



# Mobile advertisers continue to face legal challenges

By Gonzalo E. Mon

Anyone who reads Mobile Marketer knows that a growing number of companies are engaging in mobile advertising. Fortunately for companies that are new to mobile, there is no shortage of examples of successful campaigns that can be used for inspiration.

However, the list of success stories can sometimes be marred by examples of companies that have had to pay high prices for failing to comply with various legal requirements. The biggest problems have had to do with failure to disclose offer terms or get consent.

Advertising laws require advertisers to disclose important offer terms in a “clear and conspicuous” manner.

In most cases, though, laws do not specify exactly what constitutes “clear and conspicuous.”

## P’s and cues

The Federal Trade Commission encourages advertisers to consider the Four Ps: (1) proximity; (2) placement; (3) prominence; and (4) presentation.



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Although the absence of a specific standard provides advertisers with some flexibility, it also creates some uncertainty over whether a disclosure will comply with relevant laws.

In recent years, Florida Attorney General Bill McCollum has challenged a number of companies for failing to make disclosures sufficiently clear and conspicuous.

For example, the attorney general has challenged companies that advertised “free” services, but buried costs in the fine print.

Disclosing costs in the fine print is unlikely to satisfy laws in any state. Instead, costs have to be presented in the main body of the offer.

The companies challenged by the Florida attorney general have each had to pay at least \$1 million to settle the investigations.

Mr. McCollum is currently developing a “zone system” which will dictate where and how disclosures must be made.

For example, price disclosures will have to appear within a certain number of pixels of the submit field, in a specific font size, and in a color that contrasts with the background.

While the zone system is pending, advertisers would be well-advised to review the Florida attorney general’s settlements with other companies to see what has gotten them in trouble and check with their legal counsel to ensure their ads comply with the law.



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## Yes to consent

Many companies have also gotten in trouble for failing to get consent from consumers.

You need to get specific consent before you can send SMS messages to a consumer, even if the consumer has agreed to receive messages in another medium such as email.

Again, the costs of getting this wrong can be high.

For example, footwear maker Timberland last year agreed to pay \$7 million to settle a case involving unsolicited text messages.

Please review the Mobile Marketing Association guidelines for requirements for getting consent.

Many mobile advertising campaigns involve the efforts of multiple parties. It is tempting to focus on your company’s part and just hope that your partners comply with the law.

Unfortunately, in some cases, you may be held liable for your partner’s faults.

Make sure your agreements with partners contain representations, warranties and adequate indemnifications to protect you in case things go wrong.

Even then, it pays to monitor partners so that you can identify any problems and address them before regulators do. ■

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