

Federal Trade Commission Workshop on Mobile Marketing

On May 6 and 7, 2008, the Federal Trade Commission held a workshop titled “Beyond Voice: Mapping the Mobile Marketplace” to discuss the evolving mobile commerce marketplace and its implications for consumer protection policy. Panelists included industry experts, government regulators, privacy professionals, academics, and consumer advocates.

The discussion focused on business and legal trends relevant to the mobile marketplace, including the adaptation of advertising to mobile commerce, government enforcement in the mobile marketplace, and industry best practices. This Client Advisory summarizes the key points discussed during the two-day workshop.

MOBILE MARKETING AND EMERGING TRENDS

Industry representatives and other panelists discussed the components of the mobile marketplace and shared the latest advances in mobile technology. Specifically, panelists discussed the large-scale adoption of text messaging in addition to traditional voice communications, the increasing use of interactive and incentive-based marketing to mobile devices, consumer use of mobile devices to browse the Web, and the various types of premium downloadable content available in the marketplace – including ringtones, ringbacks, wallpaper, and games. In addition, panelists addressed emerging technological, economic, marketing, and social trends related to the mobile marketplace.

Mobile Devices Competing with PCs

Several panelists provided live demonstrations of the latest mobile technologies and underscored that, despite their small size and traditionally basic functions, many

modern-day mobile devices are nearly as powerful as PCs from the early 2000s. Consumers can use their mobile devices to perform many of the same functions which were traditionally limited to PCs and more, including accessing various software applications, surfing the Web, and using location-based technologies to personalize searches and results.

Market Saturation for Voice Communications

One explanation that panelists provided for the recent boom in mobile commerce is economic necessity on the part of wireless carriers. With intense market competition driving down the price of voice minutes, the average revenue per user has declined and future growth is limited by market saturation. As a result, wireless carriers have an economic need to increase data and other non-voice usage of mobile devices among their customer base.

Mobile Marketing to Young Users

As consumer use of mobile technology has grown, many companies have also increased their incorporation of that technology into marketing campaigns. Panelists noted that, while many marketers have traditionally avoided using mobile devices as a primary medium for advertising due to anticipated consumer backlash, marketers have recently seen a positive response to mobile marketing in the younger, college-aged demographic – particularly with respect to highly relevant, incentive-based campaigns. Further, mobile marketing has not been limited to sending promotional materials directly to consumers’ mobile devices; marketers have adapted traditional media such as television and billboards to interact with mobile devices by providing consumers with short codes that they can use to participate in polling or obtain free promotional content downloads such as games.

Text Messaging and Personalization

In addition to technological, economic, and marketing trends, many panelists addressed the cultural and social trends emerging from the use of mobile devices. Specifically, consumers have shifted away from using mobile devices solely for traditional voice communications, and text messaging is now the most pervasive mobile content application. Further, several panelists who presented demographic and trend information noted that, especially among younger users, the mobile device has evolved into a means of self-expression. Consumers are using ringtones, ringbacks, wallpapers, “phone bling,” and other offerings to enhance the personalized nature of their mobile devices.

CONSUMER PROTECTION ISSUES

The workshop also focused heavily on regulatory and other consumer protection-related concerns stemming from the growth of mobile marketing.

Unwanted Text Messages

The FTC staff specifically asked speakers to address the problem of unwanted text messages, including current efforts to combat text message spam and how consumers can prevent it. Panelists described the filtering technologies used by wireless carriers and other service providers to prevent text message spam from reaching customers’ inboxes and also noted the use of civil litigation to halt spammers’ activities, which could potentially violate the CAN-SPAM Act, the Computer Fraud and Abuse Act, the Telephone Consumer Protection Act, and related state laws. In addition, consumers can take a proactive approach to combating spam by blocking all text messages or placing a more tailored block on text messages originating from an e-mail address.

Premium SMS Advertising

William Haselden of the Florida Attorney General’s office addressed the agency’s recent enforcement activity in the mobile space, particularly with respect to premium SMS advertisements describing content as “free” or “complimentary.” Mr. Haselden noted that,

while smaller affiliates and third party publishers are often the source of deceptive advertising for premium mobile content, his office would maintain its regulatory focus on the larger wireless carriers, content aggregators, and advertising networks in an effort to affect the larger revenue chain and regulate the conduct of affiliates and publishers using a top-down approach.

The discussion was particularly timely in light of a \$3 million settlement between the Florida Attorney General’s office and AT&T earlier this year regarding advertising for premium mobile content. One of the AT&T settlement provisions required that price and billing period disclosures appear “immediately adjacent to” the phone number and PIN-code submit fields on Web advertising for premium content. During the FTC workshop, Mr. Haselden provided specific guidelines on how to comply with this and similar disclosure requirements, revealing a “three-zone system” developed by his office. For example, according to Mr. Haselden, price and billing period disclosures must appear in “Zone 1,” defined as within 125 pixels in any direction from the submit field. The disclosures must be in at least 12-point font, possess sufficient color contrast with the background, and use a numerical format to display price. For persons interested in obtaining more detailed information regarding the Florida Attorney General’s disclosure requirements and three-zone system, the FTC staff has represented that Mr. Haselden’s presentation will be available online at www.ftc.gov (under the “News” tab, select “Webcasts”).

Location-Based Services

A panel of speakers addressed the privacy and other consumer protection-related issues associated with the use of location-based services. Industry representatives, consumer groups, and privacy professionals discussed the importance of user notice and consent, acknowledging the industry Best Practices and Guidelines for Location-Based Services recently published by CTIA – The Wireless Association®, a trade association of wireless carriers, equipment manufacturers, and other service and application providers. Some panelists voiced

concern that consumers fail to fully understand the trackable nature of their wireless devices. Finally, the panelists addressed the lack of any uniform legislation regulating location-based services and discussed the legal standards that should apply to the government when seeking access to real-time and historical location information on citizens.

Children and Teens

Several panelists and audience members noted an apparent conflict between marketing content and services to minors who lack the competence to enter into legally-binding contracts. A panel discussion on marketing to children and teens focused on the need for effective age verification mechanisms, robust notice and opt-in processes (even for actions not triggering a premium charge), and sufficient parental controls. The panelists also described the variety of parental controls currently available through wireless carriers such as blocking and filtering capabilities, as well as all-inclusive and prepaid options. In addition, the discussion covered issues related to the use of mobile devices among young children and “tweens” in school, balancing safety concerns against the need to prevent distractions and maintain order in educational environments.

Security Issues

A panel of industry experts addressed issues relating to mobile device security, including malware and other technological threats to government and consumers. While the panelists acknowledged security threats such as viruses, network attacks, and phishing, they noted that such hi-tech threats in the mobile marketplace have been relatively uncommon. Instead, the discussion focused primarily on the day-to-day risk of consumers losing their mobile devices and forfeiting personal, business, or other sensitive information. To minimize the risk and severity of mobile security threats, panelists recommended that consumers disable any capabilities not in use (*e.g.*, Bluetooth), password-protect their mobile devices, and refrain from using mobile devices to store sensitive information such as passwords and

account numbers. They also noted that prior to recycling or disposing of a mobile device, consumers should wipe out the memory, remove the SD card (if external), or physically destroy the device to prevent unauthorized access to sensitive information.

One panelist predicted that the greatest security threat to mobile devices in the future would be over-the-air (“OTA”) updates from unknown third party hackers instead of the normal manufacturers, carriers, or software providers who typically provide such updates. The panelists were in general agreement that, in the future, mobile devices should come with security software preinstalled and Bluetooth turned off by default to increase the security of mobile devices “out of the box.”

BEST PRACTICES

Toward the end of the workshop, representatives from various industry groups participated in a session dedicated to discussing best practices applicable to mobile marketing. The panelists identified and described several existing and forthcoming voluntary guidelines for entities participating in the mobile marketplace.

Mobile Marketing Association Best Practices

The Mobile Marketing Association (“MMA”) reissues updated guidelines every six months based on input from the MMA Consumer Best Practices Committee and global public forums. The MMA Code of Conduct, Consumer Best Practices, and Mobile Advertising Guidelines provide voluntary standards relating to advertising claims, disclosures, opt-in processes, and other issues relevant to the mobile space. MMA president Laura Marriott stated that the organization plans to release a new version of its Consumer Best Practices, which will provide more robust guidelines for mobile marketing to children and teens, during the second week of June. Further, Ms. Marriott noted that in addition to industry-wide monitoring of the mobile marketing process flow, several wireless carriers have also implemented programs to monitor in-market collateral and have disabled or terminated specific campaigns for noncompliance with MMA guidelines.

Forthcoming Best Practices from Other Organizations

In addition, panelists from the Interactive Advertising Bureau (“IAB”) and the Organisation for Economic Co-operation and Development (“OECD”) indicated that their representative agencies were developing best practices documents relevant to the mobile marketing industry. The IAB guidelines will focus on best practices for interactive advertising, while the OECD guidelines will address three specific issues:

1. Disclosure requirements;
2. Advertising to minors; and
3. Unauthorized use and security of mobile devices.

REQUEST FOR COMMENTS

The FTC is accepting comments regarding the topics and issues addressed at the mobile marketing workshop through June 6, 2008.

Please be advised that attorneys in Kelley Drye & Warren’s Advertising Law Practice Group have broad experience at the FTC, the offices of state attorneys general, the National Advertising Division (“NAD”), and the networks; substantive expertise in the areas of advertising, promotion marketing and privacy law, as well as consumer class action defense; and a national reputation for excellence in advertising litigation and NAD proceedings. We are available to assist clients with developing strategies to address issues contained in this Advisory.

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