

“EXCUSE ME, I THINK YOUR SHOE IS RINGING!”
GETTING SMART ABOUT MOBILE MARKETING

Remarks of Commissioner Jon Leibowitz
at the FTC Town Hall Meeting on
“Beyond Voice: Mapping the Mobile Marketplace”
May 6, 2008

Thank you, Lois, for that kind introduction. Let me also thank our terrific and hardworking staff for putting this workshop together, and welcome everybody to the FTC’s Town Hall meeting, “Beyond Voice: Mapping the Mobile Marketplace.”

This morning I’d like to give some sense of direction about where we are going in the next two days. But sometimes it helps to first know where we’ve been. So let’s start with what is perhaps the world’s first mobile telephone, unveiled right here in Washington, just a few blocks away.... [*Roll Get Smart shoe phone clip.*]

We’ve come a long way from the *Get Smart* phone to the smart phone. Today, mobile devices are no longer restricted to secret agents and high-level officials:

- Eighty-nine percent of American adults now have a wireless device or cell phone.¹
- Thirty-five percent of “tweens” aged eight to twelve and seventy-seven percent of teens aged thirteen to seventeen have a mobile phone.²

¹ Harris Interactive, *Cell Phone Usage Continues to Increase; One in Seven Adults Now Use Only Cell Phones and One in Five Adults Have No Landline* (Apr. 4, 2008) (analysis of four surveys conducted online between October 2007 and January 2008), available at http://www.harrisinteractive.com/harris_poll/index.asp?PID=890.

² Press Release, Nielsen, *35% of U.S. Tweens Own a Mobile Phone, According to Nielsen; Most Tweens Accessing TV, Music and Internet on their Phones, Do So at Home* (Dec. 3, 2007), available at http://www.nielsen.com/media/2007/pr_071203.html; Nielsen Mobile, Inc., *Kids on the Go: Mobile Usage by US Teens and Tweens*, Selected Results from the Q3 2007 Study (2007) (“Nielsen Teen Survey”).

- In fact, the U.S. mobile penetration rate is now equal to that of Japan and Western Europe.³

Today's mobile devices are no longer just for talking:

- Well over half of American adults have used a cell phone or wireless device for at least one non-voice activity – such as text messaging, emailing, taking a picture, or playing a game.⁴
- For teens and tweens, texting and ring tones are the most popular features.⁵

And today's cell phones and mobile devices are really, well, mobile. My first cell phone experience was in 1992 with a loaner from my wife's office. It was the size of a football. I think it had a car battery attached. Today, cell phones literally can fit in the palm of your hand and slip easily into your pocket. Many people won't leave home without them. Some people panic when they forget them.

The latest technology is not only useful, it is *undeniably cool*. Some cell phones, when detecting nearby music, have the capability to recognize a song and provide the user with the title, artist, and lyrics (and even an option to buy). Phones with GPS technology can provide directions and guide you through an unfamiliar neighborhood, displaying streets and addresses, as well as hotels, restaurants, and stores.

³ FCC, Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, FCC 08-28, at 101-02 (Feb. 4, 2008) ("*Twelfth Report*"), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-28A1.pdf.

⁴ John Horrigan, Pew Internet & American Life Project, *Mobile Access to Data and Information* at 1-2 (Mar. 5, 2008), http://www.pewinternet.org/pdfs/PIP_Mobile.Data.Access.pdf (citing December 2007 survey finding that 58 percent of U.S. adults have used a cell phone or personal digital assistant for at least one of ten popular non-voice data applications).

⁵ Nielsen Teen Survey, *supra* note 2. According to a Disney Mobile Cell and Tell survey conducted by Harris Interactive, nearly half (44 percent) of cell phone users aged 10 to 17 use text messages as their primary form of communication. PRNewswire, *Along With the Temperature, Teen and Tween Cell Phone Calls Rise During the Summer; Disney Mobile Survey Unveils Teens/Tweens Cell Phone Habits as School Lets Out for Summer* (July 10, 2007), <http://sev.prnewswire.com/telecommunications/20070710/NYTU03610072007-1.html>.

In Japan, you can use your PDA to take a picture of a “quick response” (or QR) code on an advertisement or product and, almost instantly, receive a related text message or website link. Photograph a QR code on a movie poster, get the trailer and a list of nearby theaters and show times. How cool is that! Similar technology is starting to emerge here.

In short, these days cell phones and other mobile devices are always with us – changing the way consumers reach out to each other and to businesses, and changing the way businesses reach out to consumers. This emerging mobile market raises a host of opportunities – as well as a host of consumer protection challenges. Let me outline a few:

First, there are the same old **disclosure issues** in new mobile packages: do consumers understand what advertisers are selling and how much it costs? Mobile devices can make disclosures even tougher: how can marketers explain key terms and conditions on a screen the size of a small Post-it?

For example, more and more often consumers are invited to text a message to a short code to vote for their favorite TV show contestant, enter a contest, buy a ringtone, receive a joke, or get more information. Many of these promotions involve premium charges beyond standard text messaging fees – or subscription programs with recurring charges. A lot of companies are doing this right and clearly disclosing the deal – but at the FTC we also receive complaints about inadequate disclosures and unauthorized charges.

Simply put, consumers shouldn’t be short changed by short codes.

Second, **mobile advertising itself** is an issue. Some folks don’t mind a few ads – especially if they get free services or a lower monthly bill in return.⁶ But recent surveys have found that most consumers are annoyed when ads appear on their mobile devices, especially when the ads interfere with use – like

⁶ In a recent Nielsen survey, 32 percent of data users say they are open to mobile advertising if it lowers their overall bill. Press Release, Nielsen, *58 Million U.S. Mobile Subscribers Have Seen Advertising Over Their Phones* (Mar. 4, 2008) (“Nielsen Mobile Survey”), available at http://www.nielsen.com/media/2008/pr_080305a.html. According to a 2006 Harris Interactive Poll, 26 percent of U.S. cell phone subscribers said they would watch advertising on their phone in exchange for free applications. Press Release, Harris Interactive, *About One-Quarter of Current Mobile Phone Subscribers Support Incentive-Based Advertising, According to a Survey by Harris Interactive* (Oct. 23, 2006), available at <http://www.harrisinteractive.com/news/allnewsbydate.asp?NewsID=1109>.

an ad appearing while a web page is loading.⁷ Text spam is a further aggravation, subjecting consumers to unwanted and sometimes offensive content. Plus, many consumers are charged per text message.⁸

It's as if every time you got spam or a pop-up ad on your computer you had to *pay* for the privilege of receiving it. Text spam invades your time, your privacy, and your wallet.

Third, the emergence of **location-based services** in the mobile market creates unique concerns. GPS technology in cell phones permits your physical location to be tracked in real time. This can be life-saving in an emergency – and a convenience if you are trying to meet your friends at happy hour or make sure that your kids are where they are supposed to be. But the sense that Big Brother – or ex-boyfriend – knows where you are at any given moment raises troubling issues about government access, physical safety, and personal privacy.⁹

Location-based technology also permits location-based advertising. While I can certainly see the merit of a text message with a coupon for twenty percent off your next double-soy, half-caf, no-whip frappuccino delivered as you walk into your local Starbucks, imagine walking down a city street or through a mall and being bombarded with ads and messages.

Does America really need cell phones with ads flashing like in Times Square? Do we really want our PDAs turning into digital pocket billboards?

Personally, I worry about clutter.

⁷ About two-thirds of users (65 percent) are annoyed when an ad appears while a web page is loading. James Quintana Pearce, *Mobile Advertising Still Annoying, Text the Best Format: Report*, mocoNews.net, Apr. 14, 2008, <http://www.moconews.net/entry/419-mobile-advertising-still-annoying> (citing a report by analyst group Forrester); *see also* Nielsen Mobile Survey, *supra* note 6 (noting that only ten percent of data users think advertising on their mobile devices is acceptable).

⁸ *See, e.g.*, Kim Hart, *Advertising Sent to Cellphones Opens New Front in War on Spam*, Wash. Post., Mar. 10, 2008, at A1.

⁹ According to a December 2006 survey, a majority of adult mobile phone users say location-based services that enable you to determine the location of people on your contact list are an invasion of privacy. Press Release, Harris Interactive, *Survey Shows Privacy Concerns a Major Roadblock for the Adoption of Location-based Services and Presence Technology* (Feb. 23, 2007), available at <http://www.harrisinteractive.com/news/allnewsbydate.asp?NewsID=1184>.

Fourth (and finally), all of these issues are of heightened concern when they involve **children** and **teens**. Kids are usually more facile and fearless with technology than their parents – quick to click first and ask questions later. A mobile phone that gives them easy access to content and purchasing power makes them easy prey for aggressive marketers. We have already seen advertisers and content providers set their sights directly on the teen set with entertainment, coupons, social networking, and more. Broader marketing efforts and games are also sure to appeal to a young audience.

Like the problems with online behavioral marketing that the Commission is now wrestling with, mobile tracking and targeting of kids is worrisome. We need to consider whether additional protections for children are warranted.

Having said all that, mobile commerce in the United States is just beginning to emerge. As we move forward in this brave new wireless world and the marketplace develops, consumer protections need to develop, too.

We have time to get this right, and to ensure safeguards for our privacy, our security, and our sanity. I'm optimistic that we will.

Most responsible marketers are treading cautiously in this new space. To their credit, wireless carriers are monitoring mobile promotions and services, working to filter text spam, and taking action against the spammers. Services like Loopt, which enables customers to locate their friends on a cell phone map, seem to be working carefully to ensure that all involved understand the service, affirmatively agree to participate, and have tools to protect their privacy.¹⁰

Industry associations also have adopted and updated self-regulatory guidelines as technology and practices change. For example, the Mobile Marketing Association has *Consumer Best Practices Guidelines* for mobile advertising and services, including marketing to youth under age thirteen.¹¹ CTIA-The Wireless Association just unveiled *Best Practices and Guidelines for*

¹⁰ Amol Sharma & Jessica E. Vascellaro, *Phones Will Soon Tell Where You Are*, Wall St. J., Mar. 28, 2008, at A1.

¹¹ Mobile Marketing Association, *Consumer Best Practices Guidelines for Cross-Carrier Mobile Content Programs (United States)* at 4 (Dec. 11, 2007), available at <http://www.mmaglobal.com/bestpractices.pdf>; see also Mobile Marketing Association, *Mobile Advertising Guidelines* (Apr. 2008), available at <http://www.mmaglobal.com/mobileadvertising.pdf>.

*Location-Based Services.*¹² These guidelines are a good first step, but they need to go further in ensuring that consumer notice is clear and conspicuous, and not buried in a website privacy policy – and that user consent is truly express.

The good news is that most industry efforts recognize that consumer notice, choice, and some form of “*opt in*” for advertising and services is crucial in the mobile context – especially when location is involved. Trade association press releases *say* the right things about the importance of user notice and consent, but companies must also *do* the right things in implementing – and enforcing – these principles.

They can’t just “phone it in.”

In an era of broadband and information services, the FTC is watching closely.¹³ We strongly believe in self-regulation, but we are also going to police the wireless space.¹⁴

Our Agency has a long history of studying new technologies and the consumer protection and competition issues they raise. And, we have a long history of working cooperatively with our sister agency, the Federal Communications Commission, when consumer protection concerns arise in the telecom industry, for example, with Do-Not-Call and CAN-SPAM. We have different – but complementary – roles.

We hope that our forum over the next two days helps all of us – industry, consumers, and the FTC – work through complex issues in mobile commerce. As with our workshop on behavioral marketing last Fall – and as with the

¹² CTIA-The Wireless Association, *Best Practices and Guidelines for Location-Based Services* (Apr. 2, 2008), available at http://www.ctia.org/business_resources/wic/index.cfm/AID/11300. CTIA also is developing content classification standards and controls so parents can restrict access to adult-oriented content. CTIA Content Guidelines, available at http://www.ctia.org/advocacy/policy_topics/topic.cfm/TID/36

¹³ The Commission supports Congress’s efforts to repeal the exemption to the FTC Act that prohibits enforcement over those few remaining pure common carrier services. *E.g.*, Prepared Statement of the Federal Trade Commission before the Committee on Commerce, Science, and Transportation, United States Senate (April 8, 2008), available at <http://www.ftc.gov/opa/2008/04/reauth.shtm>.

¹⁴ *E.g.*, FTC Staff Closing Letter to Sprint Nextel Corp. (Aug. 8, 2007) (investigation of alleged deceptive claims that certain BlackBerry plans included “unlimited web usage” for a flat monthly fee), available at <http://www.ftc.gov/os/closings/staff/070808sprintnextelclosingltr.pdf>.

mobile marketplace itself – we'd like this forum to be truly *interactive*, with panelists as well as audience members participating. So please mute your cell phones while, to paraphrase Maxwell Smart, we lift the "Cone of Silence" and let the discussion begin.

Thank you.