

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

Reply Comments of

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I. The Commenting Parties

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

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

II. Introduction

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

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

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

III. Proposed Exemption

A. Summary

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

B. Supplemental Factual Support

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

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

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

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

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

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

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