Shipman & Goodwin LLP®
COUNSELORS AT LAW

VENTURES AND INTELLECTUAL PROPERTY GROUP

LETTER

2006 2nd Quarter

THE MOBILE REVOLUTION

Out in the woods or in the city
It's all the same to me.
The world's my home
When I'm mobile . . .
— Pete Townsend, "Goin' Mobile"

Although cell phones didn't even exist when The Who's Pete Townsend sang the praises of his mobile home more than 30 years ago, today they aptly describe the convenience afforded by cell phones and other handheld devices. We can now communicate with others by voice, text or e-mail, take pictures and instantly send them to friends, surf the web, download and listen to music, play multi-player games, watch videos and TV programs, and make purchases, from almost anywhere, with a device that fits in the palm of our hand.

If the 1990s were the decade of the Internet, then this is the decade of the "mobile revolution." There are now more than 200 million cell phone subscribers in the U.S. and more than 2 billion worldwide. Millions of wireless subscribers have no landline at all, whether by choice or necessity. New industries and business models have sprung up, seemingly overnight, and many old technologies and ways of doing business have become obsolete. In some sectors, such as the music industry, old-line players are struggling to keep up with the changes, while audacious newcomers are building market share. What is going on, and what does the future hold?

Two trends have contributed to the mobile revolution. The first is the introduction of successive *"killer applications"* for handheld devices. The second is the *convergence* of various features and capabilities into a single device.

A *"killer application"* (or "killer app") is tech industry jargon for a use or function that has mass appeal and drives widespread acceptance. For example, e-mail and the World Wide Web were killer apps for personal computers. Wireless voice communication was the first "killer app" for handheld devices, the one that brought them into existence. But then a series of new features vastly expanded their appeal: wireless text messaging (SMS, or Short Messaging Service), wireless e-mail and instant messaging (or IM), ringtones, games, built-in digital cameras, Multimedia Messaging Service (MMS), streaming media (TV and videos), location-based services (such as maps and guides to local restaurants), music storage and playback, and over the air (OTA) downloads of music and videos. This constant flow of new killer apps has caused consumers to regularly replace their cell phones (on average every 17 months in the U.S.) so they can take advantage of exciting new features. It has also made the cell phone as indispensable as a person's wallet or keys.

Running in parallel with these cell phone developments was the emergence of PDAs, or personal digital assistants. These handheld devices made it possible for users to carry around with them some of the useful information that was stored on their PCs, such as contacts and calendars. The information on the PC and the PDA could be harmonized by "synching up" the two devices. Later, PDAs acquired their own killer app when it became possible to send and receive e-mails, a boon for business travelers who no longer had to hunt for a computer to check their office e-mail. However, these devices initially only handled "data," as opposed to "voice," and road warriors had to carry both a PDA and a cell phone if they wanted to be able to check their office e-mail *and* make phone calls.

That is rapidly changing, though, due to *convergence*, another major trend in the mobile revolution. The different functions and capabilities of cell phones and PDAs are converging into a single device – as is the case with the latest BlackBerries and Treos.

Although "killer apps" and convergence help explain how we got here, they are not merely things of the past. The mobile revolution is still young. New applications for wireless devices are constantly coming on the market, and we can only begin to imagine the possibilities. Here is a peek at some of the new products and services that we already know about:

"Mobile Device-Friendly" Websites: Currently, most websites are not designed to be seen on wireless devices. A new class of websites that are designed specifically for mobile devices, identified by the suffix .mobi (instead of .com, .org, .edu, etc.), is being rolled out. Surfing the Web on your mobile device will soon be easier and more fun. Expect e-commerce to be a major beneficiary of this development.

Mobile Search: Google and Yahoo plan to introduce new search services soon that are tailor-made for cell phones.

"Portable Wallets": It won't be long before you will be able to use your mobile device to pay for everyday purchases, such as groceries, gas and tolls. Scanners will read financial information stored on your mobile device and send back an electronic receipt. This feature is already widely-used in Asia.

RFID and Bar Codes: Large retailers are beginning to tag individual products with Radio Frequency Identification (RFID) markers, which enable in-store wireless scanners to keep track of inventory on a continuous and real-time basis. Similarly, consumers will be able to obtain information about certain products (such as reviews, price comparisons, recipes and health tips) by taking a digital picture of a special bar code on the product's packaging (the bar code contains a website address that the cell phone automatically connects to).

Medical Applications: Wireless devices carried by patients and doctors will monitor vital signs and control the delivery of medications like insulin.

Home Appliances: Want your home to be toasty by the time you get home on a cold winter night? Just pick up your handheld device and dial in the desired temperature to your home climate control center. Should you stop on the way home to pick up some milk? Send a query from your cell phone to your refrigerator and avoid the guesswork.

Mobile Marketing: Retailers and advertisers are showing a growing interest in the possibilities offered by mobile marketing. Studies show that mobile campaigns achieve high response rates and promote customer loyalty if they are conducted with the express permission of the consumer and in a way that tailors the offering to the consumer's personal interests. By contrast, unauthorized or indiscriminate advertising, whether by phone, SMS or e-mail, gets a frosty reception. Hopefully, the federal Anti-SPAM Act (and corresponding state laws) as well as industry "best practice" guidelines will nip "wireless spam" in the bud.

Shipman & Goodwin LLP is an enthusiastic participant in the mobile revolution. Lawyers from various departments have developed the skills necessary to assist our "mobile revolution" clients. Our services and industry experience include:

- Software and content licensing
- Patent, trademark and copyright licensing
- Anti-SPAM Act claims and counseling
- Advice regarding wireless industry content guidelines and mobile marketing best practice codes
- Website privacy policies and terms of use agreements
- Trademark and copyright registration and infringement claims
- Domain name disputes
- Patent infringement claims
- Telecommunications applications, regulatory actions, contracts and lobbying
- "Soup to nuts" guidance and counseling for entrepreneurs and start-ups, including formation, tax structuring, shareholder agreements, stock option plans, executive compensation, employment law compliance, proprietary information and non-competition agreements, intellectual property protection, venture financing, securities offerings, and mergers and acquisitions

Shipman & Goodwin LLP is proud to have represented one of the pioneers of the mobile content industry, Zingy, Inc., since its formation. We have also advised a number of other companies in the mobile marketing and mobile content industries.

For more information about our experience and services or to discuss your plans in the wireless arena, please contact Marcus Wilkinson at (860) 251-5937 or at mwilkinson@goodwin.com.

Shipman & Goodwin LLP®
COUNSELORS AT LAW

One Constitution Plaza
Hartford, Connecticut 06103
(860) 251-5000

300 Atlantic Street	289 Greenwich Avenue
Stamford, Connecticut 06901	Greenwich, Connecticut 06830
(203) 324-8100	(203) 869-5600

home page: www.shipmangoodwin.com

Shipman & Goodwin's **Ventures and Intellectual Property (VIP) Group** has a long-standing practice of assisting high-technology and other emerging growth companies, as well as venture capital and other financing sources and financial intermediaries. We represent public and private companies in all stages of their development in various industries, including engineered materials, semiconductors, photonics, computer hardware and software, internet services, telecommunications, e-business and health care, in both domestic and international transactions. We regularly provide advice on venture capital finance and fund formation, securities offerings, equity compensation, intellectual property protection, technology development and commercialization, joint ventures and strategic relationships, and internet and e-business matters. VIP Group Co-Chairs: Donna Brooks and Thomas Flynn

VENTURE BRIEFS

Mobi Launch: A new top level domain name, .mobi, aimed at making it easier to browse the Web on mobile devices has been launched. .mobi is being backed by the world's leading mobile operators, handset manufacturers and software developers and is designed to address the problem in which a mobile device user attempts to access certain websites on the Web but can't because the websites are not based on mobile-phone standards. The early "Sunrise Registration" period for .mobi names ran from May 22 through May 29 for members of mobile industry associations to register their trademarks as .mobi names. Starting June 12, other trademark holders may register their trademarks as .mobi names, and individual users may start filing for registration from August 28. *Cathy Intravia, (860) 251-5805 or cintravia@goodwin.com*

Supreme Court Rejects Presumption of Permanent Injunction Remedy in Patent Infringement Cases: In a decision viewed by many as a major victory against so-called patent trolls, the U.S. Supreme Court in *eBay Inc. v. MercExchange LLC* overturned a decision of a federal appeals court that had directed the federal courts to presume that permanent injunctive relief was an appropriate remedy in every patent infringement case. The decision of the United States Court of Appeals for the Federal Circuit, the appeals court that handles all patent appeals from federal trial courts throughout the country, had reversed the ruling of a trial court that had denied a successful plaintiff an injunction preventing the defendants from further infringing the plaintiff's patent. The trial court had refused to issue an injunction on the grounds that the plaintiff did not practice the patent, but existed only to license its technology to third parties and could license the right to practice the patent to the defendant. Accordingly, denying the plaintiff an injunction would not cause the plaintiff irreparable harm, which is a traditional prerequisite to obtaining injunctive relief. The Federal Circuit reversed the denial of the injunction, holding that there was a presumption that an injunction should issue in all patent infringement cases and that this presumption should be defeated only in "unusual" cases under "exceptional" circumstances.

The Federal Circuit's ruling underscored what many view as a major flaw in United States patent law—vesting in a patent owner the ability to essentially shut down by means of an injunction a product line or entire business based on the assertion of a patent that may relate only to a minor aspect of a product or business method. The inequity created by virtue of this enormous bargaining power has resulted in many advocating in Congress for patent reform that would curtail the availability of injunctive relief. The Supreme Court's decision reversing the Federal Circuit in favor of eBay, however, is a dynamic shift for patent litigation in the United States in the future. The Court expressly rejected the notion of a presumption that an injunction should issue in all patent cases and unanimously interpreted the Patent Act to require trial judges to apply traditional equitable principles in making the determination as to whether an injunction is an appropriate remedy. Thus, in place of the virtual certainty facing an accused infringer that a court victory will carry with it an injunction preventing the accused infringer from continuing its infringing conduct, in the future, patent owners threatening infringement actions will have substantially less bargaining power. *Pat Fahey, (860) 251-5824 or pfahey@goodwin.com*

Constitutional Right To Jury Trial Under Connecticut Uniform Trade Secrets Act: In a recent Connecticut Supreme Court decision, *Evans v. General Motors Corp.*, the state's highest court concluded that the plaintiff-inventor had a right to a jury trial on its claim that the defendant, General Motors, had violated the Connecticut Uniform Trade Secrets Act (CUTSA) by allegedly misappropriating the plaintiff's trade secret concerning an aqueous reverse flow cooling system for automobiles. CUTSA does not expressly authorize a party to receive a jury trial; therefore, the plaintiff argued that the state constitution guaranteed him that right instead. Connecticut courts determine whether the state constitution provides a right to trial by jury by looking at whether, in 1818 when the state constitution was adopted, the rights and remedies provided by the new statutory cause of action — here, CUTSA — were traditionally enforced in an action at law rather than equity, and whether there was a proximate historical analogue at common law to the type of cause of action provided by statute. Noting the existence of common law causes of action in 1818 concerning disclosure of trade secrets, as well as for claims of copyright and patent infringement, the Supreme Court reversed the trial court's denial of plaintiff's right to a jury trial on its CUTSA claims, and remanded the case to the trial court for a new trial. *Karen Staib,(860) 251-5612 or kstaib@goodwin.com*

House Passes H-Prize Legislation to Spark Explosion of Interest in Hydrogen: Did you miss your opportunity to back the winning team in the Ansari X-Prize race to achieve privately funded suborbital space-flight? Perhaps you passed up the opportunity because your investment goals are slightly more grounded. If so, the United States House of Representatives recently passed a bill that may lift your entrepreneurial spirit without requiring you to shoot for the stars. The H-Prize Act of 2006 (H.R. 5143) authorizes the Secretary of Energy to establish prizes up to $10 million for significant achievements in overcoming scientific and technical barriers associated with hydrogen energy. Hydrogen is widely believed to be the fuel source of the future because it is environmentally friendly and extremely abundant. For example, hydrogen is routinely used as a fuel source in fuel cells that generate electricity; the resulting byproduct of the chemical reaction is merely clean water. The H-Prize Act clearly signals that the United States is committed to building a hydrogen-based economy in an effort to move away from its dependence on foreign oil. The bill was inspired by the highly successful Ansari X-Prize that encouraged investment in privately funded spaceflight technology. The H-Prize is intended to inspire private investment in hydrogen technology by offering cash prizes in categories that include: (1) advancements in components or systems related to hydrogen production, storage, distribution or utilization; (2) prototype development of vehicles or hydrogen-based products; and (3) transformational technologies for distribution or production of hydrogen. Prizes in each of the categories range from $1 million to $10 million. A version of the bill was introduced in the Senate on May 12, 2006. *Erik Ness, (860) 251-5906 or eness@goodwin.com*

State Securities Claims Preempted After All: In our First Quarter 2005 VIP Letter, we reported that the Second Circuit Court of Appeals held that the Securities Litigation Uniform Standards Act (SLUSA) does not preempt class action state law claims that an investor was induced to continue to hold a security because of an allegedly false representation. The Appeals Court had concluded that SLUSA only preempted causes of action "in connection with a purchase or sale of securities" so that a "holding" claim was not preempted. However, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, the United States Supreme Court reversed the Second Circuit's decision and concluded that SLUSA does, in fact, preempt such a state law claim brought as part of a class action, determining that to do otherwise would thwart the purpose of SLUSA to ensure a national standard for securities class actions involving nationally traded securities. While the Supreme Court construed SEC Rule 10b-5 broadly as a bar to any allegedly fraudulent statement that merely "coincides" with a securities transaction to reach its preemption holding, it did not go so far as to say that there is a federal cause of action for "holders" as opposed to "purchasers and sellers" of securities. The Court's ruling will further limit the types of securities class action lawsuits that are brought in state courts. It does not however bar or preempt state law "holding" claims brought by individuals or certain SLUSA permitted groups. *Derek Mogck, (860) 251-5745 or dmogck@goodwin.com*

Shipman & Goodwin LLP®
COUNSELORS AT LAW

One Constitution Plaza
Hartford, CT 06103-1919

VENTURE BRIEFS

SEC Rejects Small Company Exemption from Section 404 Internal Control Requirements: Rejecting the recommendations of the Advisory Committee on Smaller Public Companies, which had been many months in the making, the SEC has concluded that all public companies will need to comply with Section 404 of the Sarbanes-Oxley Act (SOX) related to internal control over financial reporting and that smaller companies will not be exempt. In furthering the implementation of Section 404, the SEC has announced several proposed actions to help guide management in the process of internal control assessment pursuant to SOX 404(a). First, the SEC expects to issue soon a Concept Release covering a variety of issues as additional SEC guidance for management. This Concept Release will seek comment on the assessment process generally, the "appropriate role" of outside auditors in connection with management's assessment of internal controls and the manner in which outside directors provide the required attestation of internal controls. The SEC has also announced that it will consider the extent to which forthcoming guidance provided by the Committee of Sponsoring Organizations of the Treadway Commission (COSO) is useful to smaller companies in completing their Section 404(a) assessments. Finally, the SEC plans to issue guidance to companies to assist them in the performance of a top-down, risk-based assessment approach to evaluating internal controls. In order to permit non-accelerated filers (companies with a public float of less than $75 million) and their auditors to have the benefit of the management guidance that the SEC intends to issue, the SEC will soon issue another short postponement of the effective date of the rules implementing Section 404 for non-accelerated filers. No exact date has been given yet; however, it is anticipated that full compliance will be required for fiscal years beginning on or after December 16, 2006. *Donna Brooks, (860) 251-5917 or dbrooks@goodwin.com*

Executive Compensation is Not a Constructive Dividend: Recently, in *Horbal, et al. v. Three Rivers Holdings, Inc., et al.*, the Delaware Chancery Court dismissed plaintiffs' claim in which plaintiffs (consisting of one of the founders, an officer and director of a health maintenance organization and several shareholders) alleged that the defendants, the company's co-investors and remaining directors, paid themselves excessive compensation which plaintiffs argued should be classified as constructive or de facto dividends to which plaintiffs were entitled to share in equally. The Court, dismissing the de facto dividends claim with prejudice, pointed out that no Delaware court has ever recast executive compensation as a constructive dividend nor has any Delaware court recognized such a cause of action to exist for the benefit of shareholders of a corporation. The Court pointed out that this case was very similar to the facts of *Wilderman v. Wilderman* (1974) where the *Wilderman* court allowed the excessive compensation at issue to be returned to the corporation as corporate profits to be distributed as dividends which would be shared by all of the stockholders. The Court pointed out that the *Wilderman* court declined to recast the compensation at issue as a disguised dividend to which plaintiff stockholder was entitled to as a right and instead returned the excessive compensation to the corporation, invalidating such payments. Plaintiffs' claims in this case, however, did not seek such a return due to the improper payments but rather argued that the payments were wrong only to the extent that they excluded payment to the plaintiff shareholders. Furthermore, the Court went on to point out that the *Wilderman* case was based on well-pled fraud allegations whereas in this case plaintiffs specifically acknowledged that they were not alleging fraud, perhaps due to the plaintiff investor's intimate involvement in the creation of the management agreements which governed the relationships which were being compensated by the health maintenance organization. *Lina McKinney,(860) 251-5733 or lmckinney@goodwin.com*

Buyer Beware in Big League Buyouts: The Delaware Chancery Court recently held that, where sophisticated private equity firms have negotiated a purchase agreement that specifically delineates and limits the indemnification liability of the seller of the stock of a portfolio company to a stated sum of money damages, the buyer may not seek rescission of the deal unless it can prove that the seller itself (as opposed to the portfolio company) actually "lied" or had knowledge that the representations set forth in the purchase agreement were untrue. In *ABRY Partners V, L.P. v. F&W Acquisitions LLC*, the private equity firm of ABRY Partners V, L.P. (Buyer) purchased F&W Publications Inc. (Company) from a holding company owned by Providence Equity Partners Inc. (Seller). After closing, Buyer became aware that the Company had seriously misstated its earnings and failed to disclose a fact that ultimately had a material adverse effect on the Company. Buyer sued Seller seeking rescission of the stock purchase agreement. Seller filed a motion to dismiss the case arguing that Buyer failed to state a claim. The court granted Seller's motion to dismiss on all counts except for the claim of fraudulent inducement. Seller's argument in support of its motion to dismiss was that the purchase agreement provided for an indemnity claim not to exceed $20 million, made that indemnity claim the exclusive remedy under the agreement and barred rescission of the contract. Buyer argued that, as a matter of public policy, Seller could not insulate itself from a rescission claim for a fraudulent misrepresentation contained in the purchase agreement. The court noted that the purchase agreement carefully delineated the representations and warranties made by Seller and those made by the Company and did not make Seller responsible for everything the Company or its management did. While agreeing with Buyer that the public policy against fraud is "a strong and venerable one," the Court held that, in order to succeed on its claim of fraudulent inducement against Seller, Buyer must prove that Seller itself "lied" to Buyer about a representation or warranty or that Seller knew the Company's representations were false. *Carol McVerry, (860) 251-5839 or cmcverry@goodwin.com*