



QuickCounsel

Legal Issues Associated with Mobile Marketing to Sports Fans

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Overview

More and more sports teams and advertisers are reaching sports fans through their mobile devices. Mobile devices are typically used by only one person and are accessible anywhere, anytime, making it a very effective method for reaching, entertaining, and learning about fans. The Wireless Association [estimates](#) that there are 322 million cellphone users in the U.S. The U.N.'s International Telecommunication Union [estimates](#) there are 5.9 billion mobile phone users globally.

Marketing to sports fans through mobile channels continues to expand. Here are just a few examples:

- Creating a mobile app, or sponsoring a mobile app, that promotes a product, event, or brand.

- Displaying a QR code that, when scanned by a mobile device, takes the user to a website for more information or to purchase a product.

- Using global positioning system (GPS) technology to send promotional messages or coupons to mobile devices that are relevant to the user's location.

- Sending a promotional message, alert, or account update to a user via text message, or allowing entry to a contest or sweepstakes, or voting, by text message (for example, some venues allow fans to vote to select music played during half-time).

- Creating a mobile-optimized website; some mobile websites can be accessed only by those attending a particular venue or event, and may provide real-time statistics or video streaming of activities inside the venue or instant replays.

- Product placement in games played on mobile devices.

- Advertising on mobile-optimized websites.

Marketing to sports fans through mobile channels is relatively new, and technology is developing faster than the legal framework

governing these types of programs. Some of the laws that apply to these programs were enacted decades ago and do not necessarily “fit” mobile programs. For example, promotional text messages (also called mobile messaging) are subject to the Telephone Consumer Protection Act, a federal law regulating telemarketing and commercial faxes, which was enacted in 1991, long before mobile messaging was launched.

Because there is some uncertainty about what laws apply to mobile programs and how to comply with these laws, there have been scores of class action lawsuits challenging various mobile marketing programs and data collected by mobile apps. Also, mobile programs are typically governed by a wide variety of state and federal statutes and case law, creating a compliance challenge.

This QuickCounsel provides an overview of the two most popular types of mobile programs used to reach sports fans - promotional text messages and mobile apps – as well as mobile privacy issues.

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Promotional Text Messages

State, federal, and case law as well as industry guidelines and terms and conditions address promotional text messages, including:

- FTC Act and FTC rules
- FCC laws and rules
- State and federal telemarketing and email laws
- State and federal privacy laws
- Traditional advertising, promotions and consumer protection laws
- Industry guidelines
- Wireless carrier policies and standards
- Terms and conditions for various mobile device operating systems
- Terms and conditions for social media platforms

The Telephone Consumer Protection Act (TCPA)

Most promotional text messages are subject to the [Telephone Consumer Protection Act](#) (“TCPA”), the FCC’s rules implementing the Act ([47 CFR 64](#)), as well as [FCC Orders](#) and case law interpreting the TCPA. There are also state telemarketing laws that may apply to promotional text messages. While these laws generally mirror the federal telemarketing law, there are some substantive differences. A very small number of promotional text messages are sent to individuals through a mobile carrier domain name; these messages would be subject to the federal, which requires, among other things, providing the sender’s name and physical address, a working opt-out mechanism, and an accurate from and subject line.

The FCC and several courts have held that a promotional text message is a “call” as defined in the TCPA. The TCPA requires, among other things, that marketers obtain prior express consent before sending a promotional text message. The TCPA does not define what constitutes “prior express consent.” However, the burden is on the marketer to show that it obtained prior express consent. The marketer can obtain consent electronically, in writing or orally. A best practice is to require the consumer to make some affirmative action (which means a pre-checked box probably does not constitute express consent).

Sports marketers should obtain consent for the particular program they want to offer. At least one court has held that consent will be narrowly construed. In [Satterfield v. Simon & Schuster, Inc.](#), the plaintiff, Laci Satterfield, registered with Nextones.com in order to receive a free ringtone for her son. The registration contained the following offer next to a check box:

"Yes! I would like to receive promotions from Nextones affiliates and brands. Please note that by declining you may not be eligible for our FREE content. By checking Submit, you agree that you have read and agreed to the Terms and Conditions."

Satterfield checked the box and clicked Submit.

Subsequently, Satterfield received a text message from Simon & Schuster advertising a new book by Stephen King. The text

message said “PwdbbyNexton.” Simon & Schuster outsourced its promotional campaign to ipsh!, which obtained a list of 100,000 cell phone numbers from Mobile Information Access Company (MIA). MIA was the exclusive agent for licensing the cell phone numbers of Nextones’ subscribers.

Simon & Shuster claimed that it had obtained consent to send promotional text messages to Nextones subscribers. However, the Ninth Circuit held that Satterfield did not expressly consent to receive text messages from Simon & Schuster because Simon & Schuster is not an affiliate of Nextone (Nextones neither owns nor controls Simon & Schuster), and Simon & Schuster is not a brand of Nextone. The parties reportedly settled for \$10 million.

In another class action, plaintiffs claimed they received text messages about past due credit card accounts from their credit card provider. (See *Gutierrez v. Barclays Group*, No. 10-cv-1012, S.D. Cal.) The plaintiffs claimed the defendant violated the TCPA because it did not obtain consent to send promotional text messages. The defendant asserted that it obtained consent when the plaintiffs provided their cell phone number on the credit card application form. The court did not rule on the issue of consent, and the parties settled out of court, reportedly for \$8.2 million. A bill was recently introduced in Congress, [H.R. 3035](#), that would amend the TCPA by stating that “a person who provides a telephone number as a means of contact evidences consent under this paragraph.”

Mobile Marketing Association Guidelines

The [Mobile Marketing Association](#) (MMA) issued a [series of guidelines and best practices](#) for those engaging in mobile programs. MMA guidelines do not have the force of law, but they are widely followed and many agreements reference and require compliance with the MMA Guidelines. The guidelines are revised often.

The MMA [Consumer Best Practices](#) generally addresses how and when to obtain consent, how individuals can terminate a program, and making disclosures during registration and in advertisements for mobile programs. For example, the guidelines state:

Content providers must obtain opt-in approval from subscribers before sending them any promotional text message.

When opt-in occurs via the web or other non-mobile point of origination, the content provider must obtain verification that the subscriber is in possession of the handset being opted-in to the service.

The opt-in applies only to the specific program a subscriber is subscribed to and should not be used as a blanket approval to promote other programs, products, and services.

A subscriber must be able to stop participating and receiving messages from any program by sending STOP to the short code used for that program. END, CANCEL, UNSUBSCRIBE or QUIT should also be opt-out key words for all programs; however, content providers should feature the word STOP in their advertising and messaging.

The MMA Code of Conduct addresses privacy (discussed *infra*).

Advertising, promotions, and consumer protection laws

Promotional text messages are also subject to laws regulating advertising and promotions as well as consumer protection laws. For example, a promotion that allows individuals to enter a sweepstakes by sending a text message must also comply with state and federal laws regulating sweepstakes. These laws typically require that a free method of entry be provided. Since many individuals are charged for sending text messages, a free method of entry would be necessary to avoid classification as an illegal lottery.

The content of advertisements or promotions sent to a mobile device should comply with existing state and federal advertising laws. These laws require, among other things, that material terms of an offer be disclosed clearly and conspicuously and the advertiser needs to have reasonable substantiation for claims made in any advertisement.

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Mobile Apps

Mobile apps are another popular channel for reaching sports fans. Mobile apps, or applications, are software programs that run on mobile devices. Some come pre-installed on mobile devices while others can be purchased or downloaded for free. Some require

internet connectivity because they access programs or information on the web. Popular app categories are games, music, news and information, social networking, product comparison and purchase, and location-based services or promotions.

Companies using mobile apps to reach consumers can create their own, sponsor a mobile app created by another party, and pay to advertise in a mobile app (such as a game). Whatever the format of the app, most companies lack the in-house programming resources to develop their own app so they hire (or use an advertising agency to hire) an app developer. The app developer should be familiar with the terms and conditions of the various mobile platforms (such as Apple, Android, and Blackberry). App developer agreements should address:

- Who owns the program;
- Who owns and can use the data that is collected from the program;
- Trademarks and other intellectual property featured or used in the app;
- Apportionment of revenues;
- Liability for any failure or regulatory violation; and
- Responsibility for distribution of the app.

Mobile apps also typically require consumers to license the app and agree to certain terms and conditions. The terms and conditions will vary but typically include at a minimum:

- Permitted uses;
- Restrictions (such as reverse engineering);
- Terms and conditions required by the mobile platform or mobile services provider;
- Payment and refund policies;
- Termination; and
- Protection of intellectual property.

One area of litigation involving mobile apps is the failure of some app providers to clearly disclose fees associated with the mobile app.

Advertising for mobile apps is subject to state and federal advertising laws. The FTC [announced a settlement](#) with two mobile app developers who allegedly violated Section 5 of the FTC Act. Advertisements for the apps claimed that light emitted from the apps treated acne when individuals held the mobile device close to the skin to be treated for a few minutes each day. The FTC claimed that the mobile app developers did not have adequate substantiation for these claims.

The hottest regulatory topic relating to mobile apps is privacy.

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Mobile Privacy

Mobile privacy was in the headlines almost weekly throughout 2011. In late 2010, the Wall Street Journal published an article called “[Your Apps Are Watching You](#).” The Wall Street Journal conducted research on mobile apps for several different platforms and claimed that dozens of mobile apps collect information without users’ knowledge or consent, and in violation of mobile platform terms and conditions. Class action law suits against Apple and Google (creator of the Android mobile operating system) were filed within days, which were soon followed by Congressional hearings and several bills introduced at the [state](#) and [federal](#) level addressing mobile privacy.

In October 2011, the MMA released new mobile app privacy guidelines for comment. The proposed guidelines are in the form of an annotated privacy policy that mobile app developers can tailor to their specific practices. The guidelines, if adopted, will likely become industry best practices for mobile app privacy policies. The guidelines address:

- What information the app obtains (i.e., information provided by the user as well as information that is automatically collected)

and how that information is used and/or shared;

Whether the application collects precise real-time location information, how that information is collected, and how it is used and/or shared;

Whether consumers can opt-out from allowing the mobile application developer to have access to the consumer's location data and how to accomplish the opt-out;

Whether third parties see or have access to information obtained by the application, who the information is shared with, and how notice of a change in ownership or use of the information will be provided to consumers;

Whether the application works with third parties to deliver targeted advertising and whether consumers can opt-out of third-party use of information for targeted advertising;

How long information is retained, whether consumers can request to have information about them deleted, and how information will be safeguarded; and

How notice of changes to the privacy policy will be provided.

The Wireless Association (CTIA) has issued privacy [guidelines](#) specifically for location-based services (LBS). These guidelines address:

Notice - LBS Providers must disclose how users' location information will be used and disclosed, and must disclose what information is shared with third parties; LBS Providers must inform users how they may terminate the LBS, and the implications of doing so.

Consent - LBS Providers must obtain consent to use or disclose location information before initiating a location based service.

Security – LBS providers must employ reasonable administrative, physical and/or technical safeguards to protect a user's location information from unauthorized access, alteration, destruction, use or disclosure, and should retain information only as long as is necessary.

Companies that launch geo-location promotions or create a special in-venue mobile website may need to revise their existing privacy policy to address collection of geo-location information and/or create a privacy policy just for the mobile site. The FTC continues to be very active in monitoring privacy practices and has announced settlements with several companies that failed to comply with their own privacy policies, failed to provide adequate security for consumer information, and failed to honor opt-out requests.

Mobile apps designed for, or knowingly used by, kids should comply with the federal [Children's Online Privacy Protection Act](#) (COPPA) and the [FTC's COPPA Rule](#). COPPA applies to the online collection of personal information from children under 13 and requires, among other things, that web site operators obtain parental consent before collecting such information. Although there is some ambiguity about whether COPPA applies to mobile apps (since some mobile apps are not actually "online"), the FTC [announced a settlement](#) with a mobile app developer, claiming it violated COPPA by collecting and disclosing the personal information of tens of thousands of children under 13 without first obtaining verifiable consent from their parents.

In addition, the FTC has issued [proposed changes to its COPPA Rule](#) that would make it clear that COPPA applies to mobile apps. If the proposed changes are adopted, COPPA would apply to the collection of geo-location data and the use of cookies for behavioral advertising on mobile devices used by children.

Many mobile apps reference or are integrated with a social media platform, such as Facebook or Twitter. The Apple App store has apps that let you read all Tweets from a particular sport, such as hockey, football, basketball and cycling. Social media platforms have their own terms of use, privacy policies, and promotions and advertising guidelines. Tying into a social media platform may result in the dissemination of information that some consumers think should be private. A class action lawsuit was filed against music sharing site Pandora alleging privacy violations when it partnered with Facebook. The plaintiffs claimed the disclosure of members' music listening logs violated a state law restricting the disclosure of rental histories.

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Conclusion

Mobile marketing is a dynamic channel for reaching sports fans, but it certainly comes with some legal challenges. Regulators and the plaintiffs' bar are scrutinizing text message campaigns and mobile apps. Privacy remains a hot topic among regulators, legislators and the media. The legal landscape is still developing so there is some uncertainty about whether new types of mobile marketing will be tomorrow's class action complaint. Nonetheless, the power of marketing through mobile devices will continue to drive more and more advertisers and teams to engage through mobile applications and communications.

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Additional Resources

ACC Resources

ACC Article (2011): [Company Use of Social Media: Best Practices Checklist](#)

ACC InfoPak (2011): [Technology Primer](#)

ACC Top Ten (2011): [I Know Where You Are: Top Ten Considerations When Using Geo-Location Data or Promotions to Reach Customers and Fans](#)

ACC Webcast (2011): [Using New Media to Promote Corporate Image - Understanding the Risks and Rewards](#)

Web Resources

[Marketing On The Go: Legal Issues In Mobile Advertising](#) (Loeb & Loeb LLP 2011)

[Advanced Advertising In The Sports Industry Free Cle Webinar](#) (Loeb & Loeb LLP 2010)

[Using Behavioral Targeting To Reach Fans: New Laws On The Horizon](#) (Loeb & Loeb LLP 2010)

[Mobile Marketing Watch](#)

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