



Electronic Frontier Foundation
Protecting Rights and Promoting Freedom on the Electronic Frontier

September 18, 2009

Robert Kasunic
Principal Legal Advisor
Office of the General Counsel
U.S. Copyright Office
101 Independence Avenue, SE
Washington, D.C. 20559-6000
Via email to rkas@loc.gov

***RE: 2009 DMCA Rulemaking/Response to Virgin Mobile USA's
Additional Written Response to the Copyright Office's Post-Hearing
Questions of June 23, 2009***

Dear Mr. Kasunic:

Thank you for the opportunity to respond to Virgin Mobile USA's ("VMU") additional written response to the Copyright Office's post-hearing questions regarding mobile phone recyclers ("Recyclers") application for an exemption to Section 1201(a)(1) of the Digital Millennium Copyright Act for handset unlocking (Exemption 5D).

I. INTRODUCTION

At the hearing of May 1, 2009, VMU told the Copyright Office that the chipset used in VMU's least expensive handsets requires the carrier lock to protect copyrighted works (such as ringtones, wallpapers and other copyrighted content), and that only more expensive chips would enable file-specific digital rights management technology ("DRM").¹ After the hearing, the Copyright Office posed the following question to the unlocking panelists, including VMU and Recyclers:

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

The record on this question is now clear. The record shows that VMU's

¹ May 1, 2009 Hearing Transcript ("TX"), pp. 130: 6-8; 134: 5-11; 200: 9-19; 201: 9-13; 220-21: 25, 1-11; 222: 3-6.

testimony was misleading at best. First, other manufacturers that use identical chipsets as VMU's least expensive handset were able to practically and inexpensively protect their copyrighted works without having to resort solely to the carrier lock. This clearly demonstrates that there are practical and cost-effective ways to protect copyrighted works using DRM separate from carrier locks. Further, VMU does not dispute this point in its additional response.

Second, VMU acknowledges its partial implementation of forward-lock DRM on its Oyst'r handset with the MSM-6050 chipset. This feature limits sharing/forwarding capability in specific folders at the device software level, thereby achieving some protection of copyrighted works separate and apart from the carrier lock.

Third, now and over the next three years, equally or nearly-equally inexpensive chipsets are and will be made available that accommodate DRM. In fact, VMU admits that the chipset incorporated into its least-expensive handset is being discontinued. The comparable chipset on the market is compatible with the Open Mobile Alliance's DRM specifications. As a result, VMU almost certainly will be selling handsets that have full DRM capability built in.

In short, reliance on the carrier lock is not necessary to protect copyrighted works. VMU's additional written responses support these conclusions. The sole matter in dispute is the irrelevant one of whether VMU has implemented file-specific DRM on its now discontinued Oyst'r handset. This disputed issue is immaterial to the question posed by the Copyright Office, whether there are practical and cost-effective means for inexpensive handsets to protect content. On that matter, VMU's submission and the uncontested evidence in the record demonstrates that the carrier lock is not necessary -- and will not be necessary during the next three years -- to protect content.

II. THE LEAST EXPENSIVE CHIPSETS ON THE MARKET TODAY AND IN THE NEXT THREE YEARS SUPPORT FILE-SPECIFIC DRM

Recyclers submitted information from independent technology analyst Carmi Levy that almost every phone chipset sold today includes hardware capable of implementing DRM separately from carrier locks. Mr. Levy's assessment is supported by the Open Mobile Alliance ("OMA"), which VMU recognizes as the leading industry forum for developing interoperable DRM for mobile handsets.² According to OMA's 2008 Annual report, 89% of handset models introduced by major handset vendors in 2006 support OMA DRM and 90% in 2007.³ Furthermore, OMA reports that 64% of mobile carriers implemented OMA DRM in 2006 and 100% in 2007.⁴ While there is a

² VMU's Supplemental Written Materials, Attachment A to its August 28, 2009 Letter to the Copyright Office ("Attachment A"), p. 2.

³ OMA 2008 Annual Report, Digital Rights Management Working Group *available at* http://www.openmobilealliance.org/News/2008_annual_report.aspx#specs

⁴ *Id.*

discrepancy between VMU's testimony and the OMA report, it is fair to say that VMU's failure to make use of OMA DRM is the exception, rather than the rule, now and in the future. VMU's choice not to use practical and cost-effective ways to protect its copyrighted works is purely a business decision by VMU and should not drive whether an exemption is appropriate under 1201(a)(1) for all handsets.

Moreover, despite its failure to embrace OMA standards, VMU nevertheless already takes steps beyond the carrier lock to protect copyrighted works from infringement. VMU admits that it limits sharing and forwarding capability in specific folders.⁵ This technique obviously provides some desirable protection for content, separate and apart from the carrier lock, regardless of whether the technique fully complies with OMA standards.

VMU's decision not to implement OMA DRM on VMU phones is of no import to the Copyright Office's decision on the proposed exemption. Though VMU claims that file-specific DRM is too expensive for low end handsets,⁶ the record shows that competing carriers using the very same chipset as VMU's Oystre (MSM-6050) separate the carrier lock from content DRM, a conclusion VMU does not dispute.⁷ Furthermore, other providers that supply no cost or inexpensive handsets to customers (e.g. Cricket Communications) support granting this exemption and find no connection between the chipsets in their phones and their ability to implement DRM.⁸

It is uncontested, then, that the market currently provides low- or no-cost handsets to consumers while protecting copyrighted content with DRM other than the carrier lock, and that the existing exemption has had no demonstrable negative effect on providers using the prepaid business model. Even with an exemption for phone unlocking on the books since 2006, VMU has continued to offer no- or low-cost handsets to its customers, while Recyclers, along with similar companies and bona fide owners of handsets, have been able to rely on an exemption for phone unlocking to mitigate legal risks arising from Section 1201(a)(1).⁹ During this time, VMU has successfully protected its rights against

⁵ Attachment A, p. 2.

⁶ VMU August 28, 2009 Letter to Robert Kasunic ("VMU August 28, 2009 Letter"), p. 3.

⁷ VMU August 28, 2009 Letter to Robert Kasunic, p. 2 ("VMU has not analyzed other carriers' handsets using the Qualcomm MSM-6050 chipset to determine whether they use DRM with that chipset and does not take issue with that part of EFF's Submission.")

⁸ Response of Cricket Communications, Inc. to the Register's June 23, 2009 Questions ("Cricket Response"), p. 1.

⁹ As this Office is aware, there are two court decisions out of Florida that purport to limit the 2006 exemption to non-commercial unlocking. 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). For the reasons stated in our 2009 application, we seek clarification in a new exemption that so long as the unlocking is for the purpose of lawfully connecting to a different network, the exemption applies, regardless of whether there is a commercial motive, like for the purpose of reselling the phone on the second hand market, as the

“bulk unlockers” by relying on breach of contract, trademark and assorted claims other than Section 1201(a)(1). By VMU’s own admission, it hasn’t lost a case yet.¹⁰

VMU’s options for employing file-specific DRM will only improve over the next three years. As VMU states, Qualcomm no longer supports its MSM-6050 chipset.¹¹ Recyclers’ and Cricket’s submissions show that Qualcomm’s next-generation inexpensive chipset, the QSC-6055¹², supports file-specific DRM and is already used in a range of handsets marketed by wireless service providers.¹³

VMU has taken issue with the accuracy of attorney William Quirk’s demonstration that an Oystre user could not copy sound files `walk_the_bubble.pmd` or `freeway.mid` from the Oystre handset. Counsel for Recyclers has asked attorney Quirk to examine VMU’s additional written submission to explain the discrepancy. Mr. Quirk has determined that that July 2009 testing was performed on an Oystre handset that included a different version of firmware (version 1110) than was included on the handset that VMU tested (version 1000).¹⁴ Thus, the screenshots from Mr. Quirk’s 2009 experiment look different than the screenshots VMU submitted in its supplemental written responses and Mr. Quirk drew his conclusions from those screenshots, which we included in Recycler’s responses to the post-hearing questions. VMU has more information about this matter than attorney Quirk’s independent testing can show, so we accept VMU’s assertion that disabling the carrier lock(s) on its current Oystre handset allows access to these sound files. Regardless of this experiment, the uncontroverted evidence shows that the purported choice between low-cost prepaid phones and copyright protection is a false one. Whether or not circumventing the carrier lock on the discontinued Oyster handset allows access to copyrighted works does not answer the Copyright Office’s question about whether there are practical and cost-effective ways to implement separate DRM on no- or low-cost handsets. The record clearly demonstrates that there are.

III. CONCLUSION

Over the next three years, as VMU starts to offer new phones, what will become of the Oystre and other VMU handsets already on the market? Legally requiring that these used phones remain permanently locked to VMU’s network is environmentally unsound. According to VMU, the Oystre handset was developed three or four years ago, and is no

Recyclers do.

¹⁰ TX, pp. 170-71.

¹¹ Appendix A, p.1.

¹² The chip is part of Qualcomm’s “Value Platform”. See April 5, 2006 Press Release, Qualcomm, Qualcomm Samples Single-Chip Solutions for Low-Cost CDMA2000 Handsets (Apr. 5, 2006) *available at* http://www.qualcomm.com/news/releases/2006/060405_samples_single_chip_print.html.

¹³ Cricket Response, p. 1.

¹⁴ Appendix A, p. 3.

longer manufactured.¹⁵ At the end of this new exemption period, the technology will be six or seven years old. Americans will have moved on to newer, more feature-rich handsets. Meanwhile, it will be up to Recyclers to repurpose billions of used phones with hundreds of different configurations from every carrier, including discarded Oyster phones. These handsets may well be attractive on the second-hand market here and in other countries, but if they cannot be unlocked, they will end up in landfill. In other words, while VMU has options for protecting copyrighted ringtones from any hypothetical infringement by unlockers, and for recouping subsidies from its customers¹⁶, Recyclers' ability to unlock is critical to managing the blight of unfashionable, but perfectly good, phones that would otherwise end up as trash for lack of an interested second-hand purchaser.

Finally, Recyclers have never suggested that VMU (or any other carrier) must implement multiple technological protection measures to enjoy protection under Section 1201(a)(1). To the contrary, the reason we are requesting an exemption is because we agree that Section 1201(a)(1) could be used to discourage handset owners from circumventing carrier locks. Our claim is that handset owners should be allowed to circumvent carrier locks in order to use the handset with a different service provider. If the carrier, the manufacturer and the content owners choose to protect content with only the carrier lock, that is a business decision, not a technological imperative, nor the kind of copyright-based rationale that deserves the protections of Section 1201(a)(1). The fact that the number of handsets that support full OMA DRM is approaching 100 percent¹⁷ makes clear that there is no copyright-based rationale for prohibiting circumvention of carrier locks.

¹⁵ Appendix A, p. 1.

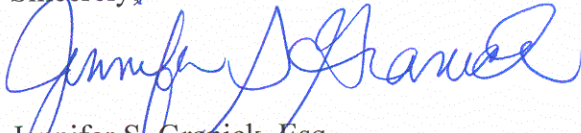
¹⁶ This non-copyright interest is not relevant to this proceeding.

¹⁷ OMA 2008 Annual Report, Digital Rights Management Working Group available at http://www.openmobilealliance.org/News/2008_annual_report.aspx#specs

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Thank you for the opportunity to address VMU's submission.

Sincerely,



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