

## Fashion Apparel Law Blog

March 21, 2011 by Sheppard Mullin

### **This Season, Cover Your Apps**

"There's an app for that.<sup>TM</sup>" The fashion world, and indeed, the general consuming public, is well familiar with this phrase. The expression has become so ubiquitous that Apple has even successfully registered it for trademark protection. But what is the import for the fashion industry? What does "that" refer to, and what are its legal ramifications? What's behind the simple swipe of a finger that allows consumers to sit front row at fashion shows around the world?

At the Financo Forum in January 2011, the old guard of department store and merchandizing veterans were replaced by social media experts and technology pioneers. Ben Fischman, CEO of Rue La La, the wildly popular invitation-only flash sale site, warned, "If only now you are starting to think about creating a mobile app, you are incredibly late."<sup>[1]</sup> Engaging consumers with the use of apps and other digital media is a powerful strategy for increasing both brand awareness and profits. But it's not just any old app that will do—consumers are eager for creative new ways to interact with mobile technology and the brands behind it, and as a whole, the fashion industry has been delivering.

The Spring/Summer 2011 Fashion Weeks from New York to London unveiled innovative ways to engage consumers in the runway shows. Gucci, Marc Jacobs, and forty other designers streamed their fashion shows live online, and Alexander Wang projected his on a moving digital billboard in Manhattan. In London, Burberry's "Retail Theater" took the concept of a trunk show straight to the iPad. The runway show was streamed live to the devices, provided at exclusive in-store viewing parties at 25 flagship locations. Using the provided iPads, customers had the unique opportunity to purchase pieces straight off the runway and receive their orders in just seven weeks. Customers do not walk out with shopping bags, but wait for deliveries instead.

This large scale embracing of the iPad certainly signifies the growing importance of a mobile presence that engages a new client base. Increasingly, technology allows for multichannel campaigns, employing an array of creative means to reach consumers. Technology directly in their hands is still a major force of mobile marketing, with new fashion apps continuously being unveiled.

Donna Karan launched one of the first iPhone (now available on iPad) apps, coinciding with her Fall 2009 collection (Sheppard Mullin represented Donna Karan in the deal). The application allows the designer to connect personally with her clients. Her "System of Dressing" includes

video tutorials on maximizing one's wardrobe, and the app includes a Q&A feature for users to email questions to Donna Karan herself. There is also the ability to create wish lists of items with the option of forwarding the list to a personal shopper. Karan also includes highlighted must-have items and a "people who inspire" section featuring prominent influences on the designer's life.

Apps like these provide a means for designers to communicate their signature style to their consumer base, and the benefits of this relationship are becoming increasingly apparent. Commentators note that 2010 was the marathon year for mobile marketing, with only a few players coming out strong in the end, but 2011 already displays signs of a more aggressive race.[2] The tablet browser is quickly becoming the platform to focus on, with the Apple iPad remaining important but competing with at least 40 new devices.[3] Another significant trend in 2011 will be the rise of location-aware systems in mobile technology—these systems recognize a consumer's physical proximity to an item or retailer they have shown interest in. The location-sensitive tool in turn will send notifications and special offers based on these preferences. This technology has powerful implications: it has the potential to mobilize the brick and mortar presence of retailers,[4] and it also raises a host of new privacy concerns.

The combination of these trends means that designers and retailers need to have a well developed, creative marketing approach coupled with a thorough legal strategy. Fashion houses and other developers of fashion apps need to pay attention to the legal issues in several key areas.

## **Intellectual Property**

### *Trademark*

Trademark law is designed to protect both business investments and consumers from confusion and deception. While an established brand developing its own app will not typically have to worry about the proper use of its own marks, there are various ways for apps to integrate other protected brands, so an app developer needs to be sensitive to these issues and clear all potential trademark conflicts. Less established designers or app developers who are providing different content—such as the Stylebook closet-organizer app—need to be particularly aware of any trademark considerations.

### *Copyright*

Depending on the capabilities of the app, different copyright issues will be implicated. The first big step that applies across the board is to ensure copyright clearance for all images, video, and music to be used in an app. Clearance may exist for certain uses, such as in-store, but it is crucial to obtain permission for any digital uses not previously covered.

If an app allows for user contribution, it is important to comply with the Digital Millennium Copyright Act in order to protect oneself from infringement by third parties using the application. The DMCA's safe harbor provision, codified in the Online Copyright Infringement Liability Limitation Act, sets forth several requirements to avoid liability. The provider must: (1) comply with standard technical measures; (2) remove repeat infringers; (3) not receive a

financial benefit directly attributable to infringing activity; (4) not be aware or have reason to be aware of infringement; and (4) quickly remove allegedly infringing material upon notice from the copyright holder.

As a final note, developers of apps should not copy privacy policy and user terms from other apps verbatim. It may sound silly, but it can be tempting to use language that seems perfect the way it is. It makes little sense to infringe another's work, especially in the context of setting forth one's own legal terms.

## Privacy

The proliferation of location-aware systems necessarily raises a host of increased privacy concerns for apps. Users tend to simply check the box stating that they've read and accepted the terms, since the alternative is not being able to use the app at all. This "click-wrap" mechanism has traditionally been upheld as a fair contractual practice, but recent trends indicate a shift in the other direction. There is also a growing public concern with app makers collecting data and selling it to third parties—entities that users are typically unaware of. As such, a privacy policy needs to be legally sound in the face of these challenges.

Our video games practice has addressed similar concerns on their blog:

*Regulations aren't great in setting forth explicit requirements with respect to privacy. Instead we often get broad statements that are meant to be applied according to context. But issues are popping up with greater frequency, so it makes sense to try and be as clear as possible. Possible downsides include the prospect of FTC enforcement proceedings or litigation based on unfair business practices if the privacy policy does not accurately describe what information is collected and how it is actually used. Additionally, there are risks if the privacy policy fails to comply with the requirement of California law and other laws that expressly say that if you collect personal information from a consumer online you must disclose what information you collect and how you use it. Additionally, a company may be responsible for downstream disclosures or uses of personal information if you know that the company to which you provide information is going to disclose it or use it in a particular way and you don't disclose that.[5]*

Since the publication of that post, the FTC has ramped up its regulatory efforts. The regulatory body can only take action if it deems business practices "deceptive" or "unfair." In a surprising decision against Sears, the FTC deemed the retailer's practices deceptive, despite no actual misrepresentation. Though Sears' privacy policy for its online community did express that the tracking application would collect information including users' online activity, purchases, secure connection transactions, online checking accounts, prescription drug records, and some email and instant messages, the FTC still determined that the retailer did not adequately disclose the actual function of the application.[6] In other words, users were not adequately put on notice.

In December, the FTC issued a report entitled "Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers." The report set forth

propositions regarding consumer consent and opting out of behavioral advertising, and also suggested Do Not Track legislation. The Do Not Track Me Online Act was introduced by Jackie Speier (D-Calif) in February, and the proposed bill will give the FTC the ability to create regulations and actually enforce them through monetary penalties, audits, and other measures. The bill will also allow the FTC to create exceptions for “commonly accepted commercial practices.” This bill gives the FTC more teeth, as it goes beyond just policing for deceptive and unfair business practices. Other legislation that would establish baseline federal privacy laws is on the books, and one representative intends to reintroduce a measure that would require ad networks to obtain users’ consent to tracking. With this growing awareness of consumer privacy, fashion houses need to be particularly careful about collecting data from consumers via mobile apps.

To start with, any existing privacy policies should be updated to reflect the changes of the mobile app environment. Privacy policies fit for an e-commerce site may not necessarily cover all of the possibilities in a mobile app context, particularly the location-sensitive capabilities.

Notably, inserting terms into a privacy policy may not be enough if the language is buried and not clearly understood. There is a trend toward favoring privacy policies and user terms of agreement that are more concise and clear, and there are potentially increase notice requirements regarding personal information that may be “sensitive.” This contradicts precedent that made consumers legally responsible for accepting contractual terms, and reflects a shift toward more protective practices. One way to deal with the challenge of thoroughly articulating terms—which may take up considerable space—and still making those terms understandable to users, is to employ a two-step practice. The first page of a policy can highlight important terms, and users can see the next page for more comprehensive explanations. Doing so balances these competing interests and may help shield an app provider from liability.

Mobile technology shows no signs of slowing down, and fashion continues to be one of the main creative forces setting the trend. The key to covering all the legal bases is to pay keen attention to current developments in both intellectual property and consumer privacy. And of course, it is necessary to carefully comply with all existing laws. Fashion has always been about setting and breaking trends, and this holds true when it comes to business and legal practices as well. It’s always in style to anticipate and create the next big thing, whether it’s an app or a bulletproof legal strategy.

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[1] Jeanine Poggi, "Retail CEOs Debate: Do We Even Need Our Stores?" *The Street*, Jan. 11, 2011.

[2] Vanessa Horwell, "Clamor for Mobile Marketing Begins" *Luxury Daily*, Feb. 10, 2011.

[3] Tom Limongello, "Why Brands Should Focus More on the Tablet Browser" *Luxury Daily*, Feb. 3, 2011.

[4] Vanessa Horwell, "Clamor for Mobile Marketing Begins" *Luxury Daily*, Feb. 10, 2011.

[5] Sheppard Mullin, "Social Games and PRIVACY POLICY PANDEMONIUM" *Law of the Level*, July 19, 2010.

[6] "In the Matter of Sears Holdings Management Corporation, a corporation." FTC File No. 082 3099.