

PRIVACY AND DATA OWNERSHIP ISSUES Arising from Use of GPS and Telematics Technologies

Many businesses now use Global Positioning and telematics technologies (“Telematics”) to track vehicles, shipment routes, vehicle diagnostics, and employee whereabouts. These technologies collect useful data, but raise concerns about privacy and data ownership.

Last month, the Seventh Circuit considered whether police violated the Fourth Amendment by placing a GPS tracking device on a suspect’s car. The Court concluded that use of a GPS tracking device was simply a more efficient way for police to follow a car on a public street and was therefore not considered a search in violation of the suspect’s privacy rights under the Fourth Amendment.¹

While the Seventh Circuit limited the Constitutional privacy implications of the use of Telematics by police, there remain many issues relevant to businesses users. Does use of Telematics and collection of data about the whereabouts of employees and customers amount to an invasion of privacy under federal or state law? Do employees and customers have any ownership interest in the data collected?

PRIVACY

State and Federal Law

Many states have enacted laws requiring entities using Telematics to disclose to, and in some cases obtain consent from, the operators of Telematics equipped vehicles. California, Texas, and Delaware have enacted criminal statutes prohibiting the use of electronic tracking devices to determine the location of a vehicle without the consent of the owner, lessor, or lessee of the vehicle.² Under the California Penal Code: “No person or entity in this state shall use an electronic tracking device to determine the location or movement of a person” unless “the registered owner, lessor, or lessee of a vehicle has consented to the use of the electronic tracking device with respect to that vehicle.”³ These statutes have resulted in criminal prosecutions against those who unlawfully use an electronic tracking device, with penalties ranging from fines to the revocation of a business license. Other states appear to be following suit and enacting both criminal and civil statutes limiting or prohibiting the use of Telematics.

While Congress has yet to enact a federal law governing Telematics, it is likely forthcoming. In 2000, the Notice of Electronic Monitoring Act was introduced which would have required employers to provide written notice to employees of the presence of tracking technology.⁴ In 2001, Senator John Edwards introduced the Location Privacy Act of 2001 which would have required providers of “location-based services and applications” to disclose to customers its policies regarding collection and use of location information and to obtain express consent to use and/or disclose such information to a third party.⁵ Although neither bill made it out of committee, they evidence Congress’ awareness of the issue and where federal laws are headed.

It appears that both current and proposed state laws, as well as proposed federal laws require that Telematics operators disclose the presence of Telematics before using the technology. In some instances, the laws may go further and require obtaining consent before using Telematics.

Employees and Labor Unions

Employees and unions are also attuned to the privacy implications of Telematics. In 2002, the NLRB’s General Counsel issued an Advice

Memorandum finding that a trucking company was not obligated to negotiate with its union to install GPS in company vehicles since it did not result in a “significant change in employees’ working conditions” or a unilateral change in the amount of surveillance to which employees were subjected.⁶ Likewise, in 2005, a New York district court rejected a union’s claim that an employer was required by its collective bargaining agreement to negotiate with the union before installing GPS devices on company-owned vehicles.⁷

Although the NLRB’s Advice Memorandum and the *Otis Elevator* opinion suggest that current collective bargaining agreements do not cover employers’ use of Telematics, the issue will likely arise when collective bargaining agreements are renegotiated. We have already seen at least one example: the UPS Teamsters’ collective bargaining agreement limits UPS’ ability to discipline employees based on data collected by GPS.

DATA OWNERSHIP

No federal or state law squarely governs ownership of data collected by Telematics, nor have any legal decisions directly addressed the issue. The data is generally not entitled to copyright protection since it is factual in nature. However, several regimes outside of copyright may be useful in determining ownership of this data, including quasi contract, express contract, implied contract, and confidentiality obligations.⁸ Businesses using Telematics can create ownership structures through private agreement which can set forth the business’ policy for ownership, collection, use, protection and disclosure of the collected data, taking into consideration the privacy concerns raised above.

BEST PRACTICES

Based on the current state of the law with regard to the use of Telematics, we recommend the following best practices for businesses planning to use Telematics:

1. DEVELOP A POLICY FOR THE OWNERSHIP, COLLECTION, USE, PROTECTION AND DISCLOSURE OF DATA COLLECTED
2. OBTAIN CONSENT FROM VEHICLE OWNERS OR LESSEES
3. DISCLOSE PRESENCE OF TELEMATICS TO DRIVERS/EMPLOYEES/VEHICLE OPERATORS

The law regarding privacy and data ownership in connection with Telematics is rapidly evolving. Therefore, continue to survey state and federal laws governing the use of Telematics and consult your attorneys for advice on particular matters as they arise.

– Sharon A. Ceresnie and Mark V.B. Partridge

1. *United States v. Garcia*, No. 06-2741, 2007 U.S. App. LEXIS *6 (7th Cir. 2007).
2. See Cal. Penal Code § 637.7 (1998); V.T.C.A., Penal Code § 16.06(b) (1999); 11 Del.C. § 1335 (2006).
3. Cal. Penal Code § 637.7 (1998).
4. H.R. 4908, 106th Cong. (2000).
5. S. 1164, 107th Cong. (2001).
6. *Roadway Express, Inc.*, Case 13-CA-39940-1 (NLRB Apr. 15, 2002). <http://www.nlr.gov/research/memos/advice_memos/template.html.
aspx?file = http://www.nlr.gov/shared_files/Advice%20Memo%2002\%20x041502_roadway.html&size = 10 >
7. *Otis Elevator Co. v. Local 1, Int’l Union of Electors*, 2005 WL 2385849 at *8 (S.D.N.Y. 2005).
8. See David B. Nimmer, NIMMER ON COPYRIGHT § 16 (2006).

FIRM UPDATE / ANNOUNCEMENTS

PRESENTATIONS

On January 25, 2007, at the AIPLA Mid-Winter Meeting in New Orleans, Louisiana, **Phillip Barengolts** presented a paper entitled "Trademark Clearance and Investigations," written by **Joseph N. Welch II**.

Bradley L. Cohn will be speaking on trademark law issues and developments at the 1st Annual Intellectual Property Law Institute for Corporate Counsel seminar on April 13, 2007, in Northbrook, Illinois.

Jonathan S. Jennings will be speaking on "The Trademark Dilution Revision Act of 2006: Its Impact On Your Company, Clients Or Practice," at the 51st Annual Intellectual Property Law Conference On Hot Topics and Developments In Patent, Trademark, Copyright and Trade Secrets Law at The John Marshall Law School in Chicago on February 23, 2007.

Mark V.B. Partridge presented a teleseminar on February 1, 2007, entitled "What Speakers Need To Know About Copyright To Protect and Avoid Infringement," to the National Speakers Association. On March 1, 2007, **Mark** will be in New Glarus, Wisconsin, giving a workshop entitled "Guiding Rights: Intellectual Property Is Your Greatest Asset" for the Wisconsin Chapter of the National Speakers Association. In April, **Mark** will be speaking on "Intellectual Property Is Your Greatest Asset at the Location Intelligence Conference in San Francisco on April 17, 2007, and on "Protecting Your Association and Its Intellectual Property on the Internet" at the American Society of Association Executives Chicago Legal Symposium on April 18, 2007.

Uli Widmaier gave a presentation entitled "The New Dilution Law" at the Chicago Bar Association Intellectual Property Law Committee's meeting on November 28, 2006. In April, **Uli** will be speaking to the Intellectual Property Law Society at the University of Chicago Law School about current developments in copyright and trademark law. **Uli** will give two presentations at the 8th International Trademark Conference in Alicante, Spain, on April 23 and 24, 2007. His topics will be "The Madrid System - the U.S. Perspective" and "Trademark Use and Online Advertising in the U.S."

PUBLICATIONS

The third edition of the single volume treatise, *Trademarks and Unfair Competition*, authored by **David C. Hilliard**, **Joseph N. Welch II** and **Janet A. Marvel**, will be published this Spring. **Janet** is a new author for this book, and provided invaluable contributions to this new edition. In addition to updates on court decisions and other developments, including commentary on the 2006 dilution amendment, the treatise now contains practice tips at the end of each chapter to assist practitioners and in-house counsel. The treatise has been used since 2001 to train federal judges in intellectual property law, and has been cited in several federal decisions.

Uli Widmaier has been writing the AIPLA Trademark Quarterly Case Summary Updates for the Third and Seventh Circuits since the first quarter of 2006.

APPOINTMENTS

Jonathan S. Jennings has been appointed to serve on the 2006-2007 Advisory Board of the Center of Intellectual Property Law & Information Technology (CIPLIT) at DePaul University's College of Law.

Mark V. B. Partridge and **Jonathan S. Jennings** have been appointed to the inaugural American Bar Association Advisory Panel. This panel will address the needs and issues of the legal profession while at the same time focusing on the direction of the American Bar Association.

Joseph N. Welch II was named President-Elect of the Chicago Intellectual Property Alliance. The Chicago Intellectual Property Alliance is a group of organizations working together to promote Intellectual Property educational programs, and the development and management of intellectual property law and practice.

TEACHING

Thad Chaloehtiarana has been appointed an Adjunct Professor of Law at Northwestern Law School. He will be teaching the Trademark and Unfair Competition class during the Fall semester.

Bradley L. Cohn and **Matthew A. Griffin** are teaching an Advanced Legal Writing course on Trademarks at DePaul University School of Law.

Jonathan S. Jennings, an Adjunct Professor at The John Marshall Law School in Chicago, is teaching a course there this semester on "Right of Publicity and Protection of Personality." It is the only three hour credit course taught on the subject in the country.

Mark V. B. Partridge, an Adjunct Professor for 20 years at The John Marshall Law School in Chicago, is teaching a course on Trademark Transactions.

NOTEWORTHY

David C. Hilliard was quoted in an article regarding trademarks and copyright law, entitled *Legal Technicalities*, in Illinois Super Lawyers Special Supplement to Chicago Magazine. He was also listed as one of the Top 100 Illinois 2007 Super Lawyers.

Nine Pattishall McAuliffe partners were named Illinois Super Lawyers by their professional peers. The list of Illinois Super Lawyers is compiled by the editors of *Law and Politics* magazine based on ballots submitted by active attorneys in Illinois. This year's Pattishall McAuliffe honorees are **Brett A. August**, **Bradley L. Cohn**, **Raymond I. Geraldson, Jr.**, **David C. Hilliard**, **Jonathan S. Jennings**, **Mark V. B. Partridge**, **Robert W. Sacoff**, **Joseph N. Welch II** and **Uli Widmaier**.

BNA'S *Media Law Reporter* in its November 7, 2006, article, "Virtual Superstars After Death," quoted **Jonathan S. Jennings'** remarks on right of publicity law that he presented at the AIPLA Annual Meeting.

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