

*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**

Reply to Submissions of TracFone Wireless Inc. and CTIA-The Wireless Association

September 25, 2006

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## I. Introduction and Summary

Thank you for the opportunity to reply to the two late submissions by TracFone Wireless Inc. and the CTIA. Following September 18, 2006 letter, we understand that the Copyright Office has not yet decided whether to consider the submissions, but is giving Mr. Pinkerton and The Wireless Alliance an opportunity to respond to the arguments presented.

CTIA's and TracFone's submissions prove that the phone locking mechanisms we have identified are technological protection measures (TPMs) that effectively control access to a copyrighted work. The wireless phone industry has used and will continue to use section 1201(a) to attack the non-infringing activity of cell phone unlocking. On this point, the late submissions support our application for an exemption in every way.

Proponents disagree, however, on two main points. First, allowing circumvention to access mobile firmware does not necessarily result in infringement of applications and/or content, whether stored on the handset or on the network.

Second, we strongly believe that allowing owners to unlock their phones benefits the public by increasing competition for quality cellular service, and by allowing phones to be resold both in the United States and overseas, reducing pollution and helping bridge the digital divide.

TracFone and CTIA argue that unlocking is contrary to legitimate public and private interests. If so, there are other legal claims that wireless service providers can bring against allegedly illegal activity they associate with unlocking. If unlocking is illegal, these claims will provide legal protection. If unlocking is not currently illegal, but should be, Congress or the Federal Communications Commission are qualified entities to make that determination.

To the contrary, an otherwise non-infringing activity like unlocking should not be made illegal by a novel application of the anti-circumvention provision contained in a copyright act. Because proponents have met their burden of proof, and because the balance of harms weighs greatly in favor of allowing unlocking, this exemption should be granted.

## II. Section 1201(a) Adversely Affects The Non-Infringing Activity Of Phone Unlocking

The late submissions prove that the phone locking mechanisms requesters have identified are technological protection measures that effectively control access to a copyrighted work. Users of mobile firmware are currently and will likely continue to be adversely affected by section 1201(a). Section 1201(a) impairs

our ability to make non-infringing uses of the software that runs mobile handsets we legitimately own and use. Wireless service providers will continue to use the law to attack unlockers who want to resell their phones, or move to a different network.

Unlocking one's own phone to use it on the network of one's choosing is unquestionably a non-infringing activity. Copyright law does not prevent a user from inserting a new SIM card in his phone and using the phone on any given cellular network. Nor does the law prevent a user from reprogramming his phone to connect to a new cellular network. Neither of these activities implicates the exclusive rights of the copyright owner. Additionally, reprogramming your phone is non-infringing activity permitted under 17 U.S.C. 117.

The CTIA and TracFone submissions support proponent's case of actual harm to an non-infringing activity.

### III. Phone Unlocking Has No Demonstrated Impact On Copyright Infringement of Other Classes of Works

Unlocking does not necessarily enable infringement of either applications or content stored on the handset or on the network. We say "necessarily" because content owners could chose to control access to their works through the identical TPM that prevents users from setting their phones to operate on a network of their choosing. However, there is no evidence that content owners are currently doing so, or will do so in the future.

To understand this point, we must be very clear. This exemption would only allow a user to circumvent to access the specific class of works that operate the handset. For example, locked SIM phones are programmed to prevent the operating system software on the handset from working with a SIM card issued by a different carrier. (CTIA p. 3) This exemption would allow a user to circumvent the lock that one carrier uses to prevent the SIM card from another carrier from communicating with the phone operating system. SPC locks control access to the programming module in the handset. If the phone is locked, the user cannot reprogram the phone operating system to instruct it to connect to another carrier. (CTIA p. 4) This exemption would allow a user to circumvent the lock that prevents reprogramming the module to connect to a different carrier.

CTIA conflates various TPMs used to control access to copyrighted works, whether operating systems, applications or content, then broadly concludes that circumvention of TPMs enables infringement. For example, CTIA erroneously defines the TPMs at issue as "various technological measures to control access to the copyrighted works that [wireless service providers] own or license from other copyright owners." (CTIA p.2) Additionally, CTIA says that "on the vast

majority of handsets, access to this content (ringtones, games or applications) requires prior identification of the wireless user by authentication through the process controlled by a SIM card or similar technological measure, and circumvention of the measure would facilitate infringing uses of these copyrighted works as well as the copyrighted works comprising the network software.” (CTIA p.9)

Requesters aren't asking for an exemption that allows circumvention of all handset TPMs or even of SIM card authentication processes in general. Therefore, the question is whether the TPMs that providers use to lock the phones to a particular network are identical to TPMs that providers use to prevent infringement.

Neither TracFone nor CTIA have presented any evidence that the locking mechanisms controlling access to the operating system, bootloader and other fundamental software that operates the phone are the same mechanisms that control access to applications or content wherever they may be stored.

Theoretically, these TPMs are quite different. The user will generally have the right to run applications like an address book or calculator stored on his phone. If the copyright owner no longer wants the user to run those applications because the user has changed networks, the copyright owner can use a TPM to control access to those works. That TPM, like any digital rights management scheme, could prevent applications or content from running if another vendor's SIM card is in the phone, or if another vendor's access information is programmed into a SPC phone module.

The user will generally have the right to run content like MP3s or ring tones he has purchased and downloaded to his phone. If the copyright owner does not want the user to play that content because the user changes networks or for some other reason, the copyright owner can use DRM such that an unauthorized SIM card or a different SPC code means the content doesn't play. Again, this exemption would not allow circumvention of those locks.

Nor does unlocking allow unauthorized access to a competing provider's network. Unlocking allows *authorized* access to a provider other than the one that originally locked the handset. 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. The provider controls access to its network by locked or unlocked phones. Access to the network controls access to applications and content stored on the network. Unlocked phones are not a tool for copyright infringement on the network. If they were, the industry probably would not sell unlocked phones at all.

Despite vague claims that these programs and the applications and content are “increasingly integrated”, CTIA has failed to show that the very same locks that control access to the firmware also prevent infringement of other copyrighted works. Indeed, the submission says that operating systems typically are preinstalled on the handset at the time of purchase, separately and independently from third party application software and content. (CTIA p. 7, 8)

The CTIA says DRM measures other than phone software locks protect against unauthorized copying of a work, but are not sufficient to restrict transfer of an application to someone other than the licensee. (CTIA p. 12) CTIA thus agrees that DRM is adequate to prevent infringement even where a user is allowed to unlock his handset. DRM may not be sufficient to technologically enforce licenses that abrogate the first sale doctrine as it applies to handset content. This, however, is an interest beyond that protected by copyright law and cannot weigh in CTIA’s favor.

TracFone also fails to provide any evidence that this exemption would facilitate infringement. In fact, TracFone uses two separate locks one to control access to its billing software and another to control access to the functionality of the handset. (TracFone p. 4) Removing the system lock would allow flashing and reprogramming the phone for another carrier, not unauthorized use of the billing software. TracFone argues that functionality is not accessible through a different lock than the operating system software. (TracFone p. 9) This exemption is for access to the class of works that includes the phone operating system. TracFone is correct that this exemption would allow flashing the phone. But erasing the software on a handset is non-infringing.

TracFone’s submission demonstrates that its sole interest in preventing unlocking is to stop purchasers from flashing the phone for use on a different network because that interferes with its revenue stream. Yet, TracFone has not shown any legally protected copyright interest that guarantees it a revenue stream from a practice of subsidizing handsets.

The copyright owner has complete programming control over how to protect the applications and content and the carrier protects the network with a separate authentication procedure. This exemption is just about reprogramming the phone to run the firmware necessary for functionality. Breaking the lock that stops a user from connecting his phone to another network has no demonstrated connection to copyright infringement.

#### IV. Unlocking Does not Facilitate Theft or Terrorism

Unlocking does not facilitate theft. For example, CTIA says it suddenly decided to submit comments in part because it learned of a criminal complaint filed by the government on August 16, 2006 that highlights the importance of section 1201(a) as applied to phone unlocking. CTIA, in its letter dated September 11th, omitted that the criminal case to which it refers was dismissed by the trial court for lack of evidence of criminal activity on September 5th.

The case involved three men initially arrested on suspicion of terrorism. When those allegations proved entirely unfounded, the Department of Justice charged the men with conspiracy to violate section 1201(a) because they had approximately 1000 handsets in their vehicle. The judge, without reaching the merits of the application of section 1201(a) dismissed the charges for lack of evidence of an unlawful agreement. (See Exhibit A, Charges dropped against Texas men in cellular phone case, Detroit News, September 5, 2006.)

The three men were purchasing prepaid handsets at a subsidized price from WalMart stores and other retailers throughout the nation. The defendants in the case knew that the handsets would be exported overseas and resold for a profit. The judge ruled that this was not knowledge of or agreement with a criminal scheme. (See Exhibit B, Excerpt of Transcript from Preliminary Hearing in U.S. v. Othman et. al., Eastern District of Michigan, Northern Division, Case No. 06-MJ-30401, pp. 126 et. seq., ruling that defendants' knowledge that the phones they purchased would be resold overseas at a profit was not knowledge of a criminal conspiracy. [Full copy of transcript available upon request]) The judge did not rule on whether 1201(a) applies to phone unlocking in light of the lack of evidence of an illegal agreement.

There is nothing inherently illegal about arbitrage. The essence of capitalism is to buy low and sell high. That is what some people are doing with TracFone handsets.

TracFone would like to put a stop to the practice. The company is correct that this exemption would remove a tool from its arsenal against phone unlockers. However, it would not leave TracFone or other prepaid companies defenseless against unlawful activity.

The case against Sol Wireless, for example, can be seen primarily as a trademark case, and not as a circumvention violation. (See Testimony before the Copyright Office of Metalitz, March 23, 2006, p 22 "This really was primarily a trademark case in which people were selling these TracFone phones after having bought them off the shelves at Walmart.") In addition to trademark law, TracFone has relied and could continue to rely on unfair competition law and

contract law. Virgin Mobile USA, for example, has brought lawsuits against phone unlockers claiming breach of contract, tortious interference, unjust enrichment, unfair competition as well as trademark infringement, without alleging a violation of section 1201(a). (See e.g. Exhibit C, Virgin Mobile USA v. Gregg Iser, et. al., Northern District of Oklahoma, Case No. 4:06-cv-00434-CVE-PJC, Complaint, filed August 23, 2006.)

Handset arbitrage may justify stronger legal protection than is currently available to the prepaid business model. In some cases, Congress has passed rules regulating international sales of domestically sold commodities (e.g. cigarettes), in some cases it has not (e.g. American blue jeans popular in Japan). Generally, the law allows people to buy low and sell high. Applying section 1201(a) to phone unlocking would be the exception to this practice, not the rule. Whether and how to regulate the secondary market in wireless handsets is a question that Congress or the Federal Communications Commission is uniquely qualified to consider.

The allegation that phone unlocking helps terrorists exploits a serious public concern in service of a narrow private interest. The article TracFone submitted entitled “Cell Phones the New Terror Gadgets” actually blames prepaid phone companies for aiding terrorism. The article says terrorists, drug traffickers and other criminals use cheap, prepaid, untraceable phones like TracFone’s product for illicit ends. The article also says that police suspect that terror cells use legal and illegal means to raise money, including flashing and reselling subsidized cell phones and chopping up handsets for parts. Though terrorists find prepaid mobile phones useful, these phones should not be illegal. Terrorists may find unlocking useful. Again, that doesn’t mean unlocking should be illegal.

#### V. All Applicable Statutory Factors Weigh In Our Favor

There are two applicable statutory factors the Copyright Office is to consider regarding this exemption, (i) the availability for use of copyrighted works and (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works. 17 U.S.C. 1201(a)(1)(C). Both are positively affected by this exemption, and adversely affected by section 1201(a).

There are millions of existing cell phones that have no current usefulness without unlocking, reprogramming and/or reselling the phone. The phones are literally useless. (See Reply Comment of Butler, “[N]ow I have a \$300 paperweight, a collection of Bluetooth accessories gathering dust, and a usable phone that has absolutely none of the features that I wanted.”) Additionally, travelers find their phones useless on international trips, despite the fact that there is no technological or legal obstacle to using the handset overseas. (See Reply Comment of Hughes-Jelen “What made this all the more frustrating was that we

had fulfilled our contractual obligations to Cingular, and were customers in good standing who had purchased GSM-enabled phones with our service plan, phones that *could* have been used in Italy.”)

Because the public is purchasing the class of works here for functionality in a device, and not for any independent value the works might have, there is no adverse effect on the market value of these works as a result of circumvention. People will still need to buy mobile phones.

Proponents of this exemption do not want something for nothing. They want to be able to modify, use and resell something they have legally purchased, a handset. Despite CTIA and TracFone assertions, actual consumers find it extremely difficult to purchase unlocked phones without attached service plans. (See Reply Comment of Crocker). Additionally, many customers find that their providers simply refuse to unlock their phones. (See e.g. Reply Comments of Markovski, Butler, Ritchie, Hughes-Jelen and Vinzant). As a result they cannot use their phones to travel or when they switch to another network.

#### V. Conclusion

This exemption is about the public’s freedom to use handsets they already legitimately own if they move, travel, wish to change carriers, or to resell their phones. CTIA and TracFone have demonstrated that section 1201(a) causes actual harm to phone unlocking. They have failed, however, to demonstrate harm to any copyright interests. Unlocking may interfere with the prepaid business model, but there are other legal doctrines available to protect that practice from unlawful competition and trademark infringement. By failing to grant this exemption, the Copyright Office is essentially issuing a new regulation of the handset market. This is improper. The Copyright Office should grant the exemption so as not to artificially restrain what may otherwise be a legitimate, legal and socially beneficial practice.

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[Return to regular web page](#)

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September 5, 2006

## Charges dropped against Texas men in cellular phone case

**Paul Egan / The Detroit News**

A U.S. magistrate judge in Bay City today dismissed conspiracy and money laundering charges against three Texas men who were initially accused of supporting terrorism.

"They feel wonderful; their confidence in our justice system has been restored," said Nabih Ayad, the Dearborn Heights attorney representing Maruan Muhareb, 18, Adham Othman, 21, and Louai Othman, 23.

Magistrate Judge Charles Binder dismissed the remaining charges against the men following a preliminary examination, ruling the government did not have sufficient evidence to proceed with the case, Ayad said.

The men faced state terrorism-related charges after they were arrested in Caro in Michigan's Thumb Aug. 11 with photos of the Mackinac Bridge and about 1,000 cell phones in their van.

Tuscola County Prosecutor Mark E. Reese dropped those charges after the FBI and the Michigan State Police said there was no evidence linking the men to terrorism.

But the same day those charges were dropped, the federal government charged the men with conspiracy to traffic in counterfeit goods and money-laundering in connection with alterations they allegedly planned to make to the phones' software so they could be sold for increased profit.

"We respect the judge and the process and we're continuing to evaluate the case in light of the decision," said U.S. Attorney Stephen Murphy.

Ayad has said the men were the victims of ethnic profiling. He said the men, who spent 10 days in custody following their arrests, are considering a civil lawsuit.

"The stigma is still with them," he said.

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[Return to regular web page](#)

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

Case No. 06-30401

v.

Bay City, Michigan  
Wednesday, September 6, 2006  
Magistrate Judge Binder

LOUAI ABDELHAMIED OTHMAN,  
ADHAM ABDELHAMID OTHMAN,  
MARUAN AWAD MUHAREB,

Defendants

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PRELIMINARY EXAMINATION

BEFORE THE HONORABLE CHARLES E. BINDER, MAGISTRATE JUDGE

TRANSCRIPT ORDERED BY: JAMES BALDINGER (Carlton Fields)

APPEARANCES:

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TABLE OF CONTENTS

PROCEEDINGS - Wednesday, September 6, 2006	3
WITNESSES - GOVERNMENT	
<b>Andrea Kinzig</b>	
Direct Examination by Ms. Parker	4
Cross-Examination by Mr. Ayad	24
Cross-Examination by Mr. McGrath	43
Cross-Examination by Ms. Fadlallah	64
Redirect Examination by Ms. Parker	77
Recross-Examination by Mr. Ayad	80
CLOSING ARGUMENTS	
By Ms. Parker for the Government	84
By Mr. Ayad for Defendant L. Othman	95
By Mr. McGrath for Defendant A. Othman	103
By Ms. Fadlallah for Defendant Muhareb	109
Response by Ms. Parker for the Government	113
RULING OF THE COURT	119

1 of the statutes before coming on the bench and they are very  
2 lengthy and have many inter-related parts. You have all cited  
3 cases entirely appropriately, cases which I have not recently  
4 visited. For all those reasons, counsel, I need some time to  
5 consider the arguments and to that end I will take a recess.  
6 I certainly expect that I will be able to make findings yet  
7 today but I do need some time to collect my thoughts, consider  
8 the arguments and put myself in a position to make a proper  
9 findings and the complete findings that -- that all of you  
10 deserve.

11 So with that we will be in recess.

12 (At about 3:00 P.M. - Court in recess.)

13 (At about 4:00 P.M. - Court in session.)

14 THE COURT: Returning to case number 06-30401, the  
15 matter is submitted for decision. The preliminary examination  
16 such as this is a creature of statute, it's a creature of  
17 court rule. A number of federal courts have held uniformly  
18 that there is no constitutional right to a preliminary  
19 examination. In fact on one occasion, in 1979, the Supreme  
20 Court implied that there may not even be a requirement to hold  
21 such a hearing at all. This highlights the fact that unlike  
22 most states, where preliminary examination plays a very  
23 significant role in the charging process itself, in the  
24 federal system a preliminary examination is a compliment to  
25 and it -- but it is not a substitute for the grand jury

1 process.

2 In the words of the advisory committee drafting the  
3 procedure rules on preliminary examinations. Such -- "a  
4 preliminary examination is to justify holding a defendant in  
5 custody or on bail during the period of time it takes to bind  
6 the defendant over to the district court for trial." In other  
7 words the period during which a grand jury deliberates to  
8 determine whether or not an indictment is appropriate.

9 The purpose of a preliminary examination and my duty  
10 today is to make a neutral judgment as to whether resort to  
11 the next steps of the federal criminal process are justified.  
12 The determination I have to make is whether there's sufficient  
13 information presented to me on this record today to enable me  
14 to determine whether the charges are baseless or on the other  
15 hand are they sufficiently supported to justify the next steps  
16 of the federal criminal process.

17 Probable cause rests on all the evidence produced on  
18 the record including anything -- including evidence adduced by  
19 the defendant during cross-examination of Government  
20 witnesses. I have no authority at a preliminary examination  
21 to adjudicate substantive evidentiary issues or to consider  
22 any motions to suppress either statements or search warrants.

23 The standard of course at this stage is probable  
24 cause. And a good definition for probable cause made by the  
25 Sixth Circuit is as follows: "Probable cause is defined as a

1 reasonable ground for belief of guilt supported by less than  
2 prima fascia proof but more than mere suspicion."

3           With that by way of introduction, let me then turn  
4 next to the charges made against the Defendant -- Defendants,  
5 rather. The information charges -- excuse me, the criminal  
6 complaint charges in sub (a), each of the Defendants with a  
7 violation of 18 U.S. Code Section 371, the general conspiracy  
8 statute. In pertinent part that statute reads, "if two or  
9 more persons conspire either" -- let me rephrase that.

10           "If two or more persons conspire to commit any  
11 offense against the United States [meaning any violation of  
12 the Federal Criminal Code] and one or more of such persons do  
13 any act to effect the object of the conspiracy, each shall be  
14 fined under this title, or imprisoned not more than five  
15 years, or both."

16           As charged by the Government, this conspiracy has  
17 one or both of two objects. One object is the trafficking in  
18 counterfeit goods in violation of 18 U.S. Code Section 2320  
19 and the other is circumvention of a copyright protection  
20 system as set forth in 17 U.S. Code Sections 1201 and 1204.  
21 Let me turn to each one of those potential objects.

22           As to the trafficking in counterfeit goods Section  
23 2320 in part reads, "Whoever intentionally traffics in goods  
24 or services and knowingly uses a counterfeit mark in  
25 connection with such goods or services or packaging of any

1 type or nature, knowing that a counterfeit mark has been  
2 applied thereto, the use of which is likely to cause  
3 confusion, mistake or deceive, shall be fined and imprisoned  
4 as set forth in the statute."

5           The statute goes on to define a counterfeit mark as,  
6 quote, "a spurious mark or a spurious designation that is  
7 identical with or substantially indistinguishable from a  
8 designation to which the remedies of the Lanham Act [and that  
9 refers to copyrights] "are made available.

10           As I look at the evidence adduced of record in this  
11 case, I cannot find on today's record any evidence of the  
12 application of a spurious mark to any of these cell phones  
13 alleged to have been found in the possession of the  
14 Defendants. There's no indication that the cell phones  
15 themselves had been altered, physically altered in terms of  
16 eliminating or changing the copyright mark on the cell phone  
17 itself.

18           In addition I cannot find -- I'm unable to conclude  
19 rather that the removal of a plastic face covering from the  
20 display of the cell phone or the removal or separation of the  
21 owner's guide -- owner's manual constitutes a trafficking in  
22 counterfeit goods.

23           I therefore find on this record, on the evidence  
24 presented to me today, no evidence of a conspiracy which has  
25 as its object the violation of 18 U.S. Code Section 2320, nor

1 is there any evidence that any of the Defendants changed any  
2 of the physical marks, copyright marks, insignia, items of  
3 that nature on any of the cell phones said to have been in  
4 their possession.

5 I therefore turn to the allegations relating to  
6 circumvention of a copyright protection system. 17 U.S. Code  
7 Section 1201(3) states that -- it defines circumventing a  
8 technological measure to mean "to descramble a scrambled work,  
9 to decrypt an encrypted work or otherwise avoid, bypass,  
10 remove, deactivate or impair a technological measure without  
11 authority of the copyright owner."

12 The next subsection states, "A technological measure  
13 effectively controls access to the work -- to a work if the  
14 measure in the ordinary course of its operation requires the  
15 application of information or a process or a treatment with  
16 the authority of the copyright owner to gain access to the  
17 work."

18 As I understand the Government's allegations made in  
19 the complaint, these Defendants are part of a conspiracy in  
20 larger enterprise whose object is to alter the proprietary  
21 software within the telephones which they possess to the end  
22 of circumventing that -- eliminating and circumventing that  
23 copyrighted and proprietary software. That's the object --  
24 alleged object of the conspiracy.

25 I turn next to what is a conspiracy. And after some

1 consideration I agree with counsel that a good working  
2 definition of a conspiracy is that set forth in Chapter 3 of  
3 the jury instructions for this circuit, with of course the  
4 understanding that the standard before me is probable cause,  
5 and not that before a jury at trial. But the jury  
6 instructions 301A point out that "A conspiracy is a kind of a  
7 criminal partnership." They go on to say, "The government  
8 must prove each and every one of the following elements:  
9 First, that two or more persons conspired or agreed to commit  
10 the crime," in this case circumventing the copyright  
11 protection system.

12 "Second, that the defendants knowingly and  
13 voluntarily joined the conspiracy. And third, that a member  
14 of the conspiracy did one of the overt acts described here in  
15 the charging documents for the purpose of advancing or helping  
16 the conspiracy."

17 The commentary to this points out that although a --  
18 the connection between a given defendant and a wider  
19 conspiracy need only be slight, an agreement must be shown for  
20 the purposes of this hearing to a level of probable cause. In  
21 other words the Defendants need to have conspired or agreed to  
22 commit the crime or that they agreed to be part of this  
23 process towards committing the crime.

24 The key question is then has there been such an  
25 agreement. That to flesh out what the necessary agreement is

1 for the purposes of this preliminary examination or any  
2 conspiracy charge, counsel have properly shown me a number of  
3 cases which help flesh out this idea. And one of the oldest  
4 of which is the Falcone case, 1940. Counsel have already  
5 described many of the facts. I'll not repeat them at this  
6 point.

7           The Supreme Court pointed out that the gist of the  
8 offense of conspiracy again is an agreement and one --  
9 according to the court, and one without more furnishes  
10 supplies, in the case of Falcone, to an illicit distributor is  
11 not guilty of conspiracy even though his sale may have  
12 furthered the object of the conspiracy to which the distiller  
13 was a party, but of which the supplier had no knowledge.

14           The Government cites the Ross case, 190 F.3d 446, a  
15 1999 Sixth Circuit case. Ross discusses Falcone and says  
16 Falcone as well as a subsequent U.S. Supreme Court decision  
17 holds that one does not become a party to a conspiracy merely  
18 by supplying goods that he knows the buyer will use illegally  
19 unless he also knows of the conspiracy.

20           In 1977 the Sixth Circuit in United States v.  
21 Grunsfeld, 558 F.2d 1231, characterized Falcone in this  
22 fashion. "That decision [referring to Falcone] comes down to  
23 this: that one does not become party to a conspiracy by  
24 aiding and abetting it, through sales of supplies or  
25 otherwise, unless he knows of the conspiracy and the inference

1 of such knowledge cannot be drawn merely from knowledge that  
2 the buyer will use the goods illegally."

3           What is the evidence adduced in this case? The  
4 evidence adduced in this case from the testimony of the case  
5 agent is that the Defendants told her that they believed that  
6 the cell phones would be resold and that they could be resold  
7 overseas at a profit. That mirrors allegations made in the  
8 criminal complaint.

9           The Defendants stated that they had sold cell phones  
10 to resellers in Dallas in the past. But I find no evidence on  
11 this record that the Defendants agreed with anyone to alter or  
12 reprogram any of these cell phones. In fact there is on this  
13 record adduced today no evidence of with whom they agreed.  
14 There is virtually no corroborating evidence beyond the  
15 Defendants' statements as recited by the case agent during her  
16 testimony and in the criminal complaint. In fact the case  
17 agent during her testimony conceded that many aspects of an  
18 investigation relating to this matter are still ongoing.

19           There was testimony today about civil cases  
20 involving suits by cell phone providers and cell phone  
21 manufacturers against individuals who are said to have  
22 improperly altered the cell phone. There is evidence adduced  
23 on this record today relating to apparently criminal  
24 investigations surrounding other allegations of improper  
25 alterations of cell phones. Those facts and that testimony

1 are entirely irrelevant. I am obligated to weigh probable  
2 cause on the record made before me today, and not on the  
3 record of some other case, be it civil or criminal, or some  
4 other investigation, whether ongoing or completed. None of  
5 that can serve as any basis or support for the allegation --  
6 for -- for the probable cause determination that I am required  
7 to make.

8           Counsel for the United States argues that willful  
9 blindness, deliberate ignorance can also be evidence  
10 sufficient to justify a finding that there was the level of  
11 agreement required in this circuit as paraphrased in the jury  
12 instructions that I read earlier. Reviewing in greater detail  
13 the facts of the cases that I cited a moment ago, I believe  
14 it's very instructive on whether there is in fact sufficient  
15 evidence of willful blindness or deliberate ignorance to  
16 justify the existence of those doctrines in this case is a  
17 justification for the conspiracy charge that's been made here.

18           Now, as pointed out in Falcone, in that case a  
19 defendant was selling yeast and sugar and cans to another  
20 entity, who in turn apparently was selling it for use by  
21 illegal distillers making what was at the time illegal alcohol  
22 products. More recently in the Ross case, there was evidence  
23 in the Ross case that the defendant, according to other  
24 witnesses, quote, "knew everything." Another witness  
25 testified that Ross, quote, "basically knew," unquote, what

1 was going on. Ross involved a conspiracy to distribute  
2 cocaine.

3           As I compare that to the evidence in this case, the  
4 evidence in this case comes nowhere near the evidence of Ross.  
5 Again, we have a belief stated by one or more of the  
6 Defendants, not individually identified, that they had sold  
7 cell phones in the past to another entity, and that the cell  
8 phones were going to be resold and that some of them could be  
9 resold again at profit overseas. That stands nowhere near,  
10 quote, "knew everything" or quote, "basically knew".

11           In Grunsfeld there was allegations that there were  
12 large purchases of chemicals for the purpose of making illegal  
13 controlled substances. The court there distinguished Falcone,  
14 and arguably this case, because the materials in which  
15 Grunsfeld obtained in that case were hard-to-get items.  
16 That's quite entirely unlike cell phones, which can be  
17 purchased anywhere.

18           In addition, in Grunsfeld there was face-to-face  
19 meetings between the defendant and others. During those  
20 meetings the use of the chemicals was explained, examination  
21 of equipment was undertaken, and explanations of the equipment  
22 and the processes involved in which the chemicals were a part  
23 were made by the defendant or at least in his presence.

24           We have none of that in this case. In fact, as I  
25 said, we have no idea who these people are in Dallas or in

1 Florida or anywhere else. There is -- there may be -- there's  
2 no evidence with whom this alleged third-party agreement that  
3 serves as the basis of the conspiracy was made. In fact we  
4 have no -- we have no definite evidence as to either party.  
5 We don't know which of the Defendants may have made an  
6 agreement, and we have no idea on this record from this  
7 testimony who was at the other end of the agreement.

8           The facts of Falcone and Grunsfeld and Ross stand in  
9 considerable contrast to those of the instant case. I cannot  
10 on the record before me find that deliberate ignorance or  
11 willful blindness can serve as any support to the conspiracy  
12 that's been alleged here.

13           Turning more broadly to the charge made itself, I  
14 find that the allegations of conspiracy fail to meet the first  
15 of the steps required by the Sixth Circuit. I fail on this  
16 record to find evidence of an agreement as required by the  
17 Sixth Circuit for the charge of conspiracy in this circuit. I  
18 fail to find probable cause supporting the first of the steps  
19 required by the Sixth Circuit for the conspiracy charged in  
20 this -- in this criminal complaint.

21           I turn then to the second charge, that of money  
22 laundering. The charge is made under 18 U.S. Code Section  
23 1956(a)(3). That charge -- that statute rather contains a  
24 lengthy list of predicate acts necessary in order to have a  
25 charge of money laundering. I have reviewed that list. I can



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

VIRGIN MOBILE USA, LLC,	)	
a Delaware limited liability company,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO.
	)	
GREGG ISER d/b/a LIGHTHOUSE	)	
COMMUNICATIONS, GREGG ISER,	)	
individually, and JANE DOE NO. 1 "AMY",	)	
	)	
Defendants.	)	
	)	
	)	

**VERIFIED COMPLAINT**

Plaintiff Virgin Mobile USA, LLC ("Virgin Mobile"), for its Verified Complaint against Defendants, alleges upon personal knowledge with respect to itself and to its own acts, and upon information and belief with respect to all other matters, as follows:

**NATURE OF ACTION**

1. Virgin Mobile seeks injunctive relief and damages against Defendants, who are participants in, and facilitate others who are engaged in, business enterprises predicated on the unlawful purchase for resale of Kyocera K10 Royale handsets (the "K10"), a wireless telephone device manufactured by Kyocera Wireless Corp. ("Kyocera") on behalf of Virgin Mobile for use exclusively on Virgin Mobile's wireless service. Defendants' business model relies on unfair competition, unjust enrichment, and violations of state and federal laws.

2. Defendants' conduct constitutes (a) breach of contract; (b) tortious interference with Virgin Mobile's prospective economic advantage and contractual relations with its customers; and (c) infringement of Virgin Mobile's rights in the K10 handsets.

3. Specifically, Defendants acquire, for non-personal use, bulk quantities of Virgin Mobile K10 handsets at prices above the retail price at which the K10 would otherwise be available in retail stores within the United States. Defendants then resell the handsets, which bear the Virgin Mobile logo, in bulk for profit. Defendants solicit others to sell Virgin Mobile handsets to them, and to purchase Virgin Mobile handsets from them, through internet postings and electronic mail communication. Defendants are not, and never have been, authorized retailers of Virgin Mobile products.

4. Virgin Mobile has reason to believe that Defendants' conduct is facilitating Defendants' customers in schemes that necessarily include the unauthorized hacking of and tampering with security software to enable reprogramming of the K10 handsets for use on non-Virgin Mobile networks.

5. Virgin Mobile further has reason to believe that Defendants are actively soliciting transactions with purchasers outside the United States, and that Defendants are therefore exporting K10 handsets in violation of the terms of purchase clearly stated on K10 packaging materials.

6. Defendants' unauthorized bulk purchase and resale of Kyocera K10 handsets has caused Virgin Mobile to incur substantial revenue losses in lost customers, and has caused immediate and immeasurable injury to its business prospects and reputation.

#### **JURISDICTION AND VENUE**

7. This Court has jurisdiction over the federal claims herein under 28 U.S.C. §§ 1331 and 1338(a). Jurisdiction over the state law claims herein is based on 28 U.S.C. §§

1332 and 1367. The amount in controversy exceeds \$75,000, exclusive of interest and costs, and each and every defendant is diverse in citizenship from the plaintiff.

8. Jurisdiction over Defendants is proper because all Defendants are located and conduct business in Tulsa, Oklahoma and have, inter alia, transacted business in this state, contracted to receive and supply services and goods in this state, and caused tortious injury by acts or omissions in this state. Venue is proper in this District under 28 U.S.C. § 1391(b), inasmuch as Defendants maintain an office in and do business in this District, and the claims against Defendants have arisen in this District.

#### **THE PARTIES**

9. Plaintiff Virgin Mobile is a limited liability company organized under the laws of Delaware with its principal place of business located at 10 Independence Boulevard, Warren, New Jersey.

10. Upon information and belief, Defendants are doing business as Lighthouse Communications ("Lighthouse") which advertises its principal place of business as located at 5865 S. Garnett Rd., Tulsa, Oklahoma.

11. Upon information and belief, Defendant Gregg Iser is a resident of the State of Oklahoma.

12. Upon information and belief, Defendant Jane Doe No. 1 "Amy" is a resident of the State of Oklahoma.

#### **VIRGIN MOBILE AND ITS WIRELESS SERVICE**

13. Virgin Mobile began commercial operations in the United States in June 2002. Pursuant to an exclusive license from Virgin Enterprises Limited, Virgin Mobile offers wireless service in the United States under certain word and logo marks including or

incorporating the trademarks “VIRGIN” and “VIRGIN MOBILE.” These trademarks include the following marks, which were federally registered by Virgin Enterprises:

- (a) VIRGIN, U.S. Reg. No. 2,689,098;
- (b) VIRGIN MOBILE, U.S. Reg. No. 2,770,775; and
- (c) VIRGIN MOBILE (and Design), U.S. Reg. No. 2,770,776

(collectively, the “Virgin Mobile Marks”).

14. Through its extensive marketing and promotional efforts, Virgin Mobile has become one of the ten largest domestic wireless service providers in America, with approximately four million customers. Virgin Mobile was the first wireless carrier in the United States to focus exclusively on the youth market, offering its customers prepaid wireless service. Also known as a “pay-as-you-go” offer, this feature enables customers to purchase airtime in advance, paying only for the minutes to be used. Virgin Mobile also offers its users a variety of alternative pricing plans, including the more traditional monthly pricing plans offered by other carriers.

15. Virgin Mobile also offers for sale in the United States a variety of wireless handsets that are specially manufactured for, and sold for exclusive use on, wireless network facilities provided by Sprint Nextel Corp. (the “Virgin Mobile USA Service”). These wireless handsets contain special proprietary software (the “Virgin Mobile Software”) that enables the purchasers of the handset to receive the distinctive package of offerings that Virgin Mobile makes available to its customers, such as downloadable ring tones, graphics and other media content. Additional software and security measures are also installed on each handset to ensure the handset cannot be operated with any wireless service other than the Virgin Mobile USA Service (the “Security Software”).

16. Wireless handsets sold by Virgin Mobile for use on its network prominently feature the following Virgin Mobile Mark (U.S. Reg. No. 2,770,276) on their face:



17. As a result of the promotional and marketing efforts of Virgin Mobile and other Virgin Group companies, consumers in the United States and other countries readily identify wireless products and services bearing the Virgin Mobile Marks as originating from, or sponsored or approved by, Virgin Mobile, and Virgin Mobile has developed a valuable reputation and enormous good will in the Virgin Mobile Marks.

18. After purchasing a Virgin Mobile-branded wireless handset, in order to use the handset to send and receive phone calls or text messages, consumers activate the Virgin Mobile wireless service on their handsets through Virgin Mobile's internet website, [www.virginmobileusa.com](http://www.virginmobileusa.com), or by calling a toll-free number. The handsets are activated using a unique serial number assigned to each handset. Purchasers of Virgin Mobile handsets select one of Virgin Mobile's pay-as-you-go service offers.

#### **VIRGIN MOBILE'S K10 HANDSET**

19. Among the mobile handsets offered by Virgin Mobile for use on the Virgin Mobile USA Service is the K10 Royale ("K10"), which is manufactured for Virgin Mobile by Kyocera Wireless Corp. ("Kyocera"). An image of the K10 handset, which features the distinctive Virgin Mobile logo, is attached as Exhibit 1.

20. The K10 is specially manufactured by Kyocera for exclusive use with the Virgin Mobile USA Service. At its factories, Kyocera installs the Virgin Mobile Software, which enables the K10 to access and use the Virgin Mobile USA Service. The K10 also contains the Security Software that “locks” the handset – that is, prevents unauthorized access to the Virgin Mobile Software and prevents the handset from being used with a wireless service other than Virgin Mobile’s.

21. In an effort to attract customers for its mobile service, Virgin Mobile offers the K10 for sale at a price well below both the market value of each handset and Virgin Mobile’s per-unit cost of acquiring the handset from Kyocera. (the “Subsidized Retail Price”). Virgin Mobile’s sale of the K10 at the Subsidized Retail Price enables consumers to purchase the handset and to obtain mobile service through the Virgin Mobile USA Service without a significant capital outlay. Indeed, many of Virgin Mobile’s customers are less affluent than those who purchase post-paid service from other wireless service providers and could not afford a handset at a retail price equal to the price Virgin Mobile pays for the handset.

22. Virgin Mobile sells the K10 at the Subsidized Retail Price with the reasonable expectation that such price will induce consumers to establish accounts with Virgin Mobile, purchase airtime and other services offered by Virgin Mobile, and replenish their accounts on an ongoing basis, thereby generating revenue for Virgin Mobile.

23. In order to ensure that the K10 handset will be activated with the Virgin Mobile USA Service so that Virgin Mobile will gain the expected economic advantage from consumers who purchase the K10, Kyocera installs the Security Software on each K10

handset, as well as other security measures to prevent unauthorized access to and tampering with the K10's Security Software.

24. Virgin Mobile includes terms of purchase on the packaging of each K10 that expressly prohibit the purchaser from using the phone on any network other than the Virgin Mobile USA Service, altering any of the hardware or software on the handset, and/or exporting the handset outside of the United States. Specifically, the packaging of each K10 now states:

This phone is sold exclusively for use with service that Virgin Mobile USA provides. You may not alter the hardware or software in the phone, or export it from the USA. BY PURCHASING OR OPENING THIS PACKAGE, YOU ARE AGREEING TO THESE TERMS.

(See Exhibit 1.) As a result of this express limitation, both initial and subsequent purchasers of the K10 handset are prohibited from altering or disabling the Security Software and from commercially exporting the handsets.

25. Said terms constitute an enforceable contract – which the law protects against tortious interference -- between Virgin Mobile and initial and subsequent purchasers of K10 handsets.

26. In light of the express limitations on the K10 packaging, because the software contained on the K10 is specially designed, manufactured, and sold for use exclusively with the Virgin Mobile USA Service, and because the handset is not to be exported, Virgin Mobile has a well-founded and reasonable business expectation that purchasers of a K10 will activate the Virgin Mobile USA Service, thereby enabling Virgin Mobile to recoup the losses it incurs by its below-cost pricing of the K10.

27. To date, Virgin Mobile has spent over \$40 million in connection with the sale and promotion of the K10 phone. As a result of Virgin Mobile's marketing and promotional

efforts, including its below-cost pricing, the K10 handset has become an extremely popular handset for which there is high consumer demand.

**DEFENDANTS' UNLAWFUL ACTS**

28. Virgin Mobile has discovered that although large quantities of its K10 handset are being purchased at retailers throughout the United States, a significant number of these purchased handsets are not ultimately activated for use with the Virgin Mobile USA Service. Instead, certain third parties, including Defendants, are involved in ongoing schemes to purchase K10 handsets at or above the Subsidized Retail Price and resell the handsets in the United States and abroad at a price substantially higher than the Subsidized Retail Price, thereby profiting from the difference between the Subsidized Retail Price and the market value of the handsets.

29. Because the K10 is available in retail stores at the Subsidized Retail Price, the resale of K10 handsets is likely to be profitable only if the handset is altered to disable the security features that "lock" the phone to the Virgin Mobile USA Service. These altered handsets are then resold in the United States and abroad for use with service providers other than Virgin Mobile, and at a price higher than the Subsidized Retail Price, thereby allowing the sellers to profit from the difference between the Subsidized Retail Price and the market value of the handsets, and depriving Virgin Mobile of the revenue it reasonably expects to accrue from services sold to K10 purchasers who activate their phones on the Virgin Mobile Service.

30. As a necessary part of these schemes, the K10 Security Software is hacked or tampered with to "unlock" the handsets, and software is installed to be activated and operate on wireless service networks other than the Virgin Mobile USA Service. Because the

phones that are purchased, hacked, and resold pursuant to these schemes are never activated on the Virgin Mobile USA Service, Virgin Mobile receives no return whatsoever on its investment in subsidizing the K10 handset's retail price.

31. As part of its investigation into bulk purchasing of K10 handsets, Virgin Mobile recently discovered that Defendants are engaged in an ongoing scheme to purchase large quantities of Kyocera K10 handsets for resale.

32. On or before July 15, 2006 Defendants posted an ad on [www.alibaba.com](http://www.alibaba.com). The ad identified Lighthouse as a "Distributor/Wholesaler" of mobile phones with annual sales of \$10-50 million and stated "We sell Large Quantity's [sic] of New Phones." A Kyocera handset was identified in the ad as one of the models offered for sale by Lighthouse. The ad also identified Defendant Gregg Iser as Lighthouse's National Sales Manager. (See Defendants' advertisement, attached as Exhibit 2.)

33. The website [www.alibaba.com](http://www.alibaba.com) describes itself as follows: "Alibaba International ([www.alibaba.com](http://www.alibaba.com)) is an English-language website primarily serving small and medium-sized enterprises (SME's) in the international trade community, with more than two million registered users from over 200 countries and territories. More than 500,000 people visit the site every day, most of them global buyers and importers looking to find and trade with sellers in China and other major manufacturing countries." (See web page at <http://www.alibaba.com/aboutalibaba/index.html>, attached as Exhibit 3.) The [www.alibaba.com](http://www.alibaba.com) slogan is "Global trade starts here." (*Id.*) Alibaba.com Corporation, which owns and operates [www.alibaba.com](http://www.alibaba.com), "is China's leading e-commerce company, operating the world's largest online marketplaces for both international and domestic China trade." (*Id.*)

34. On July 31, 2006, a private investigator hired by Virgin Mobile sent an e-mail to Lighthouse through the [www.alibaba.com](http://www.alibaba.com) web site's communications center. In the e-mail, the investigator offered to sell Lighthouse "large quantities of K10's." (See e-mail dated July 31, 2006, attached as Exhibit 4.) On August 1, 2006, the investigator sent a second e-mail to Lighthouse offering to buy or sell any volume of Kyocera K10 phones, in or out of the original Virgin Mobile packaging. (See e-mail dated August 1, 2006, attached as Exhibit 5.)

35. On August 2, 2006, the investigator called Lighthouse and offered to sell Lighthouse twenty-five (25) Virgin K10 handsets immediately, followed by larger volumes in later transactions. A man who identified himself as Gregg Iser advised the investigator that Lighthouse was interested in purchasing as many as 3,000 handsets, including both K10s and other cell phone models. Iser noted that he could purchase the K10 for \$20 retail. The investigator also advised Iser that the handsets could be sold to him in their original packaging or removed from their packaging. Iser stated that he would buy the K10 handsets "either way" (meaning either in their original packaging, or removed from the packaging).

36. Later on August 2, 2006, the investigator sent an e-mail to Iser confirming his intent to ship twenty-five (25) K10 handsets to Lighthouse at a price of \$24 per "non-flashed" handset or \$26 per "flashed" handset. (See e-mail dated August 2, 2006 attached as Exhibit 6.) Iser replied the same day in an e-mail that directed the investigator to "ship the 25 non flashed" handsets to Lighthouse Communications at 5865 S. Garnett Road, Tulsa, Oklahoma 74146. (See *Id.*) Iser also stated "we need up to 2K weekly." (*Id.*) Included in the e-mail from Iser were two URLs – [www.AboutLighthouse.com](http://www.AboutLighthouse.com) and

www.Cellclaim.com, and phone numbers (918) 250-8000, (918) 250-8008, and (918) 606-2300.

37. On August 7, 2006, the investigator shipped three packages via UPS Next Day Air to Lighthouse Communications at 5865 S. Garnett Road, Tulsa, Oklahoma 74146. The three packages contained a total of twenty-five (25) Virgin Mobile K10 handsets in their original packaging, which included the terms and conditions described in paragraph 24. Also enclosed in one of the packages was an invoice for \$600. (See invoice attached as Exhibit 7.) On August 8, 2006, UPS confirmed that the three packages had been delivered. (See UPS shipping receipts and delivery notification, attached as Exhibit 8.)

38. On August 8, 2006, the investigator sent an e-mail to Iser to confirm Iser's satisfaction with the K10 handsets and to request confirmation of payment of the \$600 invoice. (See e-mail dated August 8, 2006 attached as Exhibit 9.) Iser replied on the same date and directed the investigator to "call Amy" at (918) 250-8000 and "[g]ive her your address so we can make check today." (See Id.) Iser further stated "everything was great, we need 2-5K." (Id.) The investigator later called Lighthouse at (918) 250-8000 and spoke with a woman who identified herself as "Amy." Amy confirmed receipt of the invoice and stated that payment would be sent via U.S. mail.

39. Lighthouse Communications is not, and has never been, an authorized retailer of the K10 handset or of any other Virgin Mobile products.

40. K10 handsets offered for sale in retail stores in the United States are programmed for use only on the Virgin Mobile USA network. The Virgin Mobile USA network operates only within the United States, and K10 handsets exported from the United

States would therefore be inoperable without reflashing to another service provider's network.

41. Based upon Defendants' unlawful acquisition for resale of bulk quantities of K10 handsets at above-market prices, their solicitation of up to two thousand handsets weekly, their solicitation of purchasers on a web site catering to international trade, and their willingness to purchase K10 handsets at a price above the Subsidized Retail Price – which Defendants acknowledged was approximately \$20 per handset – Virgin Mobile alleges upon information and belief that Lighthouse is engaging in, and/or inducing, facilitating and conspiring with others to engage in, a business enterprise which of necessity includes: (a) the bulk purchase of K10 handsets; (b) circumvention of the Security Software that controls access to the Virgin Mobile Software used to ensure the K10 handsets are used only with the Virgin Mobile USA Service; and (c) hacking and disabling or erasing the Security Software and Virgin Mobile Software that resides on the handsets (“flashing”) and replacing the Security Software and Virgin Mobile Software with software that enables the handset to operate on wireless service other than Virgin Mobile's (“reflashing”).

42. Upon information and belief, as a necessary part of this scheme, the Security Software installed on the K10 is, without proper authorization, tampered with and the K10 handsets are "unlocked" in violation of the Digital Millennium Copyright Act, 17 U.S.C. § 1201, et seq.

43. Upon information and belief, Defendants are engaging in, and/or conspiring with or facilitating others who engage in (a) the resale of K10 handsets, which continue to bear the Virgin Mobile logo, that have been improperly hacked to disable or erase the Security Software and to replace the proprietary Virgin Mobile software in violation of the

Digital Millennium Copyright Act, 17 U.S.C. § 1201, et seq., or (b) the resale of K10 handsets in the United States and abroad with knowledge that Defendants' customers are likely to disable or erase the Security Software and to replace the proprietary Virgin Mobile software in violation of the Digital Millennium Copyright Act, 17 U.S.C. § 1201, et seq., such that the handsets ultimately can no longer be used with the Virgin Mobile USA Service and can be activated for use on services other than Virgin Mobile's.

44. Because the phones that are purchased and resold by Defendants pursuant to this scheme are never activated on the Virgin Mobile USA Service, Virgin Mobile receives no return whatsoever on its investment in subsidizing the retail price.

45. Further, as a result of Defendants' known acts related to bulk purchases, many consumers who seek to purchase the K10 handset and use the Virgin Mobile USA Service will be unable to do so because of inventory stock-outs and shortages, thereby causing Virgin Mobile to lose good will with both consumers and retailers.

**IRREPARABLE HARM AND PUBLIC INTEREST**

46. As a direct result of Defendants' known and suspected actions, Virgin Mobile has suffered and will suffer immediate irreparable injury in that: (a) inventory stock-outs at retail stores will be created by the bulk-purchasing activities engaged in and induced by defendants, causing Virgin Mobile to lose customers to other wireless carriers and (b) actual and potential customers have been and will be misled as to the source, sponsorship, and origin of the Virgin Mobile-branded handsets repackaged by Defendants and sold for use with non-Virgin Mobile services, and without software developed or approved by Virgin Mobile.

47. Defendants' conduct also threatens to injure irreparably Virgin Mobile's business reputation among authorized retailers of Virgin Mobile handsets. For example,

retailers' confidence in Virgin Mobile will inevitably suffer due to problems with bulk buying issues. In addition, stock-outs and shortages of phones in retail stores as a result of bulk buying threatens to cause retailers to change or cancel promotional plans for the K10, and either (a) revise the terms of the anticipated promotion to those which are less favorable to Virgin Mobile, or worse yet (b) shift promotions altogether to handsets offered by other wireless carriers. Virgin Mobile's remedy at law for these injuries is not adequate.

48. There will be no harm to the public by enjoining Defendants' conduct, and the public interest will be served because an injunction would immediately prevent stock-outs and shortages of Virgin Mobile phones at retail stores due to Defendants' bulk purchase of K10 handsets, and would otherwise further the national policy against circumvention of anti-piracy software as established by Congress when it passed the Digital Millennium Copyright Act.

**FIRST CLAIM FOR RELIEF**  
**BREACH OF CONTRACT**

49. Plaintiff repeats and re-alleges the allegations set forth above as if fully set forth herein.

50. By purchasing, or inducing others to purchase, K10 handsets, and/or by opening their packaging, Defendants have agreed to the contractual terms set forth on the packaging. In accordance with those terms, Defendants have agreed that the phones will only be used in the United States, that the software on the phone will not be hacked or otherwise altered, and that the phones will be used only with the Virgin Mobile USA Service.

51. Defendants' actions complained of herein were made with full knowledge and awareness of the contractual provisions regarding the use of and tampering with the K10.

52. Based on known circumstances, Virgin Mobile has reason to believe that Defendants may have induced others to, and/or have facilitated others to intentionally breach contracts with Virgin Mobile without legitimate justification. Specifically, Virgin Mobile has reason to believe that Defendants have themselves, and/or have induced or assisted others to: (a) circumvent the Security Software that controls access to the Virgin Mobile Software that is meant to ensure the handsets are used only with the Virgin Mobile USA Service; and/or (b) hack and disable or erase the Security Software and Virgin Mobile Software that resides on the K10 handset and replace it with software that enables the handset to operate on wireless networks other than the Virgin Mobile USA Service; and/or (c) sell altered K10 handsets to consumers in foreign jurisdictions.

53. Defendants' conduct complained of herein constitutes breach of contract under the common law of the State of Oklahoma.

54. Virgin Mobile demands judgment against Defendants due to Defendants' breach of contract for all amounts proven at trial, together with interest and attorneys' fees, and for such other and further relief as this Court deems just and proper.

**SECOND CLAIM FOR RELIEF**  
**TORTIOUS INTERFERENCE WITH CONTRACT**

55. Plaintiff repeats and re-alleges the allegations set forth above as if fully set forth herein.

56. In addition, by purchasing the K10 handset, both Defendants and the customers to whom they resell the handsets have entered into a valid, binding contract with

Virgin Mobile pursuant to the terms set forth on the packaging of the handset. In accordance with those terms, those purchasers have agreed that the phones will only be used in the United States and that the software on the phone will not be hacked or otherwise altered.

57. Defendants' actions complained of herein were made with full knowledge and awareness of the contractual provisions regarding the use of and tampering with the K10.

58. Based on known circumstance, Virgin Mobile has reason to believe that, without legitimate justification, Defendants have engaged in intentional acts designed to induce or otherwise cause a breach or disruption of the contractual terms that govern the relationship between Virgin Mobile and the ultimate purchasers of K10 handsets.

59. Defendants' conduct complained of herein constitutes tortious interference with contract under the common law of the State of Oklahoma. Defendants' conduct complained of herein was intentional, malicious, and willful, such that an award of punitive damages is appropriate.

60. Virgin Mobile demands injunctive relief and judgment against Defendants due to Defendants' tortious interference with contract, for all amounts proven at trial including punitive damages and together with interest and attorneys' fees, and for such other and further relief as this Court deems just and proper.

**THIRD CLAIM FOR RELIEF**  
**TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS**

61. Plaintiff repeats and re-alleges the allegations set forth above as if fully set forth herein.

62. Virgin Mobile has a prospective business relationship and a reasonable probability or expectation of establishing a business or economic relationship with potential

purchasers of the wireless handsets Virgin Mobile offers for sale for use with its wireless service

63. Defendants' actions complained of herein were made with full knowledge and awareness of Virgin Mobile's prospective business relationship with potential users of its wireless service, and with knowledge that interference with that prospective relationship was certain or substantially certain to result from defendants' conduct.

64. By engaging in, and aiding others to engage in, conduct prohibited by 17 U.S.C. § 1201, defendants have wrongfully interfered with Virgin Mobile's prospective business relationship and its reasonable expectation of a business or economic relationship with potential purchasers of the wireless handsets Virgin Mobile offers for sale for use with its wireless service, causing damage to Virgin Mobile.

65. Defendants' conduct complained of herein constitutes tortious interference with prospective business relations under the common law of the State of Oklahoma. Defendants' conduct complained of herein was intentional, malicious, and willful, such that an award of punitive damages is appropriate.

66. Virgin Mobile demands judgment against Defendants due to Defendants' tortious interference for all amounts proven at trial, including punitive damages and together with interest and attorneys' fees, and for such other and further relief as this Court deems just and proper.

**FOURTH CLAIM FOR RELIEF**  
**UNJUST ENRICHMENT**

67. Plaintiff repeats and re-alleges the allegations set forth above as if fully set forth herein.

68. By enabling the purchase of the K10 handset at price well below vendor cost, Virgin Mobile conferred a benefit on Defendants which led to significant financial gain to the Defendants through its resale of the handsets at a price substantially above the Subsidized Retail Price.

69. Defendants acquired this benefit with full knowledge.

70. Defendant retained this benefit and reaped significant financial gain through conduct that is both tortious and prohibited by 17 U.S.C. § 1201, and under circumstances that make it unjust for Defendants to retain that benefit without payment to Virgin Mobile.

71. Defendants have been unjustly enriched at the expense of Virgin Mobile.

72. Virgin Mobile demands judgment against Defendants due to Defendants' unjust enrichment for all amounts proven at trial, including punitive damages and together with interest and attorneys' fees, and for such other and further relief as this Court deems just and proper.

**FIFTH CLAIM FOR RELIEF**  
**COMMON LAW UNFAIR COMPETITION**

73. Plaintiff repeats and re-alleges the allegations set forth above as if fully set forth herein.

74. Defendants' conduct in unlawfully purchasing bulk quantities of K10 handsets for resale, and Defendants' subsequent resale of the K10 handsets, which Virgin Mobile reasonably believes is undertaken in connection with disabling or removing, inducing others to disable or remove, and/or assisting others with the disabling or removal of Virgin Mobile proprietary software from the handsets and replacing such proprietary software to enable use of the handsets with service providers other than Virgin Mobile, constitutes unfair competition, under the common law of the State of Oklahoma.

75. Defendants believed participation in a perverse nationwide scheme to sell, induce others to sell, and/or assistance of others with selling hacked, reprogrammed versions of Virgin Mobile-branded wireless handsets or handsets for the purpose of being hacked and reprogrammed, which cannot be activated on the Virgin Mobile USA Service constitutes unfair competition under the common law of the State of Oklahoma. Defendants' conduct complained of herein was intentional, malicious, and willful, such that an award of punitive damages is appropriate.

76. Virgin Mobile demands injunctive relief against Defendants due to their unfair competition (A) preliminarily and permanently enjoining Defendants, and those acting in concert with them, from the unlawful acquisition of bulk quantities of K10 handsets for resale and/or participation in any scheme or plan to (1) hack and reprogram, or induce or assist others to hack and reprogram, Virgin Mobile-branded handsets, including but not limited to the Kyocera K10, and (2) repackage, ship, distribute, sell, or resell Virgin Mobile-branded handsets, or induce or assist others to repackage, ship, distribute, sell, or resell Virgin Mobile-branded handsets, including but not limited to the Kyocera K10; (B) awarding damages to Virgin Mobile for all amounts proven at trial, including punitive damages and together with interest and attorneys' fees, and (C) granting such other and further relief as this Court deems just and proper.

**SIXTH CLAIM FOR RELIEF  
CONTRIBUTORY INFRINGEMENT  
UNDER SECTION 43(a) OF THE LANHAM ACT**

77. Plaintiff repeats and re-alleges the allegations set forth above as if fully set forth herein.

78. Defendants knowingly purchase bulk quantities of K10 handsets at prices above the Subsidized Retail Price at which the K10 is available in retail stores in the United States. In order to profit from the resale of these K10 handsets, then, Defendants must sell the handsets to their customers at prices substantially above the Subsidized Retail Price. It is both likely and entirely foreseeable to Defendants, then, that either Defendants' customers and/or the ultimate purchasers of these "marked up" K10 handsets tamper with the Security Software and replace the Virgin Mobile software in order to use the handsets with service other than Virgin Mobile's.

79. In addition, by actively soliciting purchasers outside of the United States through a web site that targets Chinese and other international markets, Defendants are knowingly facilitating others in schemes to resell K10 handsets abroad. Because the K10 handsets sold in the United States will not operate outside of the United States absent alteration of the software installed by Kyocera, any ultimate purchaser outside of the United States would be unable to use the handset unless the Security Software and the Virgin Mobile Software had been tampered with.

80. By bulk purchasing K10 handsets and reselling them to secondary distributors, Defendants therefore knowingly aid and enable distributors and/or sellers of its products to market them to members of the general public in a way that infringes the Virgin Mobile Marks by placing an instrument of consumer deception in the hands of distributors and/or sellers.

81. Defendants' unlawful, unauthorized, and unlicensed sale of Virgin Mobile-branded handsets have thus contributed to the creation of express and implied misrepresentations that the Virgin Mobile-branded wireless handsets, as sold by Defendants

and as resold by Defendants' customers, were created, authorized, or approved by Virgin Mobile, and may be used with the Virgin Mobile USA Service.

82. Upon information and belief, Defendants' conduct has led and/or is likely to lead to post-sale confusion by causing consumers who purchase Virgin Mobile-branded wireless handsets altered by Defendants' customers to believe that they are purchasing handsets for activation on the Virgin Mobile USA Service and/or with software licensed or approved by Virgin Mobile.

83. Defendants' conduct constitutes contributory infringement in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). Defendants' conduct is intentional, malicious, and willful.

84. Virgin Mobile demands injunctive relief judgment against Defendants due to their contributory infringement for all amounts proven at trial, including punitive damages and together with interest and attorneys' fees, and for such other and further relief as this Court deems just and proper.

**SEVENTH CLAIM FOR RELIEF**  
**CIVIL CONSPIRACY**

85. Plaintiff repeats and re-alleges the allegations set forth above as if fully set forth herein.

86. Defendants have maliciously participated in an enterprise consisting of two or more parties, including Defendants.

87. Defendants' enterprise involves multiple unlawful acts, unfair competition, unjust enrichment, and violations of state and federal laws.

88. Defendants' unlawful acts in connection with the enterprise have caused injury to Virgin Mobile.

89. Defendants' conduct is intentional, malicious, and willful, such that an award of punitive damages is appropriate.

90. Virgin Mobile demands judgment against Defendants due to their civil conspiracy for all amounts proven at trial, including punitive damages and together with interest and attorneys' fees, and for such other and further relief as this Court deems just and proper.

### **PRELIMINARY INJUNCTION**

91. Plaintiff repeats and re-alleges the allegations set forth above as if fully set forth herein.

92. Plaintiff will suffer irreparable harm if Defendants are not enjoined during the pendency of this litigation from (1) hacking and reprogramming, or inducing or facilitating others to hack and reprogram, Virgin Mobile-branded handsets, including but not limited to the Kyocera K10, (2) selling or otherwise providing to others software designed or intended to be used to tamper with the security software and/or operating software on Virgin Mobile-branded handsets, including but not limited to the Kyocera K10, (3) repackaging, shipping, distributing, selling, or reselling Virgin Mobile-branded handsets, including but not limited to the Kyocera K10 that have been so altered; and (4) exporting Virgin Mobile-branded handsets, including but not limited to the Kyocera K10.

93. For the reasons set forth herein, there is a substantial likelihood that Plaintiff will prevail on the merits.

94. The harm faced by Plaintiff outweighs the harm that would be sustained by Defendants if the preliminary injunction were granted.

95. Issuance of a preliminary injunction would not adversely affect public

interest and public policy.

96. Plaintiff is willing to post bond in the amount the Court deems appropriate.

97. Plaintiff asks the Court to set its application for preliminary injunction for hearing at the earliest possible time and, after hearing the request, issue a preliminary injunction against Defendants.

### **PERMANENT INJUNCTION**

98. Plaintiff asks the Court to set its application for injunctive relief for a full trial on the issues in this application and, after the trial, to issue a permanent injunction against Defendants.

### **PRAYER**

WHEREFORE, Virgin Mobile demands judgment:

A. Preliminarily and permanently enjoining Defendants from (1) hacking and reprogramming, or inducing or facilitating others to hack and reprogram, Virgin Mobile-branded handsets, including but not limited to the Kyocera K10; (2) selling or otherwise providing to others software designed or intended to be used to tamper with the security software and/or operating software on Virgin Mobile-branded handsets, including but not limited to the Kyocera K10; (3) repackaging, shipping, distributing, selling, or reselling Virgin Mobile-branded handsets, including but not limited to the Kyocera K10 that have been so altered; and (4) exporting Virgin Mobile-branded handsets, including but not limited to the Kyocera K10;

B. Awarding Plaintiff (1) all of Defendants' profits, gains, and advantages derived from its improper alteration and sale of Virgin Mobile-branded handsets, and that such sums be trebled pursuant to 15 U.S.C. § 1117; (2) all damages sustained by plaintiff as

a result of Defendants' wrongful acts, and that such damages be trebled pursuant to 15 U.S.C. § 1117; and (3) all of Plaintiff's costs in this action, including Plaintiff's reasonable attorneys' fees and expenses;

C. Awarding Plaintiff punitive damages for the tortious and unfairly competitive acts engaged in by Defendants under the common law of the State of Oklahoma; and

D. Awarding any such other and further relief as the Court shall deem proper.

Date: August 23, 2006

Respectfully submitted,

By: /s/ John H. Tucker  
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