ETI VIEWS AND NEWS
ECONOMICS AND TECHNOLOGY, INC.
April 2012

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Cramming finds its way to wireless and text messaging

Cramming, the practice of placing unauthorized, misleading or deceptive charges on a consumer's telephone bill, has been a longstanding problem for customers of traditional wireline telephone service. Given the explosive growth in demand for wireless services and the steady decline in demand for landlines, it seemed like only a matter of time before crammers – the third parties responsible for billing such unauthorized charges – would find their way over to the wireless side of the market. A recent lawsuit, *Humble v. Wise Media*, confirms that this is indeed a growing concern. The *Humble* complaint alleges wireless cramming, but also something more insidious: the unauthorized use of SMS text messaging to implement the cramming scheme.

What is cramming?

Historically, local phone companies would bill their customers for local phone service, along with legitimate charges from other companies for services such as long distance. However, the phone companies also allowed and facilitated other unrelated and/or unauthorized charges from third parties to be billed to end users on their local phone bill. When such charges are unauthorized, misleading or deceptive, they are deemed to be "crammed" on the bill. Such charges are not permitted under FCC rules, and often contravene a number of state and federal laws.

Cramming relies upon confusing or misleading billing practices to mislead consumers into paying for services they did not authorize or receive, or that cost more than the consumer was led to believe. Crammed charges often have little or no billing detail, and come with such vague descriptions as "service fee," "service charge," "other fees," "voicemail," "mail server," "calling plan," "psychic" and "membership" (although legitimate charges may also carry some of these same labels). The cramming strategy relies both on deceptive billing as well as the repetitive billing of charges small enough that consumers may not even notice the additional amounts.

The telephone company responsible for rendering the bill often has little to offer its customers in the way of additional details about such charges, other than perhaps a phone number to call. Many times, calls placed to such numbers go unanswered, or start a wild goose chase by providing yet another number for them to call. The telephone companies argue that their third-party billing is a valuable service to consumers by facilitating third party services and have no incentive to harm their own customers. However, these companies actually generate substantial revenue from providing third party billing services and, as such, have conflicting motivations.

Cramming in the wireless context

Wireless carriers, for better and worse, also facilitate third party billing. Consumers can make many legitimate purchases, such as ringtones, wallpapers, games, and other content for their mobile phones. Users can also use SMS text messages to complete valid financial transactions, such as donations to charity and political campaigns. In the wake of recent natural disasters, it is not uncommon to hear advertisements encouraging cellular users to text donations as a method to make an immediate impact.

However, such types of third party billing capabilities have led to cramming, such as that alleged in the *Humble* complaint. In the scenario described in the complaint, a company sent unsolicited text messages to end users offering "flirting tips" via SMS for a monthly fee. If users did not immediately respond to this unsolicited message, they were enrolled in the program and billed $9.99 a month, as well as receiving additional unsolicited text messages. According to some, efforts to stop the service by following the instructions to text "STOP" back to the provider were futile. These charges as described in the complaint clearly constitute cramming.

There is an interesting new gray area in wireless cramming. Many wireless users are not actually the customer of the wireless carrier and are not responsible for actually paying the bill. As an example, employees whose employer furnishes them with a cell phone have control of the phone, but have no direct responsibility for the bill. These mobile users can potentially generate substantial additional fees, perhaps inadvertently, by making purchases and donations from their employer-provided mobile phone, while the employer is stuck with the bill. It is ambiguous as to whether such charges are "authorized"–while they were generated by the end user, the account holder had no ability to agree to, or to prohibit, such charges. For large companies, it may be difficult or impossible to screen for such unauthorized charges even if they wanted to.

Wireless consumers, both individuals and businesses, should take care to review their wireless bills carefully and to note any vague or suspicious charges. If you suspect you have been crammed, you should ask the third-party provider responsible for the charge to adjust or credit your account and stop any future charges. If the provider is unreachable, contact your wireless carrier and ask them to refund the charge. Consumers can also file a complaint with the FCC or a state public utility commission for charges relating to telephone service, or with the FTC for non-telephone related charges.

California Court of Appeal upholds $40-million verdict based upon ETI Analysis and Testimony

In 2007 and 2008, Colin B. Weir, Vice President at Economics and Technology, Inc., testified on behalf of a class of approximately 150,000 California consumers who had purchased a product called "Avacor" from Global Vision Products, Inc. The class asserted a false advertising claim against the corporation and several of its principals. In January 2008, an Alameda County, California jury returned a verdict for the plaintiff class, and awarded damages based upon the ETI testimony. One of the defendants appealed the verdict, but on April 25, 2012, the California Court of Appeal affirmed the lower court's finding, and upheld the original $40-million damage award.

The order specifically affirms Mr. Weir's methodology and conclusions. The work involved a statistical analysis of nearly 13,000 actual Avacor purchase records to determine the amount of the average purchase of the product. This required the electronic capture of the purchase data from paper invoice records, calculating valid sample sizes for the population, taking multiple systematic random samples of purchase data, calculating the average purchase price, and validating the statistical methods employed.

The same analysis and testimony proved successful a second time, when in 2009, the same plaintiff class went to trial again, relying on ETI to calculate the economic damages to the class using similar methodology. Mr. Weir again offered damages testimony at trial, which served as the basis for another jury award. VerdictSearch, the nation's leading publisher of verdict and settlement news and research, reported that the resulting $50-million jury award in the second Global Vision case was the second largest jury award in California in 2009, and among the Top-100 largest jury awards in the United States in that year.

Is Windows Phone OS a contender?

It wouldn't be all that surprising if you missed AT&T's launch of the Nokia Lumia 900 – the first Windows Phone handset for AT&T – earlier this month. The Lumia debuted with technical problems – internet connectivity was spotty at best – and the phone runs on an older version of Windows Phone–7.5 – while version 8 is due out later this year. Meanwhile, Apple faced unending demand for its iPhone, and sold more than 35-million units of the popular handset in the first quarter of 2012. The growth in Android-based handsets has also been astonishing. Windows Phone OS represents less than 4% of smartphone handsets in the US. Does Windows Phone stand a chance? We think the answer is yes, but not for the reasons you might expect.

Windows Phone

Windows Phone OS, first released in mid-2010, is Microsoft's latest attempt to revamp is aging mobile OS platform. The previous Microsoft mobile OS, *Windows Mobile*, achieved some success, peaking at 42% market share in 2007, but has been on a steady decline ever since. Now, with a smartphone market share even smaller than Blackberry maker RIM, Microsoft has redesigned the mobile OS from the ground up, featuring a new design theme called *Metro*. The OS integrates with other Mircosoft products, including the Office suite, the SkyDrive cloud storage system, and a Microsoft-based app store. While *Windows Phone 7* sales have been a bit slow, the upcoming version 8, paired with the release of the desktop version of Windows 8, shows much more promise.

Why carriers will support Windows Phone 8

The Lumia 900 is being touted for its technical prowess, 4G LTE compatibility, and beautiful design. But none of these factors will be the driving force behind carrier support of Microsoft's OS. Windows integration? Not important. MS Office compatibility? Not important. What matters to US carriers at this point is the development of a competing wireless ecosystem – OS, app store, developers, handset manufacturers, etc. – that will help to keep Apple and Android in check.

Where carriers once controlled the bulk of the revenue from mobile services, downloads and add-ons, now Apple and Android exert control over these elements of the user experience. They also collect the bulk of the profits. We reported on Sprint's decision to carry the iPhone (*Views and News*, August and October 2011). Sprint now believes that it won't make a profit on its iPhone deal until at least 2014, while Apple announced an almost 100% increase in quarterly profits, year over year. Carriers like the idea of greater competition in the handset and mobile operating system markets because it would potentially allow the carriers to regain some of the leverage they would like to exert over handset and app pricing and revenue sharing, as well as to be able to influence the pre-placement of carrier apps on devices they sell.

"It is important that there is a third ecosystem brought into the mix here," Verizon CFO Fran Shammo said during the company's recent earnings call. "We are fully supportive of that with Microsoft. … We helped create the Android platform from the beginning and it is an incredible platform today, and we are looking to do the same thing with a third ecosystem."

Carriers like Verizon likely view Windows Phone as offering at least three benefits to their bottom line. First, the carriers must expect the required handset subsidies for Windows-based phones to be substantially smaller than for the iPhone, which presently leaves almost no margin for the carriers given their current new-every-two upgrade business model. Second, carriers will expect that a partnership with Microsoft will ultimately lead to having a greater say in the development of the software platform, leading to integration of more carrier-specific services and apps, especially by default. Finally, as more and more end users move usage from cellular data to WiFi, the carriers have to be seeking innovative ways to derive revenues from as-yet-undeveloped services. Given these benefits, and AT&T's already huge marketing push for the lackluster Lumia, we expect the carriers to throw their support behind Windows Phone.