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TELECOMMUNICATIONS

Phone tactic rings up lawsuits

Pamela A. MacLean / Staff reporter

August 20, 2007

Prepaid wireless seller TracFone Wireless Inc. has launched an aggressive litigation tack to block bulk purchases of its cellphones because the phones vanish overseas where the software is unlocked, allowing users to sign up for non-TracFone air time.

TracFone, the nation's largest independent seller of pay-as-you-go cellphone service, makes its profit by selling the prepaid minutes used by phone customers on TracFone's system — not from its cellphones, which it sells below cost.

But it has found itself victim of entrepreneurs who go from store to store buying the low-cost phones in bulk and reselling them at a big profit overseas.

So far the Miami-based company has filed 11 lawsuits in Florida and Texas, naming consumers in California, Georgia, Indiana and Oklahoma, alleging trademark and copyright violations, breach of contract, conspiracy and unjust enrichment, according to James Baldinger, TracFone attorney in the West Palm Beach, Fla., office of Tampa, Fla.-based Carlton Fields.

He expects the current crop of cases to settle and already has six injunctions against bulk buyers. But this is only the beginning. "We are identifying other hot spots in the country and it looks like the Northeast and California are particularly troublesome areas," he said.

Unlocking phone software for individual use is not illegal under recent changes in the Digital Millennium Copyright Act (DMCA). Congress exempted just such cellphone unlocking from provisions of the DMCA in December on the theory that it would unleash competition. Americans would have the option of switching providers, a common practice outside the United States. TracFone abandoned a challenge of the DMCA copyright exemption for unlocked phones earlier this year.

Dallas attorney Molly Richard of the Richard Law Firm represents defendants in five Texas cases and expects them all to settle, but added, "I think TracFone is dead wrong."

The DMCA allows individuals to unlock the phone to switch carriers, so why wouldn't it allow consumers who buy a lot of phones to arbitrage the price difference for resale, she asked.

TracFone's cases includes a novel legal theory that essentially everyone engaged in buying TracFones and reselling them is engaged in a conspiracy against the company, according to Richard.

And they claim consumers are bound by the terms of the contract inside the phone box, which can't be seen until opened, and by the fine print on the outside of the box. "The theory is: What is on the package binds consumers to a contract," Richard said.