Alliance).

**I. Statement of Interest**

The *Ad Hoc* Public Interest Spectrum Coalition (PISC), comprised exclusively of nonprofit public interest organizations, advocates for the public interest in wireless policy debates before the Federal Communications Commission and other government entities. PISC includes the Consumer Federation of America, Consumers Union, Free Press, Media Access Project, the New America Foundation, and Public Knowledge.

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<sup>1</sup> *In the Matter of Exemption to the Prohibition of Circumvention of Copyright Protection Systems for Access Control Technologies*, Docket No. RM 2008-08, Notice of Proposed Rulemaking, 73 Fed. Reg. 79425 (Dec. 29, 2008), available at <http://www.copyright.gov/fedreg/2008/73fr79425.pdf> (2008 NPRM).

## II. Summary

The proposed exemptions, to enable the use of applications on wireless handsets and the connection of wireless handsets to networks, would confer substantial public interest benefits by permitting consumers of wireless services to use the applications and devices of their choice. Openness in wireless networks promotes innovative new applications and devices; promotes consumer choice and market efficiency for applications and devices; promotes competition in wireless services over service quality, reliability, and cost; and tracks recent developments in the law and policy of wireless networks at the Federal Communications Commission.

## III. Telecommunications Policy and Law Support the Granting of the Phone Unlocking and Applications Exemptions.

In 2005, the Federal Communications Commission released its Internet Policy Statement, adopting four principles to protect consumers and consumer choice on the Internet.<sup>2</sup> The statement included two provisions relevant here:

*To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement.*

*To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to connect their choice of legal devices that do not harm the network.<sup>3</sup>*

Through the Internet Policy Statement, the FCC established open applications and open devices as key components of proper telecommunications policy for the Internet. The open applications and open devices requirements of the Internet Policy Statement benefit consumers by empowering innovation and consumer choice in the markets for applications and devices. The principles of the Internet Policy Statement served as a guide in the FCC's adjudication of the Comcast complaint filed in November of 2007, which concerned Comcast's restrictions on the use of specific applications with Comcast Internet service.<sup>4</sup> Although the FCC has yet to adjudicate a similar complaint against a wireless carrier, Acting Chairman Copps (while serving

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<sup>2</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings; Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CC Docket Nos. 02-33, 01-337, 98-10, 95-20, GN Docket No. 00-185, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986 (2005) (*Internet Policy Statement*).

<sup>3</sup> *Id.* at para. 4.

<sup>4</sup> *In re Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling That Degrading an Internet Application Violates the FCC's Internet Policy Statement & Does Not Meet an Exception for "Reasonable Network Management,"* WC Docket No. 07-52, Memorandum Opinion and Order, FCC 08-183, at paras. 6-8 (Aug. 20, 2008) (*Comcast Order*).

as a Commissioner) has stated his belief that the Internet Policy Statement is applicable to wireless service providers.<sup>5</sup>

The FCC has imposed open access conditions for devices and for applications in one portion of the wireless spectrum auctioned in the 700 MHz auction in early 2008, the “C block.”<sup>6</sup> The FCC noted that open access conditions promote innovation in the markets for devices and applications.<sup>7</sup> Although this spectrum will not be available for use until the completion of the digital television transition, service providers who operate wireless networks in the spectrum will be required to permit consumers and businesses to develop and use the devices and applications of their choice on those networks.<sup>8</sup> Thus, to the extent that the DMCA may be enforced to restrict the use of applications or devices in this spectrum, it stands in opposition not only to good communications policy but also to established law.

Granting the applications exemption proposed by the Electronic Frontier Foundation and the handsets exemption proposed by the Wireless Alliance would promote open access to applications and devices in the wireless market, recognized by the FCC as key components of proper communications policy and as beneficial to innovation. Whether or not restrictions on applications and networks even fall under the protections offered by the DMCA, there is enough uncertainty surrounding their legal status to generate a substantial deterrent. To grant the exemptions would ameliorate this legal uncertainty. To deny the exemptions would frustrate communications policy and law by allowing wireless carriers to abuse the DMCA to violate consumer rights that the FCC has worked to preserve.

#### **IV. Granting the Phone Unlocking Exemption will Promote Competition in the Market for Wireless Services.**

Following a series of mergers of major nationwide and regional wireless carriers, the market for wireless services in 2009 reflects ever-shrinking levels of competition.<sup>9</sup> The Federal

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<sup>5</sup> *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 (2007) (concurring statement of Michael J. Copps, Commissioner) (“Now that IP-based wireless services are classified as Title I information services, the inescapable logical implication of our 2005 decision is that the right to attach network devices—as well as the three other principles of our policy statement—now applies to wireless broadband services.”).

<sup>6</sup> *Service Rules for the 698-746, 747-762, and 777-792 MHz Bands; Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones; Biennial Regulatory Review -- Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services; Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010; Declaratory Ruling on Reporting Requirement under Commission's Part I Anti-Collusion Rule*, WT Docket Nos. 07-166, 06-169, 06-150, 01-309, 03-264, 96-86, CC Docket No. 94-102, PS Docket No. 06-229, Second Report and Order, 22 FCC Rcd 15289, at para. 195 (2007) (700 MHz Second Report and Order).

<sup>7</sup> *Id.* at paras. 202-03.

<sup>8</sup> *Id.* at para. 195.

<sup>9</sup> *See, e.g.*, Comments of Public Interest Spectrum Coalition, WT Docket No. RM-11498, at p. 2-3 (PISC RTG Comments) (identifying the FCC's 3 key assumptions in its 2001 removal of spectrum caps, and contending that at least two if not all three are no longer valid in the current market for wireless services).

Communications Commission's eleventh annual report on wireless competition showed that the HHI level in all of the top 25 wireless markets nationwide had increased in 2006, and the most recent report, released in January of 2009 and based on data from 2007, indicated that there had been no improvement.<sup>10</sup> The two largest carriers, AT&T and Verizon, have a combined market share of over 60%, and together purchased a majority of all spectrum made available in the FCC's most recent spectrum auction.<sup>11</sup> The combination of major nationwide carrier ownership of vast portions of spectrum, increasing demand for high speed mobile Internet access requiring carriers to employ more spectrum to provide competitive service, and greater financial ability of major carriers to purchase new spectrum at auction, is a world characterized by a few winners and countless losers.

The unique market dynamic associated with exclusivity provisions in arrangements between carriers and device manufacturers, coupled with technological and legal barriers to using an independent device on alternate networks, aggravates the harms of consolidation by providing additional incentive for customers to remain with a wireless provider who may not offer the best service or the best rate.<sup>12</sup> Rural and small wireless carriers face substantial obstacles to gaining new customers by being unable to allow their customers to use desirable new smartphones like the Apple iPhone (exclusive to AT&T), the Blackberry Storm (exclusive to Verizon), or the Samsung Instinct (exclusive to Sprint).<sup>13</sup> The iPhone and other desirable new devices – all exclusively tied to major national carriers – drive increased demand of wireless broadband services and, thus, of wireless services in general.<sup>14</sup> And, lured in by exclusive device deals and held beyond the duration of the contract through the use of technological locks backed by the DMCA, dissatisfied users are left with a false choice between keeping the same provider in perpetuity, or abandoning their wireless device.

Granting the phone unlocking exemption sought by the Wireless Alliance is only part of the solution;<sup>15</sup> reform in telecommunications law must provide the rest.<sup>16</sup> But, granting this exemption is an essential part of the solution. With this, even absent telecommunications legal changes, after the termination or buyout of initial contracts consumers are able to take their

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<sup>10</sup> *Rural Telecommunications Group, Inc. Petition for Rulemaking To Impose a Spectrum Aggregation Limit on all Commercial Terrestrial Wireless Spectrum Below 2.3 GHz*, RM-11498, at p. 11 (filed July 16, 2008). The most recent CMRS Report states “we find there was virtually no change in average concentration in 2007.” *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 08-27, DA 09-54, at para. 46 (rel. Jan. 16, 2009).

<sup>11</sup> See, e.g., PISC RTG Comments at p. 3-5.

<sup>12</sup> See, e.g., *id.* at p. 4.

<sup>13</sup> See, e.g., *Rural Cellular Association Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers*, RM-11497, at p. i-ii, 8 (filed May 20, 2008).

<sup>14</sup> See, e.g., Ralph De La Vega, *AT&T Q3 2008 Earnings Call Transcript*, SEEKING ALPHA, Oct. 22, 2008, p. 2, available at <http://seekingalpha.com/article/101193-at-amp-t-q3-2008-earnings-call-transcript?page=2> (“iPhone 3G activations have exceeded our expectations and they have brought a significant halo effect which has driven store traffic and helped sales of other devices...”). See also Dan Frommer, *AT&T's Q4 iPhone Sales More Than Double*, SILICON ALLEY INSIDER, Jan. 28, 2009, available at <http://www.alleyinsider.com/2009/1/att-q4-iphone-sales>.

<sup>15</sup> We note, as does the initial comment by the Wireless Alliance, that a similar exemption was granted by the Copyright Office after its last rulemaking process. See, e.g., Comments of the Wireless Alliance, Docket No. RM 2008-08, p. 3 (Dec. 2, 2008), available at <http://www.copyright.gov/1201/2008/comments/wireless-alliance.pdf>.

<sup>16</sup> The FCC has sought comment on the petition of the Rural Cellular Association to prohibit exclusive device deals, and at the time of this writing the docket, RM-11497, remains open.

lawfully purchased device to the (technologically compatible) carrier of their choosing. The result is a substantial improvement in the level of competition for wireless services – competition over quality and cost of wireless service rather than extraneous market features – an improvement that would translate into substantial benefits for consumers. In the absence of these exemptions, the DMCA will chill the exercise of consumer choice, undermining FCC changes in telecommunications law and policy designed to promote innovation and competition.

## **V. Conclusion**

To promote the public interest in telecommunications services and to remain consistent with law and policy developments at the Federal Communications Commission, PISC urges the Copyright Office to grant the proposed exemptions.

Sincerely,

*Ad Hoc* Public Interest Spectrum Coalition

Mark Cooper, Consumer Federation of America  
Chris Murray, Consumers Union  
Ben Scott, Free Press  
Andrew Jay Schwartzman, Media Access Project  
Michael Calabrese, New America Foundation  
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