

April 25, 2018

Mr. Ian Pannell
Chief Engineer, GSM Association
Floor 2, The Walbrook Building
25 Walbrook
London, EC4N 8AF
United Kingdom

Dear Mr. Pannell:

The undersigned organizations write to express our concern about the current discussions within the Global System Mobile Association (GSMA) on developing standards for eSIM technology, and to encourage GSMA to preserve consumers' ownership and portability rights over their mobile devices. We have been informed that some phone carriers are seeking to put into these standards anticompetitive restrictions on consumers' ability to transfer eSIM phones from one carrier to another. We note that the Department of Justice is reportedly investigating this as a potential violation of the antitrust laws.¹

We believe that the GSMA has an obligation to respect ownership rights for individuals that give them the ability to freely choose to transfer their device to a different carrier's network. As a result, we are writing to request more information about the regulation of eSIM cards and to ask GSMA to commit to ensuring that all users are able to port their devices across compatible networks.

Currently, most phones make use of a physical SIM² card. SIM cards are integral to the functioning of cellular phones: they contain the subscriber information of individual phone users and identify the users to the network.³ Due in part to the high premium on space inside smartphones, companies have increasingly been moving to using embedded SIMs (eSIMs) in their products. eSIMs are chips that are soldered directly onto the circuit boards of the connected device, removing the need for a physical card slot and SIM card.⁴ With an eSIM, the user is able to select multiple mobile networks without needing to physically change the SIM card, as we currently do.⁵

¹ Cecilia Kang, *U.S. Said to Investigate AT&T and Verizon Over Wireless Collusion Claim*, N.Y. TIMES (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/technology/att-verizon-investigate-esim.html>.

² SIM is an acronym for Subscriber Identity Module.

³ Patrick Mutabazi, *The End of an Era for the SIM. Welcome eSIM*, EMBEDDED SEC. NEWS (July 13, 2017), <https://embeddedsecuritynews.com/2017/07/the-end-of-an-era-for-the-sim-welcome-esim/>.

⁴ *Id.*

⁵ *Id.*

Essential to the functioning of the eSIM is the ability for information on the eSIM to be compliant for and re-writable by all operators, allowing a user to change from one phone carrier to another. Since eSIM technology does not require a new physical SIM card to be inserted, in theory it should be easier for consumers to move to a new service provider.⁶ eSIM technology has many benefits to the consumer, beyond shortening the lag time in switching to a new provider. Embedded SIM cards would make it easier for a user to switch to a new device;⁷ give devices a sleeker look because there will be no need for a SIM card slot; make devices easier to waterproof, also due to the elimination of the need for a SIM card slot; and, allow users to compare networks and select a new carrier directly from the device.⁸

While we look forward to the prospect of additional benefits that eSIM technology can bring to consumers, we worry that the switch to embedded SIM cards could give carriers a new opportunity to erode consumers' ownership rights over their devices and to block any unlocking of these devices. As you may be aware, in the United States, the intrinsic right to unlock a mobile phone (i.e., to enable it to be readily connected to a different carrier's wireless network) is embodied in an exemption to the anti-circumvention prohibitions in the Digital Millennium Copyright Act (DMCA). Exemptions to the DMCA have to be reconsidered by the Librarian of Congress every three years. This exemption is now well-established. It was granted in 2006,⁹ was renewed in 2010,¹⁰ was reinstated by an Act of Congress¹¹ when the Librarian declined to renew it in 2012,¹² and was renewed in 2015.¹³ And in the current pending review, renewal has already been recommended, on an expedited consideration.¹⁴ It is unclear whether or not this exemption as written would confer the same unlocking rights with respect to eSIM technology, or would have to be adapted. But the underlying justifications for an exemption would seem to apply equally.

In light of the emerging technology of embedded SIM cards, we applaud the GSMA for undertaking enormous steps to align all ecosystem participants on a standardized reference architecture for eSIMs over the past several years. However, we are concerned about phone carriers' efforts to restrict consumers' ownership of their devices by blocking the rewriting of eSIMs to allow for the transfer of a phone from one carrier to another.

⁶ *Id.*

⁷ It will be easier for consumers to upgrade because they would not require a new SIM card, but rather can just register the new device.

⁸ *Id.*

⁹ 37 C.F.R. § 201 (2006), available at <https://www.gpo.gov/fdsys/pkg/FR-2006-11-27/pdf/E6-20029.pdf>; Williams Pelegrin, *Unlocking Your Phone is Legal Again: What You Need to Know*, DIGITAL TRENDS (Feb 11, 2015), <https://www.digitaltrends.com/mobile/unlocking-your-new-smartphone-is-now-illegal-what-you-need-to-know/>.

¹⁰ 37 C.F.R. § 201 (2010), available at <https://www.gpo.gov/fdsys/pkg/FR-2010-07-27/pdf/2010-18339.pdf>.

¹¹ Pub.L. 113–144, available at <https://www.gpo.gov/fdsys/pkg/PLAW-113publ144/html/PLAW-113publ144.htm>.

¹² 37 C.F.R. § 201 (2012), available at <https://www.gpo.gov/fdsys/pkg/FR-2012-10-26/pdf/2012-26308.pdf>.

¹³ 37 C.F.R. § 201 (2015), available at <https://www.gpo.gov/fdsys/pkg/FR-2015-10-28/pdf/2015-27212.pdf>.

¹⁴ 33 C.F.R. § 117 (2017), available at <https://www.gpo.gov/fdsys/pkg/FR-2017-10-26/pdf/2017-23038.pdf>.

We have heard that the global cell phone carriers have pushed for a voluntary standard that would prevent users from wiping the phone, thus deleting the eSIM software, in order to take the phone to another carrier. Moreover, North American carriers are pushing to make this a mandatory policy for their region. We are concerned that this move would erode consumers' ownership rights over their devices and further exacerbate the unequal bargaining power consumers have in the marketplace. A mandatory policy that restricts unlocking would also be in conflict with a 2013 voluntary agreement made by the members of the Cellular Telecommunications and Internet Association (CTIA), which includes AT&T, Verizon, US Cellular, T-Mobile, and Sprint, to make it easier for consumers to unlock their devices. This agreement went into effect in 2015.¹⁵ In addition, barriers to phone unlocking would also cause problems for international travelers who may wish to temporarily switch to a new carrier while traveling, which would affect both US residents and non-US residents. We believe that the GSMA has the chance to secure ownership rights for individuals that give them the ability to freely choose to transfer their device to a different carrier's network.

We believe the work GSMA is doing could have enormous benefits for consumers, and as representatives of consumer interests with the shared goal of the success of this technology, we hope to begin an open dialogue about the coming eSIM evolution in the United States. We ask that the GSMA confirm that neither current standards nor those being discussed will inhibit consumers' ability to change carriers. In addition, please share with us information on official discussions, standards development documents, and any guidance currently available for North American carriers and consumers on eSIM and remote provisioning, so that we may effectively advocate for the rights of the consumer in the mobile phone marketplace. We urge the GSMA to reject any rules that would prevent consumers from exercising those rights.

Signed,

Consumers Union

Center for Democracy & Technology

Public Knowledge

¹⁵ Andrew Couts, *Top Five US Carriers Agree to Let You Unlock Your Cell Phone*, DIGITAL TRENDS (Dec. 12, 2013), <https://www.digitaltrends.com/mobile/top-5-us-wireless-carriers-agree-let-unlock-cell-phone/>.