

Contact Sport: Mobile Marketing To Sports Fans

Law360, New York (February 29, 2012, 1:39 PM ET) -- Sports teams and advertisers are increasingly reaching fans through their mobile devices. Recent examples include:

- Creating a mobile application, or sponsoring a mobile app, that promotes a product, event, or brand. Some sports-related apps include apps for finding schedules and where friends are sitting at sporting events, apps to help you train for an event, apps for finding places to skate, ski, run, surf and cycle, fantasy sports games, major league news, statistics, podcasts, and live chats with players and coaches.
- Creating a mobile-optimized website (i.e., a website designed to be viewed by a mobile device). 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. For example, Stanford University announced that it is enhancing the game-day experience by providing Internet connectivity within venues, real-time replays and player statistics on mobile devices, mobile food ordering, and an in-venue mobile website.
- Sending a promotional message via text message, or allowing entry to a contest or sweepstakes, or voting, by text message. Some sporting venues allow fans to vote by text message to select music played during halftime.
- Product placement in games played on mobile devices (for example, a billboard featuring a sporting apparel company in a video soccer game).

When planning mobile communications to promote a sporting event or product, marketers should consider four different legal and regulatory layers: (1) traditional laws that regulate advertising and promotions; (2) another layer of laws and industry guidelines that specifically regulate mobile communications and location-based communications; (3) privacy and data security; and (4) wireless carrier terms and conditions.

Traditional Laws that Regulate Advertising and Promotions

Using mobile channels to reach sports fans requires compliance with existing laws that regulate advertising and promotions. For example, sweepstakes and contests — whether entered or advertised in traditional or new media — are subject to a variety of state and federal laws. These laws address certain disclosures, free method of entry, how to notify winners, odds of winning, and registration requirements, among other things. Sports marketers have offered text messaging as a way to enter sweepstakes and contests.

However, because some text messaging incurs charges for the consumer, this type of sweepstakes must require an alternate, free method of entry. Furthermore, claims made in advertising — regardless of the medium — must be substantiated. Complying with these types of laws may be difficult in mobile communications due to the small screen size of most mobile devices.

Laws and Industry Guidelines that Regulate Mobile Communications

After making sure mobile communications comply with traditional laws, marketers should turn to the laws and industry guidelines that apply to mobile channels. The Telephone Consumer Protection Act, a federal telemarketing law, requires marketers to obtain “prior express consent” before sending a commercial 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.

Consent can be obtained 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).

An important detail is that marketers should obtain consent for the particular program they want to offer. For example, if consent is obtained to send a sports fan text messages containing the latest sports scores, that consent might not suffice for sending text messages promoting merchandise or other products, or for letting a third party market products to the sports fan by text message.

Industry guidelines also play an important role in designing mobile communications. The Mobile Marketing Association has 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 for a text message program, how individuals can terminate a program, and making disclosures during registration and in advertisements for mobile programs. For example, the guidelines state:

- Content providers (i.e., those who want to send text messages to subscribers) must obtain opt-in approval from subscribers before sending them any promotional text message.

- When opt-in occurs via the Web or other nonmobile 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.

Privacy and Data Security

Mobile privacy is in the headlines almost weekly: News articles report that various mobile devices and mobile apps are collecting information, such as name, age, gender, interests and specific geo-location information, from mobile users and storing or sharing that data with third-parties. Congress has held several hearings, new federal bills have been introduced, and dozens of class action lawsuits relating to mobile privacy have been filed.

Mobile apps may collect information upon registration and each time someone uses the app. Some apps, such as those tied to a specific sporting event, may use geolocation data. Sports marketers who hire mobile app developers to create an app should understand whether and how the app collects information.

An additional concern is the collection of information from children since many sports-themed apps are used by children. Such apps may be subject to the Children's Online Privacy Protection Act, which is enforced by the Federal Trade Commission. The FTC recently released a staff report called "Mobile Apps for Kids: Current Privacy Disclosures Are Disappointing," which states that neither app stores nor app developers provide parents with sufficient information relating to what data most apps are collecting from children, how the data is used, and who has access to it.

In 2011, the FTC settled an enforcement action with the developer of a mobile app for kids for \$50,000, alleging that the mobile apps were collecting and disclosing information from children without verifiable parental consent, as required by COPPA.

In early 2012, the MMA released privacy guidelines for mobile app developers. The guidelines are in the form of an annotated privacy policy that mobile app developers can tailor to their specific practices. 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 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 geolocation promotions (such as coupons for concession stands at a sporting event) or create a mobile-optimized website for viewing by those inside a sporting venue may need to revise their existing privacy policy to address collection of geolocation 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.

Terms and Conditions

Mobile programs must also consider the terms and conditions of the wireless carriers. Mobile apps typically involve hiring an app developer, and 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.

Many mobile apps reference or are integrated with a social media platform, such as Facebook or Twitter. For example, there is an app that lets you read all the 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.

Conclusion

The technology used in mobile marketing to sports fans 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.

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. The sports marketers and advertisers engaging in these types of programs should be diligent about understanding the many legal issues that are implicated by such programs.

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