

As mobile apps grow, so do potential problems

October 2012

By ALAN S. WERNICK, ESQ.

T: 847.786.1005 – E: ALAN@WERNICK.COM

Computer applications for mobile devices (i.e., "mobile apps") are becoming as ubiquitous as mobile phones. Perhaps you may fondly remember a time when the primary (if not sole) function of a mobile phone was to make and receive phone calls. Of course, not too long before that, the distance one could travel with a mobile phone depended upon the length of the phone wire attached to the phone. Today, mobile apps provide increasingly numerous functions for mobile phones to interact with you as well as with other devices. All of those mobile apps and all of those interactions have significant business, technology and legal implications.

Turning our focus to the legal implications opens up a wide array of legal issues and concerns. For instance, mobile app issues can include copyright, trademark, patent, trade secret, contract, tort, privacy, Children's Online Privacy Protection Act (COPPA), CAN-SPAM, Federal Communications Commission (FCC), Federal Trade Commission (FTC), licensing, open source and class-action legal issues, to name a few. These issues concern not only manufacturers of mobile phone devices but developers as well.

Patents

This column could be devoted entirely to the recent jury decision in the patent infringement case involving Apple and Samsung. *Apple Inc. v. Samsung Electronics Co.*, (USDC, ND, CA, Aug. 24, 2012). A jury awarded Apple \$1.05 billion in damages after finding that Samsung infringed on several of Apple's patents. We have not heard the last of that case or the impact of intellectual property laws on the evolution of mobile apps. The lesson for mobile app developers (and mobile device manufacturers) is to be aware of the patent pool in which your technology is designed to play, and act proactively in understanding and protecting your intellectual property rights and promptly if you become aware of possible infringing activity.

Promissory fraud

One recent case example of tort law interacting with mobile apps involves the manufacturer of a mobile phone announcing that it was going to upgrade the operating system of its mobile device. A consumer purchased the mobile device allegedly in reliance on that representation only to find (after the 30-day return policy expired) that the manufacturer was not going to provide the upgrade. In *Haught v. Motorola Mobility, Inc.* (Aug. 23, 2012), the U.S. District Court for the Northern District of Illinois, in denying a motion to dismiss a class-action lawsuit, held " ... because Haught alleges that he reasonably relied on Motorola's misrepresentations of future conduct regarding the proposed upgrade of his mobile phone's operating system in deciding not to return his phone, he has properly stated claims of promissory

fraud and unjust enrichment based on a scheme or device to defraud that are plausible on their face." This court decision is early in the litigation process of this lawsuit, the ultimate outcome of which will need to be determined on its merits. Nonetheless, this case provides an example of how promissory fraud (tort) issues may arise with mobile devices.

Privacy

On May 25, 2012, the FCC announced an inquiry into privacy and security of information stored on mobile communication devices. The public notice solicited comments regarding the privacy and data-security practices of mobile wireless service providers with respect to customer information stored on their users' mobile devices and the application of existing privacy and security requirements to that information. The FCC is seeking to "refresh the record" concerning these mobile devices including:

- How have those practices evolved since the FCC collected information on this issue in the 2007?
- Are consumers given meaningful notice and choice with respect to service providers' collection of usage-related information on their devices?
- Do current practices serve the needs of service providers and consumers and in what ways? and
- Do current practices raise concerns with respect to privacy and data security?

The answers to these questions, and others, will affect mobile wireless service providers and mobile app developers. The FTC and other regulators are also looking into privacy issues concerning mobile apps. As wireless service providers and mobile app developers become stewards of sensitive customer and business data, including personal identifying information, how will the law and regulations evolve? Will wireless service providers and mobile app developers be viewed differently or the same as Internet service providers?

What these developments mean for mobile app developers and the businesses hiring mobile app developers is that they, and their legal advisers, need to be mindful of the evolving legal issues as they develop and release their mobile apps. When the subpoena is served with the complaint alleging violations of these and other legal rights, this is not the time to ask, "Is there an app for that?" to wish away the pending legal liabilities. The bottom line is that mobile app developers and businesses hiring mobile app developers need to consider the business, technology, and legal aspects of the mobile app.