

Before the
**Library of Congress
Copyright Office
Notice of Inquiry
In re Exemption to Prohibition on
Circumvention of Copyright
Protection Systems for Access
Control Technologies**

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Introduction: Good morning. My name is Jennifer Granick, and I represent the Wireless Alliance and Robert Pinkerton. The Wireless Alliance recycles and resells used, refurbished, and new cellular products. The Alliance works with industry, refurbishers, and the Environmental Protection Agency to reduce toxic waste and help bridge the digital divide. In the Alliance's experience, phones that are not locked to a specific carrier are much easier to recycle and resell.

Robert Pinkerton is an individual residing in Arlington, Virginia who traveled frequently in his former capacity as Director of Government Solutions for Siebel Systems. Mr. Pinkerton, along with thousands of other Americans, has found that having a locked mobile phone has greatly interfered with his ability to communicate while traveling. We are asking the Copyright Office to grant an exemption under § 1201(a)(1) to allow individuals to unlock their cell phones so that they may use them with carriers of their choice.

Brief Summary of Argument: As the litigation in *TracFone v. Sol Wireless*¹ illustrates, Section 1201(a) is an actual threat to consumers seeking to unlock their cell phones. Cell phone unlocking is an otherwise legal and non-infringing activity and consumers should be able to unlock their phones without fear of liability. Unlocking to use the phone on the network of your choice is non-infringing. There is no option for most customers other than unlocking. Unlocking does not enable infringement of the firmware on the phone. Nor does unlocking necessarily hobble content companies in imposing digital rights management on audio-visual content stored on the phone. The balance of harms – particularly competition and consumer choice, environmental considerations, and the digital divide – greatly weighs in favor of this exemption.

This is a decision for the Copyright Office: In opposition to this application for an exemption, the content industry argues that a court or regulatory agency would first have to outlaw carrier's anticompetitive locking practices, and only

¹ *TracFone Wireless, Inc. v. Sol Wireless Group*, No. 05-232729, (S.D. Fla. Feb. 28, 2006). The Complaint is attached as Exhibit C, the Joint Stipulation for Entry of Final Judgment as Exhibit D, and the Final Judgment and Permanent Injunction as Exhibit E.

then would consumers have a right to self-help through unlocking. We need not prove that carrier locking is illegal to warrant an exemption for customer unlocking. Customer unlocking is legal, regardless of whether the carrier's practices are prohibited under antitrust law, agency regulations or state consumer protection statutes. The DMCA is the only reason consumers arguably can not engage in the otherwise legitimate activity of phone unlocking. Even if courts rule that carrier locking is unlawful, as they soon may², the DMCA would still outlaw unlocking and we would still be here seeking an exemption. So the response that this is in the wrong forum is ridiculous. Only the DMCA prevents unlocking and only the Copyright Office can grant an exemption to the DMCA.

Section 1201(A) Threatens Legitimate Unlocking: Nearly all wireless communications providers use software locks to tie a customer's handset to their service network. There are several methods of locking. In general, locking prevents the customer from accessing copyrighted mobile firmware (bootloader and operating system), and running that firmware in conjunction with the wireless network of their choosing.

The lock is a technological protection measure that controls access to a copyrighted work, i.e. the mobile firmware. Therefore, circumventing that lock arguably violates section 1201(a). Under the rule of *Lexmark Int'l, Inc. v. Static Control Components*, 387 F.3d 522 (6th Cir. 2004), a defendant in an anti-circumvention case could argue that unlocking is not illegal. In *Lexmark*, the Sixth

² There are pending state class action lawsuits against wireless carriers for locking practices. See, e.g., *In re CellPhone Termination Fee Cases*, J.C.C.P. 4332, Case No. RG04139536 (Alameda County Sup. Ct. filed June 24, 2005) attached as Exhibit F.

Circuit held that circumventing a secret handshake between a toner cartridge and a printer did not violate the DMCA because the handshake did not “effectively” control access to a copyrighted work. Rather, the purchase of the printer gave the owner access to the printer code. Similarly, purchasing a mobile phone may give the owner access to the firmware.

The Copyright Office should clarify that all mobile phone unlocking is legal under *Lexmark*, or in the alternative grant an exemption. Clarity from the Copyright Office, or an exemption, is required because, despite the rule of *Lexmark*, phone unlockers have been subject to suit and penalty under the DMCA.

Litigation between TracFone and Sol Wireless illustrates that section 1201(a) poses a real and actual threat to the non-infringing activity of cell phone unlocking. In *TracFone Wireless v. Sol Wireless Group, Inc.*,³ a small company in Florida was sued for purchasing prepaid wireless handsets, unlocking them, and then reselling them for use on other wireless carriers’ networks. Count Five of the complaint alleged that Sol Wireless violated section 1201(a)(1) by unlocking the handsets. On February 28, 2006, the trial court issued a permanent injunction against Sol Wireless that prevents it and its affiliates from “engaging in the alteration or unlocking of any TracFone phones”⁴. This outcome illustrates that even after *Lexmark*, section 1201(a) poses an actual harm to phone unlocking. This also disposes of the content industry’s objection that this

³ *TracFone Wireless, Inc. v. Sol Wireless Group*, No. 05-232729, (S.D. Fla. Feb. 28, 2006).

⁴ *Id.* at 4.

exemption is speculative.

All The Relevant Statutory Factors Support Granting The Exemption:

First, the vast majority of current and future mobile customers cannot unlock their phones without circumvention. Ninety-five percent of new subscribers have a choice of only four nationwide carriers, all of whom lock the handsets they sell.⁵

Second, allowing customers to change networks has no adverse affect on the market value of firmware. Customers buy firmware because it operates the handset, not as a commodity with independent value as a copyrighted work.

This is uncontested.

Finally, the balance of harms is in favor of unlocking. We have argued that unlocking helps customers far more than it hurts wireless carriers, and the public has resoundingly agreed. All the reply comments filed in response to this requested exemption, with the sole exception of the content industry's reply, support granting it. The thirteen comments tell personal stories of how locking deprives customers of the full value of their cell phones. For example, Michael Ditmore had to buy a new phone simply because two carriers consolidated. Jonathan Butler's phone and bluetooth accessories are now just "expensive paperweights". Everett Vinzant lost \$1200 because his carrier wouldn't unlock his

⁵ For example, a class action lawsuit filed initially in Los Angeles by the Foundation for Taxpayer and Consumer Rights against AT&T, T-Mobile and Cingular alleges that Cingular will not unlock customer phones unless their contract has expired. *See Foundation for Taxpayer and Consumer Rights v. AT&T*, Case No. BC 316619 (Los Angeles County Sup. Ct. June 7, 2004), attached as Exhibit G. The case was coordinated with pending cases in Alameda County and is now part of the *In re Cellphone Termination Fee Cases*. In the amended complaint filed in that matter, the class alleges that even after a contract has expired, wireless carriers refuse to unlock previous subscribers' handsets. *See Complaint at 3, In re CellPhone Termination Fee Cases* (Alameda County Sup. Ct. June 24, 2005) (No. J.C.C.P. 4332).

phone.

Unlocking allows customers to use the wireless products they have already purchased, and helps customers to choose among competing service providers. This is precisely the kind of competition that is consonant with U.S. telecommunications policy. Wireless providers may claim they need software locks because they subsidize the price of the handset and they want to make up the difference by ensuring that the customer uses the carrier's service. However, legally enforceable service contracts provide for a minimum monthly fee and a hefty early termination penalty. These contracts ensure that carriers receive every legitimate benefit of the subsidy they provide.

The environment benefits from unlocking because more handsets can be sold on a secondary market. That means less toxic chemicals end up in landfills, incinerators and ground water. As our written comments show, the proliferation of second-hand handsets will help address the digital divide problem, particularly in developing nations.

Most importantly, there is no evidence that phone unlocking threatens the rights of the content industry. Increasingly customers use handsets for accessing, storing, using (not to mention creating) copyrighted materials. The exemption we are requesting is *narrowly drawn*: We are asking for an exemption that would *only* allow an individual to circumvent a TPM (technological protection measure) that controls access to the software that connects the phone to a carrier's network. This exemption does not allow circumvention of TPMs that

control access to audiovisual material on a handset.

Granting an exemption for circumventing a process that allows a consumer to access the mobile phone firmware (boot process and operating system) does not necessarily open the door to circumvention of a process that controls access to or copying of audio-visual works. The content industry's reply comments finesse this by say that a mobile devices' functions of accessing, receiving, playing back, storing and copying copyright materials **may be** controlled by the same programs that connect the user to the dial tone provided by a particular network. The content industry knows how it protects its works, but it provides no evidence that that protection is or must be controlled by the same firmware that operates the phone on the network of the customer's choosing.

Modern cell phones are built like ordinary personal computers. Cell phones generally have a processor, a bootloader that starts the operating system, an operating system, a set of applications, and data files. The way these layers interact in mobile phones differs, not just from carrier to carrier, but from model to model. Because phones have different chips, different operating systems, and different configurations, it is difficult to generalize.

Publicly available documents about mobile phone technology show that DRM and content playback happens at a different layer than locking. For example, the Open Mobile Alliance is a consortium of technology companies, including content providers, promoting an open digital rights management standard.⁷ The OMA standard is used by a significant percentage of the mobile device market. The

⁷ <http://www.openmobilealliance.org/>, attached as Exhibit H.

OMA architecture places DRM functionality at a different layer than Service Provider functionality.⁸ This proves that DRM is not necessarily entwined with “accessing a dial tone”. These are different functionalities.

Different mobile devices will deal with DRM and service provision functions differently. Even if some carriers may currently place DRM technology at the firmware layer, the OMA standard does not require this architecture for DRM to work. The content industry, in collaboration with the carriers and manufacturers, can simply choose to store the keys elsewhere, as is currently the case with many handsets on the market.

CONCLUSION: This application for an exemption should be granted. Members of the public have written to the Copyright Office asking that the right to unlock their phones be returned to them. Unlocking promotes competition, environmentalism and social equality. At the same time, there is no evidence that unlocking encourages or enables infringement. The Copyright Office should remove the only legal barrier to this non-infringing, socially beneficial conduct, by either indicating that unlocking is not illegal under *Lexmark* or by granting the exemption.

⁸ http://www.lockstream.com/products_OMA_2.html, attached as Exhibit I.

EXHIBIT A

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I. THE COMMENTING PARTIES

The Wireless Alliance is a Colorado limited liability corporation that recycles and resells used, refurbished, and new cellular products. Each mobile unit contains toxic materials including lead, cadmium and beryllium. Mobile phones that are thrown away end up in landfills and these metals then leach into the water table. The Wireless Alliance helps the environment by repurposing used phones and recycling those that cannot be reused. The Wireless Alliance sells between 20-60,000 phones per month, including CDMA, TDMA, Analog, and GSM. By working with industry, refurbishers, the Environmental Protection Agency and charities, The Wireless Alliance both reduces toxic waste and helps bridge the digital divide between the United States and third world countries.

Robert Pinkerton is an individual residing in Arlington, Virginia. Pinkerton was the

Director of Government Solutions for Siebel Systems, Inc. until November 2005 and now works for Lexis Nexis. As Siebel's Director of Products Group for the Public Sector in 2002 and 2003, Pinkerton traveled over 100,000 miles per year for work. The position required him to travel regularly from the East Coast to California, Europe and Africa. During those trips, Pinkerton wanted to use his mobile phone to keep in contact with his company and his family, but the phone did not work in most of the locations Pinkerton visited. Renting a phone at the destination airport is expensive, time consuming, and requires Pinkerton to carry both his PDA and rental. Moreover, because recipients do not recognize the rental calling number, they rarely will answer his incoming calls. Because Pinkerton cannot unlock his phone and use it on European networks, he often travels without mobile phone service.

II. INTRODUCTION

The commenters submit the following comments in connection with the Copyright Office's October 3, 2005 Notice of Inquiry.¹ The commenting parties propose exemptions from the Section 1201(a)(1)² prohibition on the circumvention of technological measures that control access to copyrighted works for the following class of works:

Computer programs that operate wireless telecommunications handsets. (Mobile firmware)

In October of 2005, a major mobile handset manufacturer sent a legal threat to a business that distributes phone unlocking software, claiming Digital Millennium Copyright Act violations. Phone unlocking software is a tool that can circumvent the software locks carriers use to stop customers from using the handsets they purchase on competing mobile networks. Though the threat did not identify a specific statute, counsel for commenters Pinkerton and The Wireless Alliance also advised the unlocking business, and believes that the manufacturer is claiming that provision of unlocking software, because it circumvents the software locks that control access to the mobile firmware, violates section 1201(b).³ The cease and desist letter shows that handset manufacturers and carriers are imminently planning to use section 1201 to stop phone unlocking.

Using a mobile handset on a different network is clearly non-infringing activity. The customer is not copying the firmware, nor is he exercising any exclusive right the copyright owner has in the mobile firmware. Rather, the circumventor accesses the firmware merely to reprogram it to work on a different network, or to utilize a different SIM card. The customer merely wants the handset to run on the network of his choice.

¹ See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 70 Fed.Reg. 57526 (2005).

² Unless otherwise noted, all section references are to the current Title 17 of the U.S. Code.

³ See, Jennifer S. Granick, "Free the Cell Phone", Wired News, September 28, 2005, available at <http://www.wired.com/news/culture/0,1284,68989,00.html>

III. PROPOSED EXEMPTION

A. Summary

Mobile communications providers are using software locks to control customer access to mobile phone operating software embedded inside the devices. These locks prevent customers from using their handsets on a competitor's network. Customers who want to use their handsets on a different network must circumvent the locking software to access the computer program that allows the phone to operate (mobile firmware). Mobile providers can use section 1201(a) to stop customers from selecting a provider of their choice, resulting in poorer service and higher costs for customers, reduced competition contrary to explicit U.S. policy, and environmental disaster as a result of mobile handset waste. Locked phones also contribute to the problem of the digital divide between rich and poorer nations.

B. Facts

1. Scope of the Problem

a. Bundling Handsets with Service is a Common Practice, But is Contrary to Explicit U.S. Telecommunications Policy

In the United States, wireless communications carriers like Verizon or Sprint (carriers) use spectrum licensed to them by the Federal Communications Commission (FCC) to provide mobile phone service to customers. Mobile service uses different technological standards, and there are presently three main mobile networks in the United States, GSM, CDMA and TDMA. Customers access these networks with mobile phones, or handsets, compatible with one or more of these standards. CDMA phones do not necessarily work on GSM networks. However, a CDMA phone is capable of operating on any CDMA network.

In 1992, the FCC expressed its concern that carriers were bundling handset sales with service contracts. Specifically, the carriers were requiring customers to purchase their handsets directly from the carriers or authorize agents and to contract to pay for a minimum amount of wireless airtime per month over a period of a year or more. Based on these practices, the FCC stated its "concern that customers have the ability to choose their own CPE [handset] and service packages to meet their own communications needs and that they not be forced to buy unwanted carrier-provided CPE [handsets] in order to obtain necessary services." In the Matter of Bundling of Cellular Customer Premises Equipment and Cellular Service, CC Docket No. 91-34, 1992 WL 689944 (F.C.C. June 10, 1992), at para. 6 (hereinafter "1992 FCC Bundling Ruling"). But, because in 1992 there were low barriers to entry in the handset market, a wide selection of handsets from which customers could choose, no evidence that carriers were refusing service to customers that purchased other brands of handsets, and a geographically fragmented market, the FCC permitted carriers to continue to offer handsets and services as a

bundled package so long as service was not conditioned on purchasing the handset from the carrier. 1992 FCC Bundling Ruling, paras. 8, 15.

Despite this ruling almost every carrier today forces customers to purchase handsets directly from the carrier or its approved agents in order to get mobile service. Additionally, once the customer enters into a service agreement, the carriers use a variety of techniques to prevent customers from switching to competitor carriers, whether before or after the term of the service contract has passed.

Until recently, one effective anti-competitive practice was that carriers refused to allow customers to transfer their mobile phone numbers when they switched providers. Customers who wanted to keep their familiar phone numbers were stuck with their carrier, regardless of service quality, price, or terms of provision. With the Telecommunications Act of 1996, however, Congress mandated that carriers offer number portability in accordance with regulations to be promulgated by the FCC. 47 U.S.C. 251(b)(2). The purpose of this obligation, and others in the 1996 Act, is to “promote competition and reduce regulation . . . to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.” Telecommunications Act of 1996, HR 155, S 652, Beginning, *available at* <http://thomas.loc.gov/cgi-bin/query/F?c104:4:./temp/~c104W0zTCP:e0:>

Today, carriers’ anti-competitive practices continue to include the tying policy that forces customers to purchase handsets from the carrier or a designated agent, limits on the availability of handsets from other sources, restrictions on the ways in which dealers are permitted to market handsets, and locking the handset to prevent use with a competitor carrier.

Nearly all wireless communications providers use software locks to tie a customer’s handset to their service network. There are several types of locking software that work in different ways. In general, the software prevents the customer from accessing copyrighted mobile firmware, an act necessary to either instruct the phone to connect to a different carrier or to program the handset with the secret handshake a competing carrier provides to customers connecting with its network.

Customers who unlock their phones to use them on a different network are not infringing any copyright-protected interest of the carriers. Yet, if the Copyright Office does not grant an exemption, carriers may levy anti-circumvention claims against customers who unlock their phones and give legal force to a business practice that Congress and the FCC have explicitly stated they do not support.

b. Locking Hurts Competition and Innovation

Locked phones limit competition in the mobile communications market, contrary to explicit U.S. policy. As a result, customers get poorer service, higher prices and reduced innovation. Companies have reduced incentives to improve their networks, because

customers are less likely to change to a competitor.

The problem is much worse today than it was in 1992. Today, there are fewer carriers, no more spectrum to allocate to newcomers, and fewer equipment manufacturers. There is also now a well-established practice of forcing customers to buy unwanted handsets in order to get service. Even worse, as equipment becomes more expensive customers are increasingly stuck. Today, many mobile customers spend hundreds of dollars on a handset only to find they have to throw that handset away and purchase a new one if they want to change carriers. This discourages customers from selecting the carrier of their choice.

Locking artificially prevents a customer from using their phone on another network when changing carriers, even when that phone would otherwise be fully functional on that network. When commentator Pinkerton signed up for service from Sprint in 2000, he found that his phone was useless when he traveled outside of the U.S. Because the handset was locked, Pinkerton could not switch to a European carrier for the duration of his visit. As a result, he traveled without mobile phone service. At the end of 2002 and 2003, Pinkerton switched to a GSM phone from T-Mobile. He found there that the reverse was true. The service was great in Europe, but terrible in the U.S. Unable to unlock his phone, and locked into a one-year contract through his company, Pinkerton suffered unreliable service whenever he was in the country and when he traveled outside of Europe. During one business trip to South Africa, Pinkerton's wife desperately tried to reach him to confer on the details of a bid the family would place on a home in the competitive Arlington housing market. She was unsuccessful, and the Pinkertons did not get the house. Despite the poor service, and the fact that he never was able to clearly connect with his wife, the trip to South Africa resulted in the largest bill Pinkerton has ever received.

c. Locking Hurts the Environment

When Americans find that they can't unlock their phones and use them with a new service provider, they throw their old phones away. Americans discard over 150 million mobile phones a year. These phones are filled with toxic chemicals like lead, copper, antimony, beryllium, cadmium, and zinc. These chemicals are released into the air when the phones are incinerated and leached into the groundwater when the phones are cast into landfill, threatening human health and the environment. By some estimates, discarded phones, phone batteries and their accessories produce 65,000 tons of toxic trash a year.

Handset resellers help the environment by keeping perfectly functional handsets out of landfills and in the hands of customers. Commenter The Wireless Alliance (TWA) collects handsets and distributes them to resellers or recycles them in accordance with Environmental Protection Agency policy. TWA is able to repurpose almost 65% of handsets it collects.

Resellers and refurbishers find that handsets are more marketable when customers can

use them on any network, not just the one to which it was originally tied. TWA estimates that if participants in the used handset market were allowed to unlock handsets, it could recycle several hundred thousand more phones a year, keeping that much more toxic metals out of our air and water.

d. Locking contributes to the Digital Divide

Unlocking also makes used phones more flexible, marketable and useful to second-hand customers around the world. When phones are locked to U.S. carriers' networks, they often do not work in other countries. This exacerbates the "digital divide" between rich and poor nations. In March of this year, the United Nations launched a Digital Solidarity Fund to address "the uneven distribution and use of new information and communication technologies" between nations. Recently, The Economist noted that the best way to begin to address the digital divide was to promote the spread of mobile phones, rather than of personal computers. "The Real Digital Divide", The Economist, March 10, 2005.

As the article states:

Plenty of evidence suggests that the mobile phone is the technology with the greatest impact on development. A new paper finds that mobile phones raise long-term growth rates, that their impact is twice as big in developing nations as in developed ones, and that an extra ten phones per 100 people in a typical developing country increases GDP growth by 0.6 percentage points.

Moreover, "Mobile phones do not rely on a permanent electricity supply and can be used by people who cannot read or write." According to the World Bank, 77% of the world's population lives within range of mobile communications service networks. If these people had inexpensive used handsets that would work on those networks, it would have a strong positive effect on GDP and improve not only the digital divide problem, but also the underlying problem of poverty itself. Locked handsets that end up in landfill could be in the hands of Africans, bridging the digital divide and reducing poverty.

e. Mobile Locking Has Severe Adverse Consequences

The scope of the problem of phone locking is vast and severe. Locking mobile phones harms American customers in ways that are directly contrary to U.S. telecommunications policy. It harms the environment by encouraging customers to throw away perfectly good phones that could be repurposed and sold on the used market. Locking also perpetuates world poverty by reducing the number of usable, affordable handsets that can be exported to impoverished nations around the world.

2. Technological Protection Measures Involved

Handset locking software varies depending on the type of network and the handset equipment.

a. SPC locking

Sprint and Verizon both employ SPC (service provider code) locks on their handsets. The SPC code is a number derived from an algorithm that uses the handset's ESN (electronic serial number). The carriers provide the algorithm to the manufacturers who input the ESN and use the resulting number to set an access code on new handsets. An SPC locked handset cannot be reprogrammed to operate on a mobile network unless the programmer first inputs the correct SPC code. By blocking access to programming with an SPC lock, the carrier can ensure that its handsets cannot be reprogrammed for use with other carriers.

b. SOC locking

AT&T Wireless and Cingular use SOC (system operator code) locks. The SOC is a number assigned to a carrier. The code programmed into the handset must match the code of the carrier providing service to the phone. When the handsets are locked, the SOC code cannot be changed, so the handset cannot be reprogrammed for use on a different network.

c. Band Order Locking

Some carriers also use band order locking, which restricts the frequencies on which handsets will operate. While handsets are generally capable of operating across the entire range of frequencies allocated by the FCC for mobile communications, each carrier is licensed to operate only on certain blocks within those bands. By restricting the blocks on which the handset can operate, the carrier prevents the handset from being used on a different network.

d. SIM locking

A SIM card is a small device that stores a customer's identifying information in some handsets, especially GSM handsets. The card is easily removed and replaced. A customer with a SIM card phone can easily select service providers by popping the appropriate card in the handset. The network reads the card, allows the connection and collects accurate billing information from the card. AT&T and other carriers program their handsets with SIM locks to prevent them from operating if a different SIM card is inserted into the handset.

All these technological measures control access to the copyrighted software inside the mobile handset. Either these measures prevent the owner from reprogramming the firmware in his handset, or they stop the owner from operating the firmware inside the phone when he inserts a different SIM card.

C. An Exemption from section 1201(a) for Circumvention of Any Locking

Mechanism that Controls Access to Software Inside a Mobile Handset is Both Appropriate and Necessary

Locking software is a technological protection measure that effectively controls access to the copyrighted mobile firmware. Mobile handset locking, whether it is SPC, SOC, Band Order or SIM, effectively controls access to the copyrighted software that operates mobile phones (mobile firmware). If the phone is locked with SPC, SOC or Band Order locking, the customer cannot program the mobile firmware to connect to the network of her choice. If the phone is locked with SIM locking, the customer cannot access the mobile firmware with a different SIM card. Unlocking, or circumventing SPC, SOC, Band Order, SIM and/or other locking techniques is required to run, or access, mobile firmware.

The prohibition on circumventing locking software inhibits customers from using their handsets on other networks. When handsets are locked, the customer must use the network of the carrier that sold him the handset and cannot switch to another provider without unlocking the handset and thereby accessing the mobile firmware. Since section 1201(a) prohibits circumvention to access the copyrighted software that operates a mobile handset, customers are unable to switch networks.

Using a mobile handset on a different network is clearly non-infringing activity. The customer is not copying the firmware, nor is he exercising any exclusive right the copyright owner has in the mobile firmware.

Even if reprogramming is viewed as making an adaptation of the copyrighted work, the adaptation is non-infringing under section 117. Section 117 authorizes the owner of a copy of a computer program to adapt it “as an essential step in the utilization of the computer program in conjunction with a machine” if it is used for no other purpose. Under 17 U.S.C. 117, a legitimate owner of a copy of a program has the “right of adaptation,” which includes “the right to add features to the program that were not present at the time of rightful acquisition.”⁴ In *Aymes v. Bonelli*⁵, the Second Circuit held that the rightful possessor of a copy of a software program can make modifications to that program to suit his own needs. In *Aymes*, the appellate court stated that “[b]uyers should be able to adapt a purchased program for use on the buyer’s computer because without modifications, the program may work improperly, if at all. No buyer would pay for a program without such a right.”⁶ “[The defendants], as rightful owners of a copy of the plaintiff’s program, did not infringe upon the copyright, because the changes made to the program were necessary measures in their continuing use of the software in operating their business and the program was not marketed, manufactured, distributed, transferred, or used for any purpose other than the defendant’s own internal business needs.”⁷ As with the defendants in *Pfortmiller* and *Aymes*, the mobile handset owner simply wants to

⁴ *Foresight Resources Corp. v. Pfortmiller* 719 F.Supp. 1006, 1009 (D. Kan. 1989).

⁵ (2nd Cir. 1995) 47 F.3d 23, 26

⁶ *Id.*

⁷ (*Id.* [citing 17 U.S.C. 117(1) (1992)].)

program his copy of firmware for the sole purpose of continuing to use it in operating the handset. This is a non-infringing use under section 117.

The holdings of *Chamberlain Group Inc. v. Skylink Technologies Inc.*⁸, *Lexmark v. Static Control Components*⁹ and *StorageTek v. Custom Hardware Engineering & Consulting*¹⁰ would not ensure that consumers who want to unlock their mobile phones will not be sued under section 1201. Given the disparity in resources between an individual customer and the multi-billion dollar carriers, even a low level of legal uncertainty will have a large chilling effect on unlocking activities that a court might later find legitimate. Only an explicit exemption will assure customers that phone unlocking will not be challenged in the courts

In *Chamberlain Group Inc. v. Skylink Technologies Inc.*, the defendant manufactured and sold a device that would open a variety of garage door openers, including those manufactured by the plaintiff. The plaintiff argued that the defendant mimicked its rolling code technology to make use of, or “access” the code that opened the garage door and that the defendant’s GDO was therefore an illegal circumvention device under the DMCA. The trial court rejected this claim on the grounds that the compatible transmitters opened garage doors only if homeowners inputted the transmitter signal into the GDO. The homeowner is authorized to access the plaintiff’s code with any GDO because the plaintiff did not place any contractual restrictions on the type of transmitters homeowners are permitted to use.¹¹

Today, some mobile phone carriers inform customers in the document setting forth the Terms of Service that they may not program their phones to run on competing networks.¹² Others may soon follow. Carriers may argue that a “Terms of Service” document that states that the customer does not have authorization to reprogram the handset for use on another network distinguishes their circumvention claim from that in *Chamberlain*.

In *Lexmark v. Static Control Components*, the Sixth Circuit reversed a trial court ruling that a printer cartridge compatible with the plaintiff’s printers was an illegal circumvention device. The appellate court held that the printer owners gained unfettered access to the copyrighted Printer Engine Program when they purchased the printer, and that the authentication sequence between the cartridge and the printer closed one avenue of access but left the others open, including leaving the code freely readable to any

⁸ 381 F.3d 1178 (Fed.Cir. 2004).

⁹ 387 F.3d 522 (6th Cir. 2004).

¹⁰ 421 F.3d 1307 (Fed.Cir. 2004).

¹¹ 381 F.3d at 1187.

¹² See http://www.t-mobile.com/info/legal/terms_cond.asp, T-Mobile Terms and Conditions, para. 8, “A T-Mobile Phone may be programmed to accept only a T-Mobile SIM card.”

printer owner. Therefore, the authentication sequence did not “effectively control access” to the copyrighted work.¹³

Owners of most mobile handsets are not able to freely read the computer program that runs the handset. The locking software categorically controls user access to the code that performs certain programming functions. Carriers may argue that the locking mechanism, unlike the “secret handshake” in *Lexmark*, is a measure that does effectively control access to the mobile configuration firmware.

In *StorageTek v. Custom Hardware Engineering & Consulting*, the plaintiff sued an independent company that repairs the databases plaintiff manufactures. To diagnose problems, the defendant had to circumvent a technological protection measure in order to access diagnostic information and error codes. The Federal Circuit first found that the defendant’s actions fell within the safe harbor of section 117, which allows copying for repair and maintenance. Next, the court rejected the plaintiff’s section 1201 claim, holding that, because the repair activity was non-infringing, there could be no DMCA violation. “To the extent that StorageTek’s rights under copyright law are not at risk, the DMCA does not create a new source of liability.”¹⁴

Accessing the mobile firmware to reprogram the handset for different networks is non-infringing activity. However, accessing other portions of the firmware may implicate copyrights, not of the carrier or manufacturer, but of their content partners that sell games, ringtones, photos and videos for mobile devices. Mobile firmware often includes digital rights management software (DRM) that prevents unauthorized copying or forwarding of this content. Carriers may argue that they refuse user access to the firmware in order to protect the DRM that protects these third party copyrights. Since there is some relationship, though attenuated, between access controls on the firmware and copyrights, *StorageTek* may not protect mobile phone unlockers. Of course, the requested exemption does not include circumvention of DRM to access the class of works that includes copyrighted games, ringtones or other creative content. The requested exemption only includes circumvention of locking codes to access the class of computer programs that operate mobile devices.

Congress has never considered the exemption the commenters propose. Congress did set forth in section 1201(f) a reverse engineering exception. That exception contemplates a circumventor who seeks to create an independent interoperable computer program. It does not imagine the situation that the commenters encounter, where they need to circumvent in order to use a physical device they already legitimately possess in a legal manner. The Librarian should therefore feel free to establish this exemption under its statutory authority.

Because section 1201 prohibits phone unlocking and because phone unlocking is a desirable, non-infringing activity, the Librarian should grant this exemption.

¹³ 387 F.3d at 546-47.

¹⁴ 421 F.3d at 1318.

D. Statutory Factors

Section 1201(a)(1)(C) directs the Copyright Office to consider the following when crafting exemptions:

- (i) the availability for use of copyrighted works;
- (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes;
- (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;
- (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and
- (v) such other factors as the Librarian considers appropriate.

All relevant factors mitigate in favor of the proposed exemption.

1. Accessing one's own mobile firmware is unavailable without circumvention.

The vast majority of current and future mobile customers cannot unlock their phones without circumvention. Customers have very few options for mobile service other than the major wireless carriers. According to a January 2005 Business Week analysis, 95% of new subscribers have a choice of only four nationwide carriers.¹⁵ These are Verizon, Cingular, Sprint and T-Mobile, all of whom lock the handsets they sell.

2. Availability for Use by Nonprofit Archival, Preservation and Educational Purposes.

The commenting parties do not believe that this factor is relevant to the instant exemption.

3. Impact on Criticism, Comment, News Reporting, Teaching, Scholarship, or Research

The commenting parties do not believe that this factor is relevant to the instant exemption.

4. Impact on Market for or Value of the Protected Work

¹⁵ http://www.businessweek.com/investor/content/jan2005/pi20050120_9922.htm

Allowing customers to change networks has little to no adverse affect on the market for handsets. Wireless providers may claim they need software locks because they subsidize the price of the handset and they want to make up the difference by ensuring that the customer uses the carrier's service. However, every new customer signs a legally enforceable contract that provides for a minimum monthly fee and a hefty early termination penalty. These contracts ensure that customers bear at least the cost of any subsidy in their monthly fees, if not more. As a result, a carrier receives every legitimate benefit of the subsidy it provides. It goes without saying that the customer's financial obligation under the service contract is unaffected by unlocking. Unlocking merely allows the customer to use the same handset with a different carrier, paying an additional amount to that carrier for the service during the period of the contract, or to take their handset to a new provider if desired at the end of the contract period. Permitting unlocking will not raise the consumer price of handsets. In fact, it may lower the price of handsets and of wireless service by making mobile phone markets more competitive.

5. Other Factors

The commenting parties urge the Copyright Office to consider the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on the environment and on international poverty. Allowing customers and handset resellers to unlock phones would mitigate the massive waste problem created when people throw away their handsets to switch carriers. It would also enable used phones to work on more networks, making them more versatile and saleable for second-hand purchasers. Finally, handsets can be exported to impoverished nations, increasing their GDP and reducing the digital divide.

F. Balance of Harms

In balance, consumers, the environment and the international community suffer far, far more from handset locking than mobile providers legitimately benefit. Increased competition in the mobile service market has been the official United States policy since 1992. To improve competition, it has been national policy to enable customers to more freely switch providers. This is why Congress mandated number portability in 1996. Since then, the wireless market has consolidated even further, so pro-competitive policies are even more important. The FCC does not yet prohibit handset locking, though in March of 2004 consumer groups began urging it to do so.¹⁶ Yet, section 1201(a) prohibits the legitimate owners of handsets from unlocking. This inequity strikes the opposite balance sought in the 1996 Telecommunications Act. It is anti-competitive and adversely consumer choice in handsets and providers, increasing prices and reducing incentives for service improvements and handset innovations.

Locking also has the unintended but dramatic consequence of poisoning our air and

¹⁶See Consumer's Union letter, *available at* <http://www.consumersunion.org/campaigns/handset%20locking%20letter%20FCC%20-%20mar%202011%202004.pdf>

water. If customers could continue to use their handsets at the end of the term of their service contract, we could prevent thousands of tons of toxic waste every year. These repurposed handsets would not only help customers in the United States, but they could contribute favorably to economic growth in developing nations. In fact, mobile phones may prove far more valuable to impoverished countries than computers because they are easy to use, need less maintenance, and readily cross the language barrier.

The Copyright Office should not allow mobile providers to use the anti-circumvention provisions in order to obtain legal protection for an anti-competitive business practice that the FCC and Congress have explicitly rejected. If this exemption were granted, carriers would still be allowed to lock their handsets, but motivated customers could unlock their handsets if it was worth the trouble to do so. These customers would continue to pay their monthly service fees under their service contracts, and would be subject to penalties if they terminated their contracts early. When in Europe, their business associates and families could continue to reach them on their personal handset. While it may economically benefit carriers, they have no legitimate interest in forcing customers to continue with an inferior provider simply because they invested in a handset or to purchase a new handset simply to get wireless service.

VII. Conclusion

For the reasons set forth above, the commenting parties respectfully request that the Copyright Office Register recommends to the Librarian that the proposed exemption herein be granted.

EXHIBIT B

Before the
Library of Congress
Copyright Office
Notice of Inquiry
***In re* Exemption to Prohibition on**
Circumvention of Copyright
Protection Systems for Access
Control Technologies
Docket No. RM 2005-11

Reply Comments of

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Vice President
The Wireless Alliance, LLC
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I. The Commenting Parties

The Wireless Alliance is a Colorado limited liability corporation that recycles and resells used, refurbished, and new cellular products. Each mobile unit contains toxic materials including lead, cadmium and beryllium. Mobile phones that are thrown away end up in landfills and these metals then leach into the water table. The Wireless Alliance helps the environment by repurposing used phones and recycling those that cannot be reused. The Wireless Alliance sells between 20-60,000 phones per month, including CDMA, TDMA, Analog, and GSM. By working with industry, refurbishers, the Environmental Protection Agency and charities, The Wireless Alliance both reduces toxic waste and helps bridge the digital divide between the United States and third world countries.

Robert Pinkerton is an individual residing in Arlington, Virginia. Pinkerton was Director of Government Solutions for Siebel Systems, Inc. until November 2005. As Siebel's Director of Products Group for the Public Sector in 2002 and 2003, Pinkerton traveled over 100,000 miles per year for work. The position required him to travel regularly from the East Coast to California, Europe and Africa. During those trips, Pinkerton wanted to use his mobile phone to keep in contact with his company and his family, but the phone did not work in most of the locations Pinkerton visited. Renting a phone at the destination airport is expensive, time consuming, and requires Pinkerton to carry both his PDA and rental. Moreover, because recipients do not recognize the rental calling number, they rarely will answer his incoming calls. Because Pinkerton cannot unlock his phone and use it on European networks, he often travels without mobile phone service.

II. Introduction

The commenters submit the following reply comments in connection with the Copyright Office's October 3, 2005 Notice of Inquiry.¹ These reply comments are responsive to document 3, submitted by commenters herein, a request for an exemption from the Section 1201(a)(1)² prohibition on the circumvention of technological measures that control access to copyrighted works for the following class of works:

Computer programs that operate a mobile phone handset. (Mobile firmware)

The purpose of these reply comments is to supplement the record with additional facts demonstrating that the DMCA anti-circumvention provisions are currently being used to attack the practice of mobile phone unlocking. Companies will continue to level these claims against phone unlockers, unless the Copyright Office grants an exemption.

III. Proposed Exemption

A. Summary

The prohibition on circumvention of technological measures controlling access is having an adverse effect on noninfringing uses, including using a handset on a different network, switching service providers without having to purchase a new phone and purchasing used phones on the second-hand market. In at least one instance, a mobile communications provider has already sued a device reseller under the anti-circumvention provisions of the DMCA.

B. Supplemental Factual Support

In December of 2005, TracFone sued Sol Wireless, a small Miami phone reseller alleging

¹ See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 70 Fed.Reg. 57526 (2005).

² Unless otherwise noted, all section references are to the current Title 17 of the U.S. Code.

a violation of section 1201. TracFone is the nation's largest provider of prepaid wireless phone services. Sol Wireless would modify TracFone handsets so that they could be used on almost any carrier's network. Count Five of TracFone's complaint alleges that the defendant violated section 1201 by circumventing technological measures within the phone that control access to the proprietary software that operates the handset. The complaint alleges that "Defendants avoided, bypassed, removed, disabled, deactivated, or impaired a technological measure for effectively controlling access to the proprietary software within the TracFone Prepaid Software without TracFone's authority." A copy of the complaint is attached as Exhibit A to these reply comments. See *Wireless Company Says Firm Hacked Into Its Prepaid Phones*, by Julie Kay, January 3, 2006, available at <http://www.law.com/jsp/ltn/pubArticleLTN.jsp?id=1135937113692&rss=ltn>. The case is filed in the Southern District of Florida, TracFone Wireless v. Sol Wireless, 05-CV-23279.

TracFone says it plans to file additional cases against other resellers.

This lawsuit, and TracFone's threat, demonstrates that the anti-circumvention provisions currently threaten cell phone unlocking. Resellers who unlock phones are now and will continue to be facing lawsuits in which they will have to defend the practice, unless the Copyright Office acts.

Reselling phones is entirely non-infringing, poses no risk to efforts to control copyright infringement, and is of great social benefit. Second-hand phones mean cheaper prices for consumers, less toxic waste and economic benefits to the third world. This exemption would protect resellers against an actual and existing threat to legitimate business practices. For this reason, we ask the Copyright Office to grant the exemption for circumvention to access computer programs that operate mobile phones.

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

05 - 23279

Case No.

CIV - ALTONAGA

MAGISTRATE JUDGE
TURNOFF

TRACFONE WIRELESS, INC.

Plaintiff,

vs.

SOL WIRELESS GROUP, INC.,
CARLOS PINO, JORGE ROMERO,

Defendants.

2005 DEC 21
633

COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF

Plaintiff TracFone Wireless Inc. ("TracFone") hereby sues Sol Wireless Group, Inc. ("Sol Wireless"), Carlos Pino, and Jorge Romero (collectively, "Defendants"), and states:

INTRODUCTION AND BACKGROUND

1. This is an action for injunctive relief and damages arising out of Defendants' infringement of TracFone's trademarks and other rights in wireless telephones made by Nokia for TracFone to enable consumers to use TracFone's prepaid wireless service. As set forth in this Complaint, Defendants are engaged in an unauthorized and illegal wireless telephone business dependent on handset or phone software computer hacking, the alteration of TracFone's proprietary handset or phone software computer code, infringement of TracFone's incontestable trademarks, unfair competition and violations of other state and federal laws.

2. Defendants perpetrate their unlawful business practices by purchasing TracFone prepaid wireless telephones from retail stores such as Wal-Mart, Target or Sam's Club, hacking into and erasing or disabling the TracFone proprietary prepaid software that enables consumers to access TracFone's prepaid wireless service, and then reselling the wireless telephones as new for use on other wireless carriers' networks/systems. Together with now unknown civil conspirators, Defendants' misconduct is causing TracFone to incur millions of dollars in losses.

PARTIES, JURISDICTION AND VENUE

3. TracFone is a Florida corporation, with its principal place of business in Miami, Florida.

4. On information and belief, Sol Wireless is Florida corporation, with its principal place of business in Miami, Florida.

5. On information and belief, Carlos Pino is the President of Sol Wireless and is a resident of Florida.

6. On information and belief, Jorge Romero is the Vice President of Sol Wireless and is a resident of Florida.

7. Jurisdiction in this Court is proper pursuant to 28 U.S.C. §§ 1331, 1338, and 17 U.S.C. § 1203 because TracFone's claims for violations of the United States Copyright Act and the United States Trademark Act arise under federal law. This Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over TracFone's state law claims because those claims are so related to the federal claims that they form part of the same case or controversy.

8. Venue is proper pursuant to 28 U.S.C. § 1391(b) and 1400 because the Defendants reside in the Southern District of Florida, a substantial part of the events or omissions

giving rise to the claims occurred in this judicial district, and there is no district in which the action may otherwise be brought.

GENERAL ALLEGATIONS

9. TracFone is the largest provider of prepaid wireless telephone service in the United States. TracFone's service enables its customers to prepay for their wireless service by purchasing airtime cards and specially manufactured wireless phones. Customers load airtime into their TracFone wireless phones using codes generated from the PIN numbers found on the airtime cards. TracFone wireless phones and airtime cards are sold through major national retailers such as Wal-Mart, Target, and Sam's Club.

10. Among the manufacturers that produce wireless phones for TracFone is Nokia. Nokia installs at its factories special proprietary prepaid software, developed and owned by TracFone ("TracFone Prepaid Software"), into wireless phones sold to TracFone ("TracFone/Nokia prepaid phones"). The proprietary TracFone Prepaid Software prevents the phones from being used without loading airtime minutes from a TracFone prepaid airtime card.

11. TracFone sells its TracFone/Nokia prepaid phones to consumers for substantially less than it pays to purchase them from Nokia. TracFone recoups its losses on the sale of its TracFone/Nokia prepaid phones by earning its profits through the sale of prepaid airtime cards required to make and receive calls.

12. As set forth in more detail below, Defendants have engaged in an unlawful practice of purchasing discounted TracFone/Nokia prepaid phones at retail outlets, hacking into and removing the TracFone Prepaid Software thereby preventing their use for accessing the TracFone service and allowing their use with other services, and reselling the unlawfully unlocked phones as new for a substantial profit.

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13. Defendants' actions have substantially harmed TracFone by, *inter alia*, depriving TracFone of the opportunity to recoup its losses on the sale of its TracFone/Nokia prepaid phones and to earn profits by providing wireless service to those phones. Defendants' actions also substantially harm consumers who ultimately purchase TracFone handsets that have been improperly unlocked. These phones will not work as intended, and are unable to access TracFone's prepaid wireless service.

ALLEGATIONS REGARDING SOL WIRELESS

14. In August 2005 TracFone was made aware that Sol Wireless had purchased large quantities of TracFone prepaid wireless phones in the Miami, Florida area.

15. TracFone retained a private investigator firm to determine whether Defendants were misusing its prepaid wireless handsets.

16. The investigators contacted Sol Wireless and arranged for the purchase several Nokia 1100 wireless phones and several Nokia 2600 wireless phones.

17. While at Sol Wireless, one of the investigators observed defendant Pino take a Nokia 1100 wireless handset out of a plastic bag, remove the back cover of the phone, and insert a small, black, square-shaped device approximately three inches in diameter into the back of the wireless phone where the battery is located. The device was then connected by a black curled cord, similar to a telephone cord, to the back of a computer located on top of the desk. After a short time, the device was removed from the back of the wireless phone. This action took approximately one to two minutes to accomplish. Pino performed the same process on each of Nokia wireless phones purchased by the investigator. The phones, along with a battery and charger, were then packaged in Nokia container boxes.

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18. The investigator then purchased the Nokia wireless phones. Pino printed a Sol Wireless invoice which contained the models that were purchased and the statement "One year guarantee from Nokia and 30 days from Sol Wireless" printed in Spanish. The invoice listed the Nokia 1100's as "Nokia 1100 New" and described them as "New Handset[s]." The Nokia 2600's were described as "new complete."

19. While inside Pino's office, the investigator observed unfolded Nokia container boxes. The Nokia container boxes used to package the phones the investigator purchased, as well as the unfolded Nokia boxes, were missing general phone information such as the IMEI Number and the UPC Barcode. The Nokia container boxes did, however, contain the reflective Nokia brand stickers.

20. The phones purchased from Sol Wireless were then delivered to TracFone headquarters for examination by TracFone's technicians and fraud analyst experts. TracFone's experts concluded after reviewing the IMEI Numbers located on each phone that the phones were manufactured by Nokia for TracFone, and had originally been programmed with the TracFone Prepaid Software. The phones had the TracFone name and logo on the bottom and the back of each handset, also indicating that they were manufactured by Nokia for TracFone. TracFone's proprietary prepaid software had been disabled or erased, and could no longer access the TracFone prepaid wireless service. The phones were also "unlocked," permitting them to be used on virtually any carrier's network.

COUNT ONE
FEDERAL TRADEMARK INFRINGEMENT

21. TracFone incorporates and realleges the allegations of paragraphs 1-20 above.

22. TracFone is one of the oldest and leading providers of national prepaid wireless services. TracFone has used, and continues to use, trademarks in commerce including the mark TRACFONE. In particular, TracFone owns and has so used the registered trademarks identified below:

A. Incontestable United States Trademark Registration No. 2,114,692, issued November 18, 1997, for TRACFONE, used in connection with prepaid airtime cellular telephones and cellular telephone accessories, in international category 9; for cellphone telephone services and providing monitoring and control services for use in connection with prepaid airtime cellular phones and debit cards, in international category 38; and wholesale distributorship featuring the same, in international category 42, issued on November 18, 1997 and based on dates of first use in June, 1996.

B. Incontestable United States Trademark Registration No. 2,71,017, issued September 9, 2003, for TRACFONE and Design, used in connection with prepaid air time cellular telephones and cellular telephone accessories in international category 9; for on-line retail store services featuring the same, in category 35; and for cellular telephone services and monitoring and control services for use in conjunction with prepaid airtime cellular phones and debit cards, in category 38, issued on September 9, 2003 and based on dates of first use in December, 2001.

23. TracFone's aforementioned marks constitute the lawful, valued, subsisting and exclusive property of TracFone, and as a result of the high quality of TracFone's services, sales,

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promotion and advertising thereof, the marks have become an intrinsic and essential part of the valuable goodwill and property of TracFone, and are well known and established to customers and the trade as symbols identifying and distinguishing TracFone's services and signifying distinctive services of exceptional quality.

24. Defendants' aforementioned conduct entailed use of the marks without authorization in connection with the sale and offering for sale of their hacked and modified TracFone handsets, which downstream customers will discover are not capable of use with the TracFone prepaid wireless service.

25. Defendants' use of TracFone's marks in connection with the sale of hacked and modified TracFone handsets has caused, and will further cause, a likelihood of confusion, mistake and deception as to the source of origin of Defendants' products, as to the relationship between TracFone and Defendants; and Defendants' unauthorized use is likely to continue in the future, all to the great and irreparable damage to the business, reputation and goodwill of TracFone.

26. Defendants' use of the TracFone trademark in connection with the hacked and modified TracFone handsets, which are no longer capable of use with the TracFone prepaid wireless service, constitutes a misappropriation of TracFone's distinguishing and identifying marks that were created as a result of effort and expense by TracFone over a long period of time. Defendant's use evokes an immediate, favorable impression or association and constitutes a false representation that the products and business of Defendants have some connection, association, or affiliation with TracFone, and thus constitutes false designation of origin.

27. Defendants, in committing the foregoing acts in commerce, have damaged and will continue to damage TracFone and the reputation and goodwill of TracFone, and each has

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unjustly enriched and will continue to unjustly enrich itself at the expense of TracFone. TracFone is without an adequate remedy at law to redress such acts, and will be irreparably damaged unless Defendants are enjoined from committing and continuing to commit such acts.

28. As a complete ground for relief, the Defendants' aforesaid acts constitute infringement of TracFone's federally registered trademarks in violation of 15 U.S.C. § 1114.

COUNT TWO
FEDERAL UNFAIR COMPETITION

29. TracFone incorporates and realleges the allegations of paragraphs 1-28 above.

30. As a complete ground for relief, the Defendants' aforesaid acts constitute unfair competition in violation of 15 U.S.C. § 1125(a).

COUNT THREE
INJURY TO BUSINESS REPUTATION AND DILUTION OF MARK

31. TracFone incorporates and realleges the allegations of paragraphs 1-20 above.

32. TracFone is the largest provider of prepaid wireless telephone service in the United States. It is in the business of and has earned a reputation for providing its customers with high quality prepaid wireless telephone service.

33. The TracFone prepaid wireless phones that Defendants unlocked and resold as new are branded with the TracFone name.

34. Defendants' sale of altered TracFone prepaid wireless phones as new products carrying the TracFone trademark harms TracFone's goodwill and business reputation because the handsets can no longer operate as TracFone intended and cannot access the TracFone prepaid wireless service. Purchasers of the altered handsets are likely to attribute malfunctions and poor service due to Defendants' alterations to TracFone.

35. Purchasers are also likely to contact TracFone's customer care department with complaints and questions, causing TracFone to incur substantial costs associated with responding to such inquiries. In addition, TracFone's customer service personnel will be diverted from assisting TracFone's legitimate customers, thereby causing additional harm to TracFone's business reputation and goodwill as a result of Defendants' misconduct.

36. Defendants' continued sale of altered TracFone prepaid wireless handset units is likely to injure TracFone's business reputation and dilute the distinctive quality of their marks, trade names, or labels in violation of § 495.151, Fla. Stat.

37. TracFone requests preliminary and permanent injunctive relief against Defendants pursuant to § 495.151, Fla. Stat.

COUNT FOUR
UNFAIR COMPETITION AND DECEPTIVE TRADE PRACTICES

38. TracFone incorporates and realleges the allegations of paragraphs 1-20 above.

39. Defendants' conduct in purchasing TracFone prepaid cellular phones, disabling or removing the TracFone Prepaid Software from those prepaid phones, then reselling those phones constitutes an unfair method of competition, an unconscionable act or practice, and/or an unfair or deceptive act or practice in violation of § 501.204, Fla. Stat.

40. In addition, the TracFone prepaid cellular phones that Defendants unlocked and resold as new are branded with the TracFone name. Defendants' sale of altered TracFone prepaid wireless phones as new products carrying the TracFone trademark constitutes an unfair method of competition, an unconscionable act or practice, and/or an unfair or deceptive act or practice in violation on § 501.204, Fla. Stat.

41. TracFone has suffered damage as a direct and proximate result of Defendants' conduct. Pursuant to § 501.211, TracFone is entitled to enjoin Defendants from any further violations of this section. Section 501.211 further provides that TracFone is entitled to recover its actual damages, plus attorneys' fees and court costs.

COUNT FIVE
CIRCUMVENTION OF TECHNOLOGICAL MEASURES THAT
CONTROL ACCESS TO PROPRIETARY SOFTWARE
(TRACFONE PREPAID SOFTWARE)

42. TracFone incorporates and realleges the allegations of paragraphs 1-20 above.

43. The TracFone Prepaid Software contains technological measures that in the ordinary course of the measures' operation require the application of information, or a process or a treatment, with TracFone's authority, to gain access to the proprietary software as set forth in 17 U.S.C. § 1201.

44. The TracFone Prepaid Software contains technological measures that effectively control access to the proprietary software.

45. TracFone did not give Defendants authority to descramble or decrypt or otherwise to avoid, bypass, remove, disable, deactivate, or impair the technological measures for effectively controlling access to and operation of the TracFone Prepaid Software.

46. TracFone did not grant Defendants the authority to circumvent the technological measures for effectively controlling access to the TracFone Prepaid Software.

47. Defendants avoided, bypassed, removed, disabled, deactivated, or impaired a technological measure for effectively controlling access to the proprietary software within the TracFone Prepaid Software without TracFone's authority.

48. Defendants circumvented a technological measure that effectively controls access to the TracFone Prepaid Software that is protected under title 17 of the United States Code, and thereby violated 17 U.S.C. § 1201(a)(1).

49. Defendants' actions have caused and, unless restrained, will continue to cause TracFone severe, immediate, and irreparable injury and damages for which TracFone has no adequate remedy at law. TracFone is entitled to injunctive relief restraining such conduct, an award of damages, including punitive damages, as well as other equitable and legal relief.

COUNT SIX
TRAFFICKING IN SERVICES THAT CIRCUMVENT
TECHNOLOGICAL MEASURES PROTECTING PROPRIETARY SOFTWARE

50. TracFone incorporates and realleges the allegations of paragraphs 1-20 above.

51. Defendants are in possession of certain instrumentalities that avoid, bypass, remove, disable, deactivate, or otherwise impair the technological measures within the TracFone Prepaid Software that effectively control access to the proprietary software.

52. Defendants have trafficked in the service of circumventing the technological measures that protect the TracFone Proprietary Software from alteration or modification.

53. Individuals purchasing altered phones from Defendants purchase both the TracFone prepaid wireless phone and the service of circumventing the technological measures that protect the TracFone Prepaid Software from alteration or modification provided by Defendants or co-conspirators.

54. Accordingly, Defendants have trafficked and continue to traffic in the service of circumventing TracFone's technological measures that effectively control access to TracFone's proprietary software by offering to the public its alteration service for a fee.

55. The service of altering the TracFone Prepaid Software in TracFone prepaid wireless phones is primarily designed or produced for the purpose of circumventing the technological measures that effectively control access to TracFone's proprietary software, which is protected under title 17 of the United States Code.

56. Accordingly, Defendants have violated and continue to violate Section 1201(a)(2)(A) of the Copyright Act and, as a result, TracFone has been irreparably injured and will continue to be irreparably injured unless the violating activities of Defendants are enjoined by this Court.

57. The service of altering the TracFone Prepaid Software has, at most, only a limited commercially significant purpose or use other than circumventing TracFone's technological measures that effectively control access to TracFone's proprietary software that is protected under title 17 of the United States Code.

58. Therefore, Defendants have violated and continue to violate Section 1201(a)(2)(B) of the Copyright Act and, as a result, TracFone has been irreparably injured and will continue to be irreparably injured unless the violating activities of Defendants are enjoined by this Court.

COUNT SEVEN
TORTIOUS INTERFERENCE WITH BUSINESS
RELATIONSHIPS AND PROSPECTIVE ADVANTAGE

59. TracFone incorporates and realleges the allegations of paragraphs 1-20 above.

60. A business relationship and an expectancy of business relationships exist between TracFone and the purchasers and prospective purchasers of its phones and service.

61. There exists a high probability of future economic benefit to TracFone as a result of these present and prospective relationships.

62. Defendants have knowledge of and have intentionally and unjustifiably interfered with the relationships and with prospective relationships between TracFone and its customers. Specifically, but without limitation, Defendants knew that TracFone prepaid wireless phones are designed for the use by TracFone customers for TracFone service. Defendants are intentionally interfering with these relationships through improper means and in violation of the law.

63. But for Defendants' conduct, TracFone was reasonably certain to have continued its business relationships and prospective relationships with its customers.

64. TracFone has been damaged and continues to be damaged as a result of Defendants' interference.

COUNT EIGHT
**TORTIOUS INTERFERENCE WITH THE BUSINESS
RELATIONSHIP BETWEEN TRACFONE AND NOKIA**

65. TracFone incorporates and realleges the allegations of paragraphs 1-20 above.

66. A business relationship exists between TracFone and Nokia.

67. TracFone contracts with Nokia for the production of handsets specially designed for use only by TracFone customers to access TracFone's prepaid wireless service. Defendants have defeated and continue to defeat the purpose of these contracts by erasing or disabling the TracFone Prepaid Software and thereby preventing the handsets from accessing TracFone's prepaid wireless service. As a result, Defendants have jeopardized TracFone's business relationship with Nokia.

68. Defendants have knowledge of and have intentionally and unjustifiably interfered with the relationship between TracFone and Nokia. Specifically, but without limitation, Defendants knew that TracFone prepaid wireless phones are designed for the use by TracFone

customers for TracFone service. Defendants are intentionally interfering with this relationship through improper means and in violation of the law.

69. TracFone has been irreparably harmed and continues to be damaged as a result of Defendants' interference.

WHEREFORE, TracFone respectfully requests that this Court enter final judgment in favor of TracFone and against Defendants for the damages it sustained, treble the amount of actual damages in accordance with applicable law, an accounting for all profits received by each Defendant in connection with its conduct, injunctive relief, and for its attorneys' fees and costs, and order any further relief as this Court deems just and proper.



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Attorneys for TracFone Wireless, Inc.

CIVIL COVER SHEET 05-23279

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTION ON THE REVERSE OF THE FORM.)

CIVIL ACTION

I. (a) PLAINTIFFS TRACFONE WIRELESS, INC.	DEFENDANTS SOL WIRELESS GROUP, INC., et al.
(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF <u>Dade County, FL</u> (EXCEPT IN U.S. PLAINTIFF CASES)	COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT <u>Dade County, FL</u> (IN U.S. PLAINTIFF CASES ONLY) NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED
(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER) James B. Baldinger, Carlton Fields, P.A., 222 Lakeview Avenue, Suite 1400, West Palm Beach, FL 33401 (561) 650-8026 <i>Made 05-23279 / Attorney M. Turner</i>	ATTORNEYS (IF KNOWN) <div style="text-align: right; font-weight: bold; font-size: 1.2em;">MAGISTRATE JUDGE TURNOFF</div>
(d) CIRCLE COUNTY WHERE ACTION AROSE: <u>DADE, MONROE, BROWARD, PALM BEACH, MARTIN, ST. LUCIE, INDIAN RIVER, OKEECHOBEE, HIGHLANDS</u>	

II. BASIS OF JURISDICTION (PLACE AN X IN ONE BOX ONLY)	III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) (For Diversity Cases Only)										
<table style="width: 100%;"> <tr> <td style="width: 50%;"><input type="checkbox"/> 1 U.S. Government Plaintiff</td> <td style="width: 50%;"><input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)</td> </tr> <tr> <td><input type="checkbox"/> 2 U.S. Government Defendant</td> <td><input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)</td> </tr> </table>	<input type="checkbox"/> 1 U.S. Government Plaintiff	<input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)	<input type="checkbox"/> 2 U.S. Government Defendant	<input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)	<table style="width: 100%;"> <tr> <td style="width: 33%;"><input type="checkbox"/> Citizen of This State</td> <td style="width: 33%;"><input type="checkbox"/> Citizen of Another State</td> <td style="width: 33%;"><input type="checkbox"/> Citizen or Subject of a Foreign Country</td> </tr> <tr> <td style="width: 33%;"><input type="checkbox"/> Incorporated or Principal Place of Business in This State</td> <td style="width: 33%;"><input type="checkbox"/> Incorporated and Principal Place of Business in Another State</td> <td style="width: 33%;"><input type="checkbox"/> Foreign Nation</td> </tr> </table>	<input type="checkbox"/> Citizen of This State	<input type="checkbox"/> Citizen of Another State	<input type="checkbox"/> Citizen or Subject of a Foreign Country	<input type="checkbox"/> Incorporated or Principal Place of Business in This State	<input type="checkbox"/> Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> Foreign Nation
<input type="checkbox"/> 1 U.S. Government Plaintiff	<input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)										
<input type="checkbox"/> 2 U.S. Government Defendant	<input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)										
<input type="checkbox"/> Citizen of This State	<input type="checkbox"/> Citizen of Another State	<input type="checkbox"/> Citizen or Subject of a Foreign Country									
<input type="checkbox"/> Incorporated or Principal Place of Business in This State	<input type="checkbox"/> Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> Foreign Nation									

VI. ORIGIN (PLACE AN X IN ONE BOX ONLY)

<input checked="" type="checkbox"/> 1 Original Proceeding	<input type="checkbox"/> 2 Removed from State Court	<input type="checkbox"/> 3 Remanded from Appellate Court	<input type="checkbox"/> 4 Reinstated or Reopened	<input type="checkbox"/> 5 Transferred from another district (specify)	<input type="checkbox"/> 6 Multidistrict Litigation	<input type="checkbox"/> 7 Appeal to District Judge from Magistrate Judgment
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V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

A CONTRACT : 110 Insurance : 120 Marine : 130 Miller Act : 140 Negotiable Instrument : 150 Recovery of Overpayment & Enforcement of Judgment : 151 Medicare Act B: 152 Recovery of Defaulted Student Loans (Excl. Veterans) B: 153 Recovery of Overpayment of Veteran's Benefits : 180 Stockholders' Suits : 190 Other Contract : 195 Contract Product Liability	A REAL PROPERTY B: 210 Land Condemnation B: 220 Foreclosure : 230 Rent Lease & Ejectment : 240 Torts to Land : 245 Tort Product Liability : 290 All Other Real Property	A TORTS PERSONAL INJURY : 310 Airplane : 315 Airplane Product Liability : 320 Assault, Libel & Slander : 330 Federal Employers' Liability : 340 Marine : 345 Marine Product Liability : 350 Motor Vehicle : 355 Motor Vehicle Product Liability : 360 Other Personal Injury PERSONAL INJURY : 362 Personal Injury-Med Malpractice : 365 Personal Injury-Product Liability : 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY : 370 Other Fraud : 371 Truth in Lending : 380 Other Personal Property Damage : 385 Property Damage Product Liability	FORFEITURE/PENALTY B: 610 Agriculture B: 620 Food & Drug B: 625 Drug Related Seizure Of Property 21 USC 881 B: 630 Liquor Laws B: 640 R.R. & Truck B: 650 Airline Regs. B: 660 Occupational Safety/Health B: 690 Other A LABOR : 710 Fair Labor Standards Act : 720 Labor/Mgmt. Relations : 730 Labor/Mgmt. Reporting & Disclosure Act : 740 Railway Labor Act : 790 Other Labor Litigation B: 791 Empl. Ret. Inc. Security Act	A BANKRUPTCY : 422 Appeal 28 USC 158 : 423 Withdrawal 28 USC 157 A PROPERTY RIGHTS : 820 Copyrights : 830 Patent : 840 Trademark B SOCIAL SECURITY : 861 HIA (1395ff) : 862 Black Lung (923) : 863 DIWC/DIWW (405(g)) : 864 SSID Title XVI : 865 RSI (405(g)) FEDERAL TAX SUITS A: 870 Taxes (U.S. Plaintiff or Defendant) A: 871 IRS - Third Party 28 USC 7609	A OTHER STATUTES : 400 State Reapportionment : 410 Antitrust : 430 Banks and Banking B: 450 Commerce/ICC Rates/et : 480 Deportation : 470 Racketeer Influenced or Corrupt Organizations : 810 Selective Service : 850 Securities/Commodities Exchange : 875 Customer Challenge 12 USC 3410 : 891 Agricultural Acts : 892 Economic Stabilization Act : 893 Environmental Matters : 894 Energy Allocation Act : 895 Freedom of Information Act : 900 Appeal of Fee Determination Under Equal Access to Justice : 950 Constitutionality of State Statutes : 890 Other Statutory Actions A or B
--	--	---	--	--	---

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY.)

Claims for damages and injunctive relief for, inter alia, trademark infringement (15 USC § 1114), unfair competition (15 USC § 1125(a)), circumvention of access control measures (17 USC § 1201), and various state common-law and statutory claims for unlawful hacking into proprietary cell phone software.

LENGTH OF TRIAL
via 5 days estimated (for both sides to try entire case)

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND: \$ _____ Check YES only if demanded in complaint: JURY DEMAND : YES : NO

VIII. RELATED CASE(S) IF ANY (See instructions):

JUDGE Henry J. Buch DOCKET NUMBER _____

SIGNATURE OF ATTORNEY OF RECORD

OR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____

\$ 250.00 932388

EXHIBIT D

FILED by SW D.C.
ELECTRONIC

Feb 27 2006

CLARENCE MADDOX
CLERK U.S. DIST. CT.
S. D. OF FLA. - MIAMI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
05-23279-CIV-ALTONAGA/TURNOFF

TRACFONE WIRELESS, INC.

Plaintiff,

vs.

SOL WIRELESS GROUP, INC.,
a Florida corporation, CARLOS PINO,
an individual, and JORGE ROMERO,
an individual

Defendants.

JOINT STIPULATION FOR ENTRY OF FINAL JUDGMENT

Plaintiff, TracFone Wireless, Inc. and Defendants, Sol Wireless Group, Inc., Carlos Pino, and Jorge Romero, by and through their undersigned counsel, having fully resolved all issues in this matter, hereby stipulate to the Entry of Final Judgment and Permanent Injunction attached hereto, with each party to bear its own attorneys' fees and costs.

Respectfully submitted,

CARLTON FIELDS, P.A.
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401
(561) 659-7070 (phone)
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ISICOFF, RAGATZ & KOENIGSBERG
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By: s/ James B. Baldinger
James B. Baldinger
Florida Bar No. 869899

By: s/ Eric D. Isicoff
Eric D. Isicoff
Florida Bar No. 372201

Attorneys for Plaintiff

Attorneys for Defendants

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

Case No. 05-23279-CIV-Altonaga/Turnoff

-----X
TRACFONE WIRELESS, INC.,
a Florida corporation,

Plaintiff,

v.

SOL WIRELESS GROUP, INC.,
a Florida corporation, CARLOS PINO,
an individual, and JORGE ROMERO,
an individual,

Defendants.
-----X

FINAL JUDGMENT AND PERMANENT INJUNCTION

Plaintiff TracFone Wireless, Inc. (“TracFone”), filed a Complaint on December 21, 2005 asserting that Defendants Sol Wireless Group, Inc., Carlos Pino, and Jorge Romero (collectively “the Sol Wireless Defendants”) are purchasing TracFone prepaid wireless telephones from retail stores such as Wal-Mart, Target or Sam’s Club, hacking into and erasing or disabling the TracFone proprietary prepaid software that enables consumers to access TracFone’s prepaid wireless service, and then reselling the wireless telephones as new for use on other wireless carriers’ networks/systems. Based on that conduct, the Complaint asserts claims against the Sol Wireless Defendants for federal trademark infringement and unfair competition under the Trademark Act of 1946, as amended, 15 U.S.C. § 1051, *et seq.*, injury to business reputation and dilution of mark under Fla. Stat. § 495.151 *et seq.*, unfair

competition and deceptive trade practices under Fla. Stat. § 501.204 *et seq.*, circumvention of technological measures that control access to proprietary software under 17 U.S.C. § 1201 *et seq.*, trafficking in services that circumvent technological measures protecting proprietary software under 17 U.S.C. § 1201 *et seq.*, tortious interference with business relationships and prospective advantage, and tortious interference with the business relationship between TracFone and Nokia Corporation (“Nokia”). On January 13, 2006, TracFone filed a motion for preliminary injunction and expedited discovery with supporting declarations and exhibits and accompanying memoranda of law. The Sol Wireless Defendants have denied the allegations of TracFone’s Complaint. This Court having considered the Complaint, declarations and exhibits, memoranda of law, and further evidence submitted therewith, it is hereby:

ORDERED, ADJUDGED, and DECREED that:

1. This Court has jurisdiction over all the parties and all of the claims for federal trademark infringement and unfair competition under the Trademark Act of 1946, as amended, 15 U.S.C. § 1051, *et seq.*, injury to business reputation and dilution of mark under Fla. Stat. § 495.151 *et seq.*, unfair competition and deceptive trade practices under Fla. Stat. § 501.204 *et seq.*, circumvention of technological measures that control access to proprietary software under 17 U.S.C. § 1201 *et seq.*, trafficking in services that circumvent technological measures protecting proprietary software under 17 U.S.C. § 1201 *et seq.*, tortious interference with business relationships and prospective advantage, and tortious interference with business relationship between TracFone and Nokia, asserted in the above action.

2. Plaintiff owns all right, title, and interest in and to the trademark TRACFONE.

3. Defendants and any of their representatives, subsidiaries, related or affiliated entities, agents, servants, and employees, and any and all persons and entities in active concert and participation with them who receive notice of this order by personal service or otherwise, shall be and hereby are permanently enjoined from:

- i. purchasing or selling any wireless mobile phone bearing the TRACFONE trademark (“TracFone phones”);
- ii. engaging in the alteration or unlocking of any TracFone phones;
- iii. facilitating or in any way assisting other persons or entities that the Sol Wireless Defendants knew or should have known were engaged in altering or unlocking any TracFone phone;
- iv. using either the TRACFONE trademark, or any other mark that is likely to cause confusion therewith, without authorization;
- v. misrepresenting any used products as new or in any way infringing on TracFone’s trademarks or misrepresenting that TracFone warrants the used and/or re-conditioned phones.

4. This Court hereby retains jurisdiction over this matter and the parties to this action in order to punish any violations of the terms of this Final Judgment and Permanent Injunction by a finding of contempt and a payment of damages to TracFone in an amount of not less than \$5,000.00 for each wireless phone that the Sol Wireless Defendants are found to have purchased, sold, or unlocked in violation of this injunction.

5. The prevailing party in any proceeding to enforce compliance with the terms of this Final Judgment and Permanent Injunction shall be entitled to an award of its attorneys' fees and costs incurred thereby.

DONE AND ORDERED in chambers at Miami, Florida, this _____ day of _____, 2006.

HON. CECILIA M. ALTONAGA
United States District Judge

EXHIBIT E

FILED by *RS* D.C.
FEB 28 2006
LARENZE MADDOX
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 05-23279-CIV-Altonaga/Turnoff

-----X
TRACFONE WIRELESS, INC., :
a Florida corporation, :
 :
 Plaintiff, :
 :
 v. :
 :
 SOL WIRELESS GROUP, INC., :
 a Florida corporation, CARLOS PINO, :
 an individual, and JORGE ROMERO, :
 an individual, :
 :
 Defendants. :
-----X

CLOSED
CIVIL
CASE

FINAL JUDGMENT AND PERMANENT INJUNCTION

Plaintiff TracFone Wireless, Inc. ("TracFone"), filed a Complaint on December 21, 2005 asserting that Defendants Sol Wireless Group, Inc., Carlos Pino, and Jorge Romero (collectively "the Sol Wireless Defendants") are purchasing TracFone prepaid wireless telephones from retail stores such as Wal-Mart, Target or Sam's Club, hacking into and erasing or disabling the TracFone proprietary prepaid software that enables consumers to access TracFone's prepaid wireless service, and then reselling the wireless telephones as new for use on other wireless carriers' networks/systems. Based on that conduct, the Complaint asserts claims against the Sol Wireless Defendants for federal trademark infringement and unfair competition under the Trademark Act of 1946, as amended, 15 U.S.C. § 1051, *et seq.*, injury to business reputation and dilution of mark under Fla. Stat. § 495.151 *et seq.*, unfair

37
TB

competition and deceptive trade practices under Fla. Stat. § 501.204 *et seq.*, circumvention of technological measures that control access to proprietary software under 17 U.S.C. § 1201 *et seq.*, trafficking in services that circumvent technological measures protecting proprietary software under 17 U.S.C. § 1201 *et seq.*, tortious interference with business relationships and prospective advantage, and tortious interference with the business relationship between TracFone and Nokia Corporation (“Nokia”). On January 13, 2006, TracFone filed a motion for preliminary injunction and expedited discovery with supporting declarations and exhibits and accompanying memoranda of law. The Sol Wireless Defendants have denied the allegations of TracFone’s Complaint. This Court having considered the Complaint, declarations and exhibits, memoranda of law, and further evidence submitted therewith, it is hereby:

ORDERED, ADJUDGED, and DECREED that:

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3. Defendants and any of their representatives, subsidiaries, related or affiliated entities, agents, servants, and employees, and any and all persons and entities in active concert and participation with them who receive notice of this order by personal service or otherwise, shall be and hereby are permanently enjoined from:

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- iv. using either the TRACFONE trademark, or any other mark that is likely to cause confusion therewith, without authorization;
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5. The prevailing party in any proceeding to enforce compliance with the terms of this Final Judgment and Permanent Injunction shall be entitled to an award of its attorneys' fees and costs incurred thereby.

DONE AND ORDERED in chambers at Miami, Florida, this 27 day of February, 2006.



HON. CECILIA M. ALTONAGA
United States District Judge

EXHIBIT F

1 BRAMSON, PLUTZIK, MAHLER & BIRKHAUSER, LLP
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3 L. Timothy Fisher (State Bar No. 191626)
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14 REICH RADCLIFFE LLP
15 Marc G. Reich (State Bar No. 159936)
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18 Telephone: (949) 975-0512
19 Facsimile: (949) 975-0514

20 Attorneys for Plaintiffs

21 [Names and Addresses of Additional
22 Counsel Appear on Signature Page]

23 SUPERIOR COURT OF THE STATE OF CALIFORNIA
24 FOR THE COUNTY OF ALAMEDA

25 In re:
26
27 CELLPHONE TERMINATION FEE CASES

JCCP No. 4332
Case No. RG04139536

Class Action

28 This Document Relates To: *Nguyen et al. v. T-Mobile USA, Inc.*

FOURTH AMENDED CONSOLIDATED COMPLAINT [HANDSET LOCKING]

Handset Locking and Related Claims Against T-Mobile USA, Inc.

JURY TRIAL DEMANDED

1 Plaintiffs, by their attorneys, make the following allegations based upon information and
2 belief, except as to allegations specifically pertaining to herself and her counsel, which are based
3 on personal knowledge:

4 NATURE OF THE ACTION

5 1. This is a class action lawsuit filed to redress an unfair and wrongful practice
6 inflicted by defendants on California consumers: the secret locking of cell phone handsets to make
7 it impossible or impracticable for customers to switch cell phone service providers without
8 purchasing a new handset.

9 2. Plaintiffs seek relief in this action individually and on a classwide basis on behalf of
10 all California residents who have purchased handsets from defendants, or any of them, which have
11 been secretly programmed with SIM locks. Plaintiffs further allege that defendants have a duty to
12 disclose that they have locked a handset before selling it to a consumer, and to disclose a handset's
13 SIM Unlock Code in connection with the sale of a handset, and that their failure to do so is a
14 fraudulent and deceptive business practice. Plaintiffs seek restitution and/or disgorgement as well
15 as injunctive and declaratory relief against such practices.

16 PARTIES

17 3. Defendant T-Mobile USA ("T-Mobile") is a Delaware corporation with its principal
18 place of business in Bellevue, Washington, and is authorized to do business and is doing business
19 in California.

20 4. The true names and capacities, whether individual, corporate, associate or
21 otherwise, of defendants Does 1 through 100, inclusive, are unknown to plaintiffs, who therefore
22 sue said defendants by such fictitious names. Plaintiffs are informed and believe and thereon
23 allege that each of the defendants designated herein as a Doe is legally responsible in some manner
24 for the events and happenings herein referred to and caused, or is responsible in some proportion
25 for, the damages sustained by plaintiffs herein. Plaintiffs may seek leave to amend this complaint
26 to show the true names, capacities, actions and responsibilities of said defendants so fictitiously
27 named whenever the same shall have been ascertained. At that time, plaintiffs will seek leave to
28 include appropriate charging allegations as to said defendants.

1 the United States of America. Furthermore, the claims of plaintiffs and the members of the
 2 plaintiff classes assert no federal question or statute, and Plaintiffs' state law causes of action are
 3 not federally pre-empted. The individual claims of Nguyen and Grant and the other members of
 4 the class do not exceed \$75,000.

5 **SIM LOCKS**

6 12. T-Mobile does not manufacture handsets. It purchases handsets from equipment
 7 vendors such as Nokia, Motorola, and Samsung. It then resells those handsets to T-Mobile
 8 subscribers. These handsets are referred to herein as "T-Mobile handsets."

9 13. T-Mobile handsets utilize SIM (subscriber information module) cards. A SIM card
 10 is a wafer-thin card measuring approximately 7/8-inch by 5/8-inch (about the size of a postage
 11 stamp) that stores computer-readable information. Each T-Mobile handset has a receptacle into
 12 which the SIM card can be placed, typically behind the handset battery. The carrier's and
 13 subscriber's identifying information is written onto the SIM card, including the Mobile Network
 14 Code (MNC) identifying the carrier, which is read by the handset and transmitted to the carrier's
 15 network.

16 14. It is relatively easy to move a SIM card from handset to handset. No tools or
 17 equipment are required. Anyone can simply use his or her fingers to slide the SIM card out of one
 18 handset and into another.

19 15. T-Mobile handsets, as sold, can be activated on other carrier's networks. Activation
 20 of a T-Mobile handset on another carrier's network does not require any alteration or enhancement
 21 to the handset. Just as an FM radio is capable of receiving all stations in the FM band, T-Mobile
 22 handsets, as sold, are capable of sending and receiving signals on all cellular or PCS bands in use
 23 in the United States. A T-Mobile handset can be activated on another carrier's network in seconds,
 24 by simply removing the T-Mobile SIM card out of the handset and inserting another carrier's SIM
 25 card in its place.

26 16. T-Mobile and other cellular/PCS carriers are members of industry standard setting
 27 bodies such as the Cellular Telephone & Internet Association ("CTIA"), GSM Association, and
 28 other industry groups. T-Mobile conspired with other wireless carriers and equipment

1 manufacturers, *inter alia*, through the CTIA Certification Program, which was designed to certify
2 that cellular/PCS handsets meet the specifications required for the carriers to program and lock
3 them for use on their respective networks.

4 17. Through CTIA and other standard setting organizations, T-Mobile conspired with
5 other cellular/PCS carriers and equipment manufacturers to develop a "SIM Lock" for cellular/PCS
6 handsets. The SIM Lock employed by T-Mobile prevents the handset from operating with a SIM
7 card programmed with the Mobile Network Code for any network other than T-Mobile's. This
8 SIM lock can be unlocked by entering an eight-digit pin number³ (the "SIM Unlock Code"), and
9 once unlocked the handset will operate with any compatible SIM card for any carrier's network.

10 18. T-Mobile requires equipment vendors to alter handsets sold to T-Mobile by locking
11 them with SIM locks and by setting the SIM Unlock Code based on a secret algorithm provided by
12 T-Mobile. T-Mobile also requires equipment vendors to transmit those SIM Unlock Codes to T-
13 Mobile. T-Mobile does not consider a shipment of handsets complete, and will not make payment
14 to an equipment vendor, until T-Mobile receives the SIM Unlock Codes.

15 19. It takes only a few minutes to enter the SIM Unlock Code through the handset
16 keypad and reprogram the handset for use on another network. Indeed, a SIM Unlock Code can be
17 entered to unlock a handset in less time than it takes to dial a long distance phone number, since it
18 contains fewer digits – eight digits for a SIM Unlock Code compared to ten for a phone number
19 (with area code).

20 **MISREPRESENTATIONS³**

21 20. T-Mobile makes representations that are materially false, misleading, and likely to
22 deceive a reasonable consumer. These include (i) the statement in T-Mobile's form subscriber
23 agreement stating "the Unit [T-Mobile handset] is not compatible with and will not work with the
24 services provided by other wireless carriers," (ii) representations that T-Mobile handsets are "PCS
25 Phones," which convey to the reasonable consumer that the handsets will function on all PCS
26 bands, (iii) representations that T-Mobile handsets are "GSM" handsets, which convey to the
27 reasonable consumer that the handsets will function on GSM networks, (iv) representations that T-
28 Mobile handsets are dual- or tri-mode, or dual- or tri-band handsets, which suggest functionality

1 not limited to T-Mobile's network, and (v) representations that T-Mobile handsets are brand name
2 handsets, such as Nokia, Motorola, or Samsung, etc., which convey to the reasonable consumer
3 that the handsets will have functionality similar to unaltered handsets sold under those brand names
4 (hereafter the "Misrepresentations").

5 21. The first of the Misrepresentations, the statement in T-Mobile's form subscriber
6 agreement stating that the "Unit [T-Mobile handset] is not compatible with and will not work with
7 the services provided by other wireless carriers," is materially false, misleading, and likely to
8 deceive a reasonable consumer because T-Mobile handsets, as sold, and without alteration or
9 enhancement, *are compatible with and will work with services provided by other wireless carriers.*

10 22. The first of the Misrepresentations, the statement in T-Mobile's form subscriber
11 agreement stating that the "Unit [T-Mobile handset] is not compatible with and will not work with
12 the services provided by other wireless carriers," is also false, misleading, and likely to deceive a
13 reasonable consumer because it is part of a scheme to conceal the Concealed Facts set forth below,
14 and to prevent consumers from discovering some or all of those Concealed Facts.

15 CONCEALED FACTS

16 23. T-Mobile concealed and continues to conceal its handset locking practices.

17 24. T-Mobile intentionally failed to disclose (i) that T-Mobile handsets are locked with
18 SIM locks to create an impediment to activation on non-T-Mobile networks, (ii) the SIM Unlock
19 Code itself (*i.e.*, the eight-digit password) for the handset sold to Nguyen, and the SIM Unlock
20 Codes for handsets sold to other Class members, (iii) that T-Mobile handsets can be unlocked in
21 seconds by entering the SIM Unlock Code through the handset keypad or otherwise, (iv) that once
22 unlocked, T-Mobile handsets can be activated on non-T-Mobile networks (hereafter, "the
23 Concealed Facts").

24 25. The Concealed Facts were known to T-Mobile at all relevant times.

25 26. The Concealed Facts are important facts which consumers could not have
26 discovered because handset locks are not visible to a purchaser visually inspecting the handset.
27 Nor is there any disclosure about the locks on the packaging or materials provided with the handset
28 at the time of purchase. In the ordinary course, a purchaser would not discover the locking

1 software until attempting to activate the handset with another carrier. Thus when purchasing a T-
2 Mobile handset, neither Nguyen nor Grant was aware that the handset had been altered and locked
3 as described above. Nor were other Class members aware that the handsets they purchased from
4 T-Mobile had been altered and locked as described above.

5 27. Nguyen and Grant did not know the Concealed Facts when purchasing a T-Mobile
6 handset. Nor did other Class members.

7 28. T-Mobile intended to deceive Nguyen, Grant and other Class members by
8 concealing the Concealed Facts.

9 29. Nguyen, Grant and other Class members reasonably relied on T-Mobile's deception
10 by purchasing T-Mobile handsets, activating those handsets on T-Mobile's network, and remaining
11 T-Mobile subscribers.

12 HARM TO PLAINTIFFS AND THE CLASS

13 30. Nguyen, Grant and other Class members have suffered an injury in fact resulting in
14 a loss of money and property due to T-Mobile's handset locking practices because (i) they have
15 been locked in to the service of T-Mobile and been impeded from switching to another carrier, (ii)
16 they have incurred or may incur costs to have the handsets unlocked, which costs could have been
17 avoided completely if the Concealed Facts had been disclosed, (iii) they have been or may be
18 unable to use their handsets when switching carriers, and/or (iv) the handsets they acquired from T-
19 Mobile are of diminished value.

20 31. T-Mobile's deception was a substantial factor in causing these harms to Nguyen,
21 Grant and other Class members because all such forms of harm would have been avoided entirely
22 had T-Mobile disclosed the Concealed Facts.

23 T-MOBILE'S DUTY TO DISCLOSE THE CONCEALED FACTS

24 32. T-Mobile owed a duty to Nguyen, Grant and other Class members to disclose the
25 handset locks. There are at least five bases for such duty.

26 33. *First*, T-Mobile owes a duty to release the SIM Unlock Code by virtue of the sale of
27 the handset. T-Mobile itself does not consider a handset shipment from the manufacturer to T-
28 Mobile to be completed until the SIM Unlock Code is transmitted to T-Mobile, and will not pay for

1 a handset until it has received the SIM Unlock Code. This demonstrates that T-Mobile itself
 2 regards the SIM Unlock Code as an essential part of the sale, and essential to obtaining full rights
 3 of ownership and use of the handset. Similarly, the transfer of the handsets from T-Mobile to
 4 Nguyen and Grant is not complete because T-Mobile has not disclosed the SIM Unlock Code to
 5 Nguyen or Grant. T-Mobile has thus deprived Nguyen and Grant of full rights of ownership and
 6 use of that handset by withholding the SIM Unlock Code. T-Mobile would not have paid the
 7 manufacturers, Motorola and PalmOne, for those handsets until Motorola and PalmOne provided
 8 the SIM Unlock Codes to T-Mobile. T-Mobile thus had a duty, upon receipt of payment from
 9 Nguyen and Grant, to disclose the SIM Unlock Code to Nguyen and Grant so as to transfer to
 10 Nguyen and Grant the full rights of ownership and use of the handset that T-Mobile itself had
 11 received from the manufacturers.

12 34. *Second*, as a seller, T-Mobile has a duty to disclose the Concealed Facts because
 13 they are known to T-Mobile but are not accessible to consumers purchasing T-Mobile handsets.
 14 *See, e.g., Nussbaum v. Weeks* (1989) 214 Cal. App.3d 1589, 1600 (“seller has a general duty to
 15 disclose material facts that are not accessible to the buyer”), *citing* 5 Witkin, Summary of Cal.
 16 Law. (9th ed. 1988) Torts § 700, at 801-02.

17 35. *Third*, T-Mobile has a duty to disclose the Concealed Facts to correct the
 18 Misrepresentations which are false, misleading, and likely to deceive reasonable consumers in the
 19 absence of such disclosure. *See, e.g., Restatement (Second) of Torts* § 551.

20 36. *Fourth*, T-Mobile has a duty to disclose the Concealed Facts to prevent harm to
 21 Nguyen, Grant and the Class. *See Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397
 22 (recognizing a duty to disclose based on “the balancing of various factors, among which are the
 23 extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to
 24 him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection
 25 between the defendant’s conduct and the injury suffered, the moral blame attached to the
 26 defendant’s conduct, and the policy of preventing future harm.”). Such a duty arises here because
 27 the Concealed Facts are integral to a transaction that was intended to affect Nguyen, Grant and the
 28

1 Class, the harm to Nguyen, Grant and the Class was foreseeable (indeed, it was *intended* and
2 *purposeful*), and T-Mobile's conduct is closely connected to the injuries suffered.

3 37. *Fifth*, the substantive legal provisions under which plaintiffs brings their claims
4 herein, including without limitation Business & Professions Code §§17200 *et seq.* and the
5 Consumer Legal Remedies Act, Civil Code §§1750 *et seq.*, impose on T-Mobile a duty not to
6 engage in unfair, unlawful, fraudulent and deceptive business practices and not to conceal facts the
7 disclosure of which is necessary to avoid violating the said provisions.

8 **CLASS ALLEGATIONS**

9 38. Plaintiffs bring this action on their own behalf and on behalf of all other persons
10 similarly situated. Plaintiffs seek to represent a class defined as all California residents who have
11 purchased handsets from T-Mobile, which have been programmed with SIM locks (the "Class").
12 Within the Class is a subclass (the "Subclass") consisting of all members of the Class who are
13 "consumers" as defined by Civil Code Section 1761.

14 39. The Class and Subclass are composed of hundreds of thousands or even millions of
15 people, whose joinder in this action would be impracticable. The disposition of their claims
16 through this class action will benefit both the parties and this Court. The identities of individual
17 members of the Class and Subclass are ascertainable through the billing records of the defendants
18 named herein.

19 40. There is a well-defined community of interest in the questions of law and fact
20 involved affecting the members of the Class and Subclass. Questions of law and fact common to
21 the Class and Subclass predominate over questions which may affect only individual class
22 members, including, but not limited to, the following:

- 23 a. Whether T-Mobile misrepresented and/or concealed the fact that the
24 handsets are locked and the manner in which they are locked;
- 25 b. Whether T-Mobile should be enjoined to offer to unlock the handsets
26 purchased by plaintiffs and the Class;
- 27 c. Whether T-Mobile should be enjoined from secretly programming and
28 selling locked handsets;

1 d. Whether T-Mobile should be enjoined to make appropriate disclosures of the
2 existence and effects of its handset locks; and

3 e. Whether the representation made in T-Mobile's form customer agreements
4 that the "Unit [handset] is not compatible with and will not work with the services provided by
5 other wireless carriers" is false, misleading and likely to deceive or constitutes a violation of
6 California laws.

7 41. Plaintiffs are asserting claims that are typical of the claims of the Class and
8 Subclass, and plaintiffs will fairly and adequately represent and protect the interests of the Class
9 and Subclass. Plaintiffs have no interests antagonistic to the interests of the Class and Subclass.
10 Plaintiffs have retained counsel who are competent and experienced in the prosecution of class
11 action litigation.

12 42. Absent a class action, defendants' practices will irreparably injure the members of
13 the Class and Subclass by defrauding consumers by concealing from them the qualities of the
14 handsets they purchase from T-Mobile and by secretly imposing unfair and improper obstacles to
15 switching to a carrier other than T-Mobile. Because of the size of the individual class members'
16 claims, few, if any, class members could afford to seek legal redress on an individual basis for the
17 wrongs complained of herein. Absent a class action, the class members will continue to suffer
18 losses and the violations of law described herein will continue without remedy and T-Mobile will
19 retain the proceeds of its misdeeds. T-Mobile continues, to this day, to engage in the unlawful and
20 unfair conduct which is the subject of the complaint.

21 **COUNT I**

22 **Unfair Competition In Violation Of**
23 **California Business & Professions Code §§ 17200 *Et Seq.***
(Fraudulent and Deceptive Business Practices)

24 43. Plaintiffs incorporate by reference all allegations of all prior paragraphs as though
25 fully set forth herein.

26 44. COUNT I is brought against T-Mobile by plaintiffs individually and on behalf of
27 the Class.
28

1 45. T-Mobile violated the "fraudulent" prong of the UCL by making the
2 Misrepresentations and by concealing the Concealed Facts.

3 WHEREFORE, plaintiffs pray for relief as hereinafter set forth.

4 **COUNT II**

5 **Unfair Competition In Violation Of**
6 **California Business & Professions Code §§ 17200 *Et Seq.***
7 **(Unlawful Business Practices)**

8 46. Plaintiffs incorporate by reference all allegations of all prior paragraphs as though
9 fully set forth herein.

10 47. COUNT II is brought against T-Mobile by plaintiffs individually and on behalf of
11 the Class.

12 48. T-Mobile is subject to the Unfair Competition Law, Sections 17200 *et seq.* of the
13 California Business & Professions Code (the "UCL"). The UCL provides, in pertinent part:
14 "Unfair competition shall mean and include unlawful, unfair or fraudulent business practices and
15 unfair, deceptive, untrue or misleading advertising..."

16 49. T-Mobile violated the "unlawful" prong of the UCL by violating the Consumer
17 Legal Remedies Act, Civil Code §§ 1770 (a)(5) – (7) and (9) as set forth in COUNT IV, below.

18 50. T-Mobile violated the "unlawful" prong of the UCL by violating the Consumers
19 Legal Remedies Act, Civil Code § 1770(a)(14) and (19), as set forth in Count VI, below.

20 51. T-Mobile violated the "unlawful" prong of the UCL by violating the Cartwright
21 Act, Bus. & Prof. Code § 16720, by conspiring with other cellular/PCS carriers, such as the
22 membership of CTIA, including, for example, Cingular and other carriers, by conspiring to restrain
23 trade by locking handsets to tie the sale of cellular/PCS handsets and services. Beginning at a date
24 unknown to plaintiffs, but at least as early as April 1, 2002, and continuing to the present, T-
25 Mobile, its co-conspirators, and unknown Doe defendants have engaged in a continuing contract,
26 combination and conspiracy in unreasonable restraint of trade and commerce, as evidenced by the
27 foregoing acts and practices, among others. This contract, combination, and conspiracy had the
28 purpose and effect of unreasonably restraining trade and commerce. The contract, combination,
and conspiracy alleged herein consisted of a continuing agreement, understanding, and concert of

1 action among the defendants and their co-conspirators, the substantial terms of which were to lock
2 handsets so that each carrier would be the only source of handsets for that carrier's subscribers, and
3 each carrier's handsets would be locked for use only on that carrier's network, and to create an
4 impediment to activation on other networks. For the purpose of forming and effectuating the
5 contract, combination, and conspiracy, T-Mobile and its co-conspirators, including, *inter alia*,
6 CTIA, did those things which they contracted, combined, and conspired to do, including but not
7 limited to the acts, practices, and course of conduct set forth above.

8 52. T-Mobile violated the "unlawful" prong of the UCL by violating the Cartwright
9 Act, Bus. & Prof. Code § 16727, by unlawfully tying the sale of cellular/PCS handsets and
10 services. Cellular/PCS services and handsets are two separate products. T-Mobile coerces
11 subscribers to purchase handsets only from T-Mobile as a condition of obtaining service through T-
12 Mobile's network and refuses to provide service with handsets purchased from other sources. T-
13 Mobile has economic power in the tying product market, the provision of cellular/PCS services in
14 the State of California, by virtue of its extensive portfolio of spectrum licenses, the high cost to
15 consumers of switching to another service, and otherwise. T-Mobile's tying arrangements have
16 substantially lessened competition by creating barriers to entry to the handset market, by reducing
17 the number of handset manufacturers from several dozen in the mid-1990s to a mere ten or so
18 manufacturers today, by preventing the development of handset technology that would allow
19 handsets to access signals provided by multiple providers of wireless services, by increasing the
20 cost of handsets, and by increasing the cost of handset and services bundles. T-Mobile's tying
21 arrangements affect a substantial amount of commerce since T-Mobile has millions of subscribers
22 in California.

23 53. T-Mobile violated the "unlawful" prong of the UCL by violating the FTC Act, 15
24 U.S.C. § 45(n), because T-Mobile's handset locking practices are business practices that cause or
25 are likely to cause injury to consumers by imposing unnecessary costs when switching carriers,
26 such as the cost to unlock the handset or the cost of a new handset if the consumer is unaware of
27 the lock or unaware of the availability of means to unlock it, and also by degrading the value of the
28 handset. These injuries are substantial, and are not reasonably avoidable by consumers who in

1 most cases are unaware of the locks. There are no countervailing benefits to consumers or to
2 competition because handset locks have no utility whatsoever; their only function is to prevent the
3 purchaser from obtaining full rights of ownership and use of handsets purchased from T-Mobile.

4 54. T-Mobile violated the "unlawful" prong of the UCL by violating the FCC's
5 bundling rule. Due to concerns about the potential anticompetitive impact of tying arrangements,
6 in 1992 the FCC clarified its policy with respect to the bundling of wireless phones and services.
7 The FCC stated its "concern that customers have the ability to choose their own CPE [handset] and
8 service packages to meet their own communication needs and that they not be forced to buy
9 unwanted carrier-provided CPE [handsets] in order to obtain necessary services." *In The Matter Of*
10 *Bundling Of Cellular Customer Premises Equipment And Cellular Service*, CC Docket No. 91-34,
11 1992 WL 689944 (F.C.C. June 10, 1992), at ¶ 6. Given these concerns, the FCC permitted cellular
12 carriers to offer handsets and services as a bundled package, provided that cellular service was also
13 offered separately on a nondiscriminatory basis. In other words, the FCC permitted carriers to
14 bundle handsets and service on the condition that the carriers offer service regardless of whether
15 the subscriber purchased a bundled phone from the carrier or an unbundled phone from a source
16 other than the carrier. *See id.* T-Mobile does not offer service separately, without the purchase of
17 a bundled T-Mobile handset, in violation of this rule. T-Mobile's handset locking practices,
18 including T-Mobile's conspiracy with other carriers and sellers of handsets, is an integral part of T-
19 Mobile's violation of this FCC rule.

20 WHEREFORE, plaintiffs pray for relief as hereinafter set forth.

21 **COUNT III**

22 **Unfair Competition In Violation Of**
23 **California Business & Professions Code §§ 17200 Et Seq.**
24 **(Unfair Business Practices)**

25 55. Plaintiffs incorporate by reference all allegations of all prior paragraphs as though
26 fully set forth herein.

27 56. COUNT III is brought against T-Mobile by plaintiffs individually and on behalf of
28 the Class.

1 57. T-Mobile is subject to the Unfair Competition Law, §§ 17200 *et seq.* of the
2 California Business & Professions Code (the "UCL"). The UCL provides, in pertinent part:
3 "Unfair competition shall mean and include unlawful, unfair or fraudulent business practices and
4 unfair, deceptive, untrue or misleading advertising..."

5 58. T-Mobile violated the "unfair" prong of the UCL because T-Mobile's handset
6 locking practices threaten an incipient violation of the Consumer Legal Remedies Act, Civil Code
7 §§ 1770 (a)(5) – (7) and (9) as set forth in COUNT IV, below, and violate the policy or spirit of
8 those laws because the effects of T-Mobile's handset locking practices are comparable to or the
9 same as a violation of the law, or otherwise significantly threaten or harm competition.

10 59. T-Mobile violated the "unfair" prong of the UCL because T-Mobile's handset
11 locking practices threaten an incipient violation of the Cartwright Act, Bus. & Prof. Code § 16720,
12 and § 16727, as described above, and violate the policy or spirit of those laws because the effects
13 of T-Mobile's handset locking practices are comparable to or the same as a violation of the law, or
14 otherwise significantly threaten or harm competition.

15 60. T-Mobile violated the "unfair" prong of the UCL because T-Mobile's handset
16 locking practices threaten an incipient violation of the FTC Act, 15 U.S.C. § 45(n), as described
17 above, and violate the policy or spirit of those laws because the effects of T-Mobile's handset
18 locking practices are comparable to or the same as a violation of the law, or otherwise significantly
19 threaten or harm competition.

20 61. T-Mobile violated the "unfair" prong of the UCL because T-Mobile's handset
21 locking practices threaten an incipient violation of the FCC's bundling rules set forth in *In The*
22 *Matter Of Bundling Of Cellular Customer Premises Equipment And Cellular Service*, CC Docket
23 No. 91-34, 1992 WL 689944 (F.C.C. June 10, 1992), as described above, and violate the policy or
24 spirit of those laws because the effects of T-Mobile's handset locking practices are comparable to
25 or the same as a violation of the law, or otherwise significantly threaten or harm competition.

26 62. T-Mobile violated the "unfair" prong of the UCL because T-Mobile's handset
27 locking practices are contrary to the public policy expressed by the United States Congress which
28 established the promotion of competition in the field of telecommunications as a fundamental policy

1 underlying the Communications Act of 1934. See The Omnibus Budget Reconciliation Act of
2 1993, Pub. L. No. 103-66, Title VI, § 6002(b), amending the Communications Act of 1934 and
3 codified at 47 U.S.C. § 332(c).

4 63. T-Mobile violated the "unfair" prong of the UCL because T-Mobile's handset
5 locking practices are contrary to the public policy expressed by the United States Congress in the
6 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 151,
7 *et seq.* ("the 1996 Act" or "the Act"), to "promote competition and reduce regulation in order to
8 secure lower prices and higher quality services for American telecommunications consumers and
9 encourage the rapid deployment of new telecommunications technologies." 1996 Act, preamble.

10 64. T-Mobile violated the "unfair" prong of the UCL because T-Mobile's handset
11 locking practices are contrary to the public policy expressed by the FCC rules requiring wireless
12 carriers to provide number portability. See *Telephone Number Portability, First Report and Order*
13 *and Further Notice of Proposed Rule*, 11 F.C.C.R. 8352, 1996 WL 400225 (1996) ("First Report
14 and Order"); 47 C.F.R. § 52.31. The FCC ordered wireless number portability because it found
15 that consumers "will be reluctant to change wireless service providers unless they can keep the
16 same number," and "will find themselves forced to stay with carriers with whom they may be
17 dissatisfied because the cost of giving up their wireless phone number in order to move to another
18 carrier is too high." See *CTIA v. FCC*, 303 F.3d 502, 506-07 (D.C. Cir. 2003), quoting 17 F.C.C.R.
19 at 14,979-80. The same rationale for allowing consumers to keep their phone number when
20 changing carriers, also supports allowing consumers to keep their handsets when changing carriers.
21 Consumers "will be reluctant to change wireless services providers unless they can keep the same
22 [handset]," and "will find themselves forced to stay with carriers with whom they may be
23 dissatisfied because the cost of giving up their wireless phone [handset] in order to move to another
24 carrier is too high." See *id.*

25 WHEREFORE, plaintiffs pray for relief as hereinafter set forth.
26
27
28

COUNT IV
Consumer Legal Remedies Act

1
2
3 65. Plaintiffs incorporate by reference all allegations of all prior paragraphs as though
4 fully set forth herein.

5 66. COUNT IV is brought by plaintiffs individually and on behalf of the Subclass
6 against T-Mobile.

7 67. By secretly locking handsets and failing to disclose the existence and effects of T-
8 Mobile's handset locks as alleged above, T-Mobile has engaged in, and continues to engage in,
9 unfair methods of competition and unfair or deceptive acts and practices in violation of the
10 Consumer Legal Remedies Act, Civil Code Sections 1750 *et seq.* (the "CLRA"), including without
11 limitation, the provisions of California Civil Code Sections 1770(a)(5)-(7) and (9).

12 68. CLRA section 1770(a)(5) prohibits "Representing that goods or services have
13 sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not
14 have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she
15 does not have." T-Mobile violated this provision by making the Misrepresentations and by
16 concealing the Concealed Facts. T-Mobile continues to violate this provision in connection with
17 sales of handsets to class members.

18 69. CLRA section 1770(a)(6) prohibits "Representing that goods are original or new if
19 they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used, or secondhand."
20 T-Mobile violated this provision by representing that the handset sold to Nguyen and Grant were
21 original or new when in fact it had been altered by T-Mobile. T-Mobile continues to violate this
22 provision in connection with sales of handsets to class members.

23 70. CLRA section 1770(a)(7) prohibits "Representing that goods or services are of a
24 particular standard, quality, or grade, or that goods are of a particular style or model, if they are of
25 another." T-Mobile violated this provision by making the Misrepresentations and by concealing
26 the Concealed Facts. T-Mobile continues to violate this provision in connection with sales of
27 handsets to class members.
28

1 71. CLRA section 1770(a)(9) prohibits "Advertising goods or services with intent not to
2 sell them as advertised." T-Mobile violated this provision by advertising the sale of various
3 handset models, including the Motorola V300 Portable Camera GSM handset, with the intent of
4 not selling fully functional, unaltered versions of such handsets, but instead selling only such
5 handsets as have been altered by T-Mobile. T-Mobile continues to violate this provision in
6 connection with its advertising of handsets.

7 72. As a proximate result thereof, plaintiffs and the members of the Subclass have been
8 harmed as alleged above and will continue to be harmed in the future unless the Court grants
9 equitable relief as prayed for herein.

10 WHEREFORE, plaintiffs pray for relief as hereinafter set forth.

11 **COUNT V**
12 **Declaratory Relief**

13 73. Plaintiffs incorporate by reference all allegations of all prior paragraphs as though
14 fully set forth herein.

15 74. COUNT V is brought by plaintiffs individually and on behalf of the Class against T-
16 Mobile.

17 75. Plaintiffs are informed and believe that the form contract imposed by T-Mobile on
18 its subscribers includes the following provision:

19 Neither you nor we may be a representative of other potential claimants or a
20 class of potential claimants in any dispute, nor may two or more individuals'
21 disputes be consolidated or otherwise determined in one proceeding. . . .
22 YOU AND WE ACKNOWLEDGE AND AGREE THAT THIS SEC. 3
23 WAIVES ANY RIGHT TO A JURY TRIAL OR PARTICIPATION AS A
24 PLAINTIFF OR A CLASS MEMBER IN A CLASS ACTION.

25 76. An actual and justiciable controversy exists between the parties as to their respective
26 rights and obligations under the form contracts imposed on subscribers by T-Mobile. Specifically,
27 plaintiffs believe and thereon allege that the above provision that purports to compel arbitration and
28 preclude plaintiffs and the class members from participating in a class or representative action
against T-Mobile is procedurally and substantively unconscionable, and is therefore unenforceable.
In addition to the provision purporting to prohibit class actions or consolidation in arbitration, the

1 fee-splitting rules and the rules requiring the arbitrator to employ the WIA Rules are
 2 unconscionable.

3 77. Plaintiffs believe and thereon allege that these provisions are procedurally
 4 unconscionable in that plaintiffs and the class members were not given an opportunity for
 5 meaningful negotiation over this term and that the provision was presented by T-Mobile on a "take
 6 it or leave it basis." Plaintiffs are also informed and believes and thereon alleges that other cellular
 7 telephone service providers also impose similar provisions in their form contracts and that it would
 8 be difficult if not impossible for plaintiffs and the class members to reject the terms of the said
 9 provision and obtain similar services elsewhere without the offending provision.

10 78. Plaintiffs believes and thereon allege that the provisions of the T-Mobile form
 11 contract referenced in Paragraphs 76 and 77 are substantively unconscionable in that the terms of
 12 the provision impose harsh and oppressive terms and are so one-sided as to shock the conscience.
 13 These provisions are meant to prevent T-Mobile customers from seeking redress for relatively
 14 small amounts of money and provide them with no benefit whatsoever. Indeed, they seriously
 15 jeopardize the rights of T-Mobile subscribers by prohibiting any effective means of litigating the
 16 business practices of T-Mobile. T-Mobile seeks to immunize itself from class or representative
 17 actions despite their potential merit. The provision also provides a disincentive to T-Mobile to
 18 avoid the type of conduct that might lead to a class or representative action. In fact, T-Mobile has
 19 granted itself a license to push the boundaries of good business practices to their furthest limits.

20 79. Plaintiffs further believe and thereon allege that T-Mobile has waived its purported
 21 right to arbitration of the claims of plaintiffs and the Class and Subclass pursuant to the provisions
 22 of its form contracts with its subscribers.

23 80. Plaintiffs, on behalf of themselves and all others similarly situated, therefore seek a
 24 judicial declaration to that effect.

25 **COUNT VI**
 26 **Consumer Legal Remedies Act**
 27 **(Unconscionable Contract Clauses)**

28 81. Plaintiffs incorporate by reference all allegations of all prior paragraphs as though
 fully set forth herein.

1 5. For restitution and/or disgorgement of all amounts wrongfully charged to plaintiffs
2 and members of the Class;

3 **On COUNTS V and VI**

4 6. For a judicial declaration that plaintiffs and the members of the Class and Subclass
5 may bring and participate in a class or representative action against T-Mobile; and

6 7. For a judicial declaration that the provision in the form contract that purports to
7 compel arbitration and prohibit plaintiffs and the class members from bringing or participating in a
8 class action or consolidated action is procedurally and substantively unconscionable and is
9 therefore void and unenforceable;

10 **On ALL COUNTS**

11 8. For an order certifying this action as a class action on behalf of the Class and
12 Subclass;

13 9. For costs of suit herein incurred;

14 10. For both pre- and post-judgment interest on any amounts awarded;

15 11. For an award of attorneys' fees as appropriate pursuant to the provisions of Code of
16 Civil Procedure Section 1021.5 and any other applicable provisions of law; and

17 12. For such other and further relief as the court may deem proper.

18 **DEMAND FOR JURY TRIAL**

19 Plaintiffs hereby demand a trial by jury as to all claims properly triable to a jury.

20 Dated: June 24, 2005

21 Respectfully submitted,

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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Bramson, Plutzik, Mahler & Birkhaenser, LLP, 2125 Oak Grove Road, Suite 120, Walnut Creek, California 94598. On June 24, 2005, I served the within documents:

**FOURTH AMENDED CONSOLIDATED COMPLAINT [HANDSET LOCKING]
(Nguyen et al. v. T-Mobile USA, Inc.)**

- by placing a copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Walnut Creek, California addressed as set forth below.
- by facsimile transmission on that date. This document was transmitted by using a Canon LC 710 facsimile machine that complies with California Rules of Court Rule 2003(3), telephone number (925) 945-8792. The transmission was reported as complete and without error.
- By causing personal delivery of a copy of the document(s) listed above to the person(s).
- by depositing a true copy of the same enclosed in a sealed envelope with delivery fees provided for a Federal Express pick up box or office designated for overnight delivery, and addressed as set forth below.
- by pdf transmission on that date. These documents were transmitted via e-mail to the following e-mail addresses as set forth below.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct, executed on June 24, 2005, at Walnut Creek, California.



Lisa Baker

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Attorneys for Plaintiff and the
General Public

ORIGINAL FILED

JUN 07 2004

**LOS ANGELES
SUPERIOR COURT**

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

The Foundation for Taxpayer and Consumer
Rights, on Behalf of the General Public,

Plaintiff,

vs.

AT& T Wireless Services, Inc., a Delaware
Corporation, T-Mobile USA, Inc., a Delaware
Corporation, Cingular Wireless, LLC., a
Delaware Corporation, and DOES 1 Through
25, inclusive,

Defendants,

Case No.: BC316619

COMPLAINT FOR:

**Unlawful Business Practice in Violation
of California Bus. & Prof. Code §§17200 et
seq. and §§17500 et seq.**

1 Plaintiff, on behalf of the general public, by its attorneys, alleges upon information and
2 belief based upon, *inter alia*, the investigation made by and through its attorneys, as follows:

3 **NATURE OF THE ACTION**

4 1. The California Unfair Competition Law (“UCL”) (Bus. & Prof. Code §§17200 *et*
5 *seq.*) prohibits “any unlawful, unfair or fraudulent business act or practice.” The conduct of the
6 defendant cell phone carriers, as alleged herein, violates the UCL.

7 2. On November 24, 2003, federal regulations regarding cell phone number
8 portability went into effect that permit cell phone customers to keep their old cell phone
9 telephone numbers when they switch carriers. However, cell phone carriers effectively are
10 thwarting the regulations by locking the subscribers’ handsets. While customers can keep their
11 old phone numbers, they cannot use their old cell phones (referred to as “handsets”) when they
12 switch carriers *because the handsets are locked by the carriers* specifically to prevent handset
13 portability between compatible networks that use the same wireless standard. In order to use the
14 carrier’s service, the subscriber must purchase that carrier’s authorized handset.

15 3. The practice by defendants AT&T Wireless, Cingular Wireless and T-Mobile is
16 particularly egregious. All three companies employ a technology called GSM (short for Global
17 System Mobile communications) that, unlike other wireless standards such as CDMA and
18 TDMA supported by other nationwide carriers, permits a seamless swapping of phones between
19 services.

20 4. Instead of having to purchase a new handset in order to use the respective
21 defendants’ services, GSM customers could use their old handsets and simply replace their SIM
22 cards (an easily accessible chip that comes with the cell phone and that contains customer
23 specific information) with SIM cards from another carrier. All the user would have to do is open
24 the phone’s case and swap out the thumb-nail size SIM card issued by the first company and pop
25 in a new one issued by another GSM carrier. Indeed, the SIM card originally was specifically
26 designed so that a handset could work with different SIM cards to access different GSM
27 networks. Moreover, since GSM is the standard throughout much of the world, frequent
28

1 international travelers, for example, could buy SIM cards with prepaid service for overseas calls
2 to avoid the steep roaming charges imposed by their GSM carriers.

3 5. But Defendants don't allow customers to use the same handset and swap in
4 another carrier's SIM card because they lock the phones (sometimes called "SIM Locking") to
5 prevent their handsets from operating on competitors' networks, thus ensuring that the handset
6 will work only on their networks and not on the networks of rival GSM carriers. This is an
7 "unfair" business practice in violation of the UCL.

8 6. Further, in order to use the carrier's network, the customer must purchase only
9 that carrier's handset. This practice not only is unfair, it is "unlawful" in further violation of the
10 UCL because Defendants' conduct constitutes an illegal "tying arrangement" (which prohibits
11 the sale of one product or service but only on the condition that the buyer also buy a different
12 product or service) and otherwise restricts open competition in violation of California's antitrust
13 statute, the Cartwright Act (Bus. & Prof. Code §§16720 *et seq*).

14 7. Defendants' conduct also violates the "fraudulent" prong of the UCL because
15 Defendants' conduct is deceptive and likely to deceive consumers. When consumers sign up for
16 cell phone service, they are not adequately informed or made aware that the handsets that they are
17 receiving are locked, that the handsets are not portable and that the handsets cannot be used if
18 they switch carriers, even to a carrier within a compatible network that uses the same wireless
19 standard.

20 8. Consumer confusion further is exacerbated by cell phone number portability. As
21 Defendants already charge subscribers for portability, consumers are likely to be deceived that
22 their handsets also are portable.

23 9. Defendants also engage in false advertising regarding handset locking in violation
24 of California Business & Professions Code §§17500 *et seq*. Defendants' advertisements fail to
25 adequately notify potential customers of the existence of handset locking. Further, Defendants'
26 advertisements, which tout that customers who sign up for Defendants' service can receive an
27 inexpensive or discounted price on a handset, fail to adequately disclose that the handset is
28

1 locked, that the handset is not portable and that the handset cannot be used on another carrier's
2 compatible network.

3 10. By this action, plaintiff seeks to enjoin the practice of cell phone handset locking,
4 particularly for cell phones on the GSM standard. Plaintiff seeks an injunction requiring
5 Defendants to, *inter alia*, provide unlocking codes and/or unlocking software for the phones
6 already sold by them free of charge and to provide only unlocked phones in the future. Plaintiff
7 also seeks to enjoin and correct Defendants' false advertising.

8 JURISDICTION AND VENUE

9 11. This Court has jurisdiction over this action pursuant to Code of Civil Procedure
10 §410.10.

11 12. Venue is proper in this Court because the acts of the defendant occurred in this
12 County.

13 THE PARTIES

14 13. Plaintiff Foundation for Taxpayer and Consumer Rights ("FTCR") is a nationally
15 recognized, California-based, non-profit education and advocacy group organized under section
16 501(c)(3) of the Internal Revenue Code. Founded in 1985, FTCR employs teams of public-
17 interest lawyers, policy experts, strategists, public educators, and grassroots activists to advance
18 and protect the interests of consumers and taxpayers. FTCR has, since its inception, been
19 particularly involved in representing the interests of consumers in regulatory matters, especially
20 emphasizing the interests of utility ratepayers in California in matters before the Legislature, the
21 courts and state agencies. FTCR sues in a representative capacity on behalf of the general public
22 pursuant to the Private Attorney General provisions of the Unfair Competition Laws embodied in
23 California Bus. & Prof. Code §17200.

24 14. Defendant T-Mobile USA, Inc. is a Delaware corporation with its principal place
25 of business in Bellevue, Washington and is qualified to do business in California.

26 15. Defendant AT&T Wireless Services, Inc. is a Delaware corporation with its
27 principal place of business in Redmond, Washington and is qualified to do business in
28 California.

1 modifiable memory storage. The SIM card performs a number of cryptographic security
2 functions and holds a variety of information relating to the subscriber, such as speed dial
3 numbers and other personalized features. Every GSM service provider issues a SIM card for
4 each subscriber. When the user plugs in the SIM card, the subscriber specific information is
5 made available to the handset.

6 22. With SIM Locking, the handset is electronically locked to operate only with SIM
7 cards from the carrier's own network. Defendants program their handsets with SIM locks to
8 prevent the handsets from operating if a different SIM card is inserted into the handset. Inserting
9 a card from another Defendant's network into a SIM-locked handset results in an error message
10 on the display, and the phone will not operate.

11 23. For example, if a customer had a phone from Network A and wanted to use the
12 services of Network B, he or she could not simply use the Network A phone and insert the
13 Network B SIM card. The customer would either have to continue to use a Network A handset
14 with the existing SIM card and pay roaming charges or purchase a new handset from Network B
15 in order to use the SIM card from Network B. Once a SIM-lock is removed, the handset will
16 operate with any SIM card, and the handset can be used with a different carrier.

17 24. Soon after SIM-locked phones appeared in Europe, the European Commission
18 ("EC") ruled that such handset locking would be harmful to competition and would prevent the
19 establishment of a common market for goods. The EC warned all European handset
20 manufacturers and network operators not to produce or sell SIM-locked phones and requested
21 that the GSM Standards Committee remove a proposed SIM-lock modification from the
22 standards.

23 25. In the United States, GSM operators still sell SIM-locked phones. AT&T refuses
24 to remove the lock or reveal the code that will unlock a particular handset. Cingular provides a
25 phone's unlocking code only if the user switches carriers after a Cingular contract has expired. T-
26 Mobile provides unlocking codes only after customers have subscribed for a number of months.

27 26. Customers are unable to purchase handsets directly from equipment
28 manufacturers because the equipment manufacturers ordinarily do not sell directly to subscribers.

1 34. In addition, handsets stay locked even well after carriers have “made their money
2 back” and recovered the subsidy in the form of monthly fees. There is absolutely no excuse for
3 locking handsets any time after the subsidy has been repaid or the contract has expired. As it is,
4 customers are locked into their contracts for much longer than it takes for the handset subsidy to
5 be recovered.

6 35. Handset locking is nothing more than an unfair and anticompetitive stratagem by
7 Defendants to discourage subscribers from changing carriers. Defendants use handset locking
8 simply to lock customers into their networks. However, Defendants already lock customers into
9 their networks through contractual obligations. As long as the subscriber is under a contract for
10 service to the carrier, it should make no difference which handset the subscriber uses. The
11 subscriber is still paying for the carrier’s service and is contractually committed during that
12 period regardless of the brand of handset used by the subscriber.

13 36. On the other hand, handset locking is patently unfair to consumers. To switch
14 GSM carriers, consumers now have to acquire a new handset, making switching unnecessarily
15 expensive.

16 37. Defendants’ conduct also has caused artificially high market prices for wireless
17 service and handsets by increasing costs to consumers associated with switching networks.
18 Defendants effectively have created a floor below which switching costs cannot fall, by ensuring
19 that a subscriber who wishes to change carriers must also purchase another handset.

20 38. Further, it is unnecessarily expensive and wasteful for consumers to have to throw
21 out perfectly good and otherwise functional and compatible phones simply because the consumer
22 changes networks and the carrier will not unlock the handset.

23 39. Eliminating wireless handset locking also will have a positive effect on the public
24 generally. For example, eliminating handset locking will encourage developments in handset
25 technology. Defendants’ practices have stifled the development of important handset
26 technologies. Eliminating handset locking will incentivize manufacturers to bring innovative
27 products – such as a chipset that works on multiple digital signaling protocols, such as both
28 CDMA and GSM – that would be compatible with nearly all the networks of the national

1 carriers. There is little incentive to build handsets that use this chip if these carriers require
2 consumers to discard the handset when they switch wireless providers.

3 40. Eliminating handset locking also is good for the environment. Americans are
4 discarding over 100 million wireless cell phones a year, which means that tons of trash including
5 toxic materials such as arsenic, mercury, lead, copper, antimony, beryllium, cadmium, zinc and
6 brominated flame retardants, are being released into the air and groundwater.

7 **SIM-Locking is a "Deceptive" Business Practice**

8 41. Defendants' conduct also is deceptive and is likely to deceive consumers in
9 violation of the "fraudulent" prong of §17200. Defendants' emphasis on number portability is
10 likely to deceive customers that their handsets likewise also are portable. Defendants already
11 provide cell number portability. Defendants also charge and collect fees for cell number
12 portability (far exceeding the actual costs of number portability). As they already are paying for
13 portability, consumers are likely to be deceived that their handsets, as well as their numbers, are
14 portable.

15 42. Consumers further are deceived and/or likely to be deceived because, when they
16 sign up for service and receive a cell phone, subscribers are not adequately informed or made
17 aware that their handsets are locked. Consumers are deceived and misled that their handsets are
18 portable and can be used if they switch to a carrier within a compatible network that uses the
19 same wireless GSM standard.

20 43. Defendants' conduct also disguises the price of the components consumers are
21 buying. Since the price of the handset and the price of the service cannot be readily distinguished
22 by the consumer, the consumer cannot reasonably comparison shop for those items based on
23 price.

24 **SIM-Locking is "Unlawful"**

25 44. Defendants' conduct also violates the "unlawful" prong of the Unfair Business
26 Practices Act in that requiring customers to purchase a carrier's authorized handset in order to
27 access the carrier's wireless network is an unlawful tying arrangement in violation of California's
28 antitrust statute, the Cartwright Act (Bus. & Prof. Code §§16720, 16726, 16727).

1 45. An illegal tying arrangement under the Cartwright Act is an agreement to sell a
2 product (the tying product) but only on the condition that the buyer also purchase a different (or
3 tied) product. Here, the tying product is the wireless telephone services offered by the provider
4 (under Bus. & Prof. Code §§16720, 16726) and/or the SIM card (under Bus. & Prof. Code
5 §16727), and the tied product is the handsets.

6 46. Tying arrangements are illegal *per se* under Bus. & Prof. Code §§16720, 16726 if
7 the party has sufficient economic power and substantially forecloses competition in the relevant
8 market. Even when not *per se* illegal, a tying arrangement violates the Cartwright Act if it
9 unreasonably restrains trade. A tying arrangement is illegal *per se* under Bus. & Prof. Code
10 §16727 when the seller has power over the tying market or if a substantial volume of commerce
11 in the tied product is restrained.

12 47. Tying agreements serve no purpose beyond the suppression of competition. They
13 deny competitors free access to the market for the tied product, not because the party imposing
14 the tying requirements has a better product or a lower price but because of his power or leverage
15 in another market.

16 48. Here, the sale of the tying product is linked to the sale of the tied product. Each of
17 the Defendants purchases handsets from equipment manufacturers and resells the handsets to
18 consumers. The Defendants require consumers or subscribers to purchase one of their selected
19 handsets in order to be able to use the customer's existing SIM card and/or to subscribe to and
20 receive service on their wireless networks. As a result of Defendants' practices, subscribers must
21 purchase handsets from the same carrier that provides the wireless service to which they intend to
22 subscribe. Defendants' tying arrangements prevent consumers from purchasing handsets directly
23 from handset manufacturers or other carriers.

24 49. Defendants and each them also have sufficient economic power in the tying
25 market to impose an appreciable restraint on the free competition of the tied product (here,
26 handsets) and/or restrain a substantial volume of commerce in the tied product.
27
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1 1. A temporary, preliminary and/or permanent order for injunctive relief enjoining
2 Defendants from pursuing the policies, acts and practices complained of herein;

3 2. A temporary, preliminary and/or permanent order for injunctive relief enjoining
4 the practice of cell phone handset locking, particularly for cell phones on the GSM standard;
5 requiring Defendants to provide, free of charge, unlocking codes and/or unlocking software for
6 the phones already sold by them; requiring Defendants to provide only unlocked phones in the
7 future; and/or requiring Defendants to adequately notify customers before and at the time that
8 they sign up for cellular service that the handset they are receiving is locked, is not portable and
9 cannot be used on another carrier's compatible network;

10 3. A temporary, preliminary and/or permanent order for injunctive relief requiring
11 Defendants to correct their false advertising by adequately notifying potential customers of the
12 existence of handset locking and enjoining advertising phone subsidies if a customer signs up for
13 the carrier's service without adequately disclosing that the phone is locked and cannot be used on
14 a competing carrier's service;

15 4. A temporary, preliminary and/or permanent order for injunctive relief requiring
16 Defendants to undertake an immediate public information campaign to inform members of the
17 general public as to their prior practices and notifying affected members as to changes to
18 Defendants' policies;

19 5. An order, as appropriate, requiring imposition of a constructive trust and/or
20 disgorgement of Defendants' ill-gotten gains and requiring Defendants to pay restitution and to
21 restore to the public all funds acquired by means of any act or practice declared by this Court to
22 be an unlawful, fraudulent or unfair business act or practice, a violation of laws, statutes or
23 regulations, or constituting unfair competition; and for distribution of any monies recovered on
24 behalf of the general public, to prevent Defendants from retaining the benefits of their wrongful
25 conduct;

26 6. Reasonable attorneys' fees pursuant to, *inter alia*, Code of Civil Procedure,
27 §1021.5;

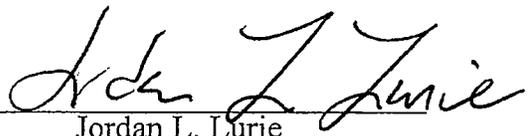
28 7. Costs of this suit;

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- 8. Pre- and post-judgment interest; and
- 9. Such other and further relief as the Court may deem necessary or appropriate.

Dated: June 7, 2004

Jordan L. Lurie
Leigh Parker
WEISS & YOURMAN

By: 
Jordan L. Lurie

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Open Mobile Alliance

About OMA

The mission of the Open Mobile Alliance is to facilitate global user adoption of mobile data services by specifying market driven mobile service enablers that ensure service interoperability across devices, geographies, service providers, operators, and networks, while allowing businesses to compete through innovation and differentiation.

Openness and the Open Mobile Alliance

Maintaining an open organization is key to OMA's vision for broad industry participation and adoption. Openness in this sense comprises of actively collaborating with other organizations and inviting comments and communications with other industry organizations. Openness also means developing industry solutions in a transparent manner, allowing other organizations insight into the technical aspects of the organization. Being able to see and comment on early versions of documents and contributions allows external organizations to be more involved in and aware of evolving service enablers. Finally, openness means that any interested party may join OMA and contribute to the technical specifications, and any entity (both members and non-members) may build applications and services in accordance with OMA's open specifications and interfaces under the same conditions.

OMA Technical Plenary

The OMA Technical Plenary is responsible for the delivery of technical specifications for application and service frameworks, with certifiable interoperability, enabling deployment of rich mobile applications and services.

In addition, the Technical Plenary oversees the technical specification drafting activities, approval and maintenance of technical specifications, as well as the resolution of technical issues within the OMA organization.

The Technical Plenary is organized around a collection of [technical working groups](#), each focusing on a particular technology area. Currently, there are 15 Technical Working Groups and 2 Committees of the Technical Plenary. The documents and specifications created within the Technical Plenary can be found within the [Technical Section](#) of this web site.

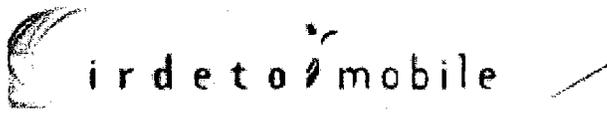
OMA Membership

Since its inception in June 2002, the Open Mobile Alliance has grown to more than 300 companies representing mobile operators, device and network suppliers, information technology companies, and content providers. For more information on how to join OMA [click here](#).

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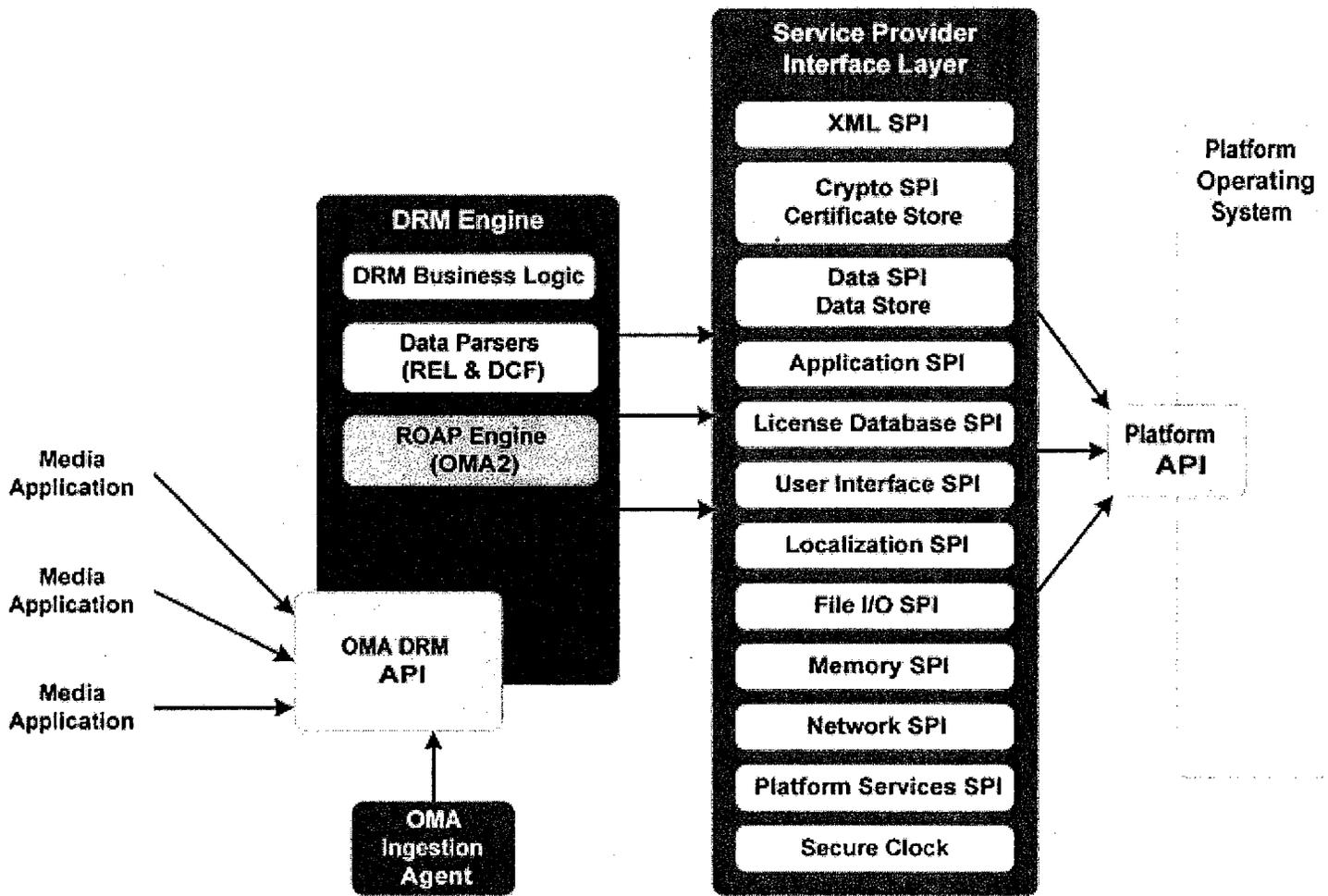


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Irdeto Mobile OMA 2.0 Client High-Level Architecture



- OMA2 additions to DRM Engine.
- LockStream core software and APIs. Platform-independent.
- OMA2 additions to the SPIs.
- Platform-specific software developed by 3rd parties using LockStream APIs and specifications. Some versions have been developed by Irdeto Mobile.
- Platform-specific operating system.

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