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TracFone Sues Alleged Cell Phone Traffickers

By **Richard Vanderford**

Law360, New York (December 23, 2009) -- Cell phone company TracFone Wireless Inc. has filed a trademark action against an online cell phone marketplace in the company's latest attempt to stem the alleged hacking and overseas shipment of prepaid cell phones.

TracFone filed suit against Idaho-based Wireless Association LLC on Wednesday in the U.S. District Court for the Northern District of Texas, accusing the company of acting as a hub for business-to-business sales of cell phones that ultimately are shipped overseas and unlocked for resale.

TracFone subsidizes prepaid handsets that are locked for use on its own network, with the expectation of recouping its losses through the sale of airtime, according to the complaint.

The cheap phones have enticed a network of resellers and other players who buy up the phones en masse, hack them, move them through a distribution network — including Wireless Association's, TracFone alleges — and sell them overseas at a profit.

Wireless Association, which has several thousand members in more than 20 countries and operates wassociation.com, is accused of conspiring with the companies and individuals who list on its site. The members allegedly buy and sell the phones knowing they'll never be activated on TracFone's network, according to the complaint.

"Instead, the phones are computer hacked," TracFone said in the complaint.

Wireless Association is accused of contributory trademark infringement, contributory copyright infringement, harming TracFone's good will, and civil conspiracy and unjust enrichment in violation Texas common law.

So far, TracFone has filed more than 100 actions to try to stop the sales at various points in the distribution chain, though this is the first action taken against a listing site, said TracFone attorney James Baldinger of Carlton Fields PA.

The position TracFone takes is that "every person in that chain is part of the conspiracy," Baldinger

told Law360.

"It's all done with the intent of profiting from the subsidies that TracFone invests in its phone that are intended to benefit legitimate consumers, in fact, to benefit customers who are least able to afford cell phones," Baldinger said.

Many prepaid customers, who often are among the poorer cell phone users, would be hurt if TracFone can't contain the trafficking and is forced to raise the cost of phones, Baldinger said.

The men who run Wireless Association maintain that they are not doing anything wrong.

"Basically, the [TracFone] business model is not efficient, so there are people out there that took advantage of TracFone loopholes," said Piotr Babichenko, a partner in Wireless Association.

"TracFone doesn't want to change their business model for one reason or another, so instead of closing down those loopholes they're going through the legal system to sue companies that can't really defend themselves," Babichenko said.

Wireless Association does not unlock cell phones itself, but the legality of unlocking a cell phone is still up in the air in any case, Babichenko said.

Beyond their battle in the courtroom, TracFone and its detractors have each mounted public relations campaigns online. TracFone has set up Stopcellphonetrafficking.com, complete with photographs of "runners" with dozens of phones. Babichenko has established Stoptrac.com, which criticizes the company's purportedly abusive legal tactics.

TracFone won a victory in July when a judge in the U.S. District Court for the Southern District of Florida allowed its suit against a company that allegedly bought phones and resold them after unlocking them.

The "shrinkwrap contract" — terms and conditions on the packaging that bar tampering with the software on the phones — was binding, the judge said. In September the defendant company agreed to the entry of a permanent injunction barring it from modifying phones.

TracFone has 12 million subscribers and bills itself as the largest prepaid company in the U.S.

Carlton Fields PA and Higier Allen & Lautin represent TracFone in this matter.

Representation information for Wireless Association was not available.

The case is Tracfone Wireless Inc. v. Wireless Association LLC et al., case number 09-cv-2442, in the U.S. District Court for the Northern District of Texas.

--Additional reporting by Ryan Davis

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