

Before the
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS

**In the matter of exemption to prohibition on circumvention
of copyright protection systems for access control technologies**

Docket No. RM 2008-08

Comments of

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Pursuant to the Notice of Inquiry of Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies¹ (“NOI”), The Wireless Alliance, ReCellular and FlipSwap submit the following comments and respectfully ask that the Librarian of Congress exempt the following class of works from 17 U.S.C. § 1201(a)(1)’s prohibition on the circumvention of access control technologies for the period 2009-2012:

Computer programs in the form of firmware that enable wireless telephone handsets to connect to a wireless telephone communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless telephone communication network, regardless of commercial motive.

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 40-60,000 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.

ReCellular is the world's largest recycler and reseller of used cellular phones and accessories. ReCellular partnered with the Cellular Telecommunications & Internet Association’s (CTIA) Wireless Foundation on the original Donate a Phone charitable recycling program and has won numerous national and local awards. All phones and accessories that cannot be reused are recycled. With millions of dollars donated to charities, tens of millions of phones recycled or reused and customers in more than 40 countries, ReCellular has developed a global network dedicated to finding the most responsible solutions for the handset industry.

Flipswap makes it easy to give mobile phones a second shot at life by offering fast, free and eco-friendly ways to trade them in. The average American buys a new cell phone every 12 months, which means more than one hundred million working phones become unused every year. Flipswap’s trade-in program allows consumers to reuse their phones by putting them back into the secondary market, and it offers cash, gift certificates or store credit to consumers for their trade. When the phone arrives at Flipswap, it is inspected, the consumer is paid and then it is sold on the secondary market indirectly to consumers around the globe. Putting these phones back into the hands of consumers reduces the demand for new phones and, therefore, new e-waste down the road. The Flipswap reuse cycle allows for many generations before a phone must be disassembled and the component parts recycled.

¹ 70 Fed. Reg. 73, 58073 (Oct. 6, 2008).

II. INTRODUCTION

Prior commenter The Wireless Alliance joins with ReCellular and Flipswap, cellular recycling and reuse companies, to urge renewal of the exemption granted in its favor in the 2006 rulemaking for unlocking cell phones. The commenting parties propose an exemption from the § 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 in the form of firmware that enable wireless telephone handsets to connect to a wireless telephone communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless telephone communication network, regardless of commercial motive.

This requested exemption is identical to the exemption granted at the request of The Wireless Alliance and Robert Pinkerton in the last rulemaking,³ with the addition of the phrase “regardless of commercial motive.” Commenters request this addition because it has become clear since the last rulemaking that federal district courts have denied motions to dismiss and granted relief on § 1201 claims against phone unlockers where the unlocking was for the purpose of lawfully connecting to a wireless telephone communication network, but the motive for the unlocking was commercial. See § III.C.2., *infra*. Commenters believe that these court rulings lack merit. Still, the erroneous reasoning could be applied to deny commenters, who sell unlocked, used phones for a profit, of the benefits of the exemption as previously phrased.

Using a mobile handset on the network of the customer’s choosing is pro-competitive and non-infringing. The customer neither copies the firmware, nor exercises any exclusive right the copyright owner has in it. Rather, the circumventor accesses the firmware merely to reprogram it to work on a different network, or to utilize a different SIM card.

Commenters take ownership of handsets and either recycle them or, when possible, unlock them to make them more marketable and put them back into the stream of commerce. Resale is the most environmentally friendly alternative to the problem of handset obsolescence and a non-infringing activity. Unlocked phones have a greater chance for resale, because they can be sold to more people and the ability to choose a carrier makes them more desirable. Indeed, developing an international market, as ReCellular and Flipswap successfully have done, requires handset unlocking, because many of U.S. domestic wireless carriers do not operate in other countries. Unfortunately, § 1201 continues to interfere with the handset recycling and reuse business. Litigation against phone unlockers has accelerated during the past three years, despite the prior exemption.

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

³ See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed.Reg. 68472, 68476 (Nov. 27, 2006).

III. PROPOSED EXEMPTION

A. Summary

Mobile communications providers use software locks to control customer access to mobile phone operating system software embedded inside the devices. The purpose of these locks is to prevent customers from using their handsets on a competitor's network, not to protect any copyright interest. 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 and do use § 1201(a) to stop customers from unlocking their phones and selecting a provider of their choice, resulting in poorer service and higher costs for customers, reduced competition contrary to explicit U.S. telecommunications policy, and environmental disaster as a result of mobile handset waste. Locked phones also contribute to the digital divide between rich and poorer nations. Phone software locks protect a business model, not any legitimate copyright interest. As the Register noted when granting this exemption at the conclusion of the last rulemaking, the Copyright Office does not express approval or disapproval of any particular business model, but looks to whether an exemption for this proposed class of works demonstrates any **copyright-based** rationale for enforcing the prohibition on circumvention of technological measures.⁴

Since the 2006 rulemaking, two things have changed. First, more consumers are now aware of the adverse impact of locked phones. Three years ago, international business travelers were the consumers most likely to want to unlock their phones. Today, the popularity of Apple's iPhone has made the issue salient to the average mobile phone user. In each of the countries in which Apple sells the phone, it has locked the device to a particular provider's network. Some iPhone owners, dissatisfied with Apple's chosen service provider, want to switch. Others purchased their iPhones second-hand, after early adopters of 2G iPhones upgraded to the newly released 3G iPhones, and prefer a carrier different from Apple's chosen provider. Potential customers of used unlocked iPhones include people looking for a less expensive way to own an iPhone, people who may already have service contracts on another GSM network, and people in countries in which the device has not yet been made available by Apple. According to Apple, 1.7 million more iPhones have been sold than have been activated for service with AT&T, suggesting that more than a million iPhones have been unlocked to operate with other carriers.⁵ Similarly, Google recently introduced its Android G1 phone, locked to T-

⁴ See 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 (U.S. Copyright Office Nov. 17, 2006) p. 51, n. 148.

⁵ Tom Krazit, *iPhone Unlocking Explodes Despite Apple's Countermeasures*, CNET NEWS, Jan. 30, 2008, http://news.cnet.com/8301-13579_3-9860766-37.html.

Mobile, and soon thereafter, people started unlocking their phones for use on AT&T or any other GSM network across the globe.⁶

Second, despite the exemption, TracFone Wireless continues to successfully sue phone unlockers under § 1201(a) despite the 2006 unlocking exemption. TracFone has argued that the exemption does not apply to commercial unlockers because in those cases the unlocking is not for the **sole** purpose of lawfully connecting to a wireless telephone communication network.

For these two reasons, the case for commenters' requested exemption is stronger now than it was in 2006. The exemption is critical to remove any legal chill over commenters' businesses and to preserve users' choice in the marketplace.

B. Factual Background

1. Handset Locking Harms Consumers and The Environment

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 use spectrum licensed to them by the Federal Communications Commission (FCC) to provide mobile phone service to customers. Different mobile services use different technological standards, and there are presently three main standards deployed 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 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."⁷ Despite this concern, the FCC in 1992 decided, in light of the competitive nature of the market, to permit carriers to continue to offer handsets and

⁶ Darren Murph, *Video: T-Mobile G1 Gets Unlocked, Quirks Still Present*, ENGADGET, Oct. 29, 2008, <http://www.engadgetmobile.com/2008/10/29/video-t-mobile-g1-gets-unlocked-quirks-still-present/>.

⁷ In the Matter of Bundling of Cellular Customer Premises Equipment and Cellular Service, 7 F.C.C.R. 4028 ¶ 6 (F.C.C. June 10, 1992) (hereinafter "1992 FCC Bundling Ruling").

services as a bundled package so long as service was not conditioned on purchasing the handset from the carrier.⁸

Mandated number portability represents another policy Congress implemented to curtail an anti-competitive practice by carriers — the providers’ refusal to allow customers to transfer their mobile phone numbers when they switched wireless services. 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.⁹ 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.”¹⁰

The FCC continues to keep an eye on the anti-competitive practices of carriers. For example, the agency is considering new rules that would limit the “early-termination fees” carriers charge customers who decide to terminate the service.¹¹ Still, 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 competing carriers, whether before or after the term of the service contract has passed. Carriers’ anti-competitive practices also include 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 competing carrier. As a result, customers are left with poorer service, higher prices, and less innovation.

States are also getting involved in protecting consumers against phone locking. Multiple class action lawsuits challenging carriers’ practice of cell phone locking are pending under various legal theories.¹²

⁸ 1992 FCC Bundling Ruling, ¶¶ 8, 15.

⁹ 47 U.S.C. § 251(b)(2).

¹⁰ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, description (1996), available at <http://www.fcc.gov/Reports/tcom1996.pdf>.

¹¹ Cecilia Kang, *FCC Chief Pushes New Rules on Phone Fees*, WASHINGTON POST, June 13, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/06/12/AR2008061203783_pf.html.

¹² See Note, John Haubenreich, *The iPhone and the DMCA: Locking the Hands of Consumers*, 61 VAND. L. REV. 1507, 1511 n.30 (2008) citing Third Amended Consolidated Complaint, *Meoli v. Viva Wireless, Inc.*, 3086113 (Cal. Super. Ct. Alameda County Mar. 12, 2003); Complaint, *Zill v. Sprint Spectrum Ltd. P’ship*, No. RG 03114147 (Cal. Super. Ct. Alameda County Aug. 28, 2003). See also *Gatton v. T-Mobile USA, Inc.*, 152 Cal. App. 4th 571, 577 (2007) referring to class action filed by plaintiffs Nguyen and Grant, brought on behalf of themselves individually and on behalf of all similarly situated California residents, challenging the practice of installing a locking

b. Bundling Handsets With Service Aggravates Environmental Waste Disposal Problems Because It Is More Difficult To Keep An Older But Still Functional Handset In Use

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 per year.

Handset resellers help the environment by keeping perfectly functional handsets out of landfills and in the hands of customers. Commenter The Wireless Alliance collects handsets and distributes them to resellers or recycles them in accordance with Environmental Protection Agency policy. The Wireless Alliance is able to repurpose almost 65% of handsets it collects. Commenter ReCellular collects more than 75,000 cell phones at more than 40,000 drop-off locations around the country each week. The majority of this product is recycled through resale. About 60 percent of the phones that come in are reusable, and of this 60 percent the majority end up in the hands of consumers outside the United States. Industry experts estimate that about a quarter of the refurbished phones sold worldwide come from ReCellular. In 2007 alone, commenter Flipswap put enough phones back into use to keep the equivalent of 50 tons of solid waste, most of it toxic, out of landfills.

Handsets are more marketable when customers can use them on any network, not just the one to which it was originally tied. Many countries use the same CDMA and GSM standards that U.S. carriers like AT&T and Verizon employ; used U.S. handsets will work in those countries. ReCellular and Flipswap sell their used unlocked handsets in these markets. Indeed, commenters estimate that if participants in the used handset market were not allowed to unlock handsets, several million phones a year would head for landfill instead of reuse, poisoning our air and water with that much more toxic chemicals.

c. 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.

device in T-Mobile handsets that prevents its subscribers from switching cell phone providers without purchasing a new handset.

2. Cell Phones Are Locked to Networks With “Technological Protection Measures”

It is undisputed that software locks are technological protection mechanisms (“TPMs”) that control access to copyrighted works by preventing the mobile phone user from operating or accessing the mobile firmware in conjunction with the network of the user’s choosing.¹³ Tracfone, a provider of prepaid cellular services, continues to allege that the software locks are TPMs in multiple lawsuits against bulk purchasers and resellers of new Tracfones.¹⁴

There are four primary types of software locks that carriers currently use. The locking mechanisms include SPC locking, SOC locking, band order locking and SIM locking. SPC locking is the most common kind of lock for CDMA phones. SIM locking is most common for GSM phones. SPC locking creates an access code that the user must input to instruct the phone to connect to a different network. The lock prevents the user from accessing and instructing the firmware that directs the phone to connect to a particular network.

- **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.

- **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.

- **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

¹³ See 37 C.F.R. § 201 (2006); 71 Fed. Reg. 68476 (Nov. 27, 2006).

¹⁴ See, e.g. *TracFone v. GSM Group*, 555 F.Supp.2d 1331 (S.D. Fla. 2008); *TracFone v. Dixon*, 475 F.Supp.2d 1236 (M.D. Fla. 2007).

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.

- **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 Appropriate and Necessary

1. Handset Unlocking Is A Noninfringing Activity

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 – 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 § 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 § 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, the owner of a copy of a software program has the right to modify the source code of that program, including “add[ing] features to the program that were not present at the time of rightful acquisition.”¹⁵ In *Krause v. Titleserv*¹⁶, the Second Circuit held that the rightful possessor of a copy of a software program can make modifications and improvements to that program to suit his own needs. In *Krause*, the appellate court affirmed that § 117 authorized an owner’s “addition of features so that a program better serves the needs of the customer for which it was created.”¹⁷ As with the defendant in *Krause*, the mobile handset owner simply wants to modify his copy of firmware to better meet his needs. This is a non-infringing use under § 117.

Importantly, the requested exemption has nothing to do with copyright infringement, in practice or in theory. There is no evidence over the past three years that the exemption has harmed copyright interests. This is because the locking mechanisms controlling access to the operating system, bootloader and other software that operates the phone are not the same as the “digital rights management” tools that prevent copying of music, movies or phone applications. In particular, there has been no suggestion over the past three years that the exemption has resulted in any infringement of copyrighted materials on a cell phone—such a music, ringtones, or video.

Nor does unlocking allow unauthorized access to a competing provider’s network. Even after unlocking her phone, a user will only be able to access to a different network if she has opened an account with that carrier. The user will still need a valid SIM card to communicate with a different network, and the carrier will still authenticate each handset that attempts to connect to its network for compatibility, billing and quality of service purposes. In short, the provider controls access to its network, whether accomplished by locked or unlocked phones.

2. The Requested Exemption Is Necessary To Remove Any Doubts About the Legality Under Section 1201 of Commenters’ Businesses

Despite the exemption for phone unlocking granted by the Librarian in the last rulemaking, at least one cellular provider, TracFone, has continued to successfully sue unlockers under § 1201. TracFone is the nation’s largest independent prepaid-wireless provider. Even after the Librarian granted the unlocking exemption in 2006, the company has continued to sue phone unlockers across the country, including in Florida,

¹⁵ *Foresight Resources Corp. v. Pfortmiller*, 719 F. Supp. 1006, 1009 (D. Kan. 1989).

¹⁶ 402 F.3d 119 (2nd Cir. 2005).

¹⁷ *Id.* at 128.

Georgia, New York, Texas and California.¹⁸ In those cases, TracFone is pursuing businesses that purchase subsidized TracFone handsets in bulk, unlock them, and resell them, usually overseas. The complaints typically allege circumvention of copyrighted software protection system under § 1201(a)(1) and trafficking in circumvention technology under § 1201(a)(2), as well as federal trademark infringement, federal unfair competition, breach of contract, contributory trademark infringement, conspiracy to induce breach of contract, civil conspiracy, unfair competition, false advertising, and unjust enrichment.

In the cases that have been settled or otherwise decided, TracFone has typically prevailed on all of its claims. Despite the 2006 exemption, some courts have upheld TracFone's § 1201 claims against motions to dismiss, reasoning that the exemption does not apply to these businesses because they are commercial for-profit entities, and thus the unlocking is not for the **sole** purpose of lawfully connecting to a wireless telephone communication network.¹⁹ Other courts in default cases have granted damages specifically on § 1201 grounds.²⁰

TracFone has an innovative business model and is understandably concerned about the bulk purchasers of its new phones. Nevertheless, its § 1201(a)(1) claims should properly have been barred by the exemption granted by the Librarian in 2006.²¹ So long as TracFone continues to successfully press unlocking claims in commercial cases, § 1201(a)(1) remains a danger to commenters. Commenters' businesses, the recycling and resale of used handsets, differs markedly from the business of the bulk purchasers and resellers of new phones that TracFone has sued. Unfortunately, the distinction TracFone tries to draw between the granted exemption and the challenged business practices—namely, whether a defendant is “commercial”—provides little security to the commenters, who, like the bulk resellers, are for-profit businesses.

The distinction urged by TracFone has no legal basis. The 2006 exemption was premised on the fact that cell phone unlocking is a noninfringing activity. That determination did not turn on the “commercial” or “noncommercial” purpose of the activity, but rather on the fact that it simply does not intrude on the exclusive rights granted to copyright owners

¹⁸ See David Kravetz, *Ruling Allows Cell Phone Unlocking, but Telco Sues Anyway*, WIRED, Aug. 8, 2007, <http://www.wired.com/politics/onlinerights/news/2007/08/tracfone?currentPage=all>.

¹⁹ See, e.g. *TracFone v. GSM Group*, 555 F.Supp.2d 1331 (S.D. Fla. 2008); *TracFone v. Dixon*, 475 F.Supp.2d 1236 (M.D. Fla. 2007).

²⁰ See, e.g. Final Judgment And Permanent Injunction Against Defendant Robin Ketcham, *Tracfone v. Riedeman*, Case No. 6:06-CV-01257 (United States District Court, Middle District of Florida, Orlando Division, December 27, 2007) p. 4, ¶7 (Attached as Exhibit A); Final Judgment And Permanent Injunction Against Defendant, *TracFone v. Thomas*, Case No. 3-07-CV-1495 (United States District Court, Northern District of Texas, Dallas Division, March 5, 2008) p. 4, ¶8; (Attached as Exhibit B).

²¹ The proposed exemption would, of course, have no impact on TracFone's ability to bring its other state and federal claims against bulk resellers.

by § 106.²² The exemption was granted in order to remove § 1201(a)(1) as an impediment to the full range of these noninfringing activities, not only the noncommercial subset of them. If the 2006 exemption is to serve the needs of the commenters, it must be renewed and clarified to expressly include commercial unlocking activities.

As the Copyright Office previously found, without an exemption, “a strict application of the statutory language of § 1201 would be likely to result in a finding that one who circumvents the software lock on a cell phone in order to connect to a new network is engaging in unlawful circumvention of an access control.”²³ Although *Chamberlain Group Inc. v. Skylink Technologies Inc.*²⁴, *Lexmark v. Static Control Components*²⁵ and *StorageTek v. Custom Hardware Engineering & Consulting*²⁶ provide some possible defenses for cell phone unlockers, they do not ensure that owners who want to unlock their mobile phones will not be sued under § 1201. Given the disparity in resources between individual customers and small recyclers, on the one hand, and the multi-billion dollar telecommunications carriers, on the other, even a low level of legal uncertainty would have a substantial chilling effect on unlocking activities. Only an explicit exemption will reassure customers and recyclers that they are entitled to engage in noninfringing unlocking activities.

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

D. The Statutory Factors Weigh Heavily In Favor of The Requested Exemption

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 militate in favor of the proposed exemption.

²² 2006 Recommendation at 50.

²³ 2006 Recommendation at 51.

²⁴ 381 F.3d 1178 (Fed. Cir. 2004).

²⁵ 387 F.3d 522 (6th Cir. 2004).

²⁶ 421 F.3d 1307 (Fed. Cir. 2004).

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

The use of access controls has made cell phone firmware less available to customers. The vast majority of current and future mobile phone customers cannot unlock their phones without circumventing technical measures put in place by carriers. 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.²⁷ These are Verizon, Cingular²⁸, Sprint and T-Mobile, all of whom lock the handsets they sell.

Moreover, there is no evidence to suggest that the availability of firmware for phones would be adversely affected by the proposed exemption. Firmware for smart phones is not generally sold separately from the phones themselves. Consequently, the software locks that prevent phone owners from accessing the phone firmware are not intended to protect the market for copyrighted firmware—instead, these software locks are intended to “control the use of hardware which, as is increasingly the case, may be operated in part through the use of computer software or firmware.”²⁹ If anything, the proposed exemption should increase demand for smart phone firmware, as firmware that is capable of connecting through more networks should, all else being equal, be more valuable to phone owners.

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

There is no reason to believe that the availability (or lack of availability) of phone firmware for nonprofit uses would be harmed by an exemption that permits smart phone users to unlock their phones to enable interoperability with the networks of multiple carriers. In the wake of the 2006 exemption, there has been no evidence of a reduction in the availability of phone firmware for the statutorily specified uses.

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

There is no reason to believe that the availability (or lack of availability) of phone firmware for criticism, comment, news reporting, teaching, or research purposes would be harmed by an exemption that permits smart phone users to unlock their phones to enable interoperability with the networks of multiple carriers. In the wake of the 2006 exemption, there has been no evidence of a reduction in the availability of phone firmware for the statutorily specified purposes.

²⁷ Kenneth M. Leon, *Wireless' Quick-Shrink Act*, BUSINESSWEEK (Jan. 20, 2005), available at

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

²⁸ Cingular is now AT&T Wireless.

²⁹ 2006 Recommendation at 52.

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

Allowing customers to change networks has little to no adverse affect on the market for phone firmware, or 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 contract that provides for a minimum monthly fee and a hefty early termination penalty. These contracts ensure that carriers will recoup, at a minimum, any subsidy provided to the subscriber in their monthly fees. As a result, a carrier receives every legitimate benefit for the purchase 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. 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. For example, in a move thought to help distribution of wireless services among the credit-impaired and younger consumer, MetroPCS announced in June 2008 that it would unlock phones sold by competing CDMA service providers and provide a month's worth of calling time.³⁰

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, thereby helping to bridge the digital divide.

VII. Conclusion

On balance, consumers, the environment and the international community suffer 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

³⁰ Olga Karif, *Unlocking Cell Phones May Get Easier*, BUSINESS WEEK, July 8, 2008, http://www.businessweek.com/technology/content/jul2008/tc2008077_567504.htm.

March of 2004 consumer groups began urging it to do so.³¹ Yet, § 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 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 or might reject based on their expertise in regulating telecommunications policy. 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.

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.

Submitted: December 2, 2008

By: _____/s/_____
Jennifer S. Granick
Attorney for Commenting Parties

³¹ See Letter from the Consumer's Union to Michael Powell, Chairman, Federal Communications Commission (Mar. 11, 2004), *available at* http://www.consumersunion.org/campaigns/handset_locking_letter_FCC_-_mar_11_04.pdf.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

TRACFONE WIRELESS, INC.,

Plaintiff,

CASE NO.: 6:06-CV-01257-ORL-18-UAM

vs.

CLINTON RIEDEMAN d/b/a LARRY'S CELL,
LAWRENCE RIEDEMAN d/b/a LARRY'S CELL,
RIEDCOR, INC. d/b/a LARRY'S CELL, and
ROBIN KETCHAM d/b/a LARRY'S CELL,

Defendants.

**FINAL JUDGMENT AND PERMANENT INJUNCTION
AGAINST DEFENDANT ROBIN KETCHAM**

Plaintiff, TracFone Wireless, Inc. ("TracFone"), brought the above-captioned lawsuit against, among others, Defendant Robin Ketcham d/b/a Larry's Cell, ("Defendant"), alleging that Defendant was engaged in an unlawful enterprise involving the acquisition, sale and alteration of large quantities of TracFone and TracFone's NET10 branded prepaid wireless telephones ("TracFone/NET10 Prepaid Phones" or "Phones") purchased from various retail outlets such as Wal-Mart, Target and Sam's Club, the solicitation and payment of others to bulk purchase TracFone/NET10 Prepaid Phones for Defendant's benefit, computer hacking and erasing or otherwise disabling the prepaid software ("TracFone/NET10 Prepaid Software") installed in the Phones essential for consumers to access TracFone's prepaid wireless network, or reselling the Phones to others who disable the software, and ultimately selling the altered Phones as new under TracFone's trademarks for the unauthorized use outside of the TracFone prepaid wireless system for profit (the "Bulk Resale Scheme").

As a result of Defendant's involvement in the Bulk Resale Scheme, TracFone asserted claims against the Defendant for Defendant's violation the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 1201 *et seq.*, Lanham Act, 15 U.S.C. § 1051 *et seq.*, Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. § 501.201, *et seq.*, and Florida's anti-dilution statute. Fla. Stat. § 495.151, and Defendant's tortious interference with TracFone's business relationships and prospective advantages. On September 7, 2007, the Clerk of Court entered a default against Defendant and Defendant has failed to file a responsive pleading in this lawsuit to date. Accordingly, it is hereby,

ORDERED, ADJUDGED and DECREED that:

1. This Court has jurisdiction over all the parties and all of the claims set forth in TracFone's complaint.

2. The Court finds that TracFone owns all right, title, and interest in and to Incontestable United States Trademark Registration No. 2,114,692, issued November 18, 1997, for TracFone and Incontestable United States Trademark Registration No. 2,71,017, issued September 9, 2003, for TracFone (the "TracFone Trademarks"). The TracFone Trademarks are valid, incontestable, distinctive, protectable, famous, have acquired secondary meaning and are associated exclusively with TracFone. TracFone also holds a valid copyright on the TracFone Prepaid Software

3. The Court finds that the Defendant has violated the following statutes: 17 U.S.C. § 1201 (circumvention of technological measures that control access to proprietary software under the DMCA and trafficking in services that circumvent technological measures protecting copyrighted software), 15 U.S.C. § 1114 (trademark infringement), 15 U.S.C. § 1125 (unfair competition), Fla. Stat. §§ 501.204 and 501.211 (unfair competition and deceptive trade practices

and false advertising) and Fla. Stat. § 495.151 (injury to business reputation and dilution of trademarks). The Court further finds that Defendant's conduct constitutes tortious interference with TracFone's advantageous business relationships and prospective advantages and has caused substantial and irreparable harm to TracFone, and will continue to cause substantial and irreparable harm to TracFone unless enjoined.

4. On November 27, 2006, the Librarian of Congress, upon the recommendation of the Register of Copyrights, issued a Final Rule setting forth six (6) classes of copyrighted works that are exempt from the provisions of the DMCA, including:

Computer programs in the form of firmware that enable wireless telephone handsets to connect to a wireless telephone communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless telephone communication network.

71 Fed. Reg. 68472 (Nov. 27, 2006) (amending 37 C.F.R. § 201.40(b)). The Court finds that this new exemption does not absolve the Defendant of liability for her violations of the DMCA as alleged in Counts I through III of TracFone's complaint, because the Defendant's conduct as alleged in this case does not come within the scope of the new exemption. The Defendant's purchase and resale of the TracFone handsets was for the purpose of reselling those handsets for a profit, and not "for the sole purpose of lawfully connecting to a wireless telephone communication network." Because the exemption does not apply to the conduct alleged in this case, there is no need for the Court to address the validity of the exemption or the circumstances surrounding its enactment.

5. TracFone has suffered damages, including loss of goodwill and damage to its reputation, as a result of the Defendant's conduct. TracFone is entitled to injunctive relief and damages on the claims set forth in the complaint.

6. Final judgment is hereby entered against the Defendant, Robin Ketcham, and in favor of the Plaintiff, TracFone Wireless, Inc., on all of the claims set forth in TracFone's complaint.

7. Pursuant to 17 U.S.C. 1203(c)(3)(A), TracFone is entitled to recover statutory damages "of not less than \$200 or more than \$2,500" for each TracFone/NET10 Prepaid Phone Defendant altered, or sold as part of a conspiracy to alter, in furtherance of the Bulk Resale Scheme for Defendant's violation of the DMCA. The Court finds Defendant altered, or sold as part of a conspiracy to alter, five thousand one hundred and four (5,104) TracFone/NET10 Prepaid Phones in furtherance of the Bulk Resale Scheme. Final Judgment is therefore entered against Defendant, Robin Ketcham, and in favor of TracFone Wireless, Inc. in the principal amount of \$ 1,020,800.00, which shall bear interest at the legal rate, for which let execution issue.

8. TracFone is also entitled to recover its costs and reasonable attorneys' fees incurred in bringing this action as a prevailing party pursuant to 17 U.S.C. 1203(b)(4)-(5) and Fla. Stat. § 501.2105(1). Should TracFone decide to pursue recovery of its reasonable attorneys' fees and costs, TracFone shall submit proof thereof within ten days of the date of this Order.

9. Defendant, Robin Ketcham, and each and all of her representatives, agents, employees, independent contractors, relatives, associates, servants and any and all persons and entities in active concert and participation with them who receive notice of this order shall be and hereby are PERMANENTLY ENJOINED from:

- a. purchasing and/or selling any wireless mobile phone that they know or should know bears any TracFone Trademark, any other trademark owned or used by TracFone, or any other model of wireless mobile phone sold or marketed by

TracFone (“TracFone/NET10 Handsets”). Specifically, the Defendant is enjoined from purchasing and/or selling all models of TracFone/NET10 Handsets currently offered for sale by TracFone, or that may be offered for sale in the future, as listed and updated from time to time on TracFone’s and NET10’s websites, http://tracfone.com/activation_pick_brand.jsp and www.net10.com, including without limitation the following TracFone/NET10 handsets:

Motorola W370	Nokia 2126	LG 3280
Motorola C261	Nokia 2126i	LG CG225
Motorola C139	Nokia 2600	LG 1500
Motorola V176	Nokia 1100	
Motorola V170	Nokia 1112	
Motorola V171	Nokia 1600	
Motorola C155	Nokia 2285	
Motorola C343		

- b. reflashing and/or unlocking of any TracFone/NET10 Handset;
- c. accessing, altering, erasing, tampering with, deleting or otherwise disabling TracFone’s proprietary prepaid cellular software contained within any and all models of TracFone/NET10 Handsets;
- d. facilitating or in any way assisting other persons or entities who Defendant knows or should know are engaged in reflashing and/or unlocking TracFone/NET10 Handsets and/or hacking, altering, erasing, tampering with, deleting or otherwise disabling the software installed in TracFone/NET10 Handsets;
- e. facilitating or in any way assisting other persons or entities who Defendant knows or should know are engaged in any of the acts prohibited under this permanent injunction including, without limitation, the buying and/or selling of unlocked TracFone/NET10 Handsets; and

f. knowingly using the TracFone Trademarks or any other trademark owned or used by TracFone, or that is likely to cause confusion with TracFone's Trademarks, without TracFone's prior written authorization.

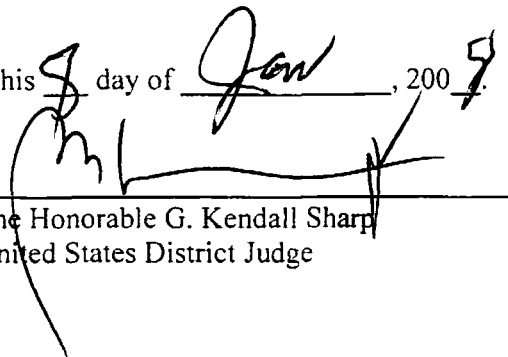
10. The last known address of Defendant Robin Ketcham is 1721 Shady Leaf Drive, Valrico, FL 33594.

11. The address of Plaintiff, TracFone Wireless, Inc. is 9700 N.W. 112th Avenue, Miami, Florida 33178.

12. The Court retains jurisdiction over this matter and the parties to this action in order to punish any violation of the terms of this Permanent Injunction by a finding of contempt and a payment of damages to TracFone Wireless, Inc. in an amount of not less than \$5,000 for each TracFone/NET10 Handset that Defendant is found to have purchased, sold, or unlocked in violation of this injunction.

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

DONE AND ORDERED in Orlando, Florida, this 9 day of Jan, 2007.


The Honorable G. Kendall Sharp
United States District Judge

Copies furnished to:

James B. Baldinger, *Counsel for TracFone Wireless*
Jeffrey Blau, *Counsel for Defendant Robin Ketcham*
Frank Killgore, Jr., *Counsel for Defendants Clinton Riedeman, Lawrence Riedeman and Riedecor, Inc.*

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

TRACFONE WIRELESS, INC., a §
Florida corporation, §
§
Plaintiff, §
v. §
JAMES RAY THOMAS, JR. a/k/a Jim §
Thomas Hollis a/k/a James L. Ford, §
individually; JOHN DOES 1-50; and §
XYZ COMPANIES 1-50, §
Defendants. §

CASE NO.: 3-07-CV-1495-N

JURY TRIAL DEMANDED

**FINAL JUDGMENT AND PERMANENT
INJUNCTION AGAINST DEFENDANT**

Plaintiff, TracFone Wireless, Inc. (“TracFone”), brought the above-captioned lawsuit against Defendant, James Ray Thomas, Jr. a/k/a Jim Thomas Hollis a/k/a James L. Ford, individually (“Defendant”). TracFone alleges that Defendant is engaged in an unlawful enterprise involving the acquisition, sale and alteration of large quantities of TracFone and TracFone’s NET10 branded prepaid wireless telephones (“TracFone/NET10 Prepaid Phones” or “Phones”) purchased from various retail outlets such as Wal-Mart, Target and Sam’s Club, the solicitation and payment of others to bulk purchase TracFone/NET10 Prepaid Phones for Defendant’s benefit, computer hacking and erasing or otherwise disabling the prepaid software (“TracFone/NET10 Prepaid Software”) installed in the Phones essential for consumers to access TracFone’s prepaid wireless network, or reselling the Phones to others who disable the software, and ultimately selling the altered Phones as new under TracFone’s trademarks for the unauthorized use outside of the TracFone prepaid wireless system for profit (the “Bulk Resale Scheme”).

As a result of Defendant’s involvement in the Bulk Resale Scheme, TracFone asserted

claims against the Defendant for breach of contract; federal trademark infringement under 15 U.S.C. § 1114; federal unfair competition under 15 U.S.C. § 1125(a); common law unfair competition; contributory trademark infringement; copyright infringement under Title 17 of the United States Code; circumvention of technological measures that control access to copyrighted software and trafficking in services that circumvent technological measures protecting copyrighted software under 17 U.S.C. § 1201, *et. seq.* as a violation of the Digital Millennium Copyright Act (“DMCA”); tortious interference with business relationships and prospective advantages; tortious interference with contract; dilution of TracFone’s trademarks under Tex. Code. Ann. § 16.29; civil conspiracy; and unjust enrichment.

On November 14, 2007, the Clerk of Court entered a Default against Defendant and Defendant has failed to file a responsive pleading in this lawsuit to date. Further, at TacFone’s request, the Court dismisses without prejudice all claims against Defendants John Does 1-50 and XYZ Companies 1-50. Accordingly, it is hereby,

ORDERED, ADJUDGED and DECREED that:

1. This Court has jurisdiction over all the parties and all of the claims set forth in TracFone’s complaint.
2. The Court finds that TracFone owns all right, title, and interest in and to Incontestable United States Trademark Registration No. 2,114,692, issued November 18, 1997, for TracFone and Incontestable United States Trademark Registration No. 2,71,017, issued September 9, 2003, for TracFone (the “TracFone Trademarks”). The TracFone Trademarks are valid, incontestable, distinctive, protectable, famous, have acquired secondary meaning and are

associated exclusively with TracFone. TracFone also holds a valid copyright on the TracFone Prepaid Software.

3. The Court finds that the Defendant's involvement in the Bulk Resale Scheme constitutes breach of contract; federal trademark infringement under 15 U.S.C. § 1114; federal unfair competition under 15 U.S.C. § 1125(a); common law unfair competition; contributory trademark infringement; copyright infringement under Title 17 of the United States Code; circumvention of technological measures that control access to copyrighted software and trafficking in services that circumvent technological measures protecting copyrighted software under 17 U.S.C. § 1201, *et. seq.* as a violation of the Digital Millennium Copyright Act ("DMCA"); tortious interference with business relationships and prospective advantages; tortious interference with contract; dilution of TracFone's trademarks under Tex. Code. Ann. § 16.29; civil conspiracy; and unjust enrichment.

4. The Court further finds that Defendant's participation in the Bulk Resale Scheme has caused substantial and irreparable harm to TracFone, and will continue to cause substantial and irreparable harm to TracFone unless enjoined.

5. TracFone is entitled to injunctive relief and damages on the claims set forth in the Complaint.

6. On November 27, 2006, the Librarian of Congress, upon the recommendation of the Register of Copyrights, issued a Final Rule setting forth six (6) classes of copyrighted works that are exempt from the provisions of the DMCA, including:

Computer programs in the form of firmware that enable wireless telephone handsets to connect to a wireless telephone communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless telephone communication network.

71 Fed. Reg. 68472 (Nov. 27, 2006) (amending 37 C.F.R. § 201.40(b)). The Court finds that this new exemption does not absolve the Defendant of liability for his violations of the DMCA as alleged in TracFone's complaint, because the Defendant's conduct as alleged in this case does not come within the scope of the new exemption. The Defendant's purchase and resale of the TracFone handsets was for the purpose of reselling those handsets for a profit, and not "for the sole purpose of lawfully connecting to a wireless telephone communication network." Because the exemption does not apply to the conduct alleged in this case, there is no need for the Court to address the validity of the exemption or the circumstances surrounding its enactment.

7. Final judgment is hereby entered against the Defendant, James Ray Thomas, Jr. a/k/a Jim Thomas Hollis a/k/a James L. Ford, individually, and in favor of the Plaintiff, TracFone Wireless, Inc., on all of the claims set forth in TracFone's complaint.

8. Pursuant to 17 U.S.C. 1203(c)(3)(A), TracFone is entitled to recover statutory damages "of not less than \$200 or more than \$2,500" for each TracFone/NET10 Prepaid Phone Defendant altered, or sold as part of a conspiracy to alter, in furtherance of the Bulk Resale Scheme for Defendant's violation of the DMCA. The Court finds Defendant altered, or sold as part of a conspiracy to alter, five thousand two hundred and eighty-three (5,283) TracFone/NET10 Prepaid Phones in furtherance of the Bulk Resale Scheme in violation of the DMCA. Final Judgment is therefore entered against Defendant

and in favor of TracFone Wireless, Inc. in the principal amount of \$1,056,600, which shall bear interest at the legal rate, for which let execution issue forthwith.

9. TracFone is also entitled to recover its costs and reasonable attorneys' fees incurred in bringing this action as a prevailing party pursuant to 17 U.S.C. 1203(b)(4)-(5). Should TracFone decide to pursue recovery of its reasonable attorneys' fees and costs, TracFone shall submit proof thereof within ten days of the date of this Order.

10. Defendant, and each and all of his representatives, agents, employees, independent contractors, relatives, associates, servants and any and all persons and entities in active concert and participation with them who receive notice of this order shall be and hereby are PERMANENTLY ENJOINED from:

- a. purchasing and/or selling any wireless mobile phone that they know or should know bears any TracFone Trademark, any other trademark owned or used by TracFone, or any other model of wireless mobile phone sold or marketed by TracFone ("TracFone/NET10 Handsets"). Specifically, the Defendant is enjoined from purchasing and/or selling all models of TracFone/NET10 Handsets currently offered for sale by TracFone, or that may be offered for sale in the future, as listed and updated from time to time on TracFone's and NET10's websites, http://tracfone.com/activation_pick_brand.jsp and www.net10.com, including without limitation the following TracFone/NET10 handsets:

Motorola W370	Nokia 2126	LG 3280
Motorola C261	Nokia 2126i	LG CG225
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Motorola V176	Nokia 1100	
Motorola V170	Nokia 1112	
Motorola V171	Nokia 1600	

Motorola C155
Motorola C343

Nokia 2285

- b. reflashing and/or unlocking of any TracFone/NET10 Handset;
- c. accessing, altering, erasing, tampering with, deleting or otherwise disabling TracFone's proprietary prepaid cellular software contained within any and all models of TracFone/NET10 Handsets;
- d. facilitating or in any way assisting other persons or entities who Defendant knows or should know are engaged in reflashing and/or unlocking TracFone/NET10 Handsets and/or hacking, altering, erasing, tampering with, deleting or otherwise disabling the software installed in TracFone/NET10 Handsets;
- e. facilitating or in any way assisting other persons or entities who Defendant knows or should know are engaged in any of the acts prohibited under this permanent injunction including, without limitation, the buying and/or selling of unlocked TracFone/NET10 Handsets; and
- f. knowingly using the TracFone Trademarks or any other trademark owned or used by TracFone, or that is likely to cause confusion with TracFone's Trademarks, without TracFone's prior written authorization.

11. The last known address of Defendant James Ray Thomas, Jr. a/k/a Jim Thomas Hollis a/k/a James L. Ford, is 1957 Greenwood Lane, Newcastle, Oklahoma, 73065.

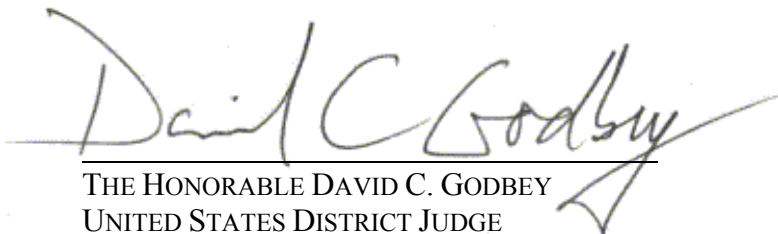
12. The address of Plaintiff, TracFone Wireless, Inc. is 9700 N.W. 112th Avenue, Miami, Florida 33178.

13. The Court retains jurisdiction over this matter and the parties to this action in order to punish any violation of the terms of this Permanent Injunction by a finding of contempt and a payment of damages to TracFone Wireless, Inc. for each TracFone/NET10 Handset that Defendant is found to have purchased, sold, or unlocked in violation of this injunction.

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

15. All relief not expressly granted is denied. This is a Final Judgment.

Signed March 5, 2008.


THE HONORABLE DAVID C. GODBEY
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel and pro se litigants of record.