

Greater focus on privacy is inevitable

By Gonzalo E. Mon

It is rarely easy to figure out how old laws will apply to new technologies, so when marketers start experimenting, lines inevitably get crossed, legal challenges follow, and the legal landscape changes.

Mobile is no exception, and the past few years have seen a number of battles over how marketers make disclosures and get consent. Although we can expect these battles to continue, it is likely that we will start to see a greater focus on privacy this year.

Agency of change

On Dec. 1, 2010, the Federal Trade Commission issued a preliminary staff report on privacy.

The report proposes a new privacy framework and makes three key recommendations.

Although not primarily focused on mobile marketing, the report includes examples of how each recommendation applies in the mobile context.

- First, companies should integrate privacy into their regular business operations at every stage.

For example, if a mobile application provides traffic or weather information based on location information, it does not need to collect contact lists or call logs from a consumer's device.

- Second, companies should provide privacy choices in a simpler manner at the point of data collection.

For example, when consumers download a mobile application, they may not know whether personal information is shared with third parties. The FTC notes that all companies involved in informa-

tion collection and sharing on mobile devices – carriers, operating system vendors, applications and advertisers – should provide meaningful choice mechanisms for consumers.

- Third, companies should improve the transparency of their privacy practices.

The FTC cites privacy policies in the mobile context as a particular problem. Because of the limitations on mobile devices, a privacy policy can be spread out over 100 screens.

The FTC urges companies to come up with simpler policies so that consumers can more easily read and understand them.





The FTC invited the public to file comments by Jan. 31.

Among other things, the FTC asked whether the rules should be different in the mobile context. Mobile marketers may want to take this opportunity to provide input.

The FTC is separately considering whether the Children's Online Privacy Protection Act should be updated to deal with mobile issues.

COPPA generally requires Web site operators to obtain verifiable parental consent before they collect, use or disclose personal information from children under 13.

Although the FTC was due to review its COPPA Rule in 2015, the FTC announced that it would begin its review in 2010 to deal with rapid advancements in technology.

Disclosures and consent

In recent years, marketers have gotten in trouble for failing to get consent before sending text messages to consumers.

In a series of lawsuits, courts essentially determined that (a) many text message campaigns are subject to the Telephone Consumer Protection Act, even though that law was enacted long before the advent of SMS, and (b) the law requires companies to get consent before sending text messages.

The costs of getting this wrong can be high.

For example, one company paid \$7 million to settle accusations of sending unsolicited text messages. Fortunately, it is relatively easy to avoid these problems. Re-

view the Mobile Marketing Association guidelines for instructions on getting consent.

Many companies have also gotten in trouble for failing to clearly disclose offer terms.

For instance, the Florida 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 should be presented in the main body of the offer.

Many of the companies challenged by Florida's top cop agreed to pay \$1 million or more to settle the investigations.

Some wireless carriers have also agreed to include provisions in contracts with third parties that dictate how certain disclosures must appear.

Make sure you consult these settlements and the carrier contracts when making disclosures.

As technology continues to change, the mobile medium is going to offer marketers more opportunities to interact with consumers.

But where marketers see exciting opportunities, many regulators may see red flags.

New regulations and enforcement actions may be on the horizon, so marketers must remain vigilant and be prepared to adapt to changes in the legal landscape. ■

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