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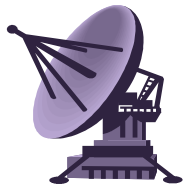
**MARKETERS MAY BE SUBJECT TO LAWSUITS
FOR SENDING COMMERCIAL EMAIL TO CELL PHONES**

An Arizona court recently held that commercial email messages could be subject to two federal laws. The CAN-SPAM Act, 15 U.S.C. §§ 7701-7713 ("CAN-SPAM"), prohibits any person, business, or other organization from sending commercial messages to an email address referencing a wireless domain name without the recipient's prior consent. The Arizona Court of Appeals has ruled that such email messages are also covered under the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"). While CAN-SPAM does not allow private plaintiffs to bring suit to enforce its decisions, the TCPA does provide for a private cause of action. Accordingly, marketers who send commercial email messages to wireless subscribers should be aware that they could be subject to private lawsuits.

The Federal Communications Commission ("FCC") distinguishes commercial text messages sent to telephone numbers assigned to wireless devices from mobile service commercial messages ("MSCMs"), which are commercial email messages sent to an email address referencing a wireless Internet domain, with the former regulated under the TCPA and the latter regulated under CAN-SPAM. The TCPA prohibits using an automatic dialing system to make "any call" to a telephone number assigned to a cell phone. TCPA covers text calls, including Short Message Service ("SMS") calls. CAN-SPAM prohibits sending any MSCM without the recipient's prior consent.

The possibility that email messages could be covered under both CAN-SPAM and the TCPA remains a strong possibility, in light of the Arizona Court of Appeal's decision in *Joffe v. Acacia Mortgage Co.*, 1 CA-CV 02-0701 (2005). In that case, the defendant used an automated system to send an email message to an address referencing the plaintiff's cell phone number plus the carrier's domain name. The carrier converted that email message to a text message and delivered it to the plaintiff's cell phone. The court held that an email advertisement sent to the plaintiff's cell phone violated the TCPA's ban on using an automatic dialing system to make any call to a number assigned to a cell phone.

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Congress proposes a radical overhaul of broadband service regulation.



The House bill establishes federal jurisdiction of broadband services and imposes interconnection and net neutrality requirements on broadband providers.

THE HOUSE AND SENATE PROPOSE SWEEPING BROADBAND LEGISLATION

The U.S. House and Senate have proposed legislation that would radically reform how broadband services are regulated. The more comprehensive proposal, a bipartisan draft telecommunications reform bill by the House Energy and Commerce Committee would, among other things, establish a uniform, federal regulatory framework for broadband services, impose interconnection and privacy protection requirements on broadband service providers, and require broadband video providers to adopt numerous broadcast and cable regulations. This bill, advanced by Committee Chairman Joe Barton (R-TX) and top-ranking Democrat John Dingell (D-MI), addresses many broadband-related issues that have been debated among various regulatory and corporate entities for years.

With the goal of speeding deployment of new broadband services to consumers, the House bill contains the following highlights:

- Creates a common regulatory definition for broadband Internet transmission services (“BITS”), which includes Digital Subscriber Line (“DSL”), cable modems, and virtually all other broadband services.
- Establishes that BITS, Voice-over-Internet-Protocol (“VoIP”), and broadband video services are interstate services subject to exclusive federal jurisdiction, except that states and local authorities retain authority over public rights-of-way.
- Mandates that BITS and VoIP providers have the right and duty to interconnect and exchange traffic with other requesting BITS and VoIP providers respectively, as well as telecommunications carriers. VoIP providers would also be required to register with the FCC and enter into reciprocal compensation agreements with telecommunications carriers for the exchange of traffic.
- Imposes a “Net neutrality” requirement on BITS providers, wherein they must, among other things: provide subscribers with access to lawful content and services, not block or interfere with access to, or use of, such content or services, and permit subscribers to connect to the Internet using devices of their choosing. Broadband video service providers and VoIP providers, however, would not be required to provide Net neutrality.



E911, franchising, consumer protection, privacy, and cross-ownership matters are also addressed in House broadband bill.



The Senate bill provides an exception to Net neutrality for BITS carriers that offer customized plans.

- Requires VoIP carriers to provide 911 and E911 services to their customers.
- Provides the FCC with discretion as to whether to impose universal service contribution requirements on VoIP carriers.
- Establishes a “streamlined local franchise” process for broadband video services, and leaves it to the FCC to establish a uniform duration for franchises, and procedures for renewal, termination, and transfer of them.
- Requires the FCC to apply comparable broadcast and cable regulations on broadband video providers, including program ratings, equal access for political candidates, retransmission consent, ownership limits, must carry, emergency alerts, equal employment opportunity, etc.
- Requires the FCC to establish national consumer protection standards for BITS, VoIP, and broadband video services. State utilities commissions are authorized to enforce the FCC’s rules.
- Provides privacy protection to subscribers of BITS, VoIP, and broadband video services. Service providers must provide a notice to consumers regarding the nature and use of, and access to, consumer information. With limited exceptions, express consent is required to collect and/or disclose personally identifiable information.
- Prevents cross-ownership between telephone companies who provide BITS or broadband video service and cable companies who provide BITS or broadband service, in the same local market.

The Senate bill, co-sponsored by Senators John Ensign (R-NV) and John McCain (R-AZ), addresses some of the same issues as the House bill. Highlights of the Senate bill include:

- BITS providers may not knowingly block access to any content unless: (a) such content is illegal; (b) blocking is expressly authorized by federal or state law; or (c) the content exceeds bandwidth limitations or quality of service limitations provided for in a service plan chosen by the consumer.



The House and Senate bills are expected to be combined and reconciled by Spring 2006.

- BITS providers may offer customized service plans that allow different levels of access to content and limitations on availability of certain applications, but they are prohibited from restricting access to VoIP applications.
- Exempts broadband video providers from local franchising, mandatory resale or build out requirements.
- State and local governments may require annual fees equal to 5% of gross revenues (local revenue only) to cover right-of-way administrative costs.
- Prohibits exclusivity or tying deals between multi-channel video programmers (e.g., cable TV companies) and broadband video providers.

The House and Senate bills are in the process of being amended. It is anticipated that they will be combined into a single bill and sent to the President's desk in the spring of 2006.

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TELECOM INFRASTRUCTURE DAMAGE BY KATRINA RESULTS IN PROPOSED NEW FCC BUREAU AND INCREASED UNIVERSAL SERVICE SPENDING

In the aftermath of Hurricane Katrina, which caused severe damage to the communications infrastructure in the Gulf Coast region, FCC Chairman Kevin J. Martin proposed a new FCC bureau to coordinate network reliability and public safety communications in crisis situations. Chairman Martin also seeks to provide more than \$200 million in universal service funding to affected areas. These proposals are top priorities for the FCC, and Martin is hoping for expedited Congressional approval.



The new FCC bureau, proposed in the wake of Hurricane Katrina, would have comprehensive public safety duties.

As of this writing, details are scarce about the new Public Safety/Homeland Security Bureau, but Chairman Martin has announced its general responsibilities. The proposed new bureau would be expected to handle issues such as public safety communications, continuity of government operations, disaster management coordination, alert and warning of U.S. citizens, and network security. Chairman Martin's other major proposal, providing \$211 million in funding to the disaster areas, would be accomplished through existing universal service programs. For example, the FCC would use the Low Income Program to help affected people reestablish communications service. For low income people eligible for FEMA assistance, the FCC would provide support for wireless handsets and 300 free minutes each. The FCC would also help pay the costs of reconnecting individuals to the public switched telephone network when it is rebuilt in the disaster regions.



Chairman Martin proposes \$211 million to be distributed through existing universal service programs.

Through the Rural Health Care Program, the FCC would allow public and non-profit health care providers in affected areas to apply for support of their telecommunications needs, and proposes to increase discounts from 25% to 50% for qualified providers.

The FCC would use the E-Rate Program to help schools and libraries in the affected areas reconnect their telecommunications services. The FCC plans to authorize \$96 million in E-Rate funds for several hundred schools and libraries, and will also allow schools and libraries serving evacuees to amend their Funding Year 2005 applications to account for unexpected increases in population.

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WAL-MART RFID TRIAL SHOWS EFFECTIVE STOCK MANAGEMENT: NEW SUPPLIER MANDATES EXPECTED

A recent study conducted by the University of Arkansas showed that Wal-Mart stores using radio frequency identification ("RFID") technology experienced significant improvements in their stock management, compared to stores that did not use RFID. Researchers found that the stores that "tagged" their merchandise (*i.e.*, applied RFID labels with unique electronic product codes) experienced a 16% reduction in out-of-stock items, and a 63% increase in stock replenishment efficiency.

Beyond stock management efficiencies, Wal-Mart has also benefited from using RFID throughout its supply chain. This has resulted in, among other things, significant inventory reduction. Wal-Mart and other retailers expect RFID to save them billions of dollars over the next several years through improved data synchronization and tracking ability, as well as reduced working capital requirements.

Encouraged by the results of the study, Wal-Mart plans to require its top 600 suppliers to tag all cases and pallets shipped to its stores and distribution centers by January 2007. It is expected that item-level tagging will be required soon thereafter. Experts have cautioned that, along with the rapid implementation of RFID caused in large measure by the Wal-Mart mandates, awareness of regulatory issues for manufacturers and users of RFID, such as compliance with FCC rules and state privacy laws, will be critical.

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Recent study shows that Wal-Mart had a large reduction in out-of-stock items using RFID.



Wal-Mart plans to implement new supplier RFID mandates due to results of the study.

DTV BILLS CONFLICT ON "HARD TRANSITION" DEADLINE FOR ANALOG BROADCASTERS AND CONSUMER FUNDING FOR TRANSITION

The U.S. House and Senate are pushing companion digital television ("DTV") bills through their respective chambers of Congress. The Senate bill, sponsored by John McCain (R-AZ), features an April 7, 2009 deadline for broadcasters to make a full transition from analog to digital broadcasting. The bill also includes \$3 billion in converter box subsidies, \$200 million for a program to transition low power TV station and translators to digital broadcasting, and \$1 billion for state and local interoperability grants.

The House bill, sponsored by Jim Nussle (R-IA), currently provides for a December 2008 "hard transition" deadline for analog broadcasters, but it now appears that it may be amended to coincide with the Senate's 2009 deadline. The bill also includes \$990 million which will provide each household with two \$40 coupons to buy converter boxes, and earmarks \$500 million in a trust fund for public safety equipment.

Congress is currently working on reconciling the differences between the two bills; the main sticking point being the amount of funding that should be allocated for converter boxes. Congress is shooting for a compromise bill before the end of 2005.

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TWO NOTABLE ATTORNEYS JOIN VENABLE'S COMMUNICATIONS GROUP

Venable LLP is pleased to welcome two accomplished attorneys to its Communications Group: **John B. Muleta** and **Brett P. Mankey**.

John B. Muleta has joined the Communications Group as Co-Chair. Prior to joining Venable, Mr. Muleta was Chief of the FCC's Wireless Communications Bureau. Before his tenure as Wireless Bureau Chief, Mr. Muleta was the President and CEO of Source 1 Technologies, LLC, a privately held systems integration firm based in Washington, DC. He was also the Co-Founder of OI Systems, a Washington-based management consulting firm. Mr. Muleta worked at PSINet, Inc. from 1998 to 2000, where he held the position of President for PSINet Ventures Inc. and, prior to that, was President of PSINet's Global Facilities Division and President of its India, Middle East and Africa Division.



DTV bills conflict on DTV transition deadline and amount of consumer funding for transition.



John Muleta, former Chief of the FCC's Wireless Bureau, presided over important telecommunications developments, including wireless broadband implementation, spectrum leasing and E911.

From 1994 to 1998, Mr. Muleta served in a variety of positions in the FCC, including the Deputy Bureau Chief of the Common Carrier Bureau and the Chief of the Enforcement Division of that bureau. He began his career at GTE Corporation and later worked at Coopers & Lybrand Consulting, LLC before joining the Commission in 1994.

Mr. Muleta's tenure at the FCC coincided with a number of milestone developments in telecommunications, including wireless broadband deployment, spectrum leasing/secondary markets, cell phone number portability, enhanced 911 and public safety initiatives, and the advent of the wireless Internet.

Brett P. Mankey is the former Vice President, Strategic Development and interim General Counsel of USA Mobility, a \$900M revenue NASDAQ listed wireless company. While at USA Mobility, Mr. Mankey was responsible for strategic alliances, joint ventures, corporate investments and acquisitions.

Prior to his position at USA Mobility, Mr. Mankey was the CEO of HOSTeu Limited, a venture-funded software services company based in London that was one of Microsoft's top five partners in the UK and Ireland. Mr. Mankey joined USA Mobility after he negotiated the acquisition of HOSTeu by one of its primary competitors in Europe. From 1998 to 2000, Mr. Mankey was an associate in the London office of a leading international law firm. Mr. Mankey worked exclusively in the telecom, media and technology sectors representing blue-chip clients such as Deutsche Telekom, Virgin and Chase Capital Partners in their endeavors throughout Europe.



Brett Mankey, former Vice President of USA Mobility, has extensive experience in U.S. and European telecom and technology sectors.

Mr. Mankey has extensive experience in the telecom and technology sectors in both the US and Europe. He has been actively engaged in the development and rollout of new services in the wireless, software and broadband arenas and the intersections of each, as well as the negotiation and structuring of investments, acquisitions and strategic alliances in each of those technology sub-sectors.

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