Before the

U.S. COPYRIGHT OFFICE

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In the matter of Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies

Docket No. RM 2008-8

Response of Apple Inc. to Questions Submitted by the Copyright Office Concerning Exemptions 5A and 11A (Class #1)

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Apple Inc. ("Apple") provides the following responses to the questions submitted by the Copyright Office on June 23, 2009 relating to proposed exemptions 5A and 11A (Class #1) concerning "jailbreaking" of smart phones.

1. *Does "jailbreaking" violate a license agreement between Apple and the purchaser of an iPhone? If so, please explain what provision it violates and whether "jailbreaking" constitutes copyright infringement*?

Response:

Jailbreaking Violates the Software License Agreement Covering the iPhone Software

Jailbreaking does violate a license agreement between Apple and the purchaser of an iPhone. All purchasers of iPhones must accept the terms and conditions of the iPhone Software License Agreement ("IPSLA") at the time of purchase of the iPhone (and any later updates of the software). The IPSLA governs use of the software resident on or included with the iPhone and contains a number of conditions and restrictions governing such use. There have been four major versions of the IPSLA: ver. 1.0, ver. 1.1.1, ver. 2.0, and ver. 3.0. Copies of each of these versions of the IPSLA are attached to this response as Attachments A-1 through A-4. Section 2(c) of all versions of the IPSLA provides that the licensee may not "modify, or create derivative works of the iPhone Software" and that any "attempt to do so is a violation of the rights of Apple and its licensors of the iPhone Software."

As explained at pp. 11-13 of Apple's response (the "Apple Response") in opposition to the "jailbreaking" exemption proposed by the Electronic Frontier Foundation ("EFF"), current jailbreaking techniques now in widespread use create unauthorized modifications to the copyrighted bootloader and operating system ("OS") software of the iPhone. Indeed, on page 7 of its submission proposing the jailbreaking exemption, proponent EFF admits that "decryption and modification of the iPhone firmware appears to be necessary for any jailbreak technique to succeed on a persistent basis." The modifications to the bootloader and the OS that the user makes in the course of jailbreaking – which should really be referred to by the more accurate label of "hacking" – therefore constitute a breach the IPSLA. The "Termination" section of the IPSLA (Section 5 of ver. 1.0 and Section 6 of vers. 1.1.1, 2.0, and 3.0) provides that the licensee's rights under the IPSLA terminate automatically without notice from Apple if the licensee fails to comply with any term(s) of the IPSLA, and upon termination of the license, the licensee must cease all use of the iPhone Software and updates thereto. Therefore, a user's continued use of the modified iPhone Software in a jailbroken phone is a further breach of the IPSLA.

Jailbreaking Constitutes Copyright Infringement

Jailbreaking constitutes copyright infringement. Because jailbreaking involves unauthorized modifications to Apple's copyrighted bootloader and OS programs, it is a violation of 17 U.S.C. § 106(1) & (2), unless such modifications are either within the scope of the license granted under the IPSLA (which they are not), or are covered by the statutory rights under 17 U.S.C. § 117 or by the fair use doctrine (again, which they are not, as detailed below).

The modifications to the bootloader and the OS are not within the license rights granted under the IPSLA, because, as noted, that agreement flatly prohibits the modification of, or creation of derivative works based upon, the iPhone Software. Nor is the initial act of jailbreaking the only act of copyright infringement that users of jailbroken iPhones may need to engage in. Further modifications (hacking) of the OS are often necessary to enable certain kinds of applications to run even after the basic jailbreaking is accomplished. Such modifications are infringing and, as described in further detail in the Apple Response, can give rise to additional functional problems on the iPhone, such as interfering with operation of certain Application Programming Interfaces (APIs) or system calls, or creating incompatibilities with other updated components of the OS. Thus, the initial infringing acts on the OS often lead to other infringing acts.

Section 117 Is Inapplicable, and in any Event Jailbreaking Activities Do Not Fall Within Its Ambit

Section 117 is simply not applicable to, and in any event does not permit, the unauthorized modifications to the bootloader and OS that are made in the course of jailbreaking the iPhone.

1. Section 117 is inapplicable at the threshold because the IPSLA prohibits modification and the licensee is not the "owner" of the copy of the iPhone Software.

Seven of the eight courts to examine the issue have held the Final Report of the National Commission on New Technological Uses of Copyrighted Works (1978) (the "CONTU Report") to be the legislative history of Section 117, or at the very least indicative of Congressional intent.[1] In recommending that the copyright statute be amended to insert Section 117, the commissioners noted in the CONTU Report that "Should proprietors feel strongly that they do not want rightful possessor of copies of their programs to prepare such adaptations, they could, of course, make such desires a contractual matter." Thus, since the very origin of Section 117 rights, Congress has contemplated that they could be negated by contract, and Apple has consistently done so in every version of the IPSLA. Accordingly, Section 117 is not available at all as a defense to jailbreaking activities by the iPhone software licensee.

In addition, Section 117 rights are applicable only to the "owner" of a copy of a computer program. At least three opinions by the Ninth Circuit have held that licensees of a computer program do not "own" their copy of the program and therefore are not entitled to Section 117 rights.[2] The most recent of these decisions from 2006, *Wall Data Inc. v. Los Angeles County Sheriff's Dept.*,[3] provided a two-part test for determining whether the acquirer of a copy of a software program is a licensee or an owner: if the copyright holder (1) makes clear that it is granting a license to the copy of the software, and (2) imposes significant restrictions on the use or transfer of the copy, then the transaction is a license, not a sale, and the purchaser of the copy is a licensee, not an "owner" within the meaning of Section 117.[4] Under this test, a district court in the Ninth Circuit recently held that no Section 117 rights existed where a license agreement provided that title to all copies of software remained with the copyright holder, the software could not be transferred except by transferring the original media along with the original packaging and manuals, and the transferee of the software had to agree to the terms of the license.[5]

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1 *See Krause v. Titleserv*, 402 F.3d 119, 128 (2d Cir. 2005); *Aymes v. Bonelli*, 47 F.3d 23, 26-27 (2d Cir. 1995); *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1520 n.5 (9th Cir. 1992); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 260-61 (5th Cir. 1988); *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1252 (3d Cir. 1983), *cert. denied*, 464 U.S. 1033 (1984); *Foresight Resources Corp. v. Pfortmiller*, 719 F. Supp. 1006, 1009 (D. Kan. 1989); *Apple Computer, Inc. v. Formula Int'l, Inc.*, 594 F. Supp. 617, 621 (C.D. Cal. 1984). *But see Lotus Dev. Corp. v. Borland Int'l, Inc.*, 788 F. Supp. 78, 93 (D. Mass. 1992), *rev'd on other grounds*, 49 F.3d 807 (1st Cir. 1995), *aff'd by an equally divided court*, 116 S. Ct. 804 (1996).

2 *Wall Data Inc. v. Los Angeles County Sheriff's Dept.*, 447 F.3d 769, 85 (9th Cir. 2006) ("[I]f a software developer retains ownership of every copy of software, and merely licenses the use of those copies, § 117 does not apply."); *Triad Sys. Corp. v. S.E. Express Co.*, 64 F.3d 1330, 1333 (9th Cir. 1995); *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 n.5 (9th Cir. 1993).

3 447 F.3d 769 (9th Cir. 2006).

4 *Id*. at 785.

5 *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, 2008 U.S. Dist. LEXIS 53988 at *26-28 (D. Ariz. July 14, 2008).

Apple's IPSLA contains virtually identical provisions. Specifically, Section 1 of vers. 1.0, 1.1.1, and 2.0 of the IPSLA all state, "You own the media on which the iPhone Software is recorded but Apple and/or Apple's licensor(s) retain ownership of the iPhone software itself." Section 1 of ver. 3.0 of the IPSLA simply states, "Apple and its licensors retain ownership of the iPhone Software itself and reserve all rights not expressly granted to you." Section 3(a) of all versions of the IPSLA further provides that the licensee may not rent, lease, lend, or sublicense the iPhone Software (versions 2.0 and 3.0 also prohibit the sale or redistribution of the software), subject to a limited exception described in the response to question 4 below. Under the Ninth Circuit authorities, these restrictions are sufficient to make iPhone users licensees, not owners, of the copies of software in the iPhone (including the bootloader and OS), and Section 117 is therefore inapplicable.

The Second Circuit and Federal Circuit have adopted somewhat more liberal tests under Section 117. Instead of adopting the Ninth Circuit's characterization of all licensees as non-owners, these Circuits look to whether the licensee has sufficient incidents of ownership in the particular transaction at hand – including the presence or absence of formal title to the copy, as well as restrictions on use and transfer – to be considered the "owner" of the copy for purposes of Section 117.[6] Even under this more liberal approach, Section 117 is inapplicable here. The Federal Circuit concluded that, where the license agreement (i) provided that the licensor retained title to copies of the software, (ii) limited the licensee's right to transfer copies of the software and to disclose the details of it to third parties, and (iii) limited the hardware on which the software could run, the licensee did not have sufficient incidents of ownership to have Section 117 rights.[7] In Apple's case, as noted, Apple's IPSLA provides that the licensee does not own title to the copy of the iPhone software and imposes restrictions on transfer. In addition, all versions of the IPSLA impose similar restrictions on the hardware with which the software may be used, limiting its use to a single Apple-branded iPhone and prohibiting making the software available over a network where it could be used by multiple devices at the same time.[8]

Similarly, the factual predicates and indicia of ownership that led the Second Circuit to conclude in *Krause v. Titleserv*[9] that Titleserv was the "owner" of its copy of the software that Krause had developed for Titleserv[10] are strikingly absent here. For instance:

- Titleserv paid Krause substantial consideration to develop the programs for its sole benefit. By contrast, the iPhone user has not paid Apple to develop the iPhone software for its sole benefit.

- Krause customized the software to serve Titleserv's operations. By contrast, Apple does not customize the iPhone software to serve a particular iPhone user's operations

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6 *See Krause v. Titleserv, Inc.*, 402 F.3d 119, 123-24 (2d Cir. 2005); *DSC Communications Corp. v. Pulse Communications, Inc.*, 170 F.3d 1354, 1360-61 (Fed. Cir. 1999).

7 *DSC Communications*, 170 F.3d at 1360-61.

8 IPSLA § 2(a).

9 *Krause v. Titleserv, Inc.*, 402 F.3d 119 (2d Cir. 2005).

10 *See id*. at 124.

or needs.

- Krause never reserved the right to repossess the copies used by Titleserv and agreed that Titleserv had the right to continue to possess and use the programs forever, regardless whether its relationship with Krause terminated. By contrast, the "Termination" section of the IPSLA (Section 5 of ver. 1 and Section 6 of vers. 1.1.1, 2.0, and 3.0) provides, "Your rights under this License will terminate automatically without notice from Apple if you fail to comply with any term(s) of this License. Upon the termination of the License, you shall cease all use of the iPhone Software."

Under any of these authorities, iPhone users are licensees, not owners, of the copies of iPhone operating software, and Section 117 rights therefore do not apply. But even if the Copyright Office were to conclude that iPhone users might possibly qualify as "owners" under the more liberal tests of the Second or Federal Circuit, it is clear that such rights are not available as a matter of law to iPhone Software licensees under the Ninth Circuit's test.[11] Therefore, at a minimum, given the existing split in authority concerning whether licensees can even have Section 117 rights *at all*, the Copyright Office cannot appropriately rely on Section 117 as a basis for concluding that unauthorized modifications to Apple's bootloader and OS software made in the course of jailbreaking would be noninfringing. Proponents of an exemption bear a high burden of proof to show that the activities that would be permitted by the exemption are noninfringing under current law.[12] They must show that the current law is undisputed, and clear, in their favor. Given the current significant split of authority concerning applicability of Section 117 to licensees, the EFF simply cannot meet this burden – the courts, and not this rulemaking proceeding, are where any such matters must be raised.

2. Even if Section 117 were deemed applicable, jailbreaking falls outside of the permissible ambit of Section 117 rights.

Even if the Copyright Office were to deem Section 117 potentially applicable at all, the modifications made in the course of jailbreaking fall outside the permissible ambit of Section 117 rights for many reasons.

Section 117(a)(1) authorizes the adaptation of a computer program provided that it "is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner." No adaptations are essential for either the bootloader or the OS to be utilized in conjunction with the iPhone. Both work properly for their

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[11] And as noted in the discussion in the next subsection, even if an iPhone software licensee qualifies as an "owner" of its copy, the modifications made in the course of jailbreaking would not fall within the ambit of permissible adaptations under Section 117 rights because of the harm to the copyright owner such modifications cause and because they are used "in another manner" from that envisioned in the creation of the program.

[12] *See* Notice of Inquiry of Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 73 Fed. Reg. 58,073, 58,077 (Oct. 6, 2008) (a proponent bears the burden of proof to "establish that the prevented activity is, in fact, a noninfringing use under current law.").

intended purposes on the iPhone hardware as originally delivered to the end user. Because the end user is licensed under Section 2(a) of the IPSLA to use the iPhone software only on an Apple-labeled iPhone, and no other type of device, the end user has neither need nor legal right to adapt the bootloader or OS for use on other hardware.[13] And as noted in the Apple Response, the iPhone works with over 35,000 (now over 50,000 as of the time of this submission) applications in the App Store, so it can hardly be said that adaptation of the iPhone software is essential to utilize it to run applications.

Moreover, in *Krause v. Titleserv*, the Second Circuit noted, "Whether a questioned use is a use *in another manner* seems to us to depend on the type of use envisioned in the creation of the program."[14] The modifications to the bootloader and the OS made to jailbreak a phone result in those programs being used in ways that were never envisioned in their creation. The iPhone bootloader and OS are each protected by two types of technological protection measures – encryption and signing. Both technological measures function as an access control (access to the software cannot be gained unless an authorized key is used to decrypt it and the sign check passes), whereas signing also functions as a copy control to prevent modification (if the software is modified in any way, the sign check will fail and the software will not be loaded). Modifications made to jailbreak a phone destroy its fundamental characteristic of operational integrity and security resulting from these technological protection measures, enabling jailbroken applications to execute that may make calls to undocumented APIs or that are otherwise non-compliant with Apple's safety and functionality criteria for iPhone use, thereby creating the many harms that Apple's representative Greg Joswiak testified about at the Copyright Office hearings in Palo Alto on May 1. Hacking the copyrighted bootloader and OS software is therefore use "in another manner" that was not envisioned in its creation and is not covered by Section 117(a).

To the extent that some court decisions have construed Section 117(a) to allow a user of a computer program to add new features to it, *Krause v. Titleserv* made clear that the right to add features can "only be exercised so long as they [do] not harm the interests of the copyright proprietor."[15] This standard cannot possibly be met here. As elaborated in the Apple Response at p. 16 and in Mr. Joswiak's testimony, modifications to the bootloader and the OS that are made to jailbreak the iPhone create harms that significantly undermine the interests of the

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[13] One of the principal concerns motivating the CONTU Commission to recommend that Section 117 be revised to afford an adaptation right was the lack of standardization of hardware in the computer industry at the time and the concomitant need to adapt a computer program for the user's particular computer hardware: "Because of a lack of complete standardization among programming languages and hardware in the computer industry, one who rightfully acquires a copy of a program frequently cannot use it without adapting it to that limited extent which will allow its use in the possessor's computer." CONTU Report at 13. No such need exists with respect to the iPhone.

[14] *Krause v. Titleserv, Inc.*, 402 F.3d 119, 129 (2d Cir.), *cert. denied*, 126 S. Ct. 622 (2005) (emphasis in the original).

[15] *Id*. (quoting CONTU Report at 13); *see also Weitzman v. Microcomputer Resources, Inc.*, 510 F. Supp. 2d 1098, 1109 (S.D. Fla. 2007) (right to add features under Section 117(a) is permitted so long as the modifications "do not disrupt [the] interests" of the copyright owner).

copyright creator and owner, Apple, and the value and integrity of the copyrighted work. Those modifications can readily cause serious problems in the operation of the iPhone – interference with safety, control and security functions of the device; interference with the proper operation of the APIs and system calls of the OS, causing application programs to fail to operate correctly on the iPhone; and failure of updates to the OS distributed by Apple to work correctly, which can also result in functional problems with the device, potentially causing it to fail to operate. The modifications also undermine Apple's copyrighted work by adversely affecting Apple's partners – creating instability and piracy risks for developers (whose own copyrighted works are put at significant risk), and network harm to iPhone cellular providers (discussed in greater detail below).

The point cannot be overstated that these harms to the operation of the iPhone device and to Apple's third party relationships – and essentially to the entire iPhone ecosystem – are *all* fundamentally harms to Apple's copyright interests; that is, harms to the value and integrity of the copyrighted work. They cannot be anything but. The value to Apple of the OS as a copyrighted work depends upon preservation of its operational integrity so that users have a consistently good experience with the product that carries and monetizes the OS, which of course is the iPhone. It also depends on ensuring third parties provide the services and functionality that help make the iPhone the revolutionary product it is. Hacking thus undermines the overall iPhone experience, diminishing Apple's copyrights and, ultimately, the overall value of the iPhone and its ecosystem to consumers.

These harms alone are enough to reject the proposed exemption as anathema to the very goal and purpose of copyright laws and the DMCA. But Apple also is at risk of direct monetary harm. As described in the Apple Response and elaborated by Mr. Joswiak, functional problems that result from unauthorized modifications to the OS increase Apple's support costs very substantially. Indeed, as Mr. Joswiak testified, the number one iPhone bug reported to Apple's support department currently results from jailbroken phones. Software crashes caused by jailbroken phones are reported to Apple literally millions of times. Apple incurs very substantial expenses to investigate these problems to determine whether they result from problems in Apple's own software, or result from jailbreaking. The kind of harm that flows to Apple as the copyright owner from jailbreaking simply was not present in the "modest alterations"[16] that the court in *Krause v. Titleserv* found to be within Section 117 – specifically, changes to the software to add new clients, insert changed client addresses, and to add the ability to print checks and to allow customers limited direct access to their records.[17]

The Fair Use Doctrine Does Not Cover Jailbreaking Activities

The unauthorized modifications of the bootloader and OS software made in the course of jailbreaking are also not covered by the fair use doctrine. Looking at the four statutory fair use factors,[18] although the use *per se* of the modified iPhone bootloader and OS on an individual

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16 *Krause v. Titleserv*, 402 F.3d at 128.

17 *Id*. at 125.

18 The four nonexclusive statutory fair use factors prescribed in § 107 of the copyright statute are: (1) the purpose and character of the use, including whether such use is of a

handset is of a personal nature, it is not a transformative use, and because a jailbroken OS is often used to play pirated content, the act of jailbreaking should be considered of a commercial nature since it facilitates obtaining applications without paying fees for the them. Therefore, factor 1 weighs against fair use.[19] Factors 2 and 3 also weigh against fair use because the copyrighted works at issue are highly creative and not factual in nature, and essentially the entire work is being copied.[20]

Of most importance is factor 4,[21] because the effect of the unauthorized modifications is to diminish the value of the copyrighted works to Apple. As elaborated in the Apple Response and summarized in the discussion of Section 117 above, jailbreaking the bootloader and the OS clearly diminishes the value of those copyrighted works directly by giving rise to a host of problems in the safety, security, operation and overall utility of the iPhone, and by substantially increasing Apple's costs to support the software.

The fact that Apple does not currently separately charge for the iPhone Software does not alter the analysis under factor 4. As noted in the Apple Response, the iPhone Software is not itself a standalone product; it is a part, and the technical center, of the iPhone mobile computing product. By itself, the OS may be of little value to consumers in that no consumer likely would purchase the OS as a stand-alone product. Likewise, by itself, the iPhone hardware (without an operating system or applications) may be of little value to consumers. And software applications on their own (without an operating system or a hardware device) may also be of little value. But when the complementary iPhone OS, iPhone hardware, and applications are combined, that combined product is highly valuable to consumers, as evidenced by its continued success in the marketplace. The utility of the iPhone to consumers cannot be denied and the OS is a central piece of the final product. It is the OS that provides the platform on which consumers can obtain useful applications and applications developers can obtain access to consumers. In the language of economics, the iPhone OS is a two-sided platform that links developers and users and is fueled by "inter-side" network effects.[22]

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commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

[19] *See, e.g., Wall Data Inc. v. Los Angeles County Sheriff's Dept.*, 447 F.3d 769, 778-79 (9th Cir. 2006) (under the first fair use factor, use of software that saves the expense of purchasing a copy is a commercial use, and creating exact copies of software and putting them to the same purpose as the original software is not transformative).

[20] *See id*. at 779-80 (second factor weighed against fair use because copyright protects software and the computer program at issue cost millions of dollars to develop; third factor weighed against fair use in view of verbatim copying of the entire computer program).

[21] *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985) (effect on the market for the copyrighted work is "undoubtedly the single most important element of fair use").

[22] *See, e.g.,* David S. Evans, Andrei Hagiu, and Richard Schmalensee, *Invisible Engines: How Software Platforms Drive Innovation and Transform Industries,* The MIT Press (2006); David S. Evans and Richard Schmalensee, "The Industrial Organization of Markets with Two-

In sum, the value of the OS software to the iPhone, and therefore to Apple, is that it enables the iPhone to function as a platform for the mobile computing experience that differentiates the iPhone from its many competitors. This, in turn, increases the value of Apple's iPhone copyrights and, again, overall consumer utility, making the iPhone a more attractive product to consumers. The value of the iPhone, and hence the software embedded in it, is substantially diminished when the integrity and functionality of that software is compromised by jailbreaking (hacking), when Apple is left to deal with the problems that ensue, and when the positive feedback loops enabled by the App Store and the iPhone Developer Program are compromised. Again, the burden of proof is on the EFF as the proponent of the jailbreaking exemption to establish that jailbreaking is a fair use. Given the evident harm to the value of Apple's copyrighted iPhone software that results from jailbreaking, the EFF cannot meet its burden.

2. *Does the iPhone licensing agreement distinguish between the ownership of the "computer program" and the ownership of the particular copy of the program that exists on the iPhone?*

Response:

Yes. Apple owns the bootloader and OS computer programs and the copyright and other intellectual property rights therein. In the IPSLA, Apple grants a limited license under its copyrights in those computer programs subject to the limitations and restrictions set forth in various provisions of the IPSLA, and Section 1 of all versions of the IPSLA provides that Apple reserves all rights in the computer programs not expressly granted to the licensee. Section 1 further provides that Apple also retains title to the particular copy of the software that exists on the iPhone. Specifically, Section 1 of vers. 1.0, 1.1.1, and 2.0 of the IPSLA all state, "You own the media on which the iPhone Software is recorded but Apple and/or Apple's licensor(s) retain ownership of the iPhone software itself." Section 1 of ver. 3.0 of the IPSLA simply states, "Apple and its licensors retain ownership of the iPhone Software itself …." The term "iPhone Software" is defined in Section 1 to mean the specific physical copy of the software resident on the iPhone. Specifically:

- The term is defined in ver. 1.0 of the IPSLA as the "software (including Boot ROM code and other embedded software), documentation and any fonts that came with your iPhone, whether in read only memory, on any other media or in any other form."

- The term is defined in vers. 1.1.1 and 2.0 of the IPSLA as the "software (including Boot ROM code and other embedded software), documentation and any fonts that

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Sided Platforms," *Competition Policy International,* 3(1): 151-179 (2007). These inter-side network effects mean that as more applications are available for the platform, the platform becomes more attractive to consumers and more consumers purchase it. As more consumers purchase the platform, the platform is more attractive to developers and more applications are written for it. This type of feedback effect is common in industries characterized by two-sided platforms.

came with your iPhone, as may be updated or replaced by software updates or system restore software provided by Apple, whether in read only memory, on any other media or in any other form."

- The term is defined in ver. 3.0 of the IPSLA as the "software (including Boot ROM code and other embedded software), documentation, interfaces, content, fonts and any data that came with your iPhone ('Original iPhone Software'), as may be updated or replaced by feature enhancements, software updates or system restore software provided by Apple ('iPhone Software Updates'), whether in read only memory, on any other media or in any other form (the Original iPhone Software and iPhone Software Updates are collectively referred to as the 'iPhone Software')."

3. *Does any licensing agreement specifically place terms on "the copy" of the computer program, or do the license terms relate to the computer program generally?*

Response:

The IPSLA specifically places terms on the copy of the computer programs licensed under the IPSLA. As explained above, the term "iPhone Software" is defined in Section 1 of all versions of the IPSLA to mean the specific physical copy of the software resident on the iPhone. The IPSLA places a number of restrictions and limitations on the use of that physical copy:

- As explained, Apple retains ownership and title to the copy of the iPhone Software.

- Section 2(a) of the IPSLA provides that the iPhone Software may be used only on a single Apple-branded iPhone and may not exist on more than one Apple-branded iPhone at a time or on any other phone. The licensee is prohibited from distributing or making the iPhone Software available over a network where it could be used by multiple devices at the same time.

- Section 2(b) provides that updates to the iPhone Software or iPhone system restore software may not be used to update or restore iPhones that the licensee does not control or own, and the licensee may not distribute or make the iPhone Software updates available over a network where they could be used by multiple devices or multiple computers at the same time.

- Section 2(c) provides that, except as and only to the extent permitted by applicable law, the licensee may not copy, decompile, reverse engineer, disassemble, attempt to derive the source code of, decrypt, modify, or create derivative works of the iPhone Software, updates to the iPhone Software, or any part thereof.

- Section 2(c) or 2(d) (depending upon the version of the IPSLA) permits use of the iPhone Software to reproduce materials only so long as such use is limited to reproduction of non-copyrighted materials, materials in which the licensee owns the copyright, or materials the licensee is authorized or legally permitted to reproduce.

- Section 3(a) provides that the licensee may not rent, lease, lend, or sublicense the iPhone Software. Versions 2.0 and 3.0 of the IPSLA also expressly prohibit the sale or redistribution of the iPhone Software.

- Section 3 further imposes restrictions on transfer of the iPhone Software (see the response to question #4 below).

- The Termination section of the IPSLA (Section 5 of ver. 1.0 and Section 6 of vers. 1.1.1, 2.0, and 3.0) provides that the licensee's rights under the IPSLA will terminate automatically without notice from Apple if the licensee fails to comply with any term(s) of the IPSLA. Upon termination of the license, the licensee must cease all use of the iPhone Software and updates.

4. *May the purchaser of an iPhone transfer ownership or dispose of the iPhone and all of the software originally included with the iPhone?*

Response:

Under specific conditions, an iPhone purchaser may transfer his or her ownership of the actual iPhone device, together with his or her license to the copy of the software in the iPhone (as explained above, iPhone purchasers are licensees, and not owners, of the copies of software in the iPhone). Section 3 of all versions of the IPSLA provides as follows: "You may, however, make a one-time permanent transfer of all of your license rights to the iPhone Software to another party in connection with the transfer of ownership of your iPhone, provided that: (a) the transfer must include your iPhone and all of the iPhone Software, including all its component parts, original media, printed materials and this License; (b) you do not retain any copies of the iPhone Software, full or partial, including copies stored on a computer or other storage device; and (c) the party receiving the iPhone Software reads and agrees to accept the terms and conditions of this License."

5. *In testimony, the Electronic Frontier Foundation stated that the iPhone warranty would not apply to an unauthorized modification on an iPhone. Would other services or functionality be affected by "jailbreaking" an iPhone, e.g., would AT&T phone, data, or GPS functionality be affected? Would AT&T be required to provide service to an iPhone modified by the user?*

Response:

Yes, other services and functionality of the iPhone can be affected by jailbreaking of the phone, as well as services and functions on AT&T's phone and data network. The OS controls a critical portion of the iPhone known as the "baseband processor" ("BBP") that is used to connect the phone to a telephone/data network and to utilize services on the network. Once an iPhone is jailbroken, it is much easier to hack the BBP software by making modifications to it. Such modifications can interfere with or otherwise affect phone, data, and GPS functionality in a

number of ways. For example, modifications to the BBP software may introduce functional errors into that software or cause it not to function correctly with other software on the iPhone, which in turn can render the iPhone incapable of connecting to the network at all in order to make phone calls or send/receive data. Such modifications may also interfere with GPS functionality. There is a special GPS chip in the iPhone that in ordinary operation computes location of the phone using the GPS geosynchronous satellites around the globe. However, an enhanced functionality called "assisted GPS" enables the location of the iPhone to be pinpointed with greater accuracy than ordinary GPS by utilizing data about the location of the cell tower to which the user is currently connected. If modifications to the BBP software were to render the user unable to connect to the local AT&T cell phone tower, the assisted GPS functionality would, in turn, not function.

More generally, as Mr. Joswiak testified at the hearings in Palo Alto, a critical consideration in the development of the iPhone was to design it in such a way that a relationship of trust could be established with the telecommunication provider (AT&T in the case of users in the U.S.). Before partnering with Apple to provide voice and data services, it was critical to AT&T that the iPhone be secure against hacks that could allow malicious users, or even well-intentioned users, to wreak havoc on the network. Because jailbreaking makes hacking of the BBP software much easier, jailbreaking affords an avenue for hackers to accomplish a number of undesirable things on the network.

For example, each iPhone contains a unique Exclusive Chip Identification (ECID) number that identifies the phone to the cell tower. With access to the BBP via jailbreaking, hackers may be able to change the ECID, which in turn can enable phone calls to be made anonymously (this would be desirable to drug dealers, for example) or charges for the calls to be avoided. If changing the ECID results in multiple phones having the same ECID being connected to a given tower simultaneously, the tower software might react in an unknown manner, including possibly kicking those phones off the network, making their users unable to make phone calls or send/receive data. By hacking the BBP software through a jailbroken phone and taking control of the BBP software, a hacker can initiate commands to the cell tower software that may skirt the carrier's rules limiting the packet size or the amount of data that can be transmitted, or avoid charges for sending data. More pernicious forms of activity may also be enabled. For example, a local or international hacker could potentially initiate commands (such as a denial of service attack) that could crash the tower software, rendering the tower entirely inoperable to process calls or transmit data. In short, taking control of the BBP software would be much the equivalent of getting inside the firewall of a corporate computer – to potentially catastrophic result. The technological protection measures were designed into the iPhone precisely to prevent these kinds of pernicious activities, and if granted, the jailbreaking exemption would open the door to them.

Finally, like Apple, AT&T's support organization is burdened by users of jailbroken phones who encounter functional problems with the phone that result from jailbreaking. Such users often call AT&T to report such problems, believing that they may be the result of problems on AT&T's network. AT&T is then forced to spend significant resources investigating and diagnosing the problems to determine whether, in fact, there is a problem with AT&T's network or service.

One additional note is warranted with respect to EFF's claim "that the iPhone warranty would not apply to an unauthorized modification on an iPhone." To clarify, Apple does not deny all warranty service to an iPhone just because it has been jailbroken. For example, if a particular user's iPhone were to have a hardware defect in materials or workmanship within the warranty period that was not caused by jailbreaking, Apple would provide warranty service to that phone, notwithstanding the fact that it had been jailbroken. However, Apple has through a variety of channels and mechanisms notified iPhone users that making unauthorized modifications to the iPhone software violates the iPhone software license agreement and may cause irreparable damage to the device, and that the inability to use an iPhone due to unauthorized software modifications is not covered under the iPhone warranty. Apple also provides iPhone customers 90 days of complimentary technical support, but technical support for issues caused by third party products, including installation of unauthorized software, is excluded.

The difficulty, both with respect to warranty service and technical support, as Mr. Joswiak stated during the hearing, is in making the determinations as to what caused a particular problem with a particular iPhone, a process that is expensive and consumes a lot of resources in Apple's service and support departments. In fact, whether a jailbreak occurred at all can require a lot of effort to ascertain – and the consumers themselves may neither realize it nor report it accurately. The iPhone itself has no reporting mechanism that would quickly identify to either Apple or the consumer that its OS has been modified. And when a customer makes a call to Apple's support line, as opposed to walking into an Apple store, the customer's iPhone is obviously not in the hands of Apple support personnel where it could be examined to determine whether the OS has been modified. Even if the reported problem is caused by jailbreaking, the consumer will often not know or even suspect that as the origin of the problem, because sources of jailbreaking tools such as Pwnage Tool typically do not warn consumers of problems that may ensue from jailbreaking. Although Apple can inquire of the consumer whether he or she has jailbroken the phone, Apple must nevertheless incur the cost of the call and the time it takes to attempt to ascertain whether the source of the problem is, in fact, from jailbreaking.

Apple's goal is to provide first class customer support to all of its customers. While Apple obviously can't provide service or technical support with respect to problems that it did not cause and has no control over, it nevertheless harms Apple's ability to offer a first class customer support experience when Apple is forced to deny support to a customer because of the effects of jailbreaking.. As Mr. Joswiak testified, jailbreaking causes an iPhone to become unstable in unpredictable ways – indeed, in ways that even those who knowingly jailbreak their phone often do not expect or understand. Even the limited number of jailbroken phones that exist today (less than one percent) already give rise to the number one reported bug causing iPhone crashes. If the Copyright Office were to grant the proposed exemption and jailbreaking were to proliferate, Apple's costs would increase exponentially to make the determinations in each instance as to whether reported problems were in fact caused by jailbreaking. But perhaps more importantly, the number of customers Apple would end up having to deny support to would increase as well, thereby harming Apple's ability to gives its customers a first class support experience.

In short, the costs and harm to Apple from jailbreaking are very substantial, and Apple's general policy on warranty and support cannot simply be cited as a way to dismiss or avoid them, as the EFF attempted to do at the hearing.

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Conclusion

As the preceding discussion makes clear, and as elaborated in the Apple Response and at the hearing on this matter, the technological protection measures of Apple's iPhone are and have always been in place to protect exactly what the DMCA anti-circumvention provisions were promulgated to protect: the pure copyright concerns at the heart of Apple's creation of its iPhone OS and resulting iPhone ecosystem. In its Final Rule on the 2006 Rulemaking Proceeding, the Copyright Office made clear, in addressing the cellular telephone "unlocking" exemption, the significance of "protect[ing] the interests of the copyright owner or the value or integrity of the copyrighted work," as distinguished from a third party's business decision.[23]

Here, the risks and dangers to copyrighted work, and to the copyright owner itself, are undeniably present. It is the creator and owner of the copyrighted work – Apple – that is seeking to maintain protection of its authorship and the integrity and value of the work it has created. And the risks and damages to these copyright interests are significant. As the Copyright Office's follow-on questions (regarding, for example, jailbreaking's effects on other services and functionality) make clear, and as Apple's answers above elaborate, all of the risks and damages Apple identified at the hearing threaten Apple's copyright interests at issue. These harms include all of the following:

- Crashes & instability
- Malfunctioning & safety
- Invasion of privacy
- Exposing children to age-inappropriate content
- Viruses & malware
- Inability to update software
- Cellular network impact
- Piracy of developers' applications
- Instability of developers' applications
- Increased support burden
- Developer relationships
- The Apple/iPhone brand
- Limitation on ability to innovate

The list is lengthy and the risks are real. It is critical to note, moreover, that these are all *copyright* risks because they strike at the heart of the integrity and value of Apple's own copyrighted works (in addition to the value and integrity of thousands of other copyrighted works, those created by developers who are relying on Apple to ensure the security of their

[23] Final Rule, 71 Fed. Reg. 68,472 (November 27, 2006) at 68,476.

works). There is no principled way to characterize certain of these harms as "copyright interests" as opposed to "non-copyright interests." The copyright laws exist to promote the advancement of knowledge by encouraging the creation of new works of expression. In order to promote investment by individuals or companies in new knowledge, authors of new works are allowed to exploit those works, that is, to sell, lease, or otherwise monetize the value of the works in order to earn a return on their investment. Owners of copyrighted works are thus rightly given latitude to make their best judgments about how to earn returns on the value consumers place on their copyrighted works, which in turn maximizes societal welfare by promoting the creation of new works that are valued by society. That has happened in abundance here. The iPhone ecosystem, with the iPhone OS as its centerpiece protected against harmful modifications, has been a tremendous engine for creativity, spawning the creation of over 50,000 new iPhone software applications as of the recent first year anniversary of the App Store. Those applications have been downloaded by users more than one billion times.

All of the harms articulated in the list above damage Apple's ability to appropriate the value of its copyrighted works and, ultimately, damage consumers because they undercut the overall *iPhone experience*. In this particular situation, it would be arbitrary to credit some as copyright interests but dismiss others as merely protecting a "business decision"[24] when all are related to promoting and protecting demand for the iPhone, the monetization vehicle for the copyrighted software. After all, the entire purpose of the intellectual property laws is to promote innovative and creative efforts by protecting business models that exploit the fruits of those creative efforts. Apple's iPhone business model may not be to the EFF's liking, but in the manner that it delivered a true mobile computing platform to consumers and created an entirely new category of mobile applications, it is an historic success story for the copyright laws.

To sum up, jailbreaking is hacking that violates Apple's IPSLA and results in copyright infringement. iPhone purchasers explicitly agree to a limited license to the OS, and do not ever have the right to modify their particular copy of the OS, whether under the IPSLA, Section 117, or the fair use doctrine. The unauthorized modifications sought to be blessed by this exemption create significant damage to the undeniable copyright interests Apple has in the copyrighted

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[24] In granting the 2006 unlocking exemption, the Copyright Office observed a very different situation from that presented here with respect to the proposed jailbreaking exemption: "The reason that [the four factors enumerated in § 1201(a)(1)(C)(i)–(iv)] appear[] to be neutral is that in this case, the access controls do not appear to actually be deployed in order to protect the interests of the copyright owner or the value or integrity of the copyrighted work; rather, they are used by wireless carriers to limit the ability of subscribers to switch to other carriers, a business decision that has nothing whatsoever to do with the interests protected by copyright. And that, in turn, invokes the additional factor set forth in § 1201(a)(1)(C)(v): 'such other factors as the Librarian considers appropriate.' When application of the prohibition on circumvention of access controls would offer no apparent benefit to the author or copyright owner in relation to the work to which access is controlled, but simply offers a benefit to a third party who may use § 1201 to control the use of hardware which, as is increasingly the case, may be operated in part through the use of computer software or firmware, an exemption may well be warranted. Such appears to be the case with respect to the software locks involved in the current proposal." Final Rule, 71 Fed. Reg. 68,472 (November 27, 2006) at 68,476.

works it created, damage that fundamentally undermines the value and integrity of those works and, at bottom, significantly harms the value consumers obtain from the iPhone.

For these reasons, and for the reasons articulated in greater detail in the Apple Response and at the hearing on this matter, Apple respectfully requests that the proposed jailbreaking exemption be denied.

Attachment A-1

IPSLA ver. 1.0

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Attachment A-2

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Update Rev. 9/14/07

Attachment A-3

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