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Privacy Laws and Wireless Location Services: Does the Law Let You Do That?

Presentation of Mark J. O'Connor to Internet World Wireless
February 22, 2001

Overview

Wireless Location-Based Services

Consumer Privacy Concerns

Laws and Legislation

Regulation: What Are the FCC and FTC Doing?

How Can Providers Address Privacy Laws and Consumer Concerns?

Wireless Location-Based Services

Background

- In the United States, the FCC has set an October 1, 2001, deadline for commercial wireless carriers to transport the caller's location information in a 911 emergency call (i.e., Phase II E911 obligations). The FCC's purpose is to allow public safety personnel (e.g., police, fire) to obtain the location coordinates of a distressed caller simultaneously with the routing of the wireless call.
- E911 compliance will be expensive, accelerating the carriers' need for commercial location-based services to defray the costs of compliance. There are over 100 million U.S. wireless subscribers today. "Telematic" and "m-commerce" services are expected to grow from 820,000 users today to more than 11 million users by 2004.

Variety of Commercial and Public Safety Location-Based Applications

- MapInfo PSAP Pro: Released in January 2001, this system contains both data and jurisdictional boundaries to target the closest public safety resource that can provide help based on a caller's location, thereby reducing response time.
- Siemens kid-locator phones: Between now and March 2001, Siemens and GAP AG are testing a wireless handset for children that lets kids access a location-monitoring

call center for help. The call center can use a "listen in" function to provide extra assistance.

- Oracle and Medicine Planet m-health: These two companies plan to offer location-based health alerts that could warn customers of potential health threats as they enter different localities.
- General Motors Virtual Advisor: In addition to its location-based safety and security services, GM's OnStar division will test location-based advertising pushed to vehicles through a wireless network.
- AAA Response Services Center wireless and satellite services: AAA subsidiary Response Service Center is testing a wireless and satellite service connecting its customers to 911 emergency assistance as well as roadside services.
- Coca-Cola location-based mobile commerce: Coca-Cola and Go2 Systems promise to provide the location of the nearest restaurant, convenience store or gas station serving its products to consumers with a device capable of determining the user's location.

Consumer Privacy Concerns

- Advanced wireless capabilities bring web browsers to cell phone and handheld computers, combining mobility, interactivity, and location sensitivity.
- Privacy concerns regarding wireless services are greater than with wired Internet.
- Imaginable security risks, such as a stalker gaining access to a victim's location data; a child under location-based surveillance is reported missing.
- Accumulation of location information, personal details, and profiling practices puts consumers at the mercy of advertisers and marketers.
- What additional powers will law enforcement have over location information?
- How does government access to location information threaten American consumers' freedom of mobility and opposition to "Big Brother" society?

Laws and Legislation: Existing Law

Section 222 of the Communications Act of 1934, as amended (47 U.S.C. § 222) - Privacy of Customer Information

- Telecommunications carriers have a duty of confidentiality to the customer.
- Carriers shall use customer proprietary network information (CPNI) only in provisioning services requested by the customer.

- Carriers may not disclose CPNI without written authorization from the customer.
- FCC's 1998 CPNI Order interpreting Section 222 to require a carrier to obtain the customer's affirmative approval before the use of CPNI for marketing purpose (the "opt-in" consent method) held unconstitutional on First Amendment grounds as commercial speech restrictions by the Tenth Circuit. *U.S. West v. FCC*, 182 F.3d 1224 (10th Cir. 1999).
- Tenth Circuit suggests that "opt-out" consent method is less burdensome on commercial speech and First Amendment.

Wireless Communications and Public Safety Act of 1999

- Empowered the FCC to deploy end-to-end emergency communications infrastructure and programs using wireless telecommunications networks and wireless E911 service.
- Amended Section 222 of the Communications Act to protect consumer privacy vis-à-vis wireless location services.
- Added a new 47 U.S.C. § 222(f) to address the use of wireless location information: a wireless customer shall not be considered to have approved the use, disclosure of, or access to call location information or automatic crash notification information unless the customer provides "express prior authorization."
- Amended statutory definition of "CPNI" (47 U.S.C. § 222(h)) to include customer's "location" information.

Laws and Legislation: Pending Legislation, 107th Congress

Wireless m-Commerce Legislation

- Wireless Telephone Spam Protection Act (H.R. 113)
- Introduced by Rep. Rush Holt (D-N.J.) on January 3, 2001 to protect the privacy of wireless subscribers by prohibiting the use of the text, graphic, or image messaging systems of wireless telephone systems to transmit unsolicited commercial messages.

Web Privacy Legislation

- Electronic Privacy Protection Act (H.R. 112)
- Online Privacy Protection Act of 2001 (H.R. 89)
- Consumer Internet Privacy Enhancement Act (H.R. 237)

Regulation: What Are the FTC and FCC Doing?

Federal Trade Commission

- Limited jurisdiction over common carriers.
- No historic involvement in telecommunications CPNI issues.
- In December 2000, the FTC hosted a public workshop, "The Mobile Wireless Web, Data Services and Beyond: Emerging Technologies and Consumer Issues," to address emerging wireless web services and related privacy, security and consumer protection issues.
- FTC cases of businesses, including e-commerce businesses, violating self-made privacy policies likely brought as deception.
- In the future, Congress may direct the FTC to promulgate rules enforcing privacy legislation.

Federal Communication Commission

- Regulatory jurisdiction over common carriers, including commercial wireless carriers.
- Historic involvement in CPNI issues affecting customers of carriers.
- In November 2000, the Cellular Telecommunications Industry Association petitioned the FCC for a rulemaking to establish fair location information practices for commercial wireless carriers. CTIA urged the Commission to implement privacy law specifically related to location-based services as part of Section 222 of the Communications Act (47 U.S.C. § 222).
- FCC Notice of Proposed Rulemaking addressing CPNI in wireless area, including wireless location information, expected in 1Q, 2001.

How Can Providers Address Privacy Laws and Consumer Concerns?

Adopt FTC "Fair Information Practices" for the Electronic Marketplace

- Notice
 - Provide notice of information policies and practices: what information is being collected, how is the information being collected and used, who has access to the information, and how is it being used (including profiling).

- Provide notice of the consumer's ability to choose whether or not to participate in information collection.
- Choice: Opt-in v. Opt-out
 - Public policy momentum favors opt-in; industry favors opt-out; proposed legislation proposes both.
 - Opt-in for practices collecting personally identifiable information (PII): get customer's opt-in consent to develop a user profile or materially change the customer's service policy.
- Access
 - Give customers web-based access to review PII, change their profiles, and discontinue previously ordered services.
 - Control information flow to third parties.
- Security
 - Limit number of employees with access to customer information and develop adequate internal security procedures.
 - Consider designating a privacy officer.
 - Consider external security.
 - 18 U.S.C. § 2511 makes it a criminal offense to intercept any wire, oral, or electronic communication.
- Consider Location Information and Third-Party Issues
 - Undertake careful contract negotiations with third parties (content providers, technology providers, etc.) to insure against liability for third party misuse and abuse of customer proprietary information.
 - Customer opt-in consent for disclosures to third parties.
- Address Other Consumer Concerns Early
 - Consumer Choice
 - Is there a potential to limit consumer choice regarding these new location-based telecommunications services?
 - AAA roadside assistance versus GM OnStar emergency service: Should consumers pick who provides in-car services as they do telephone, cable, Internet services?
 - Regulators and consumer groups historically favor consumer choice.
 - Profiling
 - Potential integration of wireless and web profiles.

- Pseudonymity: minimize the extent to which data is personally identifiable.
- FTC guidance: consumer opt-in consent.
- Surveillance - Should consumers activate and de-activate location-based services, or should surveillance features be an option?
 - Monitor someone with a heart problem using a wireless device.
 - Track the location of delivery vehicles to provide better customer service.
- Spam - To what extent are unwanted wireless email/messages a problem?
- Third Party Rights to Access Location Information - Can consumers pick and choose among specific content providers from which they want location-based services?
- Keep Apprised of Regulatory/Statutory Changes in the Law and Participate
 - Anticipate that there will be regulatory clarification from FCC and FTC in 2001-2002 regarding wireless location information and profiling.
 - Participate in the process: comments and meetings with regulators and legislators. Your competitors will participate.
 - Participate because regulations/laws oftentimes have serious “unintended consequences” on business plans and technologies.
 - Anticipate comprehensive privacy legislation addressing consumer concerns in the information economy.