

Legal Issues Surrounding Mobile Apps

--Why apps are different than websites

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Providing a mobile application for customers and potential customers has become as ubiquitous as having a website. Whether the app is used as a simple marketing tool (i.e. a trivia app that features the images of stars in an upcoming film), or a feature-packed version of an adult dating website, consumers are beginning to expect - if not demand - that their favorite online destinations have accompanying mobile applications. In fact, a leading Morgan Stanley Internet analyst recently released an "Internet Trends" report which predicts that within the next four years "more users will connect to the Internet over mobile devices than desktop PCs."¹ This statistic isn't surprising considering the popularity of the iPhone/iPad, Android-based phones, and the slew of other pad-type devices slated for imminent release.

What has resulted is an opportunity-filled time for businesses that are positioned to offer such apps. Webmasters and content providers can now literally be in their consumers' pockets and purses. The metaphorical analog to that statement is just as exciting: To put it bluntly, apps offer a perpetual method for revenue generation. In the office, on the couch, at a restaurant, in the bathroom – a direct line from the customers' pockets to the provider's bank account.

But WAIT! Before you start searching the Internet for code-jockeys who promise to build an app for you on the cheap, careful consideration should be paid to the myriad of complicated legal issues that releasing an app creates. Just as apps can generate positive new opportunities, releasing an app without careful planning can also generate new financial and legal liabilities, given the relatively uncharted waters in which they operate.

As always, content is king. As reported by XBIZ [recently](#), the notoriously-fickle Apple made its App Store Review Guidelines public. Dipping its toes in the jurisprudence pool, Apple's guidelines quote the U.S. Supreme Court's 1964 *Jacobellis v. Ohio* obscenity case in which Justice Potter Stewart, referring to hard-core pornography, stated: "I know it when I see it."² Apple thinks that app developers will likewise

¹<http://gigaom.com/2010/04/12/mary-meeker-mobile-internet-will-soon-overtake-fixed-internet/> (full report available here: http://www.morganstanley.com/institutional/techresearch/pdfs/Internet_Trends_041210.pdf)

² See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, P., concurring).

know when they have gone “over the line” with their content.³ The company does provide a slightly more concrete definition in the guidelines by indicating that apps containing pornography will be rejected, where “pornography” is defined by reference to Webster’s Dictionary. Interestingly, that definition requires that content be “explicit” to be pornographic. While Apple has been getting the bulk of negative press concerning banning “adult” apps in its App Store, Google’s Android Market content policy may be even more restrictive than Apple’s in that it prohibits “nudity” along with “pornography, obscenity, or sexual activity.”⁴ Of course, Google’s lack of an app approval process allows developers to essentially publish whatever app they desire in the Android Market. Google may then retroactively remove apps from the Market for content violations, which may be discovered via community-policing and the “flagging” efforts of users. It is important to be aware of the distinction between publishing an app in the Android Market vs. publishing an Android app elsewhere. Unlike users of Apple’s products, who must resort to “jailbreaking” their devices in order to use third-party app marketplaces, Android users have many different marketplaces from which to download and install apps, and each marketplace may have its own regulations. For example, as discussed in this article, Android’s “official” Market has restrictions on nudity, yet a third-party marketplace exists primarily for adult content.⁵

Content is therefore important because it may be what keeps an app out of a marketplace (or *the* marketplace when referring to Apple apps). Perhaps more important, however, is what happens if an app is accepted. Are there trademark concerns generated based on the name of the app? Do copyright and/or trademark considerations exist with respect to the app’s icon? Importantly, the legal terms and conditions imposed by the app’s specific marketplace significantly impact the relationship between the developer and its customers.

Some of these terms may be found in the developer agreement for the specific platform and marketplace.⁶ Apple’s is called the “iPhone Developer Program License Agreement,” and Android’s is the “Android Market Developer Distribution Agreement.”⁷ While they share similarities, they also have important differences and varying degrees of detail. Apple requires that developers provide specific provisions in the terms that govern the app. These requirements can depend on the technology the app uses. For example, if a given app uses certain GPS functions (popular in dating apps), the associated terms must contain specified language. However, Apple also states that developers are not required to

³ In attempting to explain the apparent double standard between allowable content in songs, books, and apps, all of which are available in the iTunes App Store, the guidelines say that “If you want to describe sex, write a book or a song, or create a *medical* app” (emphasis added). So, apparently you can describe sex without limitation via *songs* and/or *books*, but descriptions of sex must be medically-related for *apps*. Apple admits “It can get complicated.” No kidding!

⁴ Google is the developer of the Android mobile operating system.

⁵ See MiKandi at www.mikandi.com.

⁶ This article focuses on apps developed for Apple devices and apps developed for the Android platform (i.e. the Motorola Droid and HTC Evo), but there are others out there, and each has its own set of conditions which must be accepted when developing an app for that platform and/or marketplace.

⁷ Not surprisingly, Apple makes it very difficult to find its Agreement. In fact, it took a Freedom of Information Act request from the Electronic Freedom Frontier concerning an app that NASA released in order for the Agreement to become public. See <http://www.eff.org/deeplinks/2010/03/iphone-developer-program-license-agreement-all>.

include any terms for the app. But if such terms are omitted, then Apple's own terms will govern the use of the app. Deferring to Apple's one-size-fits-all terms may not be in the best interests of the individual developer, so careful consideration should be given to this issue.

Similarly, Google's Android Market Developer Distribution Agreement places requirements on app developers, including required privacy disclaimers and notices, support obligations (which continue even if the app is removed from the market), restrictions on free vs. paid apps, and a protocol (which includes mandatory refund provisions) that must be followed should the app be alleged to be in violation of various intellectual property rights and/or publicity/privacy rights, or should it include defamatory material.

An experienced new media attorney can help developers take advantage of important legal protections by properly drafting and implementing legal terms, disclosures and disclaimers governing the use of mobile applications. Issues such as Section 230 protection, DMCA Safe Harbor, age verification and §2257 exemptions can all be addressed in a mobile app's terms. Merely including such terms in the existing website terms may not be sufficient to bind users of the mobile app. Moreover, mobile apps generate different legal concerns for developers relating to access by minors to age-restricted content – especially given the ready access that minors have to purchasing services via mobile devices, as compared to their restricted access to credit cards necessary to purchase similar services on a traditional website. Accordingly, mobile apps require a renewed emphasis on user age verification, in addition to a host of other issues.

Some webmasters still remember the Golden Age of the Internet when throwing up some content on a website and creating a membership page made it rain money. While releasing mobile apps in today's sophisticated marketplace may not result in the same kind of easy money, it does provide a new and profitable revenue source. However, as with any cutting edge technology, the legal issues are likewise novel and sometimes complex. The release of any mobile app should only be done after evaluating the important legal concerns generated by this new business model.

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