

The Metropolitan Corporate Counsel

www.metrocorpcounsel.com

Volume 16, No. 9

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September 2008

New Developments In Communications: Mobile Commerce

The Editor interviews Henry T. Kelly, Managing Partner of the Chicago office of Kelley Drye & Warren LLP.

Editor: You and your firm represent many technology-based companies, particularly in the communications area. How did you become involved in this area?

Kelly: I have been representing communications companies since I graduated from law school in 1987. At the time, there were virtually no communications lawyers in the Midwest. All of the communications attorneys were either based in Washington, D.C., or were in-house attorneys at the large telephone companies like AT&T, MCI and then-Ameritech. As competition in the communications industry grew, other companies, like Sprint and paging companies, needed counsel in regions other than Washington, D.C. We were contacted by clients and attorneys in Washington, looking for anyone with an interest in the communications industry.

Editor: Why did you join Kelley Drye?

Kelly: I joined Kelley Drye because I was attracted to its prominent communications practice in D.C., and its reputation in Chicago for representing technology-based companies. The Kelley Drye office in Chicago represents clients that have the need for technology-based counsel, on issues like Internet security, trademark and protection of intellectual property rights. Our corporate group also tends to represent technology companies, or venture capital groups that have inter-



Henry T. Kelly

ests in high-tech companies.

Editor: What are some of the important new developments in the communications field?

Kelly: The really hot area these days is mobile commerce. A number of studies show the dramatic growth in mobile commerce. They all show that there is tremendous growth in the use of the wireless spectrum for commercial transactions. One recent study by the Nielson Company estimated that over 9 million U.S. mobile subscribers have already used their mobile phones to pay for goods and services. Many of these subscribers have purchased ring tones and wireless games, but as the platforms for mobile payment become more robust, businesses will find that they will have access to

consumers virtually anywhere, and at any time, and will find opportunities to market their goods and services through these mobile devices.

Editor: What technological developments are facilitating the expansion of mobile commerce opportunities?

Kelly: I believe two developments are driving the increase in mobile commerce opportunities, but they are more policy and competitive developments than purely technological. In February 2008, the Federal Communications Commission auctioned licenses to wireless carriers to use the 700 MHz frequency. This frequency is still being used to broadcast television programs on a few UHF channels, but with the FCC's switch to digital broadcast requirements, the 700 MHz frequency will be made available to wireless carriers. The 700 MHz band will enable service providers to deploy higher-performance mobile broadband services over greater distances than the services they offer today. For example, Qualcomm owns a small slice of the 700 MHz spectrum that had previously been auctioned, and is deploying mobile television over the frequency.

The second major development is related to the FCC's auction for the 700 MHz frequency. When the FCC made the spectrum available, it required the wireless carriers that obtained the licenses to make the frequencies available to devices manufactured and sold by companies other than the holders of the licenses for the frequency. This would allow, for example, an end user to use the wireless frequency with a device not issued or

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manufactured by the owner of the license.

Verizon was the successful bidder on most of the 700 MHz frequency, and has committed to open its network to other devices. The FCC's insistence that owners of the 700 MHz frequency provide this type of "open access" to their networks has spurred other carriers to now do the same for their existing spectrum. Verizon Wireless, T-Mobile and AT&T now all have plans to make portions of their spectrum available to devices other than their own cell phones.

Editor: Will the new technology be used primarily for consumer devices, like the iPod?

Kelly: Certainly in the future consumer products that will take advantage of the open broadband networks will begin to be deployed. I would expect, for example, gaming devices will be able to take advantage of the open wireless spectrums. However, just as important is the availability of this spectrum for business applications. For example, Verizon Wireless has certified a new device that acts as a sensor for large storage tanks (such as construction-site diesel tanks) which communicates with another device to serve as an alarm when the tank is running low.

This is just one very simple example of the possibilities that may exist with open wireless networks. T-Mobile has also announced plans to launch its "open development" platform to make its spectrum available. The "open access" for the spectrum will create a host of new devices that will take advantage of the available spectrum. Not all devices will exchange information with a person – some devices will just exchange information with other devices.

When this open access to the spectrum is combined with that increase in the capacity of the spectrum, like the 700 MHz frequency, there are an endless number of "mobile commerce" devices that can be developed for both businesses and consumers.

Editor: Will the wireless carriers themselves be creating these new mobile commerce opportunities?

Kelly: I don't believe they have the ability or desire to provide all these devices and services on their own. What will hap-

pen is that there will be new relationships developed among the wireless carriers who have licenses to use the spectrum, the device manufacturers, and the service providers, each of whom will be driving products to consumers and businesses. There will also be intermediaries or portals, particularly where consumers are involved, which will facilitate the commercial opportunities.

It's still unclear though how each of these sometimes competing interests will interact with each other. For example, under the FCC's rules for the 700 MHz auction, the licensee must allow any device compatible with basic standards to transmit and receive data on the network, and may not discriminate or give preferential treatment in the transmission of the data. However, wireless carriers still have the need to manage their networks, which may require some bytes of data to get priority over other bytes.

Editor: Do these issues raise any legal concerns that users of these mobile commerce opportunities should be aware of?

Kelly: Absolutely. Obviously, the first thing that comes to mind is data security. We know that no matter how hard software developers try to encrypt data to maintain its security, there will be instances where information is compromised. There are numerous statutes and regulations that govern the security of data, but many of these statutes do not contemplate the duties or liabilities associated with mobile or wireless devices.

For example, the FTC has the ability under Section 5 of the FTC Act to bring complaints against companies that it believes are not taking adequate measures to protect consumers from security breaches. The FTC has alleged that it is an unfair or deceptive trade practice for businesses to not adequately protect consumers' private information, such as credit card numbers and social security numbers.

But these statutes and regulations were not really designed to regulate the wireless exchange of information. Generally, there are few safe harbors in the regulations that businesses can rely on in developing their products and services to take advantage of the technology. As a result, many of the questions about duties to consumers and what may give rise to lia-

bility is completely undefined.

There are privacy concerns as well. Today, companies can very easily track consumers and collect data about their location. Companies can deliver advertisements or products directly to consumers, tailored specifically to their locations in a city, or even in the aisle of a store. There is a federal law that protects the "consumer's proprietary network information" or CPNI, but the duties under that law really only apply to the carriers. At the national level, there are no broad-based consumer privacy regulations that specifically govern other companies' use of this type of information.

Editor: How will businesses that provide some form of mobile commerce services be able to protect themselves against liability?

Kelly: There are certainly no clear answers, and the uncertainty is created by the beauty of the mobile wireless devices. One of the reasons that mobile commerce is so attractive is that the wireless devices are small, and can be carried with consumers just about everywhere. However, this creates additional hurdles. For example, everyone is familiar with the "click-wrap" contracts, where contractual relationships can be created by the consumers clicking boxes on their computers to evidence consent to the terms and conditions of licensing agreements to use software. Courts have held some of the terms of these "clickwrap" agreements to be invalid, and given the size of the screen on most mobile devices, it will be even more challenging for businesses to create the proper terms and conditions for mobile devices.

Editor: What is next on the horizon for mobile commerce?

Kelly: Because mobile commerce is in its infancy, much of its future applications will depend on how quickly the carriers can deploy broader-band capacity in their wireless networks, to increase the speed and size of data exchange. With broader-band networks we will see more interactive multimedia communications. As more machines deploy wireless devices in them, I believe we will see an increase in human-to-machine communications, where mobile users exchange information with stationary devices.