

Capital Reporting Company
Notice of Proposed Rulemaking: 37 C.F.R. Parts 201 05-31-2012

Before the

UNITED STATES COPYRIGHT ROYALTY JUDGES

Library of Congress

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Notice of Proposed Rulemaking      )
Exemption to Prohibition on        ) 37 C.F.R. Parts 201
Circumvention of Copyright         ) Docket No. RM 2011-7
Protecting Systems for Access       )
Control Technologies                )
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Washington, D.C.

Thursday, May 31, 2012

The following pages constitute the proceedings held in the above-captioned matter, held at the Library of Congress, Madison Building, 101 Independence Avenue, Southeast, Washington, D.C., before Cindy L. Sebo, RMR/CRR/CSR/RPR/CCR/RSA of Capital Reporting Company, a Notary Public in and for the District of Columbia, beginning at approximately 9:11 a.m.

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1 A P P E A R A N C E S

2 Copyright Royalty Judges

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4 ROBERT KASUNIC, ESQUIRE
5 STEPHEN RUWE, ESQUIRE
6 BENJAMIN GOLANT, ESQUIRE

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1 P R O C E E D I N G S

2 MR. CARSON: All right. Let's get
3 started.

4 This is the second of a series of four
5 hearings that the Copyright Office is conducting in
6 connection with what we call our 1201 rulemaking.
7 It's a rulemaking mandated under Section 1201 of
8 Title 17 of the U.S. Code.

9 Very brief overview:

10 Section 1201(a)(1) makes it unlawful to
11 circumvent a technological measure that controls
12 access to a copyrighted work. There are a number
13 of statutory exceptions, but in addition, there is
14 a process whereby following this rulemaking and a
15 recommendation by the Register of Copyrights, the
16 Librarian of Congress may exempt certain classes of
17 works from the prohibition of -- against
18 circumvention of technological measures that
19 control access with respect to persons who are
20 engaging in noninfringing uses when, as a result of
21 this rulemaking, the Register recommended, and the
22 Library has concluded, that noninfringing users of

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1 works in those particular classes are adversely
2 affected by the prohibition on circumvention of
3 technological measures to control access to those
4 works.

5 A. That's the brief version. I can give
6 you the two-hour version, but I think we'll move on
7 to the witnesses.

8 As I said, this is the second hearing
9 we've had. We will have two more next week. For
10 those of you who have bought a season ticket and
11 intend to attend all of these, the next hearing
12 will be at 9 o'clock on Monday in this room; and on
13 Tuesday, we'll be going across the street to the
14 Jefferson Building, in a room called the
15 Whittall Pavilion, which is on the ground floor.

16 If you enter the carriage entrance on
17 the ground floor of the Jefferson Building and then
18 turn left, once you get into the corridor on the
19 left, the Whittall Pavilion will be just to your
20 right.

21 The Register of Copyrights
22 unfortunately is ill today, so she will not be

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1 attending. We will have a transcript that she will
2 be able to review.

3 I'm David Carson. I'm general counsel.

4

5 To my right is Rob Kasunic, who -- I'm
6 not sure what your title is today, Rob. He's
7 deputy general counsel, but he's just been detailed
8 to be chief of the Performing Arts Division as
9 well, and has been a fixture in these rulemakings
10 since the beginning.

11 To his right is Stephen Ruwe, who is a
12 first-timer in this process and is an attorney
13 advisor in the Office of the General Counsel.

14 And to my left is Ben Golant, who is an
15 assistant general counsel, who is in his second
16 time around. So they're not quite so jaded as we
17 are.

18 And with that, I think we'll move on to
19 the only item on the agenda today. We did have a
20 second item. Gary Reback was going to be
21 testifying after this on Class 1, but he advised us
22 a few days ago that he would be unable to attend.

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1 So we're only going to be having a
2 hearing with respect to one class, which has been
3 designated as Class 6, and there are -- there's
4 actually a 6A, B and C, so there are three
5 variations on this class. Rather than read those
6 to you, I'll just read the existing class upon
7 which those are modeled, and to the extent it's
8 relevant and any of the witnesses think it's
9 pertinent, we can hear about the details and the
10 variations, as I said, to the extent that witnesses
11 decide they want to bring it up or to the extent
12 that in our questions we want to raise anything.

13 So the existing class is computer
14 programs in the form of firmware or software that
15 enable used wireless telephone handsets to connect
16 to a wireless telecommunications network when
17 circumvention is initiated by the owner of the copy
18 of the computer program, solely in order to connect
19 to a wireless telecommunications network and access
20 to the network is authorized by the operator of the
21 network.

22 So our witnesses this morning -- and I

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1 believe they will be testifying in this order, but
2 if I'm wrong, correct me -- are Laura Moy from the
3 Institute for Public Representation; Parul Desai of
4 the Communications Policy Counsel of the Consumers
5 Union; Steven Berry, president and CEO of RCA, the
6 Competitive Carriers Association; and Bruce Joseph
7 of Wiley Rein, counsel for CTIA - The Wireless
8 Association.

9 So we'll go in that order.

10 We've allocated 10 minutes to each
11 witness.

12 We have a fairly light schedule today,
13 so we might be a little bit flexible on that time
14 limit, but try to confine your initial remarks to
15 10 minutes.

16 Laura, we will start with you.

17 MS. MOY: Great. Thank you so much.

18 Good morning. My name is Laura Moy
19 and, as Mr. Carson just said, I'm a staff attorney
20 and a graduate teaching fellow at the Institute for
21 Public Representation at Georgetown Law. I'm
22 appearing today on behalf of Consumers Union in

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1 support of proposed exemption 6A.

2 So I'm going to start by telling a
3 little bit of a personal story to explain why
4 mobile device unlocking is important to me and why
5 I think that individual consumers should be able to
6 continue unlocking their devices on their own.

7 I'm going to date myself by telling
8 this story, but 10 years ago, when I was in
9 college, I decided to go to Spain for a couple of
10 months. I planned to spend the first month
11 enrolled in an intensive language course in Madrid,
12 and about a month after that, backpacking around
13 the country.

14 For my first month, I arranged it
15 through a study abroad program, but I didn't know
16 anyone else who was going, and the backpacking
17 portion I was going to do entirely on my own. So,
18 for safety reasons, it was obvious that I was going
19 to need a cell phone while I was there.

20 Having done some research in advance, I
21 knew that if I wanted a cell phone, it would have
22 to be a GSM phone.

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1 Luckily, I was a Cingular subscriber,
2 so I already had a GSM phone. I figured that it
3 would be okay for me to rely on just my roaming
4 service while I was there if I were only going to
5 do it occasionally, like to retrieve messages or
6 make just emergency phone calls, but if I wanted to
7 make frequent local calls -- local to Spain -- then
8 it would be insanely expensive for me to rely on
9 roaming.

10 So to mitigate the costs, I decided
11 that I would purchase a Spanish SIM card once I got
12 to Spain, and then when I installed it, that would
13 assign my phone a Spanish number and charge me
14 local rates. There was just one problem, which was
15 that my phone was locked to Cingular.

16 So being pretty tech minded, I sat down
17 with my laptop and the Internet and my phone and
18 within a couple hours, I had a fully functional
19 unlocked phone. So as I traveled, I used my
20 Spanish SIM card to call my host family in Madrid,
21 friends from my language program and hostels where
22 I was hoping to book rooms.

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1 When I wanted to check my text messages
2 from home, I swapped in my Cingular card.

3 This worked out for most of the
4 two months, until someone in Barcelona stole my
5 phone. Thankfully, that theft occurred toward the
6 tail end of my trip, so it wasn't terribly
7 problematic. But when I came home to Maryland, I
8 had no phone, and I had more than a year left on my
9 contract.

10 As a full-time student with a limited
11 budget, I really didn't want to purchase a new
12 phone, so I asked around to see if anyone I knew
13 had a used one they would be willing to give me.
14 My aunt in California reported that she had just
15 such a phone sitting around, a GSM phone, barely
16 used, still with the box and all the instructions.

17 So she mailed me the phone, and when it
18 got to me, I slipped in my Cingular SIM card.
19 Invalid SIM, it said. So, again, I had to unlock
20 the phone myself.

21 So in just a few months' time, I
22 unlocked two devices myself for the purpose of

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1 saving money, all the while continuing to make my
2 monthly payments to Cingular and never cancelling
3 my service contract.

4 The narrow exemption I speak in support
5 of today would only cover unlocking activities
6 similar to the ones I performed 10 years ago, those
7 initiated to remove a restriction that limits the
8 device's operability to a limited number of
9 networks or to connect to a wireless communications
10 network.

11 This proposed exemption would also
12 enable a person sending a used device to someone
13 else, as my aunt did for me, to unlock it before
14 shipping it. My colleague, Parul Desai, Consumers
15 Union's Communications Policy Counsel, will speak
16 more in just a few minutes about how highly
17 consumers value this ability.

18 Now, although we appear before you in a
19 copyright proceeding today, the primary reason that
20 mobile service carriers install mobile device locks
21 is not, in fact, copyright related.

22 As then Register Peters recognized in

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1 2006, quote, The purpose of the software lock
2 appears to be limited to restricting the owner's
3 use of the mobile handset to support a business
4 model, rather than to protect access to a
5 copyrighted work itself, unquote.

6 In 2010, Register Peters again noted
7 that mobile device locks, quote, do not appear to
8 be deployed to protect the interests of the
9 copyright owner or the value or integrity of the
10 copyrighted work; rather, they are used by wireless
11 carriers to limit the ability of subscribers to
12 switch to other carriers, a business decision that
13 has little to do with the interests protected under
14 copyright law, unquote.

15 Opponents to the unlocking exemption
16 have repeatedly asserted the importance of
17 Section 1201(a)(1) as a tool to combat bulk
18 reselling of unlocked mobile devices, sometimes
19 referred to as "subsidy theft."

20 But Section 1201(a)(1) is neither
21 necessary nor sufficient to accomplish this goal.
22 It is not necessary because those who oppose bulk

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1 reselling have an arsenal of other weapons at their
2 disposal.

3 And it is not sufficient, because in
4 spite of a number of successful lawsuits brought by
5 carriers against bulk resellers, bulk reselling
6 continues to be a problem.

7 In lawsuits against bulk resellers,
8 carriers regularly prevail on several types of
9 claims in addition to -- and sometimes all together
10 without -- 1201(a)(1) claims. Dozens of relevant
11 court decisions can be found available online at
12 stopcellphonetrafficking.com, but I will discuss
13 the details of only the three decisions posted
14 there that are dated in 2012.

15 This year, the Southern District of
16 Florida found bulk phone resellers liable for
17 trademark infringement, breach of contract,
18 copyright infringement, tortious interference,
19 conspiracy to induce breach of contract and unjust
20 enrichment, in addition to violation of both
21 Sections 1201(a)(1) and Section 1201(a)(2).

22 The Southern District of Texas found

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1 bulk phone resellers liable for breach of contract,
2 trademark infringement, contributory trademark
3 infringement, tortious interference, common law
4 unfair competition civil conspiracy and unjust
5 enrichment.

6 And the Eastern District of Michigan
7 found bulk resellers liable for trademark
8 infringement, violation of the Federal Computer
9 Fraud and Abuse Act, contributory trademark
10 infringement, common law fraud, common law unfair
11 competition, tortious interference, civil
12 conspiracy, unjust enrichment and conversion.

13 In the latter two of these three cases,
14 DMCA violations do not even appear to have been
15 claimed.

16 Nonetheless, as the comments filed on
17 behalf of CTIA pointed out, rampant subsidy theft
18 continues. This is in spite of the fact that CTIA
19 members spend enormous resources combating this
20 activity via litigation that, quote, has been
21 extremely expensive and has not succeeded in
22 stopping subsidy theft, unquote.

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1 So I think we need to weigh the costs
2 and benefits here.

3 If 1201(a)(1) is neither necessary nor
4 sufficient to combat bulk reselling, then the
5 benefit to carriers of striking down the unlocking
6 exemption would be relatively minimal, compared to
7 an enormous cost that would be borne by individual
8 consumers who would like to unlock their own mobile
9 devices and who currently have that ability.

10 Now, not only is the application of
11 1201(a)(1) to mobile device unlocking not necessary
12 to combat bulk reselling, but it is not necessary
13 to prevent illegal access to wireless networks
14 either. Opponents of the unlocking proposal have
15 asserted that a 1201(a)(1) exemption for mobile
16 device unlocking must include an express limitation
17 to situations in which access to the network is
18 authorized in order to avoid condoning illegal
19 access to wireless networks.

20 But even in the absence of 1201(a)(1),
21 illegal access to wireless networks is already just
22 that, illegal. A 1201(a)(1) exemption affects only

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1 the legality or illegality of a particular activity
2 with respect to 1201(a)(1). It does not render an
3 activity that is illegal under some other law,
4 legal.

5 So now I've talked at length about why
6 the benefit to carriers of striking down the
7 unlocking exemption would be minimal, at best.

8 My colleague, Parul Desai, will speak
9 in just a moment about the enormous adverse effects
10 that consumers would suffer if the unlocking
11 exemption were not renewed.

12 And with that, I'll conclude my
13 presentation.

14 Thank you.

15 MR. CARSON: Thank you very much.

16 Ms. Desai.

17 MS. DESAI: Good morning, and thank you
18 for having me appear today.

19 Again, my name is Parul Desai. I'm
20 Communications Policy Counsel for Consumers Union,
21 which is the policy and advocacy decision -- policy
22 and advocacy division of Consumer Reports Magazine.

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1 Laura gave you some great background on
2 why we think this is important. This is an issue
3 that's important for our organization.

4 Mobile device unlocking, we believe, is
5 a practical and widespread activity performed by
6 countless users of mobile device firmware and
7 software.

8 Without continuing the 1201(a)(1)
9 exemption covering unlocking, this valuable
10 activity would be chilled under the
11 anticircumvention provision.

12 If the Register of Copyrights declines
13 to extend that exemption for another three years,
14 users of mobile device firmware and software are
15 likely to be adversely affected by 1201(a)(1) in
16 their ability to unlock their mobile devices, which
17 is a noninfringing use. Thus, Consumers Union
18 strongly urges the Register to continue the
19 exemption.

20 One reason to continue the exemption is
21 because the marketplace is not a friendly
22 marketplace to consumers who wish to switch

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1 carriers. There are a number of barriers to
2 switching, but one barrier is that wireless
3 providers use software locks primarily to hamper a
4 customer's ability to switch to a competitor's
5 service network. In the words of the Register, in
6 the context of subsidy protection, quote, It is
7 apparent that the main function of the software
8 lock is to support a business model, and the
9 purpose of this rulemaking is not to protect such
10 an interest or to maintain the profitability of a
11 particular corporation or industry.

12 So not only will the exemption -- not
13 only would the exemption promote consumer choice,
14 consumers also, themselves, value portability.

15 Mobile device portability is central to
16 competition in the mobile marketplace. As mobile
17 communications become more integral to consumers'
18 lives, consumers need confidence that the devices
19 will work, regardless of the carrier or network.

20 Without portability, consumers might be
21 locked into a particular carrier for all the wrong
22 reasons. Competition will be undermined, which

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1 would ultimately harm consumers by producing
2 consumer choice.

3 As the Federal Communications
4 Commission has noted, quote, If enough consumers
5 have the ability and propensity to switch service
6 providers in response to a change in price or
7 nonprice factors, then mobile wireless service
8 providers will have an incentive to compete
9 vigorously to gain customers and retain their
10 current customers.

11 And consumers recognize the importance
12 of interoperability, and they demand the ability to
13 use their mobile devices across networks.

14 Ninety-seven percent of respondents in
15 the nationwide poll conducted at Consumers Union
16 expressed that consumers should be able to keep
17 their existing handsets when changing carriers,
18 while 59 percent stated that they would actually
19 like to take their existing devices with them to
20 another carrier. A staggering 88 percent said
21 their handset should work on any cellular network.

22 The ability to unlock a used device for

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1 operation on a nonnative network is particularly
2 important for low-income consumers who may not be
3 able to afford the hefty price tag on a brand-new
4 mobile device, or they may not qualify for the
5 credit-based postpaid service plans that offer
6 devices for low or zero subsidized up-front costs,
7 which customers then pay off later through monthly
8 fees.

9 Although cheap phones are often -- are
10 often offered with prepaid service plans, these
11 phones tend to be very basic devices that lack the
12 innovative features of cutting-edge smartphones.

13 Consequently, this leaves low-income
14 consumers who want smartphones comparable to their
15 higher income counterparts out of luck. These
16 consumers could be served by a robust secondhand
17 market for such devices.

18 Not only do consumers value this
19 ability, but they actually use this ability to
20 unlock their devices and take them with them from
21 one provider to another.

22 Take the example that Laura provided

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1 just a few minutes ago regarding her own
2 experience.

3 We also pulled additional examples from
4 e-mail messages sent over the Bethesda-Chevy Chase
5 Freecycle LISTSERV over the past several months.
6 Freecycle is a LISTSERV open to anyone in the area
7 who would prefer to recycle – typically by giving
8 away to someone else on the list – a used item
9 rather than throw it away. Participants give and
10 take furniture, paints, plants, toys, clothing,
11 pretty much anything you can think of.

12 Back in August, someone posted a
13 message looking for a used phone that her
14 sister-in-law would be able to carry -- looking for
15 a used phone that her sister-in-law would be able
16 to carry as an emergency contact number for her
17 kids in school. Someone else was looking for a
18 working phone because she had borrowed her mom's
19 phone and accidentally left it in her pocket when
20 she went swimming in the ocean.

21 This poster notified the list
22 three days later that she had received a phone.

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1 Thank you to everyone who responded, she wrote.

2 That was on September 5th.

3 By our count, since then there have
4 been an additional 16 messages circulated over the
5 Bethesda-Chevy Chase Freecycle LISTSERV either
6 offering or soliciting working used mobile devices.

7 For example, two posters asked to adopt
8 someone's used iPhone due to budgetary constraints.
9 I'll need one and can't afford it, so I'll take
10 what I can get, said the poster.

11 So as you can see, consumers find the
12 ability to unlock and reuse secondhand mobile
13 devices both valuable and useful. And, although
14 some carriers are willing, under some
15 circumstances, to unlock their customers' devices,
16 there are many circumstances under which carriers
17 are not willing to unlock their customers' devices.

18 In connection with this proceeding, we
19 inspected the publicly available unlocking policies
20 of AT&T, T-Mobile and Verizon Wireless, and
21 identified a number of strict limitations to those
22 policies.

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1 For example, AT&T and T-Mobile will
2 help some of their customers unlock their devices
3 to their networks, but only if the unlocking is
4 requested by an individual who is a current, or at
5 least a past, customer of the company.

6 This means that in the case of a
7 consumer who receives a used device free or at low
8 cost that is -- that is locked to another carrier,
9 as Laura explained she did in 2003, as far as we
10 can tell, it is not possible to get the carrier to
11 which the device is locked to provide the unlocking
12 service.

13 It is particularly difficult to get a
14 carrier to unlock certain kinds of devices,
15 including iPhones.

16 AT&T considers iPhones and other
17 certain devices, which is an undefined category,
18 not eligible to be unlocked.

19 Sprint will unlock the micro-SIM slot
20 on its iPhone 4S for subscribers who have been in
21 good standing for 90 days or more, but the unlocked
22 device will only accept an international SIM card,

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1 not one from a non-Sprint U.S. carrier, such as
2 AT&T.

3 Verizon states that the iPhone 4 is
4 configured only with the wireless service of
5 Verizon Wireless and may not work on another
6 carrier's network, even after completion of the
7 contract term.

8 Nor can consumers always purchase an
9 already unlocked device, even from a retail outlet
10 like Best Buy. As investigative attorney and
11 physical security specialist Marc Weber Tobias
12 explained in a blog post for Forbes last December,
13 even a new iPhone 4S purchased from Best Buy at the
14 unsubsidized price of \$800 for use on the Verizon
15 network can never be fully unlocked to be used on
16 multiple carriers within the U.S.

17 And, despite having the hardware
18 capacity to function on any GSM or CDMA network,
19 even a so-called unlocked iPhone 4S purchased
20 directly from Apple ships with the ability to
21 connect to GSM networks only.

22 Because many devices cannot be

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1 purchased completely unlocked, and carriers often
2 will not unlock devices to their networks,
3 consumers who are looking for other options in
4 purchasing devices are often left with no choice
5 but to do the unlocking themselves.

6 Thus, disallowing individual consumers
7 to unlock their own devices would have clear
8 adverse effects that would extend beyond the mere
9 hassle of consumers having to ask their carriers to
10 help them do something they could oftentimes
11 accomplish on their own.

12 Finally, as we have argued in our
13 proposal and comments, an unlocking exemption to
14 telephone handsets would be underinclusive and
15 cause unnecessary consumer confusion. The
16 relatively basic telephone handsets of
17 several years ago have evolved into a variety of
18 dynamic multipurpose devices.

19 Although the term "telephone handset"
20 at the time of coinage had a clear meaning,
21 technical -- technological advances have rendered
22 it all but obsolete. It no longer refers to a

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1 distinct and meaningful category of devices. It
2 would thus be more in line with current technology
3 and consumer expectations to define the exemption
4 in terms of mobile devices.

5 Thank you for your time this morning,
6 and I'll be happy to answer questions if you have
7 any.

8 MR. BERRY: Good morning.

9 Thank you. Thank you for the
10 opportunity.

11 My name is Steven K. Berry. I'm the
12 President and CEO of RCA - The Competitive Carriers
13 Association.

14 RCA is an association representing more
15 than 100 competitive wireless providers, most of
16 whom -- of which serve fewer than 500,000
17 customers. RCA has a keen interest in ensuring
18 that all customers, not merely those served by AT&T
19 and Verizon, can take advantage of cutting-edge
20 handsets and wireless devices available today.

21 The current exemption, to the
22 circumvention of copyright prevention systems,

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1 which allows customers to unlock their wireless
2 device to use on different networks has proven very
3 popular with consumers and promotes consumer
4 choice.

5 And let me identify a few items. The
6 exemption is a proconsumer/procompetition policy
7 decision. With the existence of exclusive handset
8 arrangements by the largest wireless carriers, many
9 RCA members continue to find it difficult to gain
10 access to the newest handsets their customers want.
11 Absent the exemption, consumer costs to unlock
12 devices will increase, if consumers are able to
13 unlock their devices at all.

14 Artificial device locking merely
15 protects the business model of certain wireless
16 carriers and doesn't really protect a copyright
17 interest.

18 Two: The benefits to consumers of an
19 unlocking exemption far outweigh the potential harm
20 to copyright holders. Without the exemptions,
21 consumers' fair use of content will diminish, or
22 consumers may even lose content for which they have

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1 already paid.

2 Three: The social benefits are untold.
3 The opportunity to donate unlocked devices to cell
4 phones for soldiers, battered women's shelters,
5 low-income, underprivileged or disabled communities
6 are all potential benefits of unlocked wireless
7 devices. These are all positive social benefit
8 opportunities that should not be foreclosed.

9 Four: The environmental impact is
10 positive and undeniable, extending the useful life
11 of a wireless device.

12 Five: Again, there is a significant
13 procompetitive benefit to all consumers when there
14 are more wireless choices.

15 So, accordingly, RCA strongly supports
16 extending, with slight modifications, the current
17 exemption allowing consumers to unlock their
18 wireless devices and associate those devices with
19 the wireless network of their choosing.

20 The modifications RCA proposes to the
21 exemption are intended to ensure that it covers the
22 full range of wireless devices, data and networks

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1 used by consumers today in this dynamic wireless
2 communications marketplace, and to ensure clarity
3 of the exemption purpose as technology evolves.

4 In July 2010, the Library of Congress,
5 acting on the recommendation of the Register of the
6 Copyrights, issued an order adopting several
7 exemptions from Section 1201(a)(1)(A) of the
8 Copyright Act, which prohibits the circumvention of
9 technological access controls protecting
10 copyrighted works.

11 One of those exemptions clarified that
12 consumers may actually circumvent the access
13 controls related to the following class of works.

14 And that class of works is, as partly
15 stated earlier, computer programs, in the form of
16 firmware or software, that enable used wireless
17 telephones -- telephone handsets to connect to a
18 wireless telecommunications network when
19 circumvention is initiated by the owner of a copy
20 of the program solely in order to connect to a
21 wireless telecommunications network and access to
22 the network is authorized by the operator of the

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1 network.

2 In adopting this exemption, which had
3 appeared in a slightly different form in a 2006
4 order, the Librarian permitted consumers to unlock
5 handsets they purchased from wireless carriers (or
6 their authorized dealers) in order to use them on
7 other carriers' networks.

8 The exemption thus allows, for
9 instance, an AT&T customer to switch to another
10 carrier while keeping the handset he or she
11 purchased from AT&T. It would also provide a
12 customer the opportunity to switch to AT&T using a
13 handset they bought from T-Mobile if AT&T had a
14 proconsumer current unlocking exemption policy. As
15 with other exemptions adopted in the order, this
16 current unlocking exemption would apply for three
17 years.

18 The unlocking exemption was clearly
19 justified and well documented in 2010, and the
20 Copyright Office should recommend extending the
21 unlocking exemption with some slight modifications
22 for another three years.

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1 The renewal of the current exemption in
2 2010 was a profoundly positive development for
3 competition and consumers, allowing wireless users
4 across the country to switch providers while
5 retaining their wireless devices. Those consumer
6 benefits will continue if the exemption is
7 extended.

8 Unlocking is particularly important for
9 rural, regional and smaller carriers that lack the
10 scope and scale to gain access to the latest, most
11 iconic devices directly from the equipment
12 manufacturers, which, in turn, prevents millions of
13 consumers from accessing the latest devices.

14 Conversely, a failure to extend the
15 exemption would have a substantial adverse effect
16 on noninfringing uses of wireless devices and their
17 associated firmware, software and data.

18 The Copyright Office recommendation and
19 the Librarian's previous decision to approve and
20 extend the exemption are precedential. The
21 previous detailed, well-reasoned decision to
22 continue the exemption was not only well documented

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1 with sound analytical basis, but should be
2 precedent setting. In fact, absent a significant
3 change in the circumstances, given the harmful
4 effects of allowing an unlocking exemption to
5 expire, the Copyright Office should adopt the
6 presumption that the exemption remains valid.
7 Opponents of the exemption should have to prove
8 otherwise.

9 Such an approach would be consistent
10 with the Copyright Act and would minimize
11 uncertainty for users of the wireless devices for
12 the future.

13 Indeed, the Register has found that
14 where similar facts are presented as here, the
15 Register is likely to reach a similar conclusion
16 with respect to the renewal of a particular
17 exemption.

18 Finally, in extending the unlocking
19 exemption, the Copyright Office should slightly
20 modify the wording to clarify types of works the
21 exemption covers to ensure that the exemption keeps
22 pace with ongoing technological innovation and

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1 clarify the purpose of the exemption.

2 This will ensure consumers will reap
3 the full intended benefits of the exception, and
4 those opposed to the exception could not easily
5 frustrate its implementation.

6 We urge the Copyright Office to include
7 exemption language of data used in the programs to
8 identify the other networks that we would connect
9 to, and also that wireless devices such as
10 smartphones, Tablets and other devices are intended
11 to be within the exemption, not just wireless
12 telephone handsets.

13 I also urge the Copyright Office to
14 modify the wireless telecommunications network
15 provision to wireless communications network in the
16 exemption language to more accurately reflect
17 current and future technologies in the wireless
18 marketplace.

19 I commend you for your previous
20 decisions in this regard. I thank you for the
21 opportunity to speak on behalf of all the
22 competitive carriers in the United States, urging

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1 your continued support for
2 proconsumer/procompetition policies by specifically
3 extending the unlocking provision from
4 Section 1201(a)(1)(A) of the Copyright Act.

5 Thank you, and I'll be more than happy
6 to answer your questions.

7 MR. CARSON: Thank you very much.

8 Mr. Joseph.

9 MR. JOSEPH: Good morning,
10 distinguished panelists. My name is Bruce Joseph,
11 and I'm here on behalf of CTIA – The Wireless
12 Association, an association that broadly represents
13 all sectors of the wireless communications
14 industry.

15 I appreciate the opportunity to appear
16 today to oppose the requested exemptions in
17 Class 6.

18 Our written comments and our reply
19 comments discuss at length why this class and these
20 varied versions of this class should be denied.

21 In my oral statement today, I would
22 like to focus on three points that are central in

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1 this proceeding.

2 One: The proponents have failed to
3 meet their burden of demonstrating the requisite
4 harm from the prohibition on the circumvention of
5 cell phone network locks.

6 Two: The proponents have failed to
7 prove that the harm that they assert relates to any
8 noninfringing use that they claim is being
9 interfered with. As the Register has made clear,
10 for example, in the 2010 recommendation at Page 10,
11 this is a distinct question from harm. You must
12 show both significant harm and that it is to a
13 noninfringing use.

14 And, three: Beyond the fact that there
15 is no justification for the requested class in any
16 form, there certainly is no justification for
17 expanding the class beyond that approved in 2010.
18 The proponents have failed to carry the burden of
19 proving that the expansions that they seek are
20 required to prevent substantial harm to any
21 noninfringing use. Indeed, the Register reviewed
22 and previously rejected many of the same requests

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1 in the past, and there has been no greater showing
2 of need here.

3 Let's start with harm.

4 The proponents bear the threshold
5 burden of proving that the prohibition on
6 circumvention is causing substantial harm. That's
7 out of the Register's recommendation at Page 10.

8 Here, proponents have made no showing
9 of an adverse effect on any use of a copyrighted
10 work that is properly within the scope of this
11 proceeding, much less a highly specific and strong
12 showing of the distinct verifiable and measurable
13 adverse effects that is the standard that applies
14 here. That comes from the Register's
15 recommendations in the past and the House Manager's
16 report on the legislation.

17 Arguments and unsupported statements
18 and comments or testimony are not evidence, and
19 they don't become evidence simply because they are
20 repeated and cited by another commenter.

21 Further, selected anecdotal examples
22 should be viewed with skepticism and should not be

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1 seen to constitute evidence of substantial or
2 widespread adverse effect.

3 I note that there was a reference to
4 isolated e-mails today that are not in the record
5 and that -- for which there has been no opportunity
6 to review them or respond to them.

7 The existence of the 2010 exemption
8 does not change this burden. Each triennial
9 proceeding is to be conducted de novo. As the
10 Register said in 2010, the fact that a class was
11 previously designated, and I quote, creates no
12 presumption that redesignation is appropriate, but
13 rather, the proponent of such a class must make a
14 prima facie case in each three-year period.

15 Moreover, the demonstrated harm must be
16 due to a prohibition on circumvention. Again, in
17 the words of the Register, adverse impacts that are
18 the results of factors other than the prohibition
19 are not within the scope of this rulemaking.

20 I was struck by Ms. Moy's testimony.
21 Her circumvention occurred in, apparently, 2002 or
22 2003, if she dates herself. She was clearly not

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1 deterred or harmed by any prohibition on
2 circumvention under Section 1201, so that story
3 shows no harm from the prohibition on
4 circumvention.

5 I was also struck that none of the
6 commenters have done anything to distinguish the
7 effects of any prohibition on circumvention or,
8 indeed, network locks from the effects that the FCC
9 identified in the reports that I believe Consumers
10 Union cited that prevents using phones on different
11 networks in many cases, including the use of
12 different technology, CDMA versus GSM; the use of
13 different bands, even among GSM carriers; the
14 optimization of the phone for different purposes.

15 No evidence in the record
16 differentiates the effect of the lock from all of
17 these other effects and, again, the burden is on
18 proponents.

19 Now, the harm asserted, but not proven,
20 by proponents here is that a user is prevented from
21 using a cell phone's operating system and, thus,
22 the phone, on a network other than the network to

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1 which the phone is locked.

2 But, again, as I've said, proponents
3 have prevented no -- presented no evidence that
4 consumers are suffering significant harm as a
5 result of a network lock or the prohibition.

6 At most, proponents have cited some
7 information to the effect that some people want to
8 unlock phones and, in some cases, are doing so. I
9 note in this regard, by the way, that the
10 Consumers Union poll that's cited is not in the
11 record, and there's no ability to test the validity
12 of its conclusions or whether the questions were
13 asked in a reasonable manner.

14 But more importantly, the desire to
15 circumvent a technological protection measure
16 that's protected by Section 1201 is not evidence of
17 harm. If that were the case, the widespread
18 prevalence of DCSS and the widespread use of DCSS
19 would support broad exemptions for unlocking DVDs,
20 which the Register has consistently rejected. And,
21 indeed, thinking logically, it would be absurd if
22 the prohibition on circumvention protected only

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1 locks that nobody wanted to circumvent. There
2 would be no point.

3 Moreover, even the asserted harm is not
4 properly cognizable for two reasons:

5 First, we hear a lot about consumer
6 choice here from the other side.

7 But the decision to purchase a locked
8 cell phone is entirely the choice of the consumer.
9 It's a choice that is made because a locked phone
10 comes with certain benefits, most commonly, a
11 substantially reduced price. In this record, even
12 more than in the past, CTIA has demonstrated that
13 there is an enormous selection of unlocked phones
14 that are freely available, both from wireless
15 service providers and from retail sellers, and I
16 cite our Exhibits A and B.

17 That selection is growing in late
18 April, and this was publicly announced; Google
19 announced that it was selling unlocked Android
20 phones through its online store, again, increasing
21 the availability of lawful unlocked phones.

22 Fundamentally, when a consumer freely

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1 chooses to purchase a locked phone, it is
2 unreasonable to claim that that lock is hurting the
3 consumer. The lock is part and parcel of the deal
4 the consumer made. That is not harm. There's no
5 right in the law to have it both ways.

6 Any allegedly adverse effect is the
7 direct result of the consumer's own choice, and as
8 the Register has repeatedly held, adverse impacts
9 that are the result of factors other than the
10 prohibition are not within the scope of this
11 rulemaking.

12 Second, the asserted harm is not
13 substantial. It is easily cured and is merely an
14 issue of convenience or small incremental cost, two
15 types of alleged harm that the Register has
16 consistently and explicitly rejected as justifying
17 a Section 1201 exemption.

18 As the record demonstrates, unlocked
19 phones are widely available, wholly independent of
20 the existing exemption. And carriers regularly
21 unlock phones. Contrary to Ms. Desai's testimony,
22 AT&T announced in early April that it would unlock

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1 its iPhones for bona fide customers following the
2 term commitment and for those who bought phones
3 without a term commitment.

4 Indeed, the Register's treatment of the
5 harm issue in connection with the 2010 cell phone
6 unlocking exemption stands in dramatic and
7 unsustainable contrast to the Register's treatment
8 of asserted harms in rejecting previously proposed
9 exemptions for the circumvention of CSS on DVDs and
10 certain streaming DRMs.

11 The Register described as a recurring
12 theme the desire on the part of some participants
13 to be able to gain access to protect the digital
14 works on platforms of their choosing rather than on
15 platforms offered by content providers. In the
16 Register's words, which should apply here,
17 Section 1201(a)(1)(C) was not intended to provide
18 relief to consumers who are unhappy with the
19 commercial terms on which copyright owners make
20 their works available or the platforms on which
21 they choose to distribute their works.

22 The Register found there was not

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1 cognizable harm where the user could access the
2 content in regular -- readily -- readily available
3 alternative ways or could purchase the works in
4 alternative formats. In that case, the need for an
5 exemption simply becomes a matter of convenience or
6 preference.

7 Here, the network is analogous to a
8 platform. In a great many cases, the same phone
9 operating system is available for use on different
10 networks.

11 Moreover, the same works are typically
12 available in unlocked form. As the Register found
13 also, it is not the purpose of this rulemaking to
14 provide consumers with the most cost-effective
15 means to obtain access to copyrighted works when
16 there are reasonably priced alternatives.

17 Indeed, the alternatives identified by
18 the Register in the DVD context, buying a separate
19 DVD player, buying a new operating system for their
20 computer or, indeed, even buying a new computer --
21 and those are at the Register's recommendations at
22 Pages 222 and 224 -- those options are often

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1 substantially more costly than the cost of
2 obtaining a new cell phone that is -- that is
3 compatible with the new network of choice.

4 Applying these criteria consistently,
5 as you, as an agency, are obligated to do, there is
6 no meaningful difference between a cell phone owner
7 who wants to use a phone's operating system on a
8 different network platform that's not authorized
9 and one who wants to view video content on a video
10 platform that is not authorized.

11 Indeed, I have heard complaints that
12 the cell phone locks are to protect business
13 models, but I challenge the proponents to
14 distinguish the region coding, for example, on DVDs
15 as existing to protect anything other than a
16 particular business model.

17 Moreover, I've been struck by the fact
18 that the other side has consistently said that cell
19 phone locks are only to protect business models,
20 not copyright interests, but I haven't heard
21 copyright interests identified on the proponents'
22 side. And remember, proponents bear the burden of

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1 demonstrating harm to a noninfringing use of a
2 copyrighted work in this proceeding.

3 So let's turn to that second point I
4 was going to address, noninfringing use.

5 Proponents have presented no evidence
6 that the circumvention they seek to support is to
7 avoid harm to a noninfringing use of a phone's
8 operating system.

9 First, their focus on whether the act
10 of circumvention itself is infringing is misplaced.
11 The primary issue here relates to the -- the
12 primary issue relating to noninfringing use is
13 whether the unauthorized use of the unlocked work,
14 the unlocked software, is noninfringing.

15 Now, to be sure, it is true that if
16 unlocking requires infringement, such as modifying
17 iPhone software, which is typically how iPhones are
18 unlocked, or modifying the TracPhone proprietary
19 engine, there can't be an exemption, because that's
20 not noninfringing. But the converse isn't true.
21 The use of the unlocked software must also be
22 infringing.

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1 Now, as Consumers Union admits, no
2 proponent has demonstrated or, for that matter,
3 even argued, that the use of the protected software
4 is fair use, so fair use is not at issue here. To
5 quote Consumers Union, CTIA correctly observes that
6 not one of the proponents even attempted to justify
7 their proposed unlocking activities as a fair use
8 under the Copyright Act.

9 So let's take fair use off the table.

10 Third, proponents -- or second,
11 proponents have not carried the burden of showing
12 that Section 117 authorizes the use of the software
13 that they seek because, among other reasons, they
14 have not shown that consumers own the copy of the
15 software that they seek to use.

16 The proponents indeed cite no evidence
17 to prove ownership. The Register, in the prior
18 proceeding, recognized that the issue of ownership
19 versus license of software is a nuanced question
20 that depends on more than the question of whether
21 somebody owns the material object in which the
22 software is embedded. The terms of the applicable

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1 agreement must be considered.

2 That same thought was reinforced by the
3 recent decision in Apple versus Psystar out of the
4 Ninth Circuit, which observed that software
5 licensing agreements, rather than sales, have
6 become ubiquitous, because they enable the licensor
7 to control the use of the copyrighted material.

8 But despite the recognized importance
9 of the underlying agreements pursuant to which the
10 software is distributed, not one proponent has
11 cited to any agreement by any carrier that sells
12 copies of its software. For that reason alone,
13 proponents have failed to carry their burden of
14 proof.

15 That failure is particularly acute
16 here, where CTIA has demonstrated that the
17 agreements of record, including the agreements of
18 all four of the largest wireless carriers, all
19 expressly license, rather than sell, the software,
20 and at least three of the four expressly limit its
21 use to authorized uses and prohibit a wide array of
22 unauthorized uses, and prohibit transfer or

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1 redistribution of the software.

2 Indeed, at least three, AT&T, Verizon
3 Wireless and T-Mobile, expressly retain the right
4 to change the software on the device; another clear
5 indication that the carrier owns the copy, not the
6 user.

7 Virgin Mobile's licenses are to the
8 same effect: retaining ownership, licensing it,
9 limiting its use, prohibiting distribution, and
10 retaining the right to modify the software remotely
11 and without notice, and providing that unauthorized
12 use terminates the license, and your continued use
13 will constitute copyright infringement.

14 AT&T, T-Mobile, Virgin Mobile and
15 Sprint all limit authorized use of the software --
16 all limit use to authorized use in connection with
17 the carrier's service.

18 Now, with respect, the Register in 2010
19 impermissibly eviscerated the regulatory burden of
20 proof when she shifted that burden to opponents,
21 because she presumed that, absent other evidence,
22 because the user owns the phone, he or she owns the

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1 software.

2 That shifting is inconsistent with the
3 facts of record, and it is inconsistent with the
4 Register's own recognition of how software
5 typically is licensed and distributed, and with the
6 Court's recognition in Apple versus Psystar, which
7 is an intervening decision, that licensing, rather
8 than sales, are ubiquitous.

9 Now, briefly addressing the copyright
10 misuse argument that I believe Consumers Union
11 makes -- it may also come from Metro PCS -- the
12 Ninth Circuit in Psystar made clear that that
13 doctrine is to be applied sparingly, and the main
14 point that easily dispatches with that argument is
15 that limitations on the use of the copyrighted work
16 itself is not misuse. Rather, in the words of the
17 Court, such limitations are firmly rooted in the
18 history of copyright law. And that is all we're
19 talking about here.

20 Now, with respect to my third point,
21 there has been no showing supporting any expansion
22 of the class.

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1 As weak as the supporting evidence is
2 for the classes adopted in 2010, proponents have
3 adduced no evidence supporting that expansion,
4 certainly nothing highly specific and strong,
5 showing distinct verifiable and measurable adverse
6 effect of any of the limitations that they now seek
7 to remove.

8 In addition, regarding the request to
9 extend the exemption to used cell phones, two of
10 the four proponents are wholly silent on that.
11 They just assert it should be. RCA only offers
12 argument, no evidence, and the only stated
13 justification from Consumers Union is so that
14 subscribers can get a new subsidized phone when
15 it's offered by a carrier, unlock it and sell it.

16 That is starkly different from the
17 asserted desire to foster the use of a phone on the
18 network of the consumer's choice.

19 By the way, that limitation was not
20 included in 2010 by the Register to ensure that the
21 1201 exemption did not foster in any way illicit
22 bulk reselling, which the Register found to be a

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1 serious matter that adversely affects the
2 marketplace and consumers.

3 And I have been informed that the
4 Register's clear statements against bulk reselling
5 have been very helpful in efforts to stop that
6 practice. We would urge their inclusion again, if
7 the Register recommends an exemption, which, of
8 course, we would hope that the Register would not.

9 With regard to extending the exemption
10 to devices other than cell phones and to networks
11 other than telecommunications networks, there is no
12 evidence presented that consumers are harmed by any
13 locks that may exist but haven't been shown to
14 exist on data-oriented devices such as Tablets,
15 that the harm is substantial or that they are tied
16 to any noninfringing use.

17 In addition, the effort to expand the
18 exemption to persons other than the owner of the
19 copy and for the purpose other than connection to a
20 network would eliminate any possible reliance on
21 Section 117, to the extent that's valid -- and we
22 argue, as you know, and we believe it's not -- and

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1 further, would foster bulk reselling and commercial
2 circumvention services, both of which should not be
3 encouraged by the Register in this proceeding.

4 In conclusion, I think I've said it too
5 many times, the proponents have not carried their
6 burden, and no exemption has been justified on the
7 record in this proceeding.

8 However, the proponents' primary
9 arguments are based on the alleged interests of
10 consumers, individual consumers, who want to use
11 their phones on the network of choice -- on their
12 network of choice -- and CTIA members do not
13 foresee a situation in which they would sue a bona
14 fide individual customer who circumvented a phone
15 lock solely in order to use his or her phone on
16 another service.

17 For that reason, although CTIA does not
18 believe a case has been made for an exemption, it
19 would not object to or oppose the targeted class
20 identified at the end of the CTIA comments.

21 Thank you very much for your
22 consideration.

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1 MR. CARSON: Thank you.

2 If any of the three of you people --
3 proponents have anything to say that is in direct
4 response to anything that Mr. Joseph said, I'll
5 give you two minutes each, but let's confine it to
6 that. I don't want you to start elaborating. I
7 just want you to respond directly if there is
8 anything he said that you would like to respond to.

9 Anyone?

10 MS. MOY: Sure.

11 I just wanted to take a moment to
12 respond to the discussion of the story that I told
13 about an event that happened 10 years ago.

14 It is true that at the time, there was
15 not yet an exemption for cell phone unlocking when
16 I unlocked two phones. And, as a college kid, I
17 was ignorant of the anticircumvention provision,
18 and I understand that ignorance is no excuse under
19 the law. Thankfully, the statute of limitations is
20 10 years.

21 And I also just wanted to respond
22 briefly to the -- to the points about the fair use

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1 and 117 arguments.

2 I just wanted to say it's our position
3 that in this context, Section 117 and fair use are
4 both just red herrings. We think that this is a
5 noninfringing use, not because it's fair use, but
6 because it is not infringing to begin with, and
7 that Section 117 is not necessary because this is a
8 noninfringing use, regardless of whether or not the
9 person conducting the mobile device unlocking is,
10 in fact, an owner of the copy of the software.

11 I'd be happy to talk about -- we've
12 discussed that at length in our proposal and
13 comments, but I'd be happy to talk about it more if
14 you have additional questions.

15 Yes. And we did -- we did, in fact,
16 cite to the poll providing the figures, the poll
17 that Consumers Union conducted where national
18 respondents stated a strong preference for the
19 ability to take their phones with them from one
20 carrier to another.

21 We did not include it as an appendix to
22 our comments; however, if -- if the Panel would

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1 like to -- would like to submit questions about
2 that posthearing, we would be happy to respond in
3 writing with -- with a copy of the report.

4 MR. CARSON: When you cited to it, did
5 you give us a link or anything, or did you just
6 refer to it or tell us how to find it?

7 MS. MOY: Sorry, there is no link.
8 There is a -- there is a footnote stating the title
9 of the survey or of the poll, and that is a
10 Consumers Union poll; so there is a name and a page
11 number, however, no link to a place where it might
12 be available on the Web.

13 MR. CARSON: Okay. All right. You may
14 get a question from us.

15 Mr. Berry.

16 MR. BERRY: Yes. I think I would like
17 to respond just a little.

18 It struck me as how do you measure this
19 collective harm? There's millions of consumers
20 that have unlocked their phones and gone to other
21 competitive carriers to fully utilize the device
22 that they paid for, they purchased, they have a

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1 fair use of its content that could be truncated or
2 would not be fully usable without the unlocking
3 capability, and it sort of struck me that
4 Mr. Joseph didn't assert any evidentiary material
5 that -- to support his contention that it's
6 nonconsequential.

7 I mean, how do you measure the
8 consequences of an individual, of a low-income
9 individual or a handicapped, or some disabled
10 individual who now has access to a handset for
11 nothing other than lifesaving purposes? How do you
12 measure that as inconsequential?

13 I don't know that you measure it in
14 terms of dollars. I think you measure it in terms
15 of social benefit to an entire class of people.
16 And if you multiply that by the millions of
17 consumers that have had the opportunity to get full
18 use of their -- the products that they've bought,
19 the copyright products that they have on their cell
20 phones that they downloaded and/or paid for
21 separately and distinct from the phone itself, then
22 I think you come into the hundreds, if not

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1 billions, of dollars of harm to consumers if this
2 exemption were not extended.

3 So I -- I think that, in that regard,
4 the noninfringing -- the noninfringing act is
5 clearly impaired, i.e., the user noninfringing act,
6 it would be clearly impaired by the lack of -- of
7 having the ability to unlock the phones.

8 That is clearly stated in the record.
9 It was stated on Page 154 of the Register's
10 proceedings in 2010, and I think that may have been
11 overlooked by Mr. Joseph also.

12 MR. CARSON: If you want the last word,
13 Bruce, before we get to questions, to respond
14 directly to anything that was just said, you can do
15 that now or move on to questions.

16 MR. JOSEPH: I would love to be able to
17 say I don't need the last word, but I was struck by
18 Mr. Berry's comments that we haven't proven
19 anything that we've said, and I would emphasize, as
20 the Register has emphasized, that the burden of
21 proof is on proponents.

22 I hear references and arguments about

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1 low-income and disabled individuals. I challenge
2 Mr. Berry to point to any evidence in the record
3 that a prohibition on unlocking wireless devices
4 has, in any way, shape or form harmed low-income or
5 disabled individuals.

6 You know, it's nice to make the
7 argument, but the burden is on the proponents to
8 adduce evidence, and there is no evidence.

9 MR. CARSON: All right. Let's go on to
10 questions, and I'll start.

11 I get the sense, certainly from CTIA's
12 comments and from what you said today, that it's at
13 least your position that, as compared to the last
14 time we conducted a rulemaking, the availability of
15 unlocked phones is greater than it was at the time
16 of the last rulemaking. If that's wrong, just say
17 it's wrong and I'll stop right there, but . . .

18 MR. JOSEPH: It is our position -- yes,
19 that is our position, and more to the point, it is
20 our position that there's even greater evidence in
21 the record -- which, of course, is what you all are
22 working with -- that the availability of unlocked

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1 phones, including very low price points for those
2 unlocked phones, are available.

3 MR. CARSON: Okay.

4 Can you elaborate a little bit about
5 what the record shows a little bit?

6 MR. JOSEPH: If you look at our
7 Exhibits A and B, we have examples of hundreds, I
8 believe, of unlocked phones and the prices that
9 they are offered for.

10 And I have just testified, which I --
11 what I believe is a fact, that -- that Google is
12 now making unlocked phones available, and that's a
13 matter of public record -- we can submit the
14 articles to that effect, if that's of interest --
15 and that Apple is now unlocking, for example,
16 iPhones; again, a matter of public record that we
17 could cite to and submit.

18 MR. CARSON: Okay.

19 And you've already talked about this,
20 and maybe you want to rest on what you've already
21 said, but before I turn to the proponents, I'd like
22 to give you an opportunity to explain to us what

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1 conclusions we should draw from that in terms of
2 where we end up on this particular proposal.

3 Then after you've done that, I'll ask
4 you folks to respond and tell us what -- A, feel
5 free to accept or attack the factual proposition we
6 just heard from Mr. Joseph, and then secondly,
7 assuming that that factual proposition is correct,
8 I'd like to know what you -- what conclusions you
9 think we should draw from that.

10 First, Bruce.

11 MR. JOSEPH: Well, with respect to the
12 conclusions, as I said, and I think I did say this
13 already, the burden is on proponents to show
14 substantial harm, and that harm goes beyond
15 inconvenience or some cost, as the Register has
16 repeatedly said, for example, in the DVD context,
17 given that -- given the availability of unlocked
18 phones.

19 It also, by the way, goes to the
20 question of whether any claimed harm is the result
21 of a network lock or whether it's the result of a
22 conscious decision made by the consumer to acquire

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1 a locked phone, as opposed to an unlocked phone,
2 which is freely available.

3 And under those circumstances, we
4 submit that there is no showing, and that the
5 Register cannot find that there has been a showing
6 of substantial harm that is due to the prohibition
7 of the circumvention on network locks.

8 MR. CARSON: Okay.

9 Now, any of you talk to the point?

10 MS. DESAI: I'll just briefly talk a
11 little bit about the -- the idea that consumers can
12 just easily take, you know -- consumer choice is so
13 great with respect to unlocked phones, and they can
14 just switch carriers based on purchasing an
15 unlocked phone.

16 I think Mr. Joseph fails to point out
17 that there are other restrictions that consumers
18 face, such as early termination fees, long-term
19 contracts, and so this is just one -- this is just
20 another way to lock consumers into a particular
21 carrier.

22 And we've seen that consumers do

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1 purchase their devices based on the carrier that
2 it's tied to, and so sometimes you have exclusive
3 contracts. Previously, the iPhone was an exclusive
4 contract.

5 And so the ability to take a phone with
6 a consumer, we believe, is an important choice
7 that, you know, we may not be able to quantify how
8 many consumers are doing it, but we don't know
9 whether or not the unlocked phones that are
10 available are phones that people actually want.
11 They may not be smartphones, they may be feature
12 phones.

13 So I think the idea that, you know,
14 giving consumers some locked phones, some unlocked
15 phones is enough, I don't think for us is really
16 giving consumers a choice. We think consumers
17 should have a choice, regardless of who carries the
18 phone and, you know, they may actually want one of
19 the locked phones and take it with them to a
20 cheaper carrier.

21 MR. CARSON: I think what I might have
22 heard you say, and I just want to make sure I get

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1 clarification here, are you suggesting that even
2 with respect to some of the unlocked phones, you're
3 still stuck with early termination fees and firm
4 commitments?

5 MS. DESAI: Yes.

6 MR. CARSON: Bruce, do you know if
7 that's the case?

8 MR. JOSEPH: It is true that if you
9 acquire a phone pursuant to a long-term commitment,
10 pursuant to a contract, and as a result, the
11 phone -- there are some carriers, for example, that
12 will subsidize phones that aren't locked.

13 MR. CARSON: Okay.

14 MR. JOSEPH: Verizon Wireless comes to
15 mind. They use other means to protect the subsidy
16 interest, but that doesn't mean that the lock isn't
17 also a valid means of protecting the interest that
18 was related to the development of that phone in the
19 first instance.

20 I mean, this brings us back to,
21 perhaps, the business model versus other question,
22 which I think is different than what the focus of

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1 your question is, which goes to harm.

2 But in some cases, the consumer opts to
3 enter into a contract; in other cases, the consumer
4 doesn't opt to enter into a contract.

5 In the case of prepaid phones -- which,
6 by the way, also extend beyond basic telephones --
7 the consumer doesn't have a contract. There is no
8 contractual provision, there is no early
9 termination fee. You just lose the service -- you
10 just stop. And if the phone were subsidized, only
11 the network lock exists as a means to ensure that
12 the carrier -- that the phone isn't purchased and
13 the subsidy isn't stolen for other uses.

14 But coming back to the question of
15 harm, if these other -- again, it's the proponents'
16 burden to demonstrate that the harm is due to the
17 network lock. And if it's the proponents'
18 testimony now that the harm is actually due to
19 these other factors, then they've actually
20 undermined their own case.

21 MR. CARSON: That sounds like a good
22 point.

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1 Can you explain why the termination
2 fees and the commitments make any difference
3 whatsoever in the case of the phone that is not
4 locked? Why is that pertinent to what we're here
5 about?

6 MS. MOY: Sorry. I'm sorry. I have --
7 I just have a slightly different thing that I
8 wanted to respond to there, which is that, sure,
9 there is information available to consumers with
10 respect to the long-term contracts, and they know
11 what they're getting into when they sign up for a
12 long-term contract with a locked phone and an early
13 termination fee.

14 However, the lock extends beyond the
15 term of the contract. Typically, a contract is one
16 year or two years, and often, consumers sign into
17 that deal. They might pay a couple hundred dollars
18 for the phone, and then, when the contract expires,
19 the fact that the phone is locked often keeps a
20 consumer coming back to the same service provider.

21 So the lock does serve a slightly
22 different purpose than the early termination fee

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1 and the long-term contracts, and the information
2 that is readily available to consumers in the
3 marketplace with respect to the early termination
4 fee and the long-term contract does not extend to
5 the mobile device lock which operates beyond the
6 two-year contract term.

7 MR. CARSON: Bruce.

8 MR. JOSEPH: Well, actually, with
9 respect, the information about the locks is also
10 widely available in the marketplace, and the
11 consumer who purchases a locked phone knows that
12 they are purchasing a locked phone.

13 And, moreover, I would urge you to
14 point to any evidence in the record supporting the
15 statements that you just made concerning what
16 consumers know and what consumers don't know.

17 MR. CARSON: Let me see if I can get
18 some clarification on what's in the record on the
19 following point, which relates to this. And I've
20 heard some assertions, but I'm not quite sure how
21 categorical they are and whether there are
22 exceptions.

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1 An impression that I get from what I've
2 read and heard from CTIA -- and I'm not necessarily
3 saying that's what you're saying, I'm saying it's
4 an impression I get -- is that once the contractual
5 commitment is up, as a general proposition, the
6 carriers will unlock the phone.

7 But maybe that's not always -- I don't
8 know -- but to the extent any of you can help me on
9 that, that's pertinent to the point you just made,
10 so . . .

11 MR. JOSEPH: Well, I think since
12 it's -- your question is directed to the impression
13 you get from our comments, I believe that is a
14 correct impression. Once the contract is up, as a
15 general matter, but not as in ubiquitous
16 universe -- you know, in all cases, the carrier
17 will unlock the phone.

18 As our comments made clear that there
19 are certain cases where there's -- the carriers
20 have invested in the development of the phone and
21 the software, and as part of the inducement to do
22 that, they have an exclusive distribution

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1 agreement, and there are at least -- it was my
2 understanding that there were at least some
3 carriers, or there was at least one carrier that up
4 to a point did not unlock phones for which they
5 were the exclusive distributor. They had --
6 because of the investment that they had made in
7 bringing that phone and its functioning software,
8 which is a copyright interest, I might add, to
9 market.

10 Now, I say that with a major caveat,
11 and that is, I have some reason to believe -- and
12 I'd like to check on this for the record, I just
13 don't know as I sit here -- that the policy of that
14 carrier with respect to unlocking the iPhone now
15 actually extends beyond the iPhone to other phones.
16 I just don't know that for sure as I sit here, so I
17 don't want to misrepresent anything.

18 MR. CARSON: Okay. Then please do
19 follow up on that for us.

20 MR. BERRY: If I may have an
21 opportunity.

22 MR. CARSON: Yeah.

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1 MR. BERRY: First, on the harm, I go
2 back -- the record is replete with the harm. The
3 terminating a right of a consumer on an
4 noninfringing act is, in fact, harm. And that
5 will, in fact, be truncated or terminated.

6 Access to the -- of the consumer to the
7 content which they paid for and is housed on that
8 device is, in fact, a right that's being truncated
9 and, in many instances, I think most people would
10 say if they don't have access to the information on
11 the phone that -- on their phone, their personal
12 phone, that is, in fact, a severe, you know,
13 impairment of their expectations for that device.

14 Going to the question you asked
15 originally, is -- are there other carriers --
16 excuse me -- are there devices that are being
17 unlocked, yes, there are more devices now than
18 there were three years ago, but I would presume --
19 I would say that without your acts, without the act
20 of the Register providing this unlocking provision,
21 there is a high probability that -- that there
22 would not be any unlocked phones by the largest

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1 carriers that dominate the OEM -- the manufacturers
2 with the handsets.

3 I think your policy of allowing
4 unlocked phones has actually changed the
5 marketplace and changed the wireless carriers'
6 expectations.

7 My carriers distinguish themselves on
8 the ability for personal service to customers.
9 That's why they're willing to take the time, effort
10 and energy to allow other devices from other
11 carriers to come on their network and they service
12 that -- that customer.

13 Without the unlocking provision, I
14 think you would lessen competition, we would have
15 fewer opportunities for our smaller carriers to
16 distinguish themselves in the market, and customers
17 and consumers, especially consumers, would have
18 fewer choices, and they would have less benefits.

19 I don't know that you would have
20 unlocked devices from the larger carriers had you
21 not made the decision originally to say this is, in
22 fact, a right that the consumers should, in fact,

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1 have.

2 Now, whether you want to measure harm
3 by an empirical, you know, study -- and I
4 understand the shift to the burden here, but what
5 I've suggested to Mr. Joseph is he's suggested that
6 there were no consequential evidence of -- of harm.

7 You can't just make a statement without
8 also being able to support it. And -- just like
9 he's expecting of us.

10 I can say that there's millions of
11 consumers right now on my carriers' networks that
12 have devices that they have unlocked and brought to
13 our network. They have benefited economically from
14 that, because they have not had to purchase another
15 device. And they have enjoyed full use of the
16 content, and they did, in fact, be -- were able
17 to -- to act on a noninfringing act, i.e., take
18 their phone to another carrier. Those are all well
19 documented in -- in the record of 2010, and I think
20 the record of -- that's currently before you.

21 So I -- I -- I take issue with that,
22 but I really believe you have had a greater impact

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1 than you may think on the issue of are there
2 unlocked devices on the market today. And I think
3 your actions, in fact, have contributed greatly to
4 that industry policy or practice of unlocking
5 phones.

6 And I disagree that there are carriers
7 that unlock phones, but there are carriers, large
8 carriers, that do not unlock all the phones and
9 will not unlock all the phones that you're
10 requested by a consumer to unlock.

11 MS. MOY: Right. If I can just add a
12 couple points.

13 We did detail the publicly available
14 unlocking policies of a few carriers in our reply
15 comments. However, we were completely unable to
16 find a publicly available unlocking policy for
17 Sprint. So I -- I don't know, maybe -- maybe there
18 is one, but I was unable to find it.

19 And there are a number of terrible
20 limitations on these unlocking policies.

21 For example, T-Mobile will only unlock
22 one phone for a customer every 90 days or more. So

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1 if I have -- if I have two unused old T-Mobile
2 phones sitting in a drawer and I'd like to give
3 them to friends, I have to wait 90 days between
4 unlocking them if I want to go to T-Mobile to do it
5 for me.

6 And another thing is that I can't give
7 my phone to -- to a friend who's not a T-Mobile
8 subscriber and have that person go to T-Mobile to
9 get it unlocked. I have to do it myself, as the
10 T-Mobile customer. And someone who's not a
11 customer certainly can't go to the carrier and ask
12 them to unlock a phone that is already locked to
13 the carrier if that person is not a customer.

14 MR. CARSON: Anything else, Bruce? Or
15 move on to the next question?

16 MR. JOSEPH: Well, let's see.

17 As far as having to wait 90 days or get
18 a phone unlocked and not be a source of multiple
19 unlocked phones with 90 days, it's hard for me to
20 understand how that is characterized as a terrible
21 restriction. The goal is to be sure that you're
22 unlocking phones for bona fide customers who have

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1 fulfilled whatever obligation -- actually, they
2 haven't even fulfilled -- T-Mobile doesn't even
3 require that the subscriber have fulfilled
4 contractual obligations. T-Mobile's policy says it
5 will unlock even if you're still under a contract.

6 With respect to the speculation -- and
7 it is only that -- that the exemption that the
8 Register has started granting in 2006 has fostered
9 the carriers', or has promoted the carriers'
10 actions in unlocking, that strikes me -- and,
11 again, there's no evidence to support causation.
12 You have a coincidence in time, but you have many
13 other factors at play.

14 And I think the fact that there's no
15 instance of a carrier ever suing a customer for
16 unlocking their phone for connection on a network,
17 which is what was within the scope of the
18 exemption, shows that the fact of the exemption,
19 used narrowly, has not been what has caused the
20 carriers to unlock their phones. There's just no
21 evidence of that.

22 MR. CARSON: Okay. One final question

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1 on this topic, then we'll move on.

2 So the record shows that there are
3 certainly a wide number of devices that are
4 available in unlocked form.

5 Can anyone identify any particular
6 devices that are not available in an unlocked form
7 and that have features or that, for some reason, a
8 consumer would want to have that device in
9 particular unlocked as opposed to some other device
10 that is out there in unlocked form?

11 I don't know if I made myself clear,
12 but the point basically being there are all sorts
13 of alternatives, apparently, for unlocked devices.
14 Why, if a particular model isn't available in
15 unlocked form, does that make a difference?

16 MR. BERRY: I would -- in the Metro PCS
17 filing, there is a statement in there. I don't
18 think any of the exclusive devices that AT&T has in
19 its portfolio are unlocked.

20 There are other ways to restrict access
21 to the phone that are not related to the locking
22 and unlocking, which is a practice of uniquely

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1 creating specifications for the phones so that they
2 cannot be used on any other network. And that's
3 not before us here, I understand that, but it does
4 show a tendency or a practice of the largest
5 carriers to exclude competitive opportunities from
6 all other carriers.

7 Unlocking of handsets of the iconic
8 devices that carriers, the largest carriers, have
9 exclusive rights to, continues to be a
10 difficulty -- can create a difficulty for smaller
11 carriers getting access to those devices, even if
12 they were to purchase them from the OEMs.

13 So at least we know that that is not a
14 policy of AT&T to unlock their exclusive handsets
15 that I'm aware of.

16 There's also some iPads that you could
17 say that are locked and -- and cannot operate on
18 another network. I think the reason for that may
19 be more how they're designed technically on purpose
20 than just a mere unlocking process.

21 But, again, the largest carriers have
22 shown a great propensity to ensure that their

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1 unique devices are, in fact, not available to
2 other -- for other competitive carriers to utilize.
3 And on T-Mobile, itself, I understand T-Mobile does
4 value the benefit. I think there's over
5 1.2 million unlocked devices on the T-Mobile
6 network now.

7 MS. MOY: And as of the time that we
8 filed our reply comments, which was in the
9 beginning of March, even if you purchased an
10 unlocked iPhone 4S directly from -- I'm sorry,
11 directly from Apple, it still would only be
12 unlocked for GSM networks and not for CDMA.

13 So I -- I mean, unless that's changed
14 in the past few months, it's -- although the phone
15 has the hardware capability to connect to both GSM
16 networks and CDMA networks, it's my understanding
17 that if you purchase a phone unlocked -- quote,
18 unlocked, from the Apple store, it's not fully
19 unlocked for both types of networks.

20 MR. CARSON: All right. Let's move on
21 to another topic.

22 One of the basic things one has to

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1 address in this rulemaking is whether the use in
2 question is a noninfringing use.

3 I may have missed it, Bruce, but I
4 don't think I identified anything in your comments
5 pointing out to any of the desired uses that the
6 proponents are suggesting are -- are the driving
7 force behind this request for an exemption, that
8 any of those uses are infringing. But I may have
9 missed it, so here's your opportunity to tell me
10 how what they want to do would result in acts of
11 infringement.

12 MR. JOSEPH: Sure.

13 When you turn on a cell phone, you
14 typically need to copy significant chunks, if not
15 all, of the operating system into RAM, that is,
16 making a copy.

17 And the making of that copy -- putting
18 aside the issue over Section 117, which we can
19 discuss separately -- but the making of that copy
20 has uniformly been held to be within the scope of
21 the rights of the copyright owner. And the
22 agreements that are in the record typically

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1 limit -- and I can expand on those with respect to
2 those that aren't in the record -- at least of the
3 carriers that I have described today, typically
4 limit the authorization that's granted by the
5 licenses to the use of the software in connection
6 with the carriers' service, so that making the
7 reproduction of that software is infringing.

8 Did we argue that explicitly in our
9 comments? No, because none of the proponents in
10 their opening case made the argument that that
11 wasn't infringing. I saw other arguments made, but
12 we responded to the arguments where they have the
13 burden of proof.

14 We can certainly -- and I'm making that
15 point now, and it's consistent with what we have in
16 our comments, where we take the position that the
17 uses are infringing uses. But it does come from
18 the reproduction of the operating system into the
19 RAM of the phone.

20 MR. CARSON: Okay. Let's turn to that,
21 then.

22 117 is obviously another issue, and

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1 Bruce's point of view on how it works probably
2 differs from yours, but without getting into
3 that -- we may get into it later -- is it your
4 position that, apart from Section 117, the act of
5 turning on your cell phone and loading the
6 operating system when you are using it with a
7 network other than the network that your license
8 permits you to use it on is or is not an infringing
9 act?

10 MS. MOY: It's our position that that
11 is a noninfringing act, in large part because we
12 believe that the terms of the service -- of the
13 software license agreement that would prohibit a
14 user from turning on the cell phone that he or she
15 has purchased -- has lawfully purchased with the
16 software already installed on it, after connecting
17 to another network, would be an enforceable term of
18 the contract due to the doctrine of copyright
19 misuse.

20 It's an anticompetitive term. It
21 stifles competition, and I really can't imagine a
22 term of a license that would be more

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1 competition-stifling than that particular term.

2 MR. CARSON: Okay. So I assume -- I
3 believe you're also relying on Section 117,
4 correct?

5 MS. MOY: Yes, in part.

6 MR. CARSON: Okay.

7 So 117, copyright misuse. Are those
8 the only two reasons why you would say that that
9 use is noninfringing?

10 MS. MOY: Well, we also -- so my
11 understanding is that you're discussing now after
12 the software has already been altered, just turning
13 on the phone, or are you asking --

14 MR. CARSON: I don't think Bruce is
15 talking about alteration --

16 MS. MOY: -- questions about --

17 MR. CARSON: -- although we certainly
18 understand that's one scenario.

19 MS. MOY: -- placement of the -- of the
20 variables?

21 MR. CARSON: Sorry.

22 Well, we're talking over each other.

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1 Why don't you repeat what you said so the reporter
2 gets it all, and then I'll respond.

3 MS. MOY: Sorry. So the other portion
4 of our argument about why unlocking of phone and
5 using it to connect to another carrier's network
6 constitutes a noninfringing use is because the --
7 the -- reflashing a phone and injecting
8 particular -- I'm sorry, this is -- I'm not a
9 technologist, and it's difficult for me to talk
10 about these issues.

11 But overwriting some of the variables
12 that the software uses to connect to a carrier's
13 network with different variables to enable it to
14 connect to another carrier's network are
15 alterations, if you'd like to call them that, that
16 do not rise to the level of constituting a
17 derivative work.

18 So the derivative -- we believe that
19 the derivative work right is not infringed, and we
20 believe that the reproduction right is not
21 infringed either, under the copyright misuse
22 doctrine.

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1 MR. GOLANT: So you're saying when you
2 reflash, you clear out all those variables, leaving
3 a blank slate, and then you impose your own
4 variables by -- when you switch to another network
5 with a new kind of system to use that phone in that
6 network?

7 MS. MOY: Yes, and that those
8 variables, themselves, are unprotectable elements
9 representing mere ideas rather than protectable
10 expression.

11 MR. CARSON: Okay. We've gotten into
12 the question of derivative works, Bruce. Do you
13 want to speak to that issue?

14 MR. JOSEPH: I do.

15 I -- I should have added that.
16 Remember in my testimony-in-chief, I spoke about
17 both the error of focusing -- the fact that you
18 need to be noninfringing in two respects. First,
19 you need to be noninfringing in the context of the
20 act of circumvention.

21 And I identified two situations where
22 there -- it's my understanding that there are

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1 modifications that are infringing modifications.
2 One of those is the typical means by which iPhones
3 are unlocked, which involves changing either the
4 boot loader software or the operating system
5 software in ways that go -- in terms of their
6 authentication functionality in ways that go beyond
7 mere addition of variables.

8 Secondly, I believe that's also the
9 case with respect to the TracPhone proprietary
10 engine.

11 But when you get beyond the question of
12 the act of circumvention, the second order question
13 is whether the use of the software after it has
14 been unlocked -- in other words, after these
15 variables have been changed -- is infringing, and I
16 don't think Ms. Moy addresses that issue when she
17 argues that simply changing variables or reflashing
18 those variables is noninfringing.

19 It may be that in certain
20 circumstances, the act of circumvention is
21 noninfringing, but, again, that's not primarily the
22 right question. The right question is whether the

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1 use of the copyrighted work, after it has been
2 unlocked, is infringing, and that doesn't go to
3 that point.

4 MR. CARSON: The right you're referring
5 to in that latter case is, again, the reproduction
6 right, I assume; is that correct?

7 MR. JOSEPH: In the latter case, yes.

8 MR. CARSON: Okay. All right.

9 MR. JOSEPH: And in the former case,
10 it's the derivative work right, yeah.

11 MR. CARSON: The derivative right.

12 Any more comments on reproduction
13 right, derivative work right from anyone?

14 MR. BERRY: You know, I'm not a patent
15 expert either, but I clearly --

16 MR. CARSON: No one in this room is, I
17 suspect.

18 MR. BERRY: -- I don't believe that
19 we're talking about an infringing act, and in my
20 mind, you unlock the handset, which is under the
21 exemption, and you utilize the device on another
22 network, and it's fairly -- I mean, it's fairly

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1 focused and it's very narrow, and you use the
2 device as you had used it earlier.

3 There can -- there can be, you know,
4 additional data that you may have to -- to use in
5 the process of unlocking a device. You know, as
6 everyone gets smarter on how they protect their
7 device and keep it to -- from being unlocked --
8 which we have talked a little about technological
9 innovation -- the main purpose and the main focus
10 of the exemption is very narrow and very specific,
11 and I don't know that -- that you get to that point
12 of -- of full utilization of -- beyond a 117
13 derivative works.

14 MR. CARSON: All right.

15 MS. MOY: Sorry. I have a quick
16 question here, which is, so then -- so then,
17 Mr. Joseph, am I clear in thinking that it's your
18 position that if a user of a mobile device has an
19 unlocked device and is using that device currently
20 to connect to a network that is not the native
21 network, that that consumer is engaging in
22 copyright infringement?

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1 MR. JOSEPH: That would depend on the
2 terms of the license governing the software that
3 the consumer is using, whether the consumer is a
4 licensee, and whether the action is consistent with
5 the license.

6 But, fortunately, we're not here --
7 there is -- we're not here to -- to consider --
8 well, let me withdraw that.

9 So I think the answer would be,
10 depending on the state of the license and what the
11 consumer is authorized to do, yes.

12 MS. MOY: So for a carrier that unlocks
13 a phone for one of their consumers, are they
14 engaging in contributory copyright infringement?

15 MR. JOSEPH: Since the carrier is the
16 party that granted the license, it is not
17 infringing when the carrier unlocks the phone for
18 its licensee for use on other networks. That's, if
19 not explicitly authorized, implicitly authorized.

20 MR. CARSON: Okay. Let's talk about
21 the licenses.

22 Bruce, you've given us examples of four

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1 customer agreements, one from each of the major
2 carriers. But it's not clear to me whether those
3 four provisions you've given us are standard
4 provisions in all contracts for all four of the
5 major carriers, or are these just examples of
6 certain contracts where there may be all sorts of
7 variations that go off in different directions?

8 MR. JOSEPH: I believe those are the
9 standard terms of service that would apply
10 generally to the carriers' services. And we can
11 expand those.

12 I think I've also since received
13 information regarding Virgin Mobile's standard
14 terms of service and some of the additional
15 provisions that are cited in the terms of service
16 in our comments, but that we didn't quote in
17 detail. Those are available to you. But it's my
18 understanding those are standard terms of service
19 that generally apply.

20 MR. CARSON: Okay. And isn't it true
21 that in the absence of such provisions in license
22 agreements, someone who bought a cell phone which

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1 had the software on it would, in fact, own the copy
2 of that software that was on the cell phone?

3 MR. JOSEPH: I don't know in the
4 abstract the answer to that question. I think it
5 would depend in part on the custom and the trade
6 and the industry. It wouldn't require a specific
7 document, but here, where we have specific
8 documents, they certainly govern.

9 MR. KASUNIC: Just with regard to that,
10 what if there is the -- the term of the contract is
11 fulfilled or, for instance, the purchaser of the
12 phone -- the purchaser of the phone gives the --
13 gives the phone away, so there's no longer any
14 privity for that contract?

15 MR. JOSEPH: Well, then you're
16 confusing, I would respectfully submit, copyright
17 infringement with breach of contract. When
18 software is distributed subject to a license, the
19 licensee has no greater authority to give rights in
20 the licensed software to a third party than the
21 copyright owner -- than the licensee has acquired.
22 That's fundamental copyright law.

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1 And with respect to the standard terms
2 of service, those are not the same as the term
3 "contract provision." Their term persists for the
4 time you have the phone. They don't expire at the
5 end.

6 If you have a two-year contract where
7 you're paying a given fee for two years, the
8 standard -- the terms of service that govern your
9 use and the license to the software don't -- don't
10 expire with the term contract.

11 So I think there are confusion of a
12 couple of issues embedded in your question.

13 MR. KASUNIC: So who would be the
14 infringer in that case? If the phone's given away,
15 you're saying the person who then turns the phone
16 on who was not subject to any license is infringing
17 the copyright?

18 MR. JOSEPH: They would be the
19 infringer, yes.

20 MR. GOLANT: Can I just follow up on
21 this line of questioning, Bruce?

22 So this is a hypothetical. I have a

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1 phone and I throw it away. Would the owner of the
2 copyrighted work or the licensee have any suit
3 against me for destroying his property if you
4 believe that it's the license, rather than
5 ownership, of that particular phone?

6 MR. JOSEPH: As a general rule, no,
7 because typically, there's not an obligate --
8 destruction of the phone is one of the contemplated
9 outcomes, and there's not an obligation to return
10 the phone in all cases.

11 MR. GOLANT: Okay.

12 MR. JOSEPH: And, by the way, I was --
13 to amend -- I think my answer was right vis-a-vis
14 the acquirer of the phone, even in the absence of
15 the binding terms of service. And I think I'll
16 stop there, actually.

17 MR. CARSON: Okay.

18 So question for everyone, then: Do we
19 have any evidence in the record before us that any
20 significant numbers of purchasers of locked cell
21 phones actually do own the copies of the software
22 on them?

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1 Another way of putting that is, do we
2 have any evidence that any significant number of
3 people who purchase cell phones do so without being
4 subject to license terms, such as the terms that
5 were decided in the CTIA comment?

6 Bruce, do you want to start?

7 MR. JOSEPH: My quick answer is, no, I
8 believe there's no evidence in the record of that.

9 MR. CARSON: Folks?

10 MS. MOY: So I am unaware of any
11 evidence that is currently in the record about
12 that. We would be happy to respond to it in
13 writing posthearing.

14 However, I also -- I do believe that
15 for the thousands of consumers who purchase their
16 mobile devices from the secondhand market, such as
17 from eBay, many of them probably are not subject to
18 the terms of a service contract that governs --
19 that typically comes governing the software
20 installed on the phone.

21 MR. CARSON: But does it follow that
22 when they acquired that copy, presume -- that --

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1 that phone presumably from someone who did obtain
2 it pursuant to license, that they obtained the
3 right to reproduce that copy every time they turned
4 on their cell phone?

5 MR. BERRY: I think the record is --
6 sort of identifies -- I mean, it's unknown. But if
7 you get a phone, you know not where it came from,
8 what it was restricted to, this is sort of a
9 servitude, or the chattel theory of, you know, what
10 right do you have to something that you have in
11 your hand and if it works, it works.

12 You know, I mean, I don't know if
13 anyone knows. Even the carriers clearly understand
14 that they have a right to that hardware/software
15 together, that when you turn it on, it works.

16 I -- you know, I -- I am not so sure
17 there's an easy answer. I don't know of anything
18 in the record that -- that speaks to that
19 profoundly.

20 MS. MOY: I think that there's also
21 the -- the first sale doctrine, which I think would
22 enable a -- the owner of a device to sell it to

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1 someone else or to give it to someone else.

2 And it seems that if, under this
3 theory, the person to whom they would give it or
4 sell it would not be capable of turning it on
5 without engaging in copyright infringement, and
6 that's a burden for a sale.

7 MR. CARSON: But if the initial owner
8 of the device obtained it pursuant to a license
9 agreement which made it quite clear that the owner
10 of that device did not own the copy of the software
11 that was on the device, when that person sold that
12 device to a third party, how could the third party
13 suddenly get more rights than the original person,
14 the original owner had?

15 I had a contract with Verizon. I sell
16 that phone to you. I didn't own the copy of the
17 software on the phone, so how is it that you own
18 the copy of the software on the phone after I sold
19 the phone to you?

20 Bruce, you look like you want to answer
21 for it.

22 MR. JOSEPH: No, I don't. I just want

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1 to add I think your question captures it
2 brilliantly and precisely, but I would then simply
3 amplify, moreover, the first sale doctrine also
4 only applies to owners of copies, it doesn't apply
5 to licensees of copies.

6 So the first sale doctrine suffers from
7 the same defect as the Section 117 argument.

8 MR. CARSON: One issue that I was
9 surprised I didn't see a whole lot of discussion on
10 in the comments, given the amount of time we spent
11 on it last time around and the changes that have
12 occurred since that time, has to do with case law
13 in the Ninth Circuit.

14 My recollection of what we said three
15 years ago, two years ago, was essentially that the
16 law is pretty unclear with respect to what the
17 status is of who owns -- whether one owns the copy
18 of software when one obtains it pursuant to a
19 license. And that issue was, in fact, before the
20 Ninth Circuit, and one of our problems was we
21 couldn't predict how the Ninth Circuit was going to
22 rule, so we were dealing with a relative paucity of

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1 cases, but also cases that went in both directions.

2 Like it or not -- and some may, some
3 may not -- the Ninth Circuit has now spoken, but I
4 don't know that any of you have really spoken real
5 clearly as to what the implications are of the
6 rulings in the Ninth Circuit, and since we spent so
7 much time worrying about them last time around, it
8 would be nice to have some help on what lessons we
9 should draw from the Ninth Circuit rulings, if any.

10 Bruce?

11 MR. JOSEPH: I thought we actually did
12 address that issue in our written comments, which
13 is, of course, where most of our position is laid
14 out.

15 And it's our view that the Ninth
16 Circuit, which in that particular case found the
17 copies at issue to have been licensed rather than
18 sold, that the holding of the Ninth Circuit is
19 consistent with our position that software on
20 mobile phones typically is licensed, and at -- the
21 examples of the agreements that we cite, we think
22 support that.

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1 Now, to be fair, the Ninth Circuit
2 didn't go into an added characteristic that is
3 common in the wireless terms of service, which is
4 the right to modify at will by the carrier the
5 software, which I think is a further indicium of
6 license rather than ownership in the licensee.

7 MR. CARSON: So would anyone on that
8 side of the table like to address for us what
9 implications we should draw from the Ninth Circuit
10 ruling?

11 MS. MOY: I'm sorry. I'm sorry.

12 MR. BERRY: I've had some help here to
13 point to Page 16 of Metro's reply comments. And we
14 can certainly supplement that particular section
15 more fulsome.

16 But I think it's also fairly well --
17 well, I'd say it's addressed, but I would like to
18 supplement that for the record, if it's okay.

19 MR. CARSON: Okay. Ben, do you want to
20 ask some questions?

21 MR. GOLANT: Sure. So I have some
22 questions for both sides here. Let's start with

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1 you, Laura, and Parul.

2 Tell me why anyone would want to use a
3 Tablet on another network. I'm trying to wrap my
4 head around the expansion that you have requested.

5 I see it's clear that you want to use
6 another mobile carrier for voice services for all
7 sorts of reasons, but I'm still unclear as to why
8 someone would want to switch anything but their
9 mobile phone device to another network.

10 So please let me know what the reasons
11 would be and why we should entertain your exemption
12 as written.

13 MS. MOY: I mean, I think there are a
14 number of reasons that people switch service
15 carriers and, you know, not just for voice
16 services, but also for data, and it may have to do
17 with coverage of the network or with customer
18 service, maybe just a -- a personal relationship
19 that an individual consumer has with a particular
20 carrier that is either positive or negative that --
21 you know, and these are the -- these are the sorts
22 of things that influence consumers' decisions to

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1 sign up with one carrier or another in the first
2 place, and they're the same sorts of considerations
3 that come into play when consumers are considering
4 switching carriers.

5 MR. GOLANT: Are there any terms of
6 service that we should be aware of as there were
7 for voice services that apply to the switching of
8 Tablets for data services that should be part of
9 the record or we should know about?

10 MR. BERRY: Well, you know, I'm sort of
11 struck by your distinction between voice and data
12 when we're moving into a 3G and 4G world where
13 voice is data, and many of the devices that you
14 currently have are VoIP, Voice over Internet
15 protocol, you know, signals. It's a bit sort of
16 concept. Whether it's voice, whether it's data,
17 whether it's video, it's all -- it's all bits of
18 data.

19 So in that respect, a wireless Tablet
20 is a wireless device. That's why we suggest that
21 you should identify wireless devices.

22 And many of the suggestions from Laura

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1 are correct. What if you have a device, you get
2 transferred from Washington, D.C. area to the -- to
3 the Texas area and you want a different carrier
4 because they have better coverage in that area.
5 Most Tablets right now, you're already switching to
6 hot spots or Wi-Fi offload type of situations.

7 So if you're a host carrier, if you
8 want to change, then you should have that same
9 right.

10 It is a wireless device that transmits
11 data. Whether it's turned into voice or whether
12 it's, you know, a video or whether it's something
13 else, I -- that's why we suggest to expand the --
14 the understanding. It means a lot in the telecom
15 world whether it's a, you know, telecommunications
16 service or information service.

17 I'm not so sure that those distinctions
18 are relevant particularly in the copyright world,
19 but I think it certainly is easier to understand
20 the types of devices we're talking about if you say
21 wireless device.

22 MR. GOLANT: I just want to know -- I

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1 think the burden is on the proponents here to show
2 why there should be an expansion, because it -- at
3 least as I understood it, the current exemption
4 is -- has been traditionally understood to apply to
5 what we know as voice service. The whole reason
6 for switching is maybe an old language -- the
7 service that the current carrier has, but it was
8 really in the context of what we knew in 2006 and
9 2010.

10 So if you're looking to see a revision
11 of it, then you have to show us exactly why we
12 should entertain that. One of the reasons why I
13 was asking those questions.

14 MR. CARSON: Let me jump in on that,
15 because one of the questions I wanted to ask was
16 what evidence do we have in the record that access
17 controls are, in fact, used to lock Tablets,
18 Notebook computers, eReaders, any mobile devices
19 other than what have typically been understood to
20 be cell phones?

21 MS. MOY: Well, as we've pointed out in
22 our reply comments, that when you purchase, for

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1 example, an iPad from the Apple store, you're
2 required to select a carrier before checking out,
3 and the consumer is informed during the checkout
4 process that your iPad will work only with the
5 carrier you choose.

6 So we know that they are being sold
7 locked.

8 MR. CARSON: Wait a minute. Hold on.
9 How do we know that? What you just told us doesn't
10 tell me they're locked.

11 MR. JOSEPH: That's correct.

12 MR. CARSON: Do you know what kind of
13 access control, if any, is put on the iPad?

14 MS. MOY: I'm sorry. I was referring
15 to any -- I mean, any type of access control that
16 restricts it to one particular carrier
17 constitutes --

18 MR. CARSON: But what you cited a
19 moment ago did not in any respect say there's an
20 access control on it. It said you won't be able to
21 use it somewhere else. I don't know why you can't
22 use it somewhere else. Maybe it's just totally

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1 incompatible software. I just don't know.

2 But my specific question is, what
3 evidence do we have that access controls are used
4 on these other devices? Because we have no
5 evidence. I think the game is over on that front.

6 MR. GOLANT: Related to that, I think
7 there's some contractual -- I mean, I don't see
8 anything that locks you down. I think it's a
9 matter of citing an agreement. That's why I was
10 asking --

11 MR. CARSON: I don't know.

12 MR. GOLANT: -- this line of
13 questioning with regard to everything but what we
14 know of today.

15 MR. BERRY: And I know that Samsung
16 Notebooks, some of the Xbox, some of the other
17 devices are locked, and we can provide you
18 information in that regard. I think it's referred
19 to in -- I think in a footnote, but we can provide
20 you additional information.

21 But, again, I'm still sort of struck
22 with your question that you're talking about

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1 telephonic, i.e., you know, voice only, when, in
2 the wireless world, there literally is no
3 distinction between an analog voice -- traditional
4 analog voice, you know, connection and a data
5 connection, especially when you're -- we're already
6 into VoIP, Voice over Internet protocol, we'll be
7 into 4G LTE, which is all data, and -- and I -- in
8 the wireless devices, the Tablets and the other
9 devices are -- are following along the same
10 traditional path that carriers have looked to to
11 lock devices in order to access their network.

12 It's the same -- I don't want to say
13 it's the same protocol, but it's the same type
14 of -- of network access regime, and that's what
15 we're suggesting should be covered under the
16 exemption and should be -- the language should be
17 modified so that it's clear that we're talking
18 about wireless devices.

19 Now, many of the phones that you refer
20 to now are actually smartphones that are much more
21 than -- than voice. As a matter of fact, most
22 people will tell you that a smartphone spent

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1 70 percent of its life in some other data

2 consumption form other than a voice conversation.

3 MR. CARSON: But is there any evidence

4 that anyone is confused by the reference in the

5 current exemption to -- what is it -- what's the

6 word, handsets, I think? -- is there any evidence

7 that anyone believes that smartphones are not

8 within the scope of that?

9 MR. BERRY: I certainly don't, but I

10 also look at the wireless device world maybe a

11 little different than you do.

12 You can make telephone calls; you can

13 have video Skype, you know, face-to-face phone

14 calls over a -- over a wireless iPad or a Tablet,

15 just like you have a phone call. And so the

16 difference, I think, is -- at least for me, it sort

17 of escapes me as a major difference between a

18 telephone, i.e., wireless phone, as it's matured

19 and developed and the -- and the functionality

20 continues to -- to grow as technology develops.

21 MR. GOLANT: Just reading the record, I

22 didn't see any harm that's been in the record with

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1 regard to anything but what we know of today. And
2 even though you want to expand the scope and you
3 said with some rationales why it should be, I don't
4 see how it's currently affecting consumers now.

5 We've seen in other contexts, like for
6 jailbreaking, that over 25,000 people signed a
7 petition how jailbreaking your mobile device helps
8 there, but I didn't see anything here from any kind
9 of consumers that said I need to unlock my Tablet
10 to use it on another network for some other reason.

11 Bruce, I think, would agree with that.

12 MR. JOSEPH: I agree with that. I'm
13 not aware of any evidence in the record addressing
14 this, and that's one of the main points we made.

15 And I'm also not aware, to answer
16 Mr. Carson's question, that there is any confusion
17 about the scope of the current exemption, and I
18 think it's quite clear that the intent is that an
19 iPad is not a wireless telephone handset, as that
20 term is commonly understood.

21 MR. GOLANT: Along those lines, have
22 you seen any activity in the bulk reselling context

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1 that people want to unlock their Tablets or
2 eReaders, anything else, to be used in other
3 countries for the purposes that you are concerned
4 about in terms of the voice devices that you've
5 seen?

6 MR. JOSEPH: I don't know the answer to
7 that. I have not personally seen it, but that does
8 not at all mean that it's not out there. So the
9 best answer is I don't know the answer to that
10 question.

11 MR. GOLANT: Okay.

12 MR. CARSON: Mr. Berry, which of the
13 comments did you say there was a footnote talking
14 about some Samsung Tablets?

15 MR. BERRY: We couldn't figure out if
16 it was Metro PCS or another one, but we will find
17 it and get it to you.

18 MS. MOY: I'm sorry. I just wanted to
19 add for just a moment that many Tablet devices are
20 also -- have telephone numbers assigned to them
21 by -- by the phone carriers. I mean, I think it's
22 not entirely -- it's not as clear as -- it's not as

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1 clear as Mr. Joseph indicated that a Tablet is
2 necessarily not a handset.

3 MR. CARSON: Can you make a phone call
4 on them?

5 MS. MOY: Over an application, for
6 sure.

7 MR. JOSEPH: Yeah, but I think David
8 has the absolutely right question. The fact that a
9 telephone number is or is not assigned or the type
10 of device identifier that's assigned is a red
11 herring.

12 The question is, is the device designed
13 to make a telephone call apart from the addition of
14 possibly an over-the-top VoIP application, and the
15 Tablets that we're talking about here don't connect
16 to the telephone voice communications network, and
17 whether they have a phone number or not, that phone
18 number is not callable as part of the telephone
19 network.

20 MR. BERRY: You know, if I may, it
21 strikes me, what is a telephone, what is a
22 telephone call? I mean, the exchange of data right

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1 now is a telephone call. Whether it's voice or
2 text or it's data or it's a picture or whatever,
3 that's essentially a telephone call. That's what
4 your telephones, wireless telephones, do today.

5 And it strikes me that the -- that the
6 progression of technology in the march forward
7 is -- is happening at a rapid pace. The fact that
8 you have a Tablet that can do all those things and
9 also do a lot more doesn't necessarily disqualify
10 it as a nontelephonic device.

11 I -- you know, we're getting -- I think
12 you're getting telecommunications law and the
13 definitions under Title 2 or Title 1 or Title 3 a
14 little -- confused a little with some copyright
15 law.

16 I think this narrow exemption is fairly
17 focused and very narrow, and we're talking about
18 devices that -- wireless devices that communicate
19 with each other through a wireless network. And
20 whatever the device is, given the technology that
21 we're moving to, they make telephone calls in a
22 whole different variety of versions and flavors

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1 and -- and -- and I think qualify similarly as your
2 description of a voice call.

3 I -- it bothers me that -- that you
4 focus on that when, in fact, it's more the --
5 the -- the technology that is going to use data to
6 turn that into whatever you want to cause a
7 communication to another person.

8 MR. CARSON: I think what we're
9 learning here is that if we recommend an exemption
10 this time around, we're going to have to carefully
11 look at the record, see what the evidence is with
12 respect to current locking practices, see if there
13 is any evidence of what is likely to happen in the
14 next three years, and our jurisprudence pretty
15 clearly says that means more likely than not, and
16 shape the class with what the record tells us in
17 mind. And we'll see what the record tells us on
18 that.

19 MR. GOLANT: Any further questions? I
20 have some.

21 MR. CARSON: Go ahead.

22 MR. GOLANT: So for you, Bruce, I read

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1 in The Wall Street Journal -- I have it right here,
2 from May 7th -- there was an article in the
3 marketplace section called Carriers Chip Away at
4 Phone Subsidies.

5 And it seems to indicate that one of
6 the trends for the next three years, at least, is
7 that more and more carriers are taking back the
8 control of the device from others in the chain,
9 such as Apple, and using the cost of the device as
10 a means by which to retain the customer, because if
11 you're spending \$700 for an iPhone -- whereas, if
12 it was unlocked, that would be more of an incentive
13 for you to stay with that particular carrier.

14 So I'm trying to gather some
15 information from you about where this whole
16 argument about subsidies is going and whether or
17 not this article is, in fact, indicative of the
18 trend that there will be less and less subsidies
19 going forward in the next couple of years. That
20 seems to be your basis upon which you're concerned
21 about with respect to your clients and CTIA.

22 MR. JOSEPH: I have to admit to being

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1 at something of a disadvantage because I haven't
2 seen the article to which you're referring. And I
3 think discretion and wisdom would say that it would
4 be better for me to respond to that question in
5 writing after the hearing, if you would be amenable
6 to that, because as I sit here, I don't think I
7 have an answer. In fact, I'm pretty sure I don't
8 have an answer.

9 MR. GOLANT: No, that's quite all
10 right. I just wanted to see what the trend is in
11 terms of the business practices and the models
12 going forward with regard to what subsidies are for
13 the wireless marketplace.

14 This really piqued my interest, and I
15 understand you don't have something to respond in
16 kind, but I thought maybe you had some general
17 idea, based on what you're speaking to with your
18 clients, of where things may well be going.

19 MR. JOSEPH: I don't. I don't have any
20 knowledge, and consumers -- again, this is a
21 consumer choice, and consumers have shown that they
22 like getting the discount that a subsidy permits.

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1 And so I'm not aware of any information suggesting
2 that they are going away, but, you know, better
3 than my speculating on the record, let me get back
4 to you on that one.

5 MR. GOLANT: Sure. I completely
6 understand that.

7 Some other questions with regard to
8 what is in the record. And that has to do with the
9 use of precedents.

10 I'm seemingly confused by CTIA's
11 comments because in one point you say you should
12 not rely on what the Register has done in the past,
13 yet in terms of bulk reselling and used phones, you
14 say we should definitely use that as a model to go
15 forward, we do have an exemption for this
16 particular class.

17 So give me an idea of what we should be
18 doing in terms of how we view precedents in the
19 1201 rulemaking proceedings.

20 MR. JOSEPH: Sure.

21 On issues of fact, I believe the law is
22 clear that this is a de novo proceeding, and the

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1 burden is on proponents to freshly adduce facts.

2 With respect to issues of law and/or
3 statutory construction, the prior decisions of the
4 Register presumably have persuasive effect, but not
5 binding effect, to the extent they are believed to
6 be correct.

7 I believe, for example, in the context
8 of the reversal of the presumption on Section 117,
9 we have demonstrated, I hope persuasively, that the
10 Register's reversal of that burden as a result of a
11 presumption that flew in the face of the Register's
12 own recognition of prevailing practice was
13 incorrect as a matter of law, and that you would
14 not do that again. But I don't believe the prior
15 determination is binding; it ought to be
16 persuasive.

17 I do believe that to the extent --
18 again, we have to focus on where the burden of
19 persuasion and where the burden of production is in
20 this proceeding, and it rests firmly on the other
21 side. And to the extent they have failed to
22 provide sufficient evidence that goes beyond what

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1 they did last time, I would expect you to do
2 certainly no more than you did last time. We
3 believe that the evidence was insufficient last
4 time and that, once again, that would not justify
5 an exemption.

6 Finally, as an administrative body, you
7 are obligated to be consistent across classes, and
8 to the extent, for example, that you apply a level
9 of harm with respect to, say, DCSS to pick a -- or
10 DVD protection, you ought to apply -- you ought to
11 not apply a different, less favorable conclusion or
12 level of harm with respect to the other types of
13 copyrighted works.

14 So I think there are a number of
15 factors at play.

16 MR. GOLANT: Okay. Now, a question for
17 Laura Moy.

18 I didn't see any comments in your
19 replies about CTIA's proposed exemption.

20 What would you think of the fact
21 that -- if we decide to adopt the language that was
22 proposed, how would you respond to that?

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1 MR. CARSON: And before Bruce
2 interjects, we understand they're not really
3 proposing that we adopt it, but what they might be
4 willing to live with if we went anywhere.

5 MR. JOSEPH: Well, I'll go beyond that.
6 I'd say that we would be willing to live with
7 and -- you know, it's -- it's actually somewhat
8 broader than what we said we would be willing to
9 live with last time.

10 MR. GOLANT: Right. I saw that
11 difference.

12 So what's the response of the
13 proponents' side?

14 MS. MOY: I'm sorry. I don't have a
15 copy of that language in front of me.

16 MR. GOLANT: Okay. Well, in general,
17 it's -- I think someone behind you has it to share.

18 It was not just the specific language,
19 but the general propositions that were laid out.
20 Given that there is an opponent that's willing to
21 concede particular language for an exemption for
22 individuals such as what you described when you

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1 were traveling, why would you seemingly object to
2 something like that if it provides you the relief
3 that you would seek?

4 MS. DESAI: Forgive me. This is off
5 the cuff right now, from looking at this. I think
6 one of the concerns that I would have is undertaken
7 by an individual customer of a wireless service
8 provider. So that means if I'm not already a
9 customer of a wireless provider, I can't unlock my
10 phone.

11 So, you know, I don't know how that
12 would work. So if Laura gives me her phone and I
13 haven't decided what provider I want, if I unlock
14 the phone, it -- this wouldn't apply to me.

15 Noncommercial purposes, I can go on
16 about what does that really mean and what if I used
17 my -- I mean, I work for Consumers Union, my
18 phone -- my personal phone is also my work phone.
19 What happens in that case?

20 MR. GOLANT: Right.

21 MS. DESAI: You know, Consumers Union
22 doesn't provide me a separate business phone.

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1 MR. GOLANT: I certainly don't mean to
2 impose upon you at this time your learned advice
3 here, but I just want to get that general feeling
4 as to how you would feel about something that's
5 something an opponent could live with.

6 MR. CARSON: Well, don't let her off so
7 easy. This was in the initial comments. It's fair
8 game to get their reaction to it now. If they
9 can't react to it, then we'll react to it on our
10 own.

11 MR. GOLANT: It's just something, by
12 reading the record, seeing some of the gaps, and
13 that's why I'm asking you these questions today.
14 I'm trying to reconcile any contradictions or
15 omissions, is one of our missions here in this
16 hearing, so we can make the record even better than
17 it is today.

18 MS. DESAI: Right. Yes, and I
19 definitely appreciate the opportunity.

20 So, you know -- I have not had a chance
21 to fully review, but I would say those would be two
22 of my concerns, looking at this.

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1 At the moment, I do appreciate
2 Mr. Joseph suggesting language, but I do think
3 there are some concerns with this language.

4 MR. GOLANT: Mr. Berry, do you have any
5 comments here?

6 MR. BERRY: Yes.

7 I -- as you know, it's not exactly what
8 I or we have suggested. I think there's at least
9 three or four different versions out there now.

10 I would like to respond to this in
11 writing, if you would. I think there's a couple
12 issues that are raised by this, some of which we
13 discussed previously in our discussions on 117 that
14 I think raise serious concerns about their
15 definition here.

16 I would prefer, obviously, the
17 recommendation we -- you know, we made to you. I
18 think the way it's drafted right now, for me,
19 especially the conversations we had this morning, I
20 believe -- I believe that there are potential
21 hidden traps there that would maybe confuse and --
22 and provide, you know, easy efforts to frustrate

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1 the implementation of the exemption. So I'd like
2 to respond to that in detail.

3 MR. GOLANT: I understand that. And I
4 just have one more question for both of you here.

5 That's with regard to your
6 copyrightability argument that you make in your
7 opening brief.

8 Explain to me exactly what you mean by
9 that. Are you talking about copyrightability of
10 the firmware that is the lock itself?

11 And for you, Bruce, you didn't seem to
12 suggest that their argument was entirely wrong, but
13 you said something like leave it to the Courts to
14 decide whether or not the firmware that locks the
15 phone is copyrightable.

16 So with that in mind, please present
17 your arguments on that particular defense as to why
18 this would be a noninfringing use.

19 MS. MOY: Right. We were referring --
20 when we were saying that these elements are not
21 copyrightable, we were referring to the particular
22 elements of the firmware that are used to connect

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1 to a carrier's network.

2 So those are just the particular
3 elements that limit the connectivity to one or, I
4 don't know, some limited number of networks, and
5 that changing those particular elements of the
6 firmware, therefore, is a noninfringing use.

7 MR. GOLANT: Are you talking about --
8 is this a code we're talking about in the firmware?
9 Is it the firmware's a computer program? I'm just
10 trying to wrap my head around what it means when
11 you're saying it's not copyrightable.

12 MS. MOY: I'm sorry. What -- what was
13 your distinction there?

14 MR. GOLANT: Are we talking about lines
15 of code or are we talking about a computer program
16 that is, in fact, the firmware itself that locks
17 the phone to the particular network?

18 MS. MOY: We're talking about lines of
19 code, I think, that in order to merge, alter --
20 alter the firmware to enable it to connect to a
21 different network. The -- the person reflashing
22 the device has to replace some of those elements in

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1 the code with different elements, and that those
2 elements, themselves, just those mere elements are
3 not copyrightable.

4 MR. GOLANT: Okay.

5 MR. CARSON: My understanding from past
6 rulemakings -- I just want to make sure my
7 understanding is correct -- is that what you're
8 really talking about is simply changing some data,
9 which is the data that says go to this network and
10 this network alone. Instead, you could change it
11 to say go to that network.

12 Is that what we're talking about or are
13 we talking about something different?

14 MS. MOY: Right. That's basically what
15 we're talking about. And I believe that the
16 Register in the past -- Register at the time,
17 Register Peters, used the -- the analogy to the
18 happy birthday song, where you can imagine that the
19 happy birthday song is a piece of code and that
20 just the name is a variable that can be replaced
21 with a different name. And I think that that was a
22 good analogy, helpful in this context for someone

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1 like me, who's not a technologist.

2 MR. JOSEPH: I think that response, if
3 I'm understanding it correctly, goes back to the
4 distinction between the act of unlocking and the
5 use of the operating system software after it has
6 been unlocked.

7 And I believe that there are -- there
8 are certain locks or means of circumventing locks
9 for which you do not need to do something that is
10 infringing to accomplish the unlock, and there are
11 other types of -- there are other configurations of
12 software where the way unlocking is commonly
13 accomplished does require the creation of an
14 infringing modification.

15 But that begs the question of whether
16 the use -- whether the operating system software
17 that is thereupon used is copyrightable, and I am
18 aware of nothing in the record to suggest that it
19 isn't.

20 So the short answer is, it is, given
21 the absence of proof to the contrary, and the
22 loading of that software would -- that is not -- to

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1 the extent that it is not authorized by license,
2 would be infringement.

3 MR. GOLANT: Thanks for the responses.
4 David.

5 MR. CARSON: I would like to follow up
6 on that.

7 I understand your argument about the
8 reproduction. But let's say that the only changes
9 you're making are literally as a change in a code
10 that directs you to -- instead of going to Verizon,
11 you're going to Sprint or whatever.

12 Under those circumstances, is it your
13 argument that there is an additional -- there is an
14 infringement of an additional exclusive right
15 beyond the reproduction right when what -- all that
16 is altered is a bit of data like that?

17 MR. JOSEPH: No, that is not -- I am
18 not arguing that there is -- in that case, as you
19 have described it, I am not arguing that there is
20 an infringement of the adaptation right.

21 MR. CARSON: You seem to be suggesting
22 that there -- with respect to some of the operating

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1 system software and some of the cell phones, you
2 might have to do actually more, which might rise to
3 that level; is that correct?

4 MR. JOSEPH: That is my understanding.
5 For example, it's my understanding that the most
6 common means of unlocking an iPhone is modifying
7 the boot loader software so that it doesn't engage
8 in authentication, and that modification is more
9 than re- -- more than substituting a simple
10 indicator of where the -- the phone is allowed to
11 connect and that that would constitute an
12 infringing -- the use of that or the accomplishment
13 of that would constitute the creation of an
14 infringing derivative work.

15 MR. CARSON: Okay. Anyone on the other
16 side have any -- any views to offer on that latter
17 point about the fact that, at least with respect to
18 the iPhone, you would, in fact, be creating an
19 unauthorized derivative work? Subject, perhaps, to
20 117. That's an issue on which we have
21 disagreement.

22 MR. BERRY: Right. And that's

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1 probably -- my answer is that you need the
2 exemption to unlock. The degree of what you have
3 to do to unlock varies by device and may vary by
4 the -- the process that the -- that either the
5 manufacturer or the carrier that requested the
6 device, so that it could be more complicated than
7 just -- than just a set of data that unlocks it and
8 it's good to go.

9 It may actually also have other --
10 other series of data that needs to be replaced in
11 order to not only put it on the network, but
12 actually let it work and authenticate on another
13 network.

14 And to that extent, my view would be to
15 the extent that you have to do that, and we're only
16 talking about accessing and putting it on another
17 network so it can actually function in the same way
18 it functioned on the other network, it would be
19 covered by 117.

20 So I -- I understand the dancing on the
21 head of the pin on the extent of the unlocking
22 requirement, and I suspect that if you do not

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1 extend the exemption that we have here, we will
2 have even more complicated, you know, versions of
3 software and -- and -- and efforts to -- to
4 frustrate this opportunity for consumers to take
5 their device.

6 MS. MOY: And I just want to add that
7 we're still talking about a mere segment of the
8 operating system that is essentially functional in
9 nature and in which there are very limited modes of
10 expression, so I think that this still may not --
11 may not be the type of alteration that would rise
12 to the level of -- of -- of creativity or
13 expression necessary to constitute a derivative
14 work.

15 MR. CARSON: Okay. Bruce?

16 MR. JOSEPH: I don't think there's
17 anything in the record to support the argument that
18 that would be the case. And, again, I don't want
19 to sound like a broken record, but the burden is on
20 proponents to come forward with it.

21 MR. CARSON: Bruce, let me ask you a
22 couple of questions about the -- the narrower

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1 alternative that you put forward.

2 First of all, you talk about this being
3 permitted when circumvention is undertaken by an
4 individual customer of a wireless service provider.

5 And I read that to mean a current
6 customer. So if I was a Verizon subscriber and my
7 contract expired and I am no longer connected to
8 Verizon, I would not be privileged to take
9 advantage of this exemption? Was that an
10 intended -- an intended component of -- of your --
11 of what you're putting forward?

12 MR. JOSEPH: Can I get back to you --
13 no, I'm kidding.

14 It's -- it's a fair question, and I
15 don't believe -- you know, I believe that a prior
16 customer -- and, indeed, if you look at the carrier
17 unlocking policies, they typically do also apply to
18 a -- a prior bona fide customer, and -- and I think
19 it's fair to -- to include that within the term
20 customer here; not -- not limited to current
21 customer.

22 MR. CARSON: Okay. All right.

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1 Next question. Reading on, you talk
2 about a customer who owns the copy of the computer
3 program.

4 Now, if I understand your other
5 arguments, the customer is never going to own the
6 copy of the computer program, so don't we really
7 have a null set here?

8 MR. JOSEPH: Given that the entire
9 basis on which the argument is being made -- and I
10 realize that there's an argument of misuse, but I
11 believe the argument that the prohibition and a
12 term that said that you have infringement would --
13 is simply not copyright misuse and that you would
14 not find it to be so.

15 But it's based on Section 117. That
16 actually carries forward a limitation that the
17 Copyright Office -- that the Register and the
18 Librarian included in the prior rule, and it is
19 possible that there will be owners -- I'm not aware
20 of them; I believe that what we have are
21 licensees -- but that is consistent with the
22 exemption as the Register recommended it and the

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1 Librarian adopted it last time.

2 MR. CARSON: Yeah. One reason we
3 recommended it last time around was we couldn't
4 figure out who the owner is and -- and the law was
5 in such disarray that we decided, fine, we will put
6 that language in there, and if it turns out you
7 were the owner of the copy, you get the benefit of
8 it, and if it turns out you weren't, then you
9 don't.

10 MR. JOSEPH: With respect, I don't
11 think that's why you included it last time. The
12 reason you included it last time was the only
13 noninfringing use on which the Register relied was
14 Section 117, and an absolute prerequisite of the
15 application of Section 117 is ownership of the copy
16 of the copyrighted work.

17 MR. CARSON: I understand that. But
18 I'm saying as we crafted the language, one thing
19 that was in our mind was we don't really know who
20 falls within this because the law is so unclear.

21 But notwithstanding that, what I think
22 I'm taking away from this is that if we were -- if

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1 we were to adopt this particular language, it would
2 be the position of your clients that none of your
3 subscribers could ever fall within this; is that
4 correct?

5 MR. JOSEPH: I don't know that that
6 would be their position. Remember, they have not
7 sued individual consumers who have unlocked their
8 phones. They may forebear; they're likely to
9 forebear. It would be, I think, their position
10 that this exemption didn't apply to them, but that
11 doesn't mean that there would be a risk of
12 liability to the extent that the terms of service
13 remain as they are set forth in our contract, we
14 -- in our comments.

15 We don't know where the terms of
16 service might go in the future, and it may be that
17 a court would find that certain companies' terms of
18 service actually do transfer ownership.

19 But, again, it's tied into your -- you
20 know, the section -- we need to find a
21 noninfringing use in order for this proceeding to
22 proceed at all. And the one on which you relied

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1 last time was Section 117, and this is an absolute
2 requirement of Section 117.

3 MR. CARSON: Do you have any questions?

4 MR. KASUNIC: Maybe a couple.

5 I wanted to get back to, since we're
6 talking about scope of the exemption, and switch
7 for a second to the other side in terms of
8 expanding the scope of the current exemption.

9 And if I'm understanding the argument
10 that -- that -- or the difficulty is that defining
11 or -- or the concept of when we're talking about a
12 telephone now seems to -- is broadened, but some of
13 the examples given of Voice over Internet protocol
14 as being a way to communicate now and, with those
15 kind of services, it has expanded this -- this
16 concept.

17 Is there any -- are there any cases
18 where Voice over Internet protocol is being
19 restricted or where that restricts consumers in any
20 way? Isn't that the open option for most
21 consumers?

22 MR. BERRY: I don't know that I

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1 understand the question exactly, but voice is --

2 MR. KASUNIC: Let me just try -- before
3 we go wandering, let me try and clarify a little
4 bit. Since we're talking about now potentially
5 expanding this to, I think you had said, mobile
6 devices of any kind, then that's --

7 MR. BERRY: I said wireless.

8 MR. KASUNIC: Excuse me -- wireless
9 mobile devices --

10 MR. BERRY: I said wireless.

11 MR. KASUNIC: -- that there may not be
12 any limits on that.

13 Is there any other way of -- of
14 restricting that concept? And I'm trying to
15 understand how your mention of Voice over Internet
16 protocol as changing the concept of what is a -- a
17 mobile communication device, how that fits in to
18 how we might be able to -- to figure out how to
19 tailor or craft an appropriate exemption, should
20 one issue.

21 MR. BERRY: I think I was trying to
22 convey that technology is changing and voice, data

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1 or video is all digits in the IP world. And 3G,
2 whether it's Voice over Internet protocol or, you
3 know, traditional analog translation, it's -- it's
4 all the same.

5 And -- and whatever device it is, if
6 it's a wireless device conveying information over
7 Xs and Os, 1s and 2s, whether it carries a voice or
8 it carries a -- an image or something else, it
9 is -- in the IP world, it's really irrelevant, and
10 that's why I suggested changing it to wireless
11 devices, because the wireless devices do all those
12 things. And they're going to continue, and
13 technology will continue to -- to -- to march on,
14 so to speak.

15 That's why the suggestion of wireless
16 device -- if you say wireless telephone, what do
17 you see in -- what's the first vision that comes to
18 mind? It's not the old -- what do we say, the
19 Carter phone, the black phone sitting there, you
20 think of a -- you might think of a -- of a phone
21 that -- or maybe a flip phone or a phone that you
22 pull out that's maybe an iPhone. But a wireless

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1 device will mature into a 9-inch phone or a Tablet
2 or -- or an iPad, and all those things are
3 communication devices.

4 So that would be the more traditional
5 thought process of what is a wireless device that
6 you communicate with. That's why I suggest, you
7 know, you might want to -- to change the words to
8 clearly identify where the majority of people are
9 going with wireless devices.

10 MR. KASUNIC: Okay. Do you have any
11 thoughts on that?

12 MR. JOSEPH: The short answer is none
13 that you haven't heard before. The longer answer
14 is there is nothing in the record supporting a
15 demonstration of harm or need or noninfringing use
16 with respect to such devices.

17 MR. KASUNIC: And while we're on the
18 topic of harm, if I understand correctly, that
19 because -- at least when circumvention relates
20 to -- based on the current exemption where it
21 relates to individual consumers, I believe I heard
22 you say that there has not been any -- any specific

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1 harm for the exemption that's existed the last
2 three years with -- with respect to the cellular
3 carriers?

4 MR. JOSEPH: I don't think I said that.
5 What I think I said was that there was no
6 demonstration of cognizable harm to the user,
7 either in this record or, frankly, three years ago,
8 but I don't think I addressed the question of
9 whether the exemption has caused harm to the
10 industry. I think that's actually the wrong focus.

11 The question is whether the proponents
12 have carried their burden of demonstrating harm
13 that requires the existence of the exemption.

14 MR. KASUNIC: Well, assuming for a
15 minute that we -- that they did prove their burden,
16 and considering the fact that there has been an
17 exemption in existence, to what -- do you have any
18 knowledge or any information you can provide as to
19 harm that has been caused by the existing
20 exemption?

21 MR. JOSEPH: The continued citation of
22 the exemption as, for example, justifying bulk

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1 reselling -- although, fortunately, I think it's
2 fair to say the courts have not gone there in part,
3 and -- due to the Register's clear statements that
4 the exemption doesn't cover that, but as I sit
5 here, I do not have evidence of harm to the
6 industry from the existing exemption confined to
7 its current scope.

8 MR. KASUNIC: Confined to the scope
9 that -- during -- for the current exemption.

10 So is there any particular reason --
11 given that the proposed scope that you offer seems
12 to be limited -- where it's limited to owners, and
13 there's an argument that no one is actually an
14 owner of the software of -- on a device, and maybe
15 that's -- that's an issue based on the current
16 language, too, because that -- that was based on
17 Section 117 at a time when we had less clarity of
18 contracts and pre-Verner decisions, is there any
19 reason, given the fact that there has been no harm
20 under the current language, why there is a need to
21 limit that scope further?

22 MR. JOSEPH: Well, vis-a-vis the

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1 question of owner of the copy of the computer
2 program, we're not changing -- proposing a change
3 from the existing scope.

4 That's in the current exemption, and
5 we're not -- we're simply suggesting that it stay.

6 MR. KASUNIC: Okay.

7 MR. JOSEPH: We are -- we are adding
8 the individual customer limitation, I believe. I'd
9 have to go back and look at the existing scope, but
10 I believe that's a proposed change, because our
11 view is it's important to be clear that this
12 exemption doesn't support commercial activity.

13 It's -- the primary arguments that have
14 been made on the other side relate to the needs of
15 individuals to -- to allow -- to be able to use
16 their phone on their network of choice, and that's
17 what we're targeting.

18 MR. CARSON: Let me pick up on that
19 last point. I know you made the point that
20 commercial activity isn't really something that
21 this is all about. I'm not sure whether I agree.
22 But -- but I invite you to elaborate, and then I'd

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1 like to sort of flip the question and say why
2 should we care about commercial activity as opposed
3 to acts taken simply by an individual owner of a
4 cell phone who wants to be able to use it on
5 another network?

6 So first, Bruce, what -- why does the
7 fact that an activity might be commercial
8 disqualify it from being a noninfringing use that
9 we need to pay attention to?

10 MR. JOSEPH: I don't think that's the
11 argument that I'm making. The argument that I'm
12 making is that the primary basis that is advanced
13 by the other side -- first of all, I don't think
14 the other side has carried its burden even as to
15 individuals, but the primary argument that is
16 advanced by the other side relates to the needs of
17 individuals, and we are trying to be accommodating
18 to that.

19 We are also recognizing, as a factual
20 matter, that we do not expect CTIA members to go
21 after individual customers who would do this, who
22 would circumvent using Section 1201. That's the

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1 reason we are limiting the proposed exemption to
2 individual customers.

3 MR. CARSON: Okay. But I really wasn't
4 talking about necessarily just what you were
5 putting out as an alternative exemption.

6 I think throughout your comments, you
7 talk about how this rulemaking is not supposed to
8 get into the enabling of commercial activities.
9 And I'm not sure I take that from the language of
10 the statute. I'm not sure I can take it from the
11 legislative history, although I think you do, so
12 it's an opportunity for you to expound on that.

13 MR. JOSEPH: We do take it from the
14 legislative history. If you look at the reason
15 that this was included, it was primarily to -- out
16 of a concern about individual fair use, and if you
17 look, for example, at the factors that are
18 identified in the statute, at least two of them out
19 of the four go to core fair use-type issues.

20 So our belief is that when Congress put
21 this entire proceeding in -- and it came in in the
22 Commerce Committee, as you'll recall -- the concern

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1 was over limitations on individuals and other --
2 individual uses and other traditional fair uses.

3 MR. CARSON: But often it's not the
4 case is finding fair use, the use is actually
5 commercial. So it's not as though the fact we're
6 talking about fair use means it has to be
7 noncommercial.

8 MR. JOSEPH: I understand that. But I
9 don't believe those were the types of cases that
10 animated the Commerce Committee, and if you look at
11 the history and the debates leading up to the
12 introduction of this section, the concerns that
13 animated the Commerce Committee were socially
14 beneficial noncommercial fair uses. And I think we
15 make those arguments -- we set out that history and
16 we make those arguments in our comments.

17 MR. CARSON: Okay. Now, let me put it
18 to you folks a little differently.

19 I think if you look at what the
20 Register's recommendations in the last two
21 rulemakings have focused on, they certainly focused
22 on the individual and the need of the individual

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1 owner of the cell phone to be able to switch to
2 another network if he or she so desires.

3 So that's been our focus. Your focus
4 is a bit broader.

5 So I guess -- I guess what I will ask
6 you to do is justify why we need to be so concerned
7 about commercial actors who might want to make a
8 buck out of being able to do things that in some
9 cases, perhaps, might be more within the scope of
10 Section 1201(a)(2) than 1201(a)(1).

11 MR. BERRY: Specifically, I don't think
12 I am asking for that expansion. Basically, we've
13 suggested solely for the purpose of connecting with
14 another wireless telecommunications network or
15 wireless network.

16 So, you know, I'm -- I don't think that
17 our position was a massive expansion of -- of that
18 from a -- solely for the purposes of connecting to
19 another network.

20 So I -- I do think that in reference to
21 the -- to the harm, I think you clearly have a
22 record of the benefits that accrue to this specific

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1 exemption, and were you not to have the exemption,
2 then all those benefits go away, creating, you
3 know, harm to -- to Bruce's point.

4 I think the record is replete with --
5 with that issue. And I think that his particular
6 definition that he's proposing is -- is more of
7 a -- a Trojan horse, that you cannot fully utilize
8 an exemption under the terms and conditions that
9 not only he's stated today in his testimony, but
10 specifically, if you look at his exemption, it is a
11 ratcheting down, if not a further restriction, of
12 the individual -- individual's right to -- to full
13 use and noninfringing use of a handset.

14 So I think that sort of -- the burden
15 of proof may shift again back to someone who's
16 asking you to modify the definition, and I don't
17 particularly see any information in the record that
18 supports his definition as a fair and accurate
19 rewrite that -- that the office should consider.

20 MR. CARSON: I want to follow up on
21 that point, but first of all, anything else on the
22 commercial uses?

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1 MS. MOY: Sure. I just wanted to refer
2 to the example that we provided in our proposal of
3 the individual consumer who has long-term service,
4 a long-term service contract with a postpaid
5 service provider, has a device that he or she is
6 perfectly happy with, and when the time comes up,
7 that person is -- is presumably paying an elevated
8 monthly service charge every month to cover the
9 cost of providing devices at low up-front cost to
10 that person or anyone else who accepts a long-term
11 contract.

12 So when the time comes up for that
13 person to sign a new contract and to -- to get a
14 so-called subsidized device in return for signing a
15 new contract or to just continue on with the
16 service month to month, continuing to pay the
17 elevated service fee, either way, if that person
18 sticks with that service, he or she is going to be
19 paying the elevated monthly service charge that
20 contemplates the purchase -- the investment that
21 the company makes in providing a low-cost so-called
22 subsidized device to consumers.

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1 So that person should be able to get a
2 device from -- by -- in exchange for signing a new
3 contract, and if he or she does not want to switch
4 from their old device, then they should be able to
5 sell it and -- I mean, I think that was the very
6 limited sort of -- something that I suppose you
7 could call expressly commercial purpose that we had
8 contemplated.

9 But aside from -- and aside from that,
10 I think that solely noncommercial is just sort of a
11 fuzzy term that may be unclear for a lot of
12 consumers who -- who want to unlock their phones
13 for financial reasons.

14 MR. CARSON: Why is permitting someone
15 who owns the -- the cell phone to sell it to
16 somebody else the kind of core copyright-related
17 interest that we need to be concerned about here?
18 It strikes me as being a real stretch in terms of
19 the kinds of things we typically looked at.

20 Maybe that doesn't mean it's
21 illegitimate, but I think you've got a burden to
22 explain to us why we need to care about that.

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1 MS. MOY: Sure. I think that -- I
2 mean, I think that I would -- I would almost flip
3 that question the other way and say, why is making
4 the distinction part of the core copyright concern?

5 I think that that distinction is just
6 not part of the core copyright concern here.

7 If unlocking the device is a
8 noninfringing use, then it is a noninfringing use,
9 regardless of what the motive is for engaging in
10 that noninfringing use.

11 MR. CARSON: Maybe you can help me by
12 going through the four statutory factors in
13 Section 1201(a)(1)(C) and explain to me how those
14 factors militate in favor of permitting -- of
15 widening the exemption to permit someone to resell
16 it -- to unlock purely for purposes of resale.
17 Because it's -- it's clearly not enough to say the
18 use is noninfringing. We then have to look at the
19 factors.

20 MS. MOY: So if we start with the first
21 factor and discuss the availability of -- the
22 availability for use of copyrighted works, clearly,

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1 encouraging a robust secondhand market for mobile
2 devices is something that encourages more
3 widespread availability of these copyrighted works,
4 in the form of mobile device firmware and software.

5 And that includes the availability for
6 use of the works for all types of purposes,
7 including nonprofit, archival, preservation and
8 educational purposes, particularly given the fact
9 that nonprofit and low-income purchasers of devices
10 may need low-cost devices, which they're more
11 likely to find in a robust secondhand market.

12 Now, I think we -- we didn't -- we
13 didn't talk about the impact that the prohibition
14 on circumvention would have on criticism, comments,
15 news reporting, teaching, scholarship or research,
16 because I think that's just not a particularly
17 salient factor with respect to this particular
18 class.

19 But -- and then with respect to the
20 effect of the circumvention of technological
21 measure on the market for a value of copyrighted
22 works, I just -- I just don't think that there's

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1 any evidence that this will have an impact on the
2 market for a value of mobile device computer
3 programs.

4 Mobile device manufacturers will
5 continue to develop and innovate new devices for
6 those consumers in the marketplace who wish to
7 purchase new devices, and they will continue to
8 develop firmware and software to be installed on
9 those devices and to -- to operate those devices
10 for sale in the firsthand market.

11 MR. CARSON: Bruce, do you want to make
12 any response?

13 MR. JOSEPH: Well, first of all, as to
14 the last point, the -- the greatest example of
15 innovation in the market for cell phone operating
16 systems and cell phones came out of the iPhone
17 example, I believe, which was an exclusive AT&T
18 device, and it was -- at the beginning. And it was
19 because AT&T invested enormous resources to make
20 that device compatible with its network, and would
21 not have done so but for the ability to ensure that
22 the device was exclusive.

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1 You may not have seen iPhones, which
2 then subsequently stimulated enormous creativity in
3 the marketplace with respect to the functionality
4 of wireless devices, which necessarily includes how
5 their operating systems work. That was an
6 immediate response because others wanted to be able
7 to compete with the iPhone.

8 So I think the model that you've got
9 where there are locks helping to foster exclusive
10 relationships is evidence that circumvention could
11 undermine the -- that kind of marketplace and that
12 kind of value.

13 You know, I have heard the arguments,
14 but do not see the evidence that the prohibition on
15 circumvention of technological measures has
16 adversely affected criticism, comment and news
17 reporting, and that the prohibition would limit the
18 availability of copyrighted works.

19 Indeed, when the Copyright Office has
20 looked at that similar language in other contexts,
21 it has tended not to look at the dissemination of
22 those works, but rather the creation of those

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1 works, and to the extent that the ability to foster
2 investment in those works stimulates such
3 availability, you actually are enhancing the
4 availability of copyrighted works.

5 MR. CARSON: Okay.

6 MS. DESAI: Can I just make one
7 clarification?

8 MR. CARSON: Sure.

9 MS. DESAI: There has been a lot of
10 reporting on this, and we've argued this
11 oftentimes, that the iPhone -- I don't think it's
12 clear to -- or accurate to say that -- that AT&T
13 invested in the iPhone. I think it's the reverse;
14 Apple invested in the iPhone, and they did market
15 it to other carriers, and they were pretty much
16 forced into an exclusive.

17 So I think -- I think the innovation
18 came from Apple, per se, not necessarily the
19 carrier.

20 MR. CARSON: Bruce, which came first,
21 the iPhone or AT&T's investment in the iPhone?

22 MR. JOSEPH: I think you needed both.

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1 And to make the iPhone successful, there was a
2 great deal that AT&T had to do that's detailed in
3 our comments that was necessary to make it a
4 successful release.

5 MR. CARSON: All right. We'll go on
6 record with that.

7 Steven, I think the last thing you
8 said -- it was with respect to the alternative
9 language suggested by CTIA -- was that the burden
10 is on someone who wants to pose something different
11 to explain why you need that something different.

12 So let me just put to the three of you
13 the first question: Has the existing class that
14 was announced a couple of years ago, has that --
15 has that been too narrow, such that noninfringing
16 uses that people should have been able to engage in
17 have not been engaged in because the exemption was
18 not sufficiently broad?

19 MR. BERRY: I'm not aware of -- of that
20 particular trend or suggestion to change some of
21 the definitions. I would go more to the -- to
22 the -- how the industry is viewing these devices

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1 back to Mr. Kasunic's suggestion. I think I
2 finally understand a little more what you're
3 saying.

4 And to Mr. Golant, if you have a device
5 that -- you have an app that's downloaded, and
6 Google provides an app that downloads and makes
7 that device look, act, feel and -- and respond like
8 a telephone, i.e., a wireless device that --
9 that -- that you can make the phone calls, what
10 would you call it? Would you -- and I'm suggesting
11 it's a wireless device, and that's where the
12 industry is going in terms of its description of --
13 of the devices that are on networks, and that would
14 be more appropriate so that there is not a
15 confusion and there's not efforts to frustrate
16 the -- the full use and benefit of -- of -- of your
17 exemption that you've -- that you've most
18 graciously provided for over the years.

19 MR. CARSON: Does anyone else have
20 anything to add?

21 MS. MOY: Right.

22 I would just echo what Mr. Berry said

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1 and say that most of the language changes that we
2 recommended were for the purpose of clarifying the
3 application of this exemption and for making it
4 simpler for the average consumer to understand that
5 we do not have specific evidence of particular
6 cases at this point in time of the individual
7 consumers who, in the term of the -- of the current
8 exemption, have failed to take advantage of the
9 exemption because of some difference in language.

10 MR. CARSON: Okay.

11 MR. KASUNIC: One thing I wanted to go
12 back to for a second was the one change that's
13 occurred over -- fairly seemingly significantly
14 over the last three years is the availability of
15 unlocked phones.

16 And what I notice in -- what we mean by
17 an unlocked phone may be less clear. And, in
18 particular, I wanted to just go back to some
19 evidence that was introduced in Consumer Union's
20 reply comments that looked like mostly related to
21 the iPhone 4S, but it has that when a consumer
22 purchases an unlocked phone from Verizon, Sprint,

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1 AT&T, those are not really unlocked.

2 So can you talk about that, at least
3 that in that context, the -- it sounds like only a
4 phone purchased directly -- an iPhone purchased
5 directly from Apple is fully unlocked, but can you
6 describe or expand on that a little, just to
7 understand -- for our understanding of what an
8 unlocked phone is in this context?

9 MS. MOY: I actually believe that an
10 iPhone purchased directly from Apple unlocked is
11 not completely unlocked insofar as the -- the CDMA
12 chip set is disabled, I believe.

13 However, that could've changed, as I
14 said, in the last couple of months.

15 But, for example, with -- with the
16 Sprint policy, just looking for a moment at the
17 Sprint policy, Sprint will unlock the micro-SIM on
18 its iPhone 4S for consumers who wish to travel
19 internationally, but that SIM slot will still only
20 accept an international SIM card. It won't accept
21 a SIM card from a domestic carrier such as AT&T.

22 And so that's -- that's where they're

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1 calling it unlocking, but it's not completely
2 unlocked.

3 MR. KASUNIC: But that's not the case
4 with the -- although there may be some limitations
5 for an iPhone purchased from Apple, that there is
6 more -- more interoperability or use of that device
7 unlocked.

8 MS. MOY: I believe that an iPhone
9 purchased directly from Apple unlocked can be used
10 to connect to any GSM network, any -- so that --
11 that you can use it to connect on multiple -- to
12 multiple carriers that are domestic; however,
13 although the phone also has the necessary hardware
14 built in to connect to CDMA networks such as
15 Verizon, that chip set is disabled, even though the
16 phone is marketed as unlocked.

17 MR. GOLANT: Along with what Rob is
18 saying, I found this article just this morning from
19 Consumer Electronics. It says, iPhone goes prepaid
20 through Cricket. You know, Cricket was one of the
21 proponents from three years ago. It says, Cricket
22 Communications will become the first prepaid

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1 service carrier to offer the iPhone beginning June
2 22nd, when it offers both the iPhone S and iPhone 4
3 with its current \$55-a-month plan.

4 And it says, iPhone 4S will be
5 available for 499 for the 6 gigabyte model and the
6 8 gigabyte model for the iPhone 4 will be 399.

7 So, again, this is an ongoing issue. I
8 don't have any answer to that. I don't have any
9 comments. I'm just saying the iPhone issue prepaid
10 is something that I think you all should be
11 thinking about as we go forward with this, because
12 I don't know from this article here whether or
13 not -- if I'm paying Cricket 499 for this, whether
14 or not that's locked or unlocked, even though it's
15 prepaid.

16 So Rob's question is salient even to
17 this date, this particular report.

18 MR. KASUNIC: Before I give Bruce an
19 opportunity to express his views on this issue, I
20 just want to find out, is -- is -- when we're
21 talking about unlocked phones and this problem that
22 we see with -- or has been alleged with the -- with

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1 the iPhone, is that true for other types of phones,
2 or is this something where an unlocked phone is not
3 really or not fully unlocked an issue just for the
4 iPhone?

5 MS. MOY: I think the short answer is
6 that we're not sure. So that -- you know, the AT&T
7 policy says iPhones and certain other devices,
8 quote, are not eligible to be unlocked. So I
9 think -- it may be, but without going device to --
10 with -- without going to AT&T, device by device,
11 it's impossible to tell.

12 MR. KASUNIC: Okay.
13 Bruce.

14 MR. JOSEPH: First of all, the AT&T
15 policy, as I said, is no longer that it will not
16 unlock iPhones, and I'm in the process of trying to
17 confirm whether that extends beyond the iPhone.

18 Second of all, I think David pointed
19 out in some of his questions that there are
20 technological incompatibilities that don't relate
21 to locks, and I don't think there's evidence in the
22 record to say what is an effect of a lock and what

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1 is the effect of a technological incompatibility.

2 The specific question with respect to
3 the iPhone 4S and CDMA networks when purchased, for
4 example, from Apple unlocked is -- is a -- is a
5 good factual question that I simply don't know the
6 answer to.

7 Whether that's a technological
8 incompatibility, whether it's a disabling of a
9 chipset that would -- that might not be considered
10 a lock or a TPM, it's just the way the phone is
11 shipped, that chipset isn't active, or whether
12 there's actually a technological protection measure
13 that meets the definition of Section 1201, I think
14 the record is entirely silent on that and,
15 therefore, I don't think you should or can presume
16 that there's a locking issue there.

17 MR. KASUNIC: Okay.

18 MR. CARSON: Any further questions?

19 Okay. Well, then, before we conclude,
20 just a word about the record and what's next.

21 Essentially, the record is what it is.
22 We're at a pretty -- we're at a pretty advanced

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1 stage in this process now, so we do not, as a
2 general proposition, intend to start taking in more
3 evidence or more argument.

4 It has been traditional -- and it may
5 or may not be the case this time around -- that
6 following the hearing, and perhaps after we've
7 taken a look at the transcripts, there may be some
8 ambiguities we need clarification on, there may be
9 some facts that we think are really important to
10 know that we will ask for some additional
11 information on or we may not, because, quite
12 frankly, the time for presenting evidence is -- is
13 in the past.

14 So it's only if there was just
15 something that we're confronting that we can't
16 really figure it out and we need to figure it out
17 in order to make a decision, and we'll be asking
18 you for either more argument or for more facts.

19 So you may or may not hear from us. If
20 you don't hear from us, please don't -- please
21 don't speak to us, because we really -- we've got
22 to start figuring out where we're going with this

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1 and -- and we have a process, we're trying to stick
2 to that process.

3 With that in mind, I'm happy to say
4 it's noon, so everyone can go off to lunch and not
5 be bothered with us any more today.

6 And for those of you who are real
7 masochists, we'll see you here at 9:00 a.m. on
8 Monday.

9 (Whereupon, at 12:00 p.m., the
10 hearing was concluded.)

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1 CERTIFICATE OF CERTIFIED COURT REPORTER

2 I, CINDY L. SEBO, the Certified Court Reporter,
3 do hereby certify that the witnesses whose testimony
4 appear in the foregoing hearing is the testimony of said
5 witnesses which were taken by me in stenotypy and
6 thereafter reduced to typewriting by me or under my
7 direction; that said hearing is a true record of the
8 testimony given by said witnesses; that I am neither
9 counsel for, related to, nor employed by any of the
10 parties to the action in which this hearing was taken;
11 and, further, that I am not a relative or employee of
12 any counsel or attorney employed by the parties hereto,
13 nor financially or otherwise interested in the outcome
14 of this action.

15

16

17

18 _____
Cindy L. Sebo, RMR, CRR, RPR, CSR,
19 CRR, RSA, Notary Public in and
for the District of Columbia

20

21

22 My commission expires: April 14, 2015

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