

Why aren't we protecting the rights of cell phone owners?

This is a response to CRTC 2012-206¹ by Russell McOrmond².

Summary

Cell phones are being sold in ways that cause confusion as they are not being treated similar to other property. Very different transactions such as selling, rental and rent-to-own are being conflated. This market distorting misinformation should be stopped, and retailers should be forced to be transparent about whether they are selling the cell phone or renting it. A sale must involve a transfer of all ownership rights as well as any keys to any locks placed on the phone, otherwise the transaction should not be allowed to be considered a sale.

While the CRTC prefers to rely on market forces, this requires that consumers are not being misled about what types of transactions are occurring. It is impossible to have a legitimate market for cell phone purchases or rentals if cell phone users are unable to accurately differentiate between the two.

Multiple Locks on Cell Phones

The lock most people are familiar with is the lock that ties the cell phone to a specific phone carrier. This lock can exist on cheap feature phones all the way up to expensive smart phones. Choosing a competing cell phone provider requires that the carrier lock be removed.

Some cell phone manufacturers add a lock which ties to the device manufacturer the ability to choose and install software. Owners are not able to install software that competes with or for any other reason is not authorized by the manufacturer. Choosing a competing software supplier requires the manufacturer lock be removed.

While these locks are sometimes independent of each other, on some phones unlocking the carrier locks requires unlocking the manufacturer lock. Both of these locks create considerable market distortions that are harmful to competitors as well as the owners of the cell phone.

Handing over the keys

The purchasing of a home most often involves a ritual of going to a lawyer's office and being handed the keys. The handing over of the keys is an important part of the transfer of ownership of something that is locked. This needs to be as true of cell phones as it is of homes, where a sale of a cell phone involves handing over the keys to any locks placed on the phone

¹ Press release <http://crtc.gc.ca/eng/com100/2012/r120404.htm> and notice <http://crtc.gc.ca/eng/archive/2012/2012-206.htm>

² Full contact details at <http://flora.ca/#contact>

by any previous owner.

This means that any lock, whether the carrier lock or a manufacture lock, should be unlocked or keys provided as part of the sale. If **any** previous owner is unwilling to hand over the keys, then the transaction should not be allowed to be mislabelled a sale and is in fact some form of rental.

It may be an unlimited time rental agreement where the property is never intended to be returned to its owner, but this relationship needs to be transparently understood as being a rental and regulated appropriately.

In the case of homes we have a large body of law regulating the complex relationship between landlord and tenant. As more of our lives are embedded within mobile computers, the relationship between the citizen using the device and the effective owner (the entity with the keys) will need similar regulation to ensure that the rights and responsibilities of each party are protected. A mobile computer rental agreement is closer in complexity to a home rental, given the privacy and other implications, than it is to a vehicle or movie rental.

We must have limits on the freedom to contract to disallow any previous owners from claiming that a "sale" has taken place when keys are not handed over. Existing Canadian legislation, such as the Canadian Personal Information Protection and Electronic Documents Act, prohibits the condition of the supply of a product or service on a person waiving their privacy rights. This should apply to cell phones and cellular service where the purchase of the cell phone or hiring of phone service can not be conditioned on waiving the rights of technology owners to maintain any keys or remove any locks which have been applied to their property.

Price of key transfer

It is not reasonable to charge a \$30 service charge to hand over the keys. For a feature phone which only costs \$40 to buy unlocked, or even when it is 10% of a \$300 phone, this is ludicrous. We would never tolerate a \$20,000 cost to transfer the keys or otherwise unlock a \$200,000 home, and we should not be tolerating this with cell phones.

Any alleged cost of unlocking and/or transferring the keys of a cell phone should be built into the sale price such that there is no additional cost to unlocking the device once ownership has been transferred from the retailer. This should include within any rent-to-own contract agreement that subsidizes the eventual hardware purchase.