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Watchdog eyes copyright safety for iPhones, YouTube And recycling

By [Dan Goodin in San Francisco](#)

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A landmark exemption to US copyright law allowing Americans to unlock their cell phones should be strengthened to prevent trampling on the right of companies that recycle and refurbish handsets, their attorney told the Librarian of Congress Tuesday.

The exemption would apply to a provision of the Digital Millennium Copyright Act of 1998 that makes it illegal to circumvent digital rights management technologies that protect copyrighted, music, software, and other electronic media. Two years ago, the Library of Congress [granted a similar exception](#) (http://www.theregister.co.uk/2006/12/01/internet_archive_copyright_retrieve/) that explicitly permits cell phone holders to bypass software and hardware that prevents them from using alternative carriers' networks. The exemption is set to expire in late 2009 unless it is renewed.

This time around, Electronic Frontier Foundation Staff Attorney Jennifer Granick is trying to add teeth to the exemption that she says is crucial to companies trying to recycle hundreds of millions of used cell phones per year so they don't wind up in landfills. They specifically seek language that allows such unlocking "regardless of commercial motive."

The request was one of three filed by the EFF. A second proposal is aimed at securing the right of amateur video creators to use excerpts from DVDs. Many in Hollywood have argued any excerpting of video - even when it falls under the so-called fair-use doctrine - is always illegal if the ripping of DVDs is involved. And that chills the posting of videos on YouTube and elsewhere, the EFF argues.

A third exemption request is designed to protect the jailbreaking of iPhones so they run a wide variety of programs, rather than only those available from Apple's iTunes App Store. "It's not the DMCA's job to force iPhone users to buy only Apple-approved phone applications," EFF Senior Staff Attorney Fred von Lohmann said in a statement.

The move to renew the cell phone unlocking exception is designed to sidestep two federal court rulings that have blocked phone resellers from availing themselves of the DMCA exception because their motive for unlocking was commercial. The decisions, which came in lawsuits filed by US wireless provider TracFone, cited language in the exemption that allows unlocking "for the sole purpose of lawfully connecting to a wireless telephone communication network."

"The problem is courts have denied the exemption where there was a commercial motive, even when the purpose of the circumvention was to connect lawfully to a different wireless network," Granick told *The Register*. "The fact these decisions are out there and on the books has a potential chilling effect, and phone recyclers and customers who are buying second-hand phones shouldn't have to wonder."

James Baldinger, an attorney representing TracFone and other providers, said the provision EFF seeks is unnecessary and that TracFone only goes after resellers who unlock old phones and try to pass them off as new.

"TracFone has no problem with recycling of handsets, and fully supports protecting the environment and preventing used phones from ending up in landfills," he wrote in an email. "What we vehemently oppose, however, is attempts by traffickers to use the DMCA exemption as a legal 'shield' to attempt to avoid liability for profiting by diverting the subsidies that TracFone intends to benefit its legitimate customers."

But Baldinger said there is nothing preventing a court from applying the same rationale to recyclers that they've applied to resellers. He said he offered to jointly draft a proposal that addressed the concerns of both TracFone and the EFF clients but EFF declined.

TracFone has sued more than 160 defendants in more than 30 lawsuits.

The Copyright Office will accept comments on the proposals until February 2. Hearings are scheduled for this spring, and a decision is expected in October. ®