

COLUMNS

Understanding legal challenges on the mobile Web

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Mobile phones present marketers with unique opportunities for interacting with consumers, but they also present unique legal challenges.

Laws written for a wired world do not always translate well into the mobile world. But before figuring out how to comply with these laws, the first challenge is often figuring out exactly which laws apply.

Unfortunately, that is not always easy. In part, that is because mobile phones allow marketers to interact with consumers using different technologies and these technologies can be governed by different laws.

Tips on TCPA

If marketers interact with consumers via text messages, they will likely have to comply with Telephone Consumer Protection Act (the "TCPA").

In a series of recent lawsuits, courts have essentially determined that (a) text messages are subject to the TCPA, even though that law was enacted long before the advent of SMS, and (b) the law requires that companies obtain consent before they send text messages.

Unlike email marketing, mobile marketing requires opt-in consent. Marketers should consult the Mobile Marketing Association guidelines for tips on how to get consent.

As mobile browsers get better and networks get faster, more companies are focusing on the mobile Web.

Most activities on the mobile Web will not be subject to the TCPA, but other laws apply.

In general, laws that govern Web sites apply regardless of whether consumers access a Web site from a computer browser or a mobile browser.

Thus, companies that develop mobile versions of existing Web sites and already have compliance procedures in place may not be subject to new laws. Nevertheless, complying with the laws they already know could be harder.

For example, advertising laws require advertisers to disclose the materials terms of their offers in a "clear and conspicuous" manner.

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

Instead, the FTC encourages advertisers to consider the four Ps: (1) proximity; (2) placement; (3) prominence; and (4) presentation.

Ensuring that disclosures meet this standard can be very difficult within the limited real estate on mobile browsers.

Nevertheless, marketers that do not disclose material terms effectively are likely to face complaints and lawsuits.

As companies collect more data and find new ways to monetize that data, regulators and consumer groups are growing more wary about privacy issues.

In May, Rep. Rick Boucher released a discussion draft of a broad privacy bill that could affect mobile marketing. If enacted, mobile marketers would likely be obligated to display a privacy policy before collecting certain information.

In addition, if a marketer uses an unaffiliated third party to implement its campaign, the marketer would be required to get opt-in consent from the consumer before disclosing information to the third party.

Coping with COPPA

Regulators are also likely to focus on how children use the mobile Web.

The Children's Online Privacy Protection Act ("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, given rapid advances in technology, the FTC announced that it would begin its review this year.

Among other things, the FTC is seeking input on whether the Rule needs to be updated to deal with mobile issues.

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

But regulators are paying close attention and are contemplating legislation and enforcement actions that will place boundaries in the mobile space.

Marketers and their lawyers are going to have to work creatively together to find a way to take advantage of the opportunities while staying within those boundaries.

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