



August 28, 2009

Robert Kasunic
Principal Legal Advisor
Office of the General Counsel
U.S. Copyright Office
101 Independence Avenue, SE
Washington, D.C. 20559-6000

RE: 2009 DMCA Proceedings/Virgin Mobile USA's
Request to Respond to EFF's Submission

Dear Rob:

Thank you for your response and the opportunity to submit this letter.

Virgin Mobile USA LP ("VMU") has requested the opportunity to respond to comments submitted by the Electronic Frontier Foundation ("EFF") to the Copyright Office on July 13, 2009 in response to the Copyright Office's questions dated June 23, 2009 ("EFF's Submission"). VMU recognizes that there is no formal procedure for it to submit such a response, but believes the circumstances, namely EFF's accusations that VMU provided "incorrect or misleading" testimony (EFF's Submission at 2) with respect to the availability of file-specific digital rights management ("DRM") for Virgin Mobile's low-cost handsets, warrant such a response. Unless VMU submits the corrections to EFF's Submission, there is a significant risk that the Copyright Office may rely on misleading information provided in EFF's Submission.

EFF's July 13, 2009 Submission states that VMU's Oystr handset contains DRM. EFF describes how Attorney William Quirk used a PST tool to access files on the Oystr handset and states that some of the sound files on the Oystr handset that it analyzed were not accessible through this process. EFF concludes that therefore "it is readily apparent that some of the files are protected by DRM."

VMU does not in fact use DRM on any of its low-cost handsets, as it stated in its testimony. This includes the Oystr, which is a relatively old handset and is no longer manufactured. As explained in more detail below, VMU's Handset Engineering Team reproduced EFF's test on the Oystr handset, found all of the sound files to be fully accessible and found no DRM on the handset. The team also confirmed that VMU uses no DRM on any of its low-cost handsets. In the attached PowerPoint document entitled "Response to EFF DMCA Submission" ("Attachment A"), VMU's Handset Engineering Team describes the mobile industry standards for DRM and demonstrates from a technical view why VMU's handsets do not meet those specifications.

Moreover, while VMU does use the Qualcomm MSM-6050 chip discussed in EFF's Submission on some of its handsets, to VMU's knowledge, that chip is being discontinued and is no longer supported by the manufacturer. Even if VMU desired to expend the significant resources necessary to upgrade the handsets to support DRM, VMU does not believe it would be able to do so using this chipset.

VMU has not analyzed other carriers' handsets using the Qualcomm MSM-6050 chipset to determine whether they use DRM with that chipset and does not take issue with that part of EFF's Submission. As acknowledged by VMU in its July 13, 2009 submission and by Christian Buerger in his May 1, 2009 testimony, it might be possible to use DRM on VMU handsets if significant engineering efforts were undertaken, which would substantially increase costs to consumers. Nothing under the DMCA or copyright law requires VMU to do so.

Relevance to Proceedings

As stated in its July 13, 2009 submission and its recent request to respond to EFF's submission, VMU does not believe that the issue of whether VMU handsets are capable of supporting DRM is or *should be* relevant to the Copyright Office's evaluation of the proposed exemption to allow circumvention of mobile handset locks for the purpose of connecting to a wireless telecommunications network. As explained in VMU's July 13, 2009 submission, the question of whether or not it is technologically possible to use separate technological measures for firmware and other software than for content is inapposite to the issue of whether the proposed exemption from the section 1201(a) prohibition is warranted. Section 1201 does not require multiple layers of protection measures, much less the use of the most sophisticated, expensive technological protection measures ("TPMs"). It merely requires that the TPMs "effectively control[] access to a work." (17 U.S.C. § 1201(a)(1)(A).)

The fact that VMU could possibly offer alternative forms of protection by reengineering its handsets does not provide any justification for the proposed DMCA exemption, especially when those alternative forms are more expensive to implement and, if implemented, would harm the interests of low-income or other consumers who prefer low-cost handsets. As has been fully briefed in VMU's prior submissions, unlocked handsets are already available to consumers who are willing to pay the price for the freedom to switch carriers; but there is also a market for consumers who wish to spend only \$10-\$20 on a handset even if it means they cannot switch carriers. The Copyright Office should not allow this rulemaking to be used to favor one market over another. None of the four factors listed in the statute (17 U.S.C. § 1201(a)(1)(c)(i)-(iv)) instruct the Copyright Office to consider the availability of other, much less more sophisticated, TPMs in this rulemaking, nor is there anything in the statute to indicate that Congress would find that it is "appropriate" to do so. (17 U.S.C. 1201(a)(1)(c)(v).)

If the Copyright Office nevertheless considers the availability of DRM on VMU's handset to be relevant to the overall issue of whether an exemption to circumvent TPMs on mobile telecommunications handsets is warranted, EFF's allegations, if unrebutted, could lead the Register to reach the wrong conclusion on the merits of the pending proposal. In light of the Copyright Office's questions and prior statements, VMU is justifiably concerned that the Copyright Office may believe the issue to be relevant. VMU thus wants to ensure that the

Copyright Office has the correct information and does not base its decision on meritless accusations.

In the Copyright Office's follow-up questions to the May 1, 2009 and May 8, 2009 testimony on the issue, it asked a question on this very issue. Specifically, the Copyright Office, in a letter dated June 23, 2009 asked hearing witnesses, including VMU and EFF, the following:

"VMU testified that due to the inexpensive nature of the chip used on many of its subsidized handsets, there was no practical or cost-effective way to use separate technological measures to protect (1) the firmware and (2) the copyrighted works (such as ringtones, wallpaper or screensavers) contained on its handsets. Do any other manufacturers use the same or substantially similar chipsets but with separate protection measures on (2)? Are equally or nearly-equally inexpensive chipsets available that can accommodate such separate technological measures? In other words, in order to control cost, is it necessary to protect different copyrighted works contained on such handsets with one technological protection measure that controls access?"

This question indicates that the Copyright Office believes that the availability of affordable, separate technological protections for content (*e.g.*, DRM) is relevant to its final analysis on the merits of the proposed exemption.¹ EFF's response to that question, in which it accuses VMU of providing "incorrect or misleading information," is the matter at issue here. Although EFF's description of its alleged finding of DRM on the Oyster is not *directly* responsive to this question, it is intended to undermine VMU's testimony on which the question is based – namely, that file specific DRM is currently too expensive an option for its low cost handsets. The Copyright Office could deem EFF's misleading information relevant to the question of the availability of separate technological measures if it believes the statements to be true. Without any further information, there is no reason for the Copyright Office not to take EFF's allegations at face value.

For these reasons, VMU believes that it is important to correct EFF's testimony on this issue.

¹ Further indicating that the Copyright Office believes the availability of additional TPMs to be relevant is the Register's statement in the 2006 Recommendation in which she indicates that the availability of DRM on handsets was pertinent to granting the exemption. See Marybeth Peters, Register of Copyrights, Recommendation of the Register of Copyrights in RM 2005-11; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies 52-53 (Nov. 17, 2006). Indeed, VMU's testimony that its low-cost handsets do not currently support DRM and that implementing DRM would cause it to incur significant costs that would drive up the price of its handsets (or service) was offered in response to that statement.

Responses to EFF's Submission

Attachment A hereto (a PowerPoint document entitled "Response to EFF DMCA Submission") was prepared by VMU's Handset Engineering Team and addresses some of the misleading statements made in EFF's submission:

1. Based on the team's own analysis, described on pages 3 through 12 of the attached, all of the sound files in the Oystr handset can be copied, and there is no DRM used on these files.
2. There is no DRM used on any of VMU's lower cost handsets, as the term DRM is generally understood (*i.e.*, to mean file specific digital rights management – separate from SPC or MSL carrier locks). Any access protections in the Oystr or other the low-cost VMU handsets, such as the MSL locks, are mere technological protection measures; not DRM. Specifically, VMU does not comply with any of the three recognized types of DRM for mobile devices per the requirements for DRM released by the Open Mobile Alliance ("OMA").

VMU's Handset Engineering Team's Analysis

VMU's Handset Engineering Team reproduced the test conducted by William Quirk on behalf of EFF, which is described on pages 4 through 7 of EFF's Submission. The team used the same tool, BitPim, that it believes EFF used in testing for DRM, and also used the Qualcomm QPST tool for comparison. A step by step demonstration of VMU's tests, with screen shots is set out on pages 3 through 12 of Attachment A, prepared by the team. The VMU team found no DRM on the Oystr handset using either tool and no basis for EFF's alleged belief that there was DRM on the handset it tested. The team was not able to determine why or how EFF apparently obtained different results, but surmises that it might be attributable to use of a tool that is not a commercial grade PST. In any event, there was no basis for EFF to conclude that there was DRM on the handset because it was unable to access certain files using the BitPim tool.

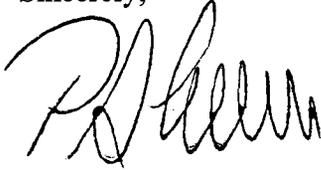
No DRM on VMU Handsets

VMU's handset engineering team then evaluated the established industry standard specifications for DRM to determine if any of VMU's handsets could be said to meet any of those standards. OMA (defined above) is the leading industry forum for developing market driven, interoperable mobile service enablers and develops and releases open specifications for the mobile market. It has released requirements for three separate types of DRM: (1) Forward Lock, (2) Combined Delivery, and (3) Separate Delivery. (See http://www.openmobilealliance.org/Technical/release_program/drm_v1_0.aspx). VMU's low-cost handsets do not meet any of the three specifications. As demonstrated on the attached Power Point on slides 13 through 15, VMU does not implement Forward Lock, Combined Delivery and Separate Delivery because, among other reasons, content delivered to VMU handsets are not packaged in DRM format – one of the requirements.

Affects on Interests of other Interested Parties

Last, we do not believe the issues addressed in this letter affect the interests of any other witnesses or interested parties aside from Virgin Mobile U.S.A., as they pertain solely to VMU's handsets and are intended to correct statements directed specifically at VMU's testimony in an attempt to make the testimony appear unreliable.

Sincerely,

A handwritten signature in black ink, appearing to read "P. Lurie". The signature is fluid and cursive, with a large initial "P" and a long, sweeping underline.

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