

PRIVACY REGULATIONS THREATEN MOBILE APP INNOVATION

BY JAMIE TUCKER

Facebook Inc.'s \$1 billion acquisition of Instagram Inc. made headlines both for the size of the deal and for the many users of the popular mobile photo-sharing application who pulled it from their smartphones, citing concerns about the privacy of their data.

This rapid consumer reaction, and the slower but more significant legislative activity related to mobile privacy issues, raises the possibility that American technological innovation, particularly in the realm of mobile application development, could be headed for a train wreck as federal policymakers focus their attention on mobile device privacy and raise the specter of regulations that could unintentionally stifle innovation and kill jobs.

Reaction to the Facebook-Instagram deal provides a chance to look at several legal and regulatory initiatives that could have a significant impact on the future development of mobile applications software used in smartphones and other devices. These are a \$20 billion and growing piece of our economy, one of the few sectors that generated expansion and job creation through the depths of the Great Recession, though that could be quashed — and investors could suffer — if the spate of pending legislation is passed without serious examination of its unintended consequences.

Mobile analytics company Carrier IQ Inc. gained notoriety in December when a programmer discovered that its software, embedded in 141 million phones, was tracking and recording keystrokes, including text messages, phone numbers and Web searches. More recently, popular social networks such as Path, Yelp Inc., Twitter Inc. and Facebook have drawn scrutiny for accessing, storing or transmitting users' address books without their knowledge.

These incidents highlight the need for privacy enhancements in the rapidly evolving mobile app space. Before imposing new restrictions that could slam the brakes on this economic engine, regulators in Congress and at the Federal Trade Commission must carefully consider what drives this industry and the consequences that new regulations could have for companies — tech and traditional — as well as for average smartphone and tablet users.

The growth of mobile apps has been explosive by any metric, providing a needed spark to the economy. Apps generate economic activity through app purchases, advertising within apps, or “appvertising,” and facilitation of consumer spending through apps.

According to a recent estimate by AppNation Inc. and Rubinson Partners Inc., the “app economy” generated nearly \$20 billion in revenue in 2011, a figure they expect to quadruple by 2015.

While that revenue growth is staggering, let's also consider jobs, a top issue for voters and Washington policymakers. Roughly 1 million apps have been created for the iPhone, iPad and Android platforms, and more are on the way. Every new app represents new jobs for programmers, advertisers and retailers. The AppNation-Rubinson report estimates that 466,000 jobs are linked to the app economy, a sector that only emerged in mid-2008. During that 3-1/2-year span, the economy as a whole lost 4 million jobs.

These new jobs are spread across the country. Seventy-five percent were created outside of tech-heavy California, in New York, Dallas, Washington, Chicago and Atlanta. A robust, job-creating sector sprang up, virtually overnight, due to strong demand for the increasingly sophisticated and consumer-friendly apps being developed by American innovators.

Yet expansion in this space is at risk of slowing due to the collision of two trends. Privacy concerns led regulators and policymakers to train their sights on mobile apps, and many apps are developed by small businesses incapable of complying with complex legislation or agency rules.

Every time a mobile app is found to be secretly tracking GPS locations, copying address books or recording browsing histories, regulators are emboldened. Rather than punish just the offenders, some in Congress advocate imposing one-size-fits-all restrictions on the entire app economy. Five bills have been introduced, each bestowing new rulemaking authority upon the FTC to dictate how mobile apps operate. The bipartisan sponsors of key legislation include Sen. Jay Rockefeller, D-W.Va.; Reps. Joe Barton, R-Texas, and Edward Markey, D-Mass.; Sens. Al Franken, D-Minn., and Richard Blumenthal, D-Conn.; Rep. Jason Chaffetz, R-Utah; and Sen. Ron Wyden, D-Ore. (Markey introduced a second bill in the aftermath of the Carrier IQ incident.)

The motivation guiding these proposals is laudable, but the methods threaten to upend the mobile app sector by adding new compliance costs and injecting the threat of crippling financial penalties. Rockefeller's Do-Not-Track Online Act of 2011 authorizes

civil penalties up to \$15 million, for instance, and Markey's draft legislation allows for private lawsuits in addition to any civil penalties. Further, it imposes burdensome filing requirements with two separate federal agencies, the FTC and the Federal Communications Commission.

Also, most app innovators are ill equipped to make the changes being discussed by Congress. According to the Association for Competitive Technology, 88% of the top-selling 500 apps are developed by small businesses, most of which have fewer than 10 employees. Few of these microbusinesses have legal departments capable of counseling on new regulatory obligations. The threat of additional compliance costs, as well as financial penalties, may impede future growth of this industry and the jobs it creates.

The Carrier IQ and Path incidents have exposed privacy risks that must be addressed, but they must be addressed in a thoughtful manner. The app industry should be given a chance to establish self-regulatory guidelines — with government and consumer input — that protect users and preserve businesses' ability to innovate. For instance, the Obama administration's privacy initiative, launched Feb. 23, offers a model for addressing mobile privacy concerns through multistakeholder working groups that set voluntary codes of conduct. On Feb. 29, the Commerce Department

indicated that mobile transparency may be the first topic tackled by the multistakeholder group. And on Feb. 27, a worldwide association of mobile operators known as the GSMA published new guidelines for protecting app users by increasing transparency, choice and control. Before heavy-handed legislation or regulations are imposed, voluntary, flexible and collaborative efforts such as these should be given a chance.

Some observers are quick to dismiss the prospects for mobile privacy legislation, given the inability of Congress to pass even noncontroversial legislation. Interested parties should still follow this debate closely.

Sufficient risks and potentially broad impacts remain considerable. If burdensome, inflexible regulations were to be imposed on the mobile app sector, the consequences could be far-reaching. Development of apps could stall, causing a decline in the app economy as rapid as its initial acceleration. Average users would be deprived of the next generation of innovations on their smartphones and tablets, and the U.S. economy could take a hit in direct and indirect job creation in a vital industry-leading sector.

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