

TEXTS, TWEETS & TORTS: Dos and Don'ts of Mobile Marketing

IAPP Breakout Session

Thursday, March 10, 2011

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What is Mobile Marketing?

- ◆ Live and pre-recorded voice calls delivered directly to a wireless device
- ◆ Alpha and/or numeric messages delivered directly to a wireless device
 - ◆ Phone-to-phone
 - Short Codes (4-6 numeric characters)
 - SMS/Text messages (maximum 160 characters)
 - Tweets (maximum 140 characters) and Direct Messages
 - ◆ Computer-to-phone
 - Electronic E-Mail Messages
 - SMS/Text Messages (maximum 160 characters)
 - Tweets (maximum 140 characters) and Direct Messages

Mobile Messaging Examples

Contests/Sweepstakes – Short Codes



**THIS SMOOTHIE COULD BE
YOUR TICKET
TO PARADISE.**

Text **SKWIN**
to **55022**
and register to
win one of 20
**\$1,000 Swimsuit
Weekends.**

Be good to yourself!

Includes an image of a 'Welcome to Tisbury' sign with the text 'Say Hello to a Better Beach Body' and a picture of a smoothie.




D.C. Lottery

\$100 FREE GAS
Text **4GAS** to **55022**
for your chance to win.

And learn how you could win a 2008 Corvette Coupe
at this year's Washington Auto Show.

Includes a small image of a red Corvette Coupe.



Text **MGD** to **55022**
For a chance to meet **Bon Jovi**

Standard Text Message Rates Apply. Must be 21+ click for details

Includes an image of a Miller Genuine Draft beer can.

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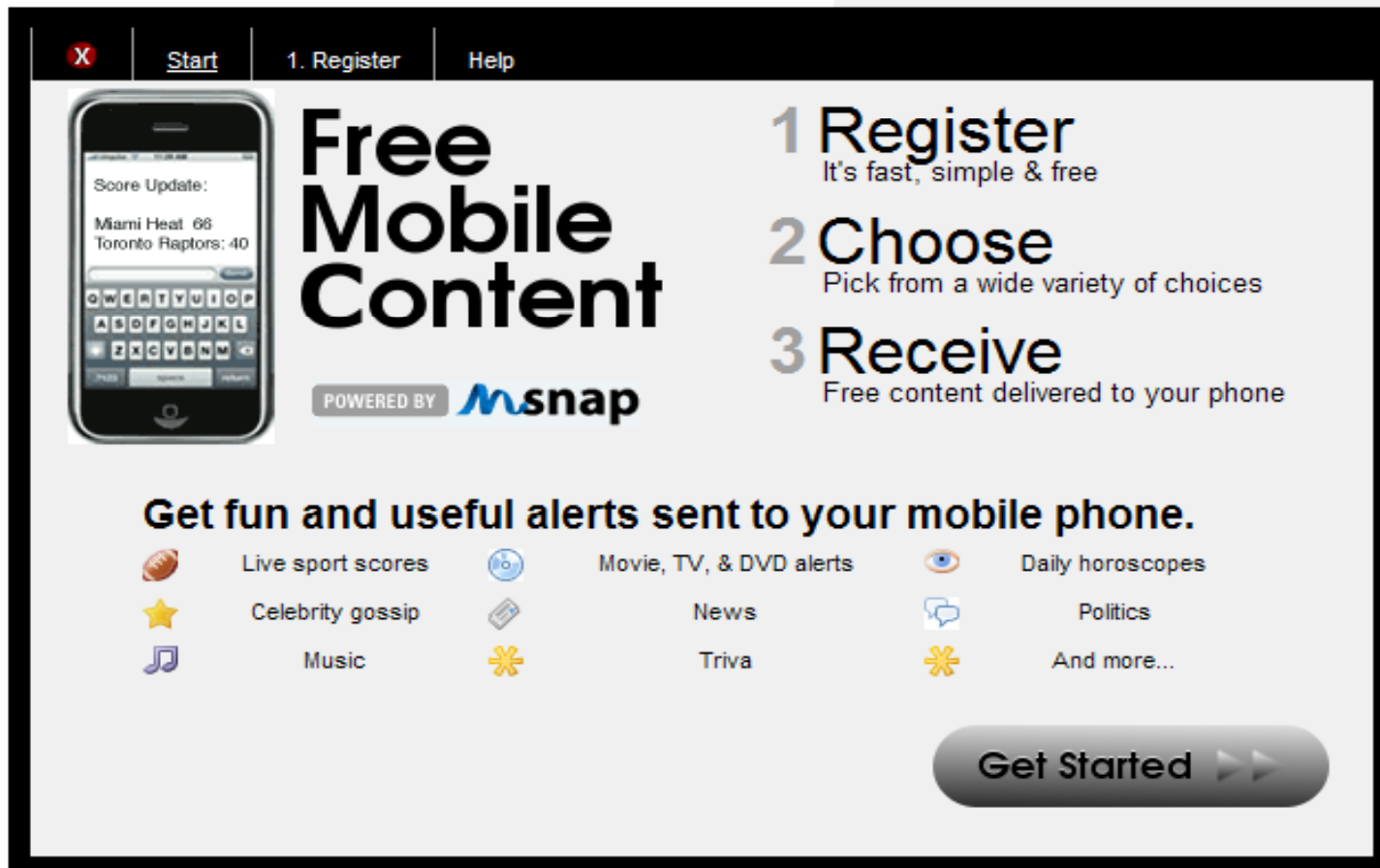
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Mobile Messaging Examples

Online Mobile Alerts and Subscriptions



The screenshot shows a mobile messaging registration page. At the top, there are navigation tabs: 'Start', '1. Register', and 'Help'. The main heading is 'Free Mobile Content' with a sub-headline 'POWERED BY msnap'. To the left is an image of a smartphone displaying a 'Score Update' for Miami Heat (68) vs Toronto Raptors (40). To the right, there are three numbered steps: '1 Register (It's fast, simple & free)', '2 Choose (Pick from a wide variety of choices)', and '3 Receive (Free content delivered to your phone)'. Below this, a section titled 'Get fun and useful alerts sent to your mobile phone.' lists various alert categories with icons: Live sport scores (football), Celebrity gossip (star), Music (musical notes), Movie, TV, & DVD alerts (film strip), News (newspaper), Trivia (question mark), Daily horoscopes (eye), Politics (globe), and 'And more...' (starburst). A large 'Get Started' button with a right-pointing arrow is at the bottom right.

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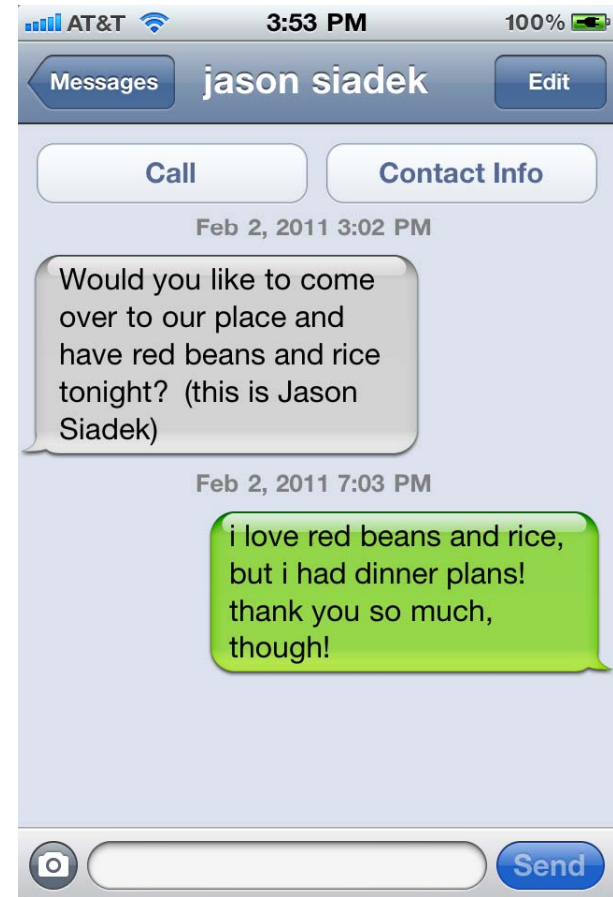
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Mobile Messaging Examples

- ◆ Text messaging – short message sent over a mobile carrier.
- ◆ Images, video and sound can also be sent.



Twitter Messaging Examples

The screenshot shows the Twitter home page interface. At the top, there is a navigation bar with the Twitter logo, a search bar, and links for Home, Profile, Messages, and Who To Follow. The user's name 'shingyin' is visible in the top right corner. Below the navigation bar, there is a text input field for posting a tweet, followed by tabs for Timeline, @Mentions, Retweets, Searches, and Lists. The main content area displays a list of tweets. The first tweet is from user 'y2hecate' (Nikki) with the text '日本の食べものが大好きですよ!!とてもおいしい!! \ (^o^)/'. The second tweet is from 'nomnomtruck' (Nom Nom Truck) with the text 'Happy Valentines Day Nomsters! We love you! ooh la la!'. The third tweet is from 'spankystokes' with the text 'RAD RT @tracytubera: ..And YES the 3D shoes Print is 3D! Also comes with 3d Glasses! www.tracytuberaart.bigcartel.com'. The fourth tweet is from 'punkagogo' (Space Pirate Queen) with the text 'I uploaded a YouTube video -- Traci Dinwiddie and Richard Speight Jr @ SPN LA Con 2011 http://youtu.be/xPRdzd4FbRg?a'. On the right side of the interface, there are sections for 'Your Tweets 2,559', 'Following 403', 'Followers 488', 'Favorites 4', and 'Listed 40'. There is also a 'Trends' section with 'Los Angeles · change' and several trending hashtags like '#HeartShapedPizza', '#happyvalentinesday', and '#vday'. A 'Who to follow' section suggests users like 'jerryjamesstone', 'jonathanmayer', and 'TheNewModern'.

◆ Twitter – short communications (140 characters)

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What is Mobile Marketing?

- ◆ Commercial apps processed via wireless device (non-location based) – software that provides access to the Internet or can perform computer functions via a wireless device
- ◆ Geolocation-based message (via GPS, cell tower or server)
 - ◆ Bluecasting – use of Bluetooth technology to deliver proximity-based messages; uses wireless spectrum based on short range server reach in buildings or retail outlets
 - ◆ Mobile Apps – software that also provides access to goods or services based on physical location of recipient or retail provider

Why is Mobile Marketing a Consumer Privacy Concern?

- ◆ Potential for Misuse of Consumer Data
 - ◆ Short-term or Long-term
 - ◆ For New Non-disclosed Purposes
- ◆ Right to be Left Alone
- ◆ Public Safety Issues
- ◆ Protection of Children
- ◆ Protection of Sensitive Information

What Laws and Guidelines Govern Mobile Marketing?

- ◆ Telephone Consumer Protection Act of (TCPA)
- ◆ Telemarketing and Consumer Fraud and Abuse Prevention Act (TCFAPA)
 - ◆ FTC Telemarketing Sales Rule (TSR)
- ◆ Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM Act)
- ◆ FTC Act (Section 5, unfair and deceptive trade practices)
- ◆ FTC Endorsement and Testimonial Guidelines
- ◆ Children's Online Privacy Protection Act (COPPA)
- ◆ State Consumer Protection and/or Unfair/Deceptive Trade Protection Laws
- ◆ State Telemarketing/Do-Not-Call Laws
- ◆ State Lottery and Contest/Sweepstakes Laws
- ◆ State Child Protection Registries
- ◆ Mobile Marketing Association (MMA) Guidelines
- ◆ Direct Marketing Association (DMA) Guidelines

What Entities Enforce the Laws and/or Guidelines?

- ◆ FCC (TCPA, DNC and CAN-SPAM)
- ◆ FTC (TSR, DNC, FTC Act, CAN-SPAM, COPPA and Endorsement/Testimonial Guidelines)
- ◆ State Attorneys General, State Regulatory Agencies, and/or State Consumer Protection Agencies (CAN-SPAM, DNC, COPPA, State telemarketing laws, unfair/deceptive trade practice laws, lottery and contests/sweepstakes laws)
- ◆ State and Federal Courts (private causes of action and class action lawsuits)
- ◆ MMA and DMA (self-regulatory guidelines)

Mobile Marketing Basics

Key Principles for Mobile Marketing

- ◆ The type of transmission or technology will determine the regulatory scheme and potential liability. Certain mobile messages can be classified as "telephone calls" regardless of the type of transmission (via phone-to-phone, or computer-to-phone) or device.
- ◆ Both individual and bulk mobile messages are subject to laws and guidelines; individual messages can be subject to federal and state government enforcement actions and/or trigger a lawsuit.
- ◆ General rule: Cannot send a mobile message to get consent to send a mobile message. Senders – at minimum – need informed affirmative consent from recipient.
- ◆ Cannot contract away liability for sending unauthorized commercial messages – both the company whose product or service is promoted and the person that sent the message may be held legally responsible, e.g., advertisers, marketers and third party service providers.

Mobile Marketing Technology

How does it work and which laws apply?

- ◆ SMS/Text Messages
 - ◆ Phone-to-phone (via wireless telephone numbers or short codes)
 - ◆ Computer-to-phone (via wireless domain names)
 - Joffe v. Acacia Mortg. Corp. (Arizona App. Div. 2005), wireless messages sent via computer also subject to TCPA
- ◆ Twitter (Tweets and Direct Messages to Followers)
 - ◆ Via computer
 - ◆ Via wireless device
- ◆ Mobile Apps (non-location based)
- ◆ Geolocation-based messages
 - ◆ Bluecasting
 - ◆ Mobile Apps

Mobile Marketing Statistics

- ◆ FCC “Connecting America: The National Broadband Plan,” March 2010

- ◆ 80% of U.S. Households have some sort of personal computer.

- ◆ In 2009, approximately 172 million phones were sold in the U.S.

Source:<http://www.broadband.gov/>

- ◆ “Android Soars, but iPhone Still Most Desired as Smartphones Grab 25% of U.S. Mobile Market”

- ◆ 25% of the U.S. mobile market were smart phones (allow users to access the web and e-mail, run apps, and share texts and picture messages), up 23% since last qtr. Smart phones are expected to overtake sale of standard mobile phones by end of 2011.

Source:Nielsen Wire, August 2, 2010, http://blog.nielsen.com/nielsenwire/online_mobile/android-soars-but-iphone-still-most-desired-as-smartphones-grab-25-of-u-s-mobile-market/

- ◆ “More than 75 billion text messages are sent each month, and teens 13 to 17 are the biggest texters of all. They average 2,272 text messages a month, according to the Nielsen company -- that's almost 77 messages a day.”

Source: Common Sense Media, <http://www.common sense media.org/texting-taking-over-your-teen>

Mobile Marketing Statistics

- ◆ “Generation M2: Media in the Lives of 8-18-Years Olds,” Kaiser Family Foundation Study, January 2010
 - ◆ Kids spend average of 7 hours/38 minutes consuming “entertainment media.” If consider multi-tasking, actually closer to 11 hours – nearly every minute of every day when kids aren’t in school or sleeping.

Source: www.safekids.com/tag/kaiser-family-foundation

- ◆ “M-Commerce Growing, Limited Interest In Location-Based Marketing”
 - ◆ 2% of online retail sales coming from mobile, estimated at \$4 Billion in 2011. Source: Shop.org Survey and Forrester estimate of 2011 \$191 Billion in online retail sales
 - ◆ Notwithstanding new start-ups in industry, limited interest in location-based marketing via mobile phones – only 6% want local offers and 4% want time-sensitive promotions (e.g., daily deals)

Source: Online Media Daily, February 17, 2011,

http://www.mediapost.com/publications/index.cfm?fa=Articles.showArticle&art_aid=145159

Mobile Marketing Generally

Marketing to Minors

- ◆ Does COPPA apply?
 - ◆ Voice (live or pre-recorded calls)
 - ◆ TMs (or IMs)
 - ◆ Mobile Apps
 - ◆ Location-based

- ◆ Other Minor Issues
 - ◆ Does minor have legal capacity to consent – provide EPA?
 - ◆ Liability of account holder, carrier, and/or sender for charges accrued by minor

Text Messaging Requirements

The CAN-SPAM Act

- ◆ How do FTC and FCC rules work together?
 - ◆ CAN-SPAM Act and FTC's rules establish definitions of commercial and transactional/relationship messages, definition of "Sender," "Initiator," and "Procure" plus Forward-to-a-Friend guidelines.
 - ◆ FCC's rules apply to commercial electronic messages sent via computer-to-phone using a wireless domain name listed on the FCC's domain name registry:
-<http://www.fcc.gov/cgb/policy/DomainNameDownload.html>

Text Messaging Requirements

FTC CAN-SPAM Act Rules

- ◆ Definition of commercial message
 - ◆ Electronic message whose primary purpose is the commercial advertisement or promotion of a commercial product or service, including content on an Internet website operated for a commercial purpose
- ◆ Definition of relationship/transactional relationship message
 - ◆ Narrowly defined as any message whose primary purpose is to:
 - Facilitate, complete or confirm a commercial transaction that the recipient previously agreed to;
 - Provide warranty, product recall, safety or security information;
 - Notification concerning change in features or terms, or recipient's status or standing, or account balance or statements;
 - Deliver goods and services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction previously entered into; or
 - Provide information directly related to an employment relationship or related benefit plan.
 - ◆ No established business relationship (EBR) exception

Text Messaging Requirements

FTC CAN-SPAM Act Rules cont.

- ◆ If message is transactional or relationship, can have some commercial component – but can't be primary purpose.
- ◆ Messages can also be “informational” – neither commercial nor transactional/relationship
 - ◆ E.g., Newsletters, press releases, or weather, sports, traffic alerts
- ◆ Mixed Content Messages – How to determine primary purpose:
 - ◆ If recipient reasonably interpreting the subject line would likely conclude that the message contains an advertisement or promotion for a commercial product or service; or the transactional or relationship content does not appear mainly at the beginning of the message - the message is commercial.
 - ◆ Other factors to consider: how much of the message is dedicated to commercial content; and how color, graphics, type size, style, etc., are used to highlight the commercial content.

Text Messaging Requirements

FTC CAN-SPAM Act Rules cont.

- ◆ Must label sexually-oriented material (violations subject to criminal sanctions)
- ◆ Cannot use deceptive or false headers or subject matter lines
- ◆ Commercial messages must include:
 - ◆ Name and postal address of Sender
 - ◆ Clear and conspicuous statement that content is commercial (unless affirmative consent is provided by recipient)
 - ◆ Clear and conspicuous functioning opt-out mechanism – must be active for at least 30 days after message is sent.
 - Must honor opt-out request within 10 business days
 - Once recipient has opted-out, cannot transfer e-mail address to another marketer

Text Messaging Requirements

FTC CAN-SPAM Act Rules cont.

- ◆ Multiple Sender Rule
 - ◆ Multiple Senders can designate one Sender, who acts on behalf of all Senders
 - ◆ Designated Sender must meet all CAN-SPAM requirements, or all Senders are liable for non-compliance:
 - Non-deceptive name, trade name, product or service of designated sender must be in “FROM” line
 - Postal address and clear and conspicuous commercial content statement included
 - Clear and conspicuous functioning opt-out mechanism and honor all opt-out requests within 10 business days
- ◆ Forward-to-a-Friend Rule (viral marketing)
 - ◆ If inducement or consideration is offered – message is subject to all CAN-SPAM requirements, including opt-out mechanism
 - ◆ Thus, no money, coupons, discounts, prizes, additional contest entries, special privileges, etc. should be offered – must be “routine conveyance”
 - ◆ Can be prominent button or link that states “forward this to a friend” but with no additional inducement or consideration

Text Messaging Requirements

FCC CAN-SPAM Rules

- ◆ Strictly prohibits sending an electronic commercial e-mail directly to a wireless device, i.e., Mobile Service Commercial Message (MSCM) without “express prior authorization” (EPA)
 - ◆ Both consumer and B2B MSCMs are prohibited
 - ◆ Messages sent via computer-to-phone are included – phone-to-phone transmissions are not
 - But see Acacia Mortgage case in Arizona, where wireless e-mail messages are also subject to TCPA due to conversion of wireless domain name to telephone number – ultimately a telephone call
 - ◆ MSCMs use a wireless domain name– combination of telephone number with provider’s domain name: XXX-XXX-XXXX@att.mobility.com
 - Wireless telephone numbers have corresponding wireless domain names

Text Messaging Requirements

FCC CAN-SPAM Rules cont.

- ◆ Must provide certain disclosures prior to securing EPA
 - ◆ Name of entity sending message, and if different, name of entity advertising/promoting product, service or commercial website;
 - ◆ Recipient may be charged a fee (standard and/or premium rates); and
 - ◆ Recipient has right to revoke EPA (opt-out) at any time
 - Recipient must be allowed to opt-out same way opted-in
 - Sender must honor opt-out in 10 business days

Text Messaging Requirements

FCC CAN-SPAM Rules cont.

- ◆ EPA can be verbal, written or electronic
- ◆ A signature is required for written and electronic consent
 - ◆ If consent is secured electronically, signature must comply with federal Electronic Signatures in Global and National Commerce Act (E-SIGN Act)
 - E-SIGN compliance issue: Whether various E-SIGN disclosures prior to consent (e.g., necessary hardware and software, right to withdraw consent and consequences for withdrawal, including termination) are required or whether E-SIGN requirement merely refers to any “electronic sound, symbol, or process”
- ◆ Burden on Sender to provide proof of EPA, retention of detailed documentation is prudent

Text Messaging Requirements

CAN-SPAM Act Enforcement

- ◆ No Private Right of Action for consumers, only ISPs
 - ◆ May bring suit in any U.S. District Court with jurisdiction
 - ◆ Injunctive relief and statutory damages
- ◆ FTC Enforcement
 - ◆ Violation is unfair or deceptive act or practice under FTC Act
 - ◆ Up to \$16,000 in fines per violation/message
 - ◆ 10-20 years of reporting conditions
- ◆ FCC Enforcement
 - ◆ Violation of the Communications Act of 1934
 - ◆ Up to \$16,000 in fines per violation/message
 - ◆ Reporting conditions
- ◆ State Attorneys General Civil Enforcement

Text Messaging Requirements

FCC TCPA Rules (Interstate and Intrastate Telephone Solicitation and Unsolicited Advertising)

- ◆ Governs:
 - ◆ **Unsolicited advertisement** – messages for a commercial purpose that advertise the availability or quality of any property, goods, or services which is transmitted without the recipient’s prior express invitation or permission.
 - ◆ **Telephone solicitation** – messages that encourage or induce the purchase or rental of, or investment in, property, goods, or services (including discounts or coupons), or charitable donations without recipient's prior express invitation or permission.
 - Covers consumer and B2B mobile messages
 - ◆ Federal DNC Registry
- ◆ Prior Express Consent required if transmission equipment has “capacity” to store or produce telephone numbers to be called, using random or sequential number generator, and to dial such numbers – “automatic telephone dialing systems”

Text Messaging Requirements

FTC TSR Rules (Interstate Telemarketing via Telephone)

◆ Governs:

◆ **Telemarketing** – a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call.

- Does not cover B2B calls, unless for retail sales of nondurable office or cleaning supplies
- Does not cover calls made in response to general media advertising or direct mail advertising (with certain exceptions)

◆ Content of calls

- Disclosure of Material Information
- Sales Transactions
- Payment Methods and Unauthorized Billing

◆ Federal DNC Registry

Text Messaging Requirements

FCC TCPA Enforcement

- ◆ Private Right of Action – numerous class action lawsuits
 - ◆ \$500 statutory damages for each violation/message
 - ◆ Treble damages if intentional/wilfull
- ◆ FCC Enforcement
 - ◆ Up to \$16,000 in fines per violation/message

FTC TSR Enforcement

- ◆ No Private Right of Action
- ◆ FTC Enforcement
 - ◆ Up to \$16,000 in fines per violation/message
 - DirectTV fined \$5.3 Million in 2005 and \$ 2.31 Million in 2009 for violations of DNC Registry, pre-recorded and abandoned call rules. Held responsible for violations of third-party telemarketing firms. Individual telemarketing companies also fined between \$75,000 - \$115,000.

Text Messaging Requirements

FTC Act, Section 5

◆ Unfair Trade Practice:

- ◆ Failure to provide basic safeguards or protections to consumers – misrepresentation is not required
- ◆ Consumer “harm” must be significant
- ◆ Benefits to consumer must outweigh the harm

◆ Deceptive Trade Practice:

- ◆ A material misrepresentation, practice, or omission that is likely to mislead reasonable consumers
- ◆ “Intent” to mislead is not required
- ◆ “Harm” to consumer is not required

Twitter Enforcement Action, June 2010: FTC claimed privacy policy was deceptive due to serious lapses in the company’s data security, which allowed hackers to obtain unauthorized administrative control of Twitter, including access to non-public user information, tweets that consumers had designated private, and the ability to send out phony tweets from any account.

Text Messaging Requirements

- ◆ Consent Mechanisms and Best Practices
 - ◆ Express Prior Authorization
 - Form of Consent on Small Screen
 - Contest/Sweepstakes Entry
 - Consent secured via purchase of ring tones, etc.
 - Bounce Back Messages with commercial components
 - GPS/Location-based messages
 - ◆ Calls to Recipient on Federal Do-Not-Call (DNC) Registry
 - Express written consent plus signature and designated telephone number (FCC and FTC Rules)
 - Does EBR apply to calls to a wireless device?
- ◆ MMA “U.S. Consumer Best Practices Guidelines for Cross-Carrier Mobile Content Services” – details industry standard consent mechanisms
- ◆ DMA “Guidelines for Ethical Business Practice” – Consent best practices
- ◆ DMA’s Interactive Marketing Services “Wireless Block Identifier” list – identifies current and to be assigned cell phone numbers

Text Messaging Requirements

◆ TM Class Action Lawsuits

- ◆ Satterfield v. Simon & Schuster, Inc. (9th Cir. 2009)
 - \$10 Million settlement and \$2.725 Million attorneys fees
- ◆ Cooley v. McDonald's Corp. (N.D. Ill. 2008)
 - Voluntarily dismissed; assumed confidential settlement
- ◆ Weinstein v. AIRIT2ME, Inc. (N.D. Ill. 2006)
 - Against The Timberland Co. and various mobile marketing partners
 - \$7 Million settlement and \$1.75 Million attorneys fees
- ◆ Abbas v. Selling Source LLC (N.D. Ill. 2009)
 - Dismissed without prejudice but court stated in dicta charge to recipient for TM not necessary element for claim under TCPA – issue of first impression
 - Confidential settlement
- ◆ Lozano v. Twentieth Century Fox Film Corp. (N.D. Ill. 2010)
 - Followed Abbas dicta – charge for TM not necessary to trigger TCPA claim
 - \$16 Million settlement and \$3.75 Million attorneys fees

Text Messaging Requirements

- ◆ TMs Are Subject to State Telemarketing and DNC Laws
 - ◆ State telemarketing laws may have major differences compared to CAN-SPAM Act, TCPA, and TSR - state laws may be more restrictive
 - Federal law does not always pre-empt state laws for interstate calls
 - » E.g., Nixon v. Beer Nuts Ltd. (Missouri 2000)
 - E.g., California prohibits the sending of unsolicited text advertisements to cell phones or pagers.
 - Different EBR exemptions (e.g., Indiana, Louisiana, Missouri, New Jersey, Tennessee, Wisconsin)
 - Don't recognize EBR (e.g., Indiana, Delaware)
 - Different day/time calling restrictions than federal M-Sun 8AM - 9PM (e.g., Alabama, Kentucky, Louisiana, Missouri, Utah, Texas, Wyoming)
 - ◆ Certain States have separate DNC registries; Senders need to scrub against both federal and state registries
 - E.g., Colorado, Florida, Montana, Wisconsin
 - DMA list - <http://www.the-dma.org/government/donotcalllists.shtml>

Mobile Marketing Generally

- ◆ Other State prohibitions against TMs not necessarily pre-empted by federal law (e.g., computer fraud laws)
 - Michigan and Utah Child Protection Registries – prohibits sending certain commercial messages to a minor’s contact points, i.e., e-mail address, wireless telephone number, IM, fax numbers that have been registered on state-run registries for 30 days – Effective 2005
 - » **Michigan** – Prohibits sending messages if primary purpose of message is to, directly or indirectly, advertise or otherwise link to a message that advertises products or services that are unlawful for minor to purchase, possess, view, participate in or otherwise receive, such as gambling, alcohol, tobacco, firearms, illegal drugs, and pornography or obscene material
 - » **Utah** – Prohibits advertising any goods/services that minor or adult cannot lawfully purchase but also includes content that contains or advertises material that is "harmful to minors"
 - » Must scrub entire database against state registry every 30 days. Michigan \$0.007 and Utah \$0.005 per contact point. If database is 100,000 contact points, \$1200 per/month for both states

Mobile Marketing Generally

- Michigan and Utah Child Protection Registries cont. - Significant penalties – even for first time offenders!
 - » **Michigan** – Misdemeanor punishable by imprisonment for not more than one year or a fine up to \$10,000, or both for the first violation. Subsequent violations are felonies up to 3 years of imprisonment and increased fines, up to \$30,000. Civil suits may be filed by Michigan Attorney General, ISPs, and parents on behalf of their children.
 - » **Utah** – Misdemeanors for first and subsequent offenses. Violations subject to administrative civil fines of not more than \$2500 for each separate message; intentional violations are \$5,000 per message. Can be subject to both criminal and civil liability. Also grants private right of action for parents/legal guardian of minor child and user of e-mail address.

Mobile Apps Requirements

Unique Identifiers and Unauthorized Disclosure of Consumer Data Issues

- ◆ What is a Unique Device ID (UDID)?
 - ◆ A unique string of electronically readable characters and/or numbers that is stored in a particular device or file for the purpose of identification of the device or file – similar to a serial number
 - ◆ UDIDs can be used to collect and transmit user location data and other personally identifiable information (e.g., age, gender, zip code, search and transaction history) to third parties
- ◆ Class Action Lawsuits Involving UDIDs
 - ◆ E.g., Freeman v. Apple, Inc. and Lalo v. Apple, Inc. (N.D. CA Dec. 2010)
 - Co-Defendants include various mobile app manufacturers, including Pandora Media and The Weather Channel
 - Multiple state and federal counts, including Computer Fraud and Abuse Act, Electronic Communications Privacy Act, California's Computer Crime Penal Code, Trespass, Conversion and Unjust Enrichment

Mobile Apps Requirements

Unique Identifiers and Unauthorized Disclosure of Consumer Data Issues cont.

- ◆ Class Action Lawsuits Involving Digital Media Stamp and HTML5 (Supercookie) – Various U.S. District Courts
 - ◆ E.g., Cooks v. Ringleader Digital, Inc., (Texas); Aughenbaugh v. Ringleader Digital, Inc. (California); and Hillman v. Ringleader Digital, Inc., (New York)
 - Additional Defendants include: AccuWeather, Inc.; Cable News Network, Inc.; FOX News, LLC; Merriam-Webster, Inc.; Travel Channel, LLC; and WhitePages, Inc.
 - Alleged unlawful tracking of mobile device using embedded supercookie that allows access to, and disclosure of, personal and sensitive personal information, and a user's browsing activities; the supercookie cannot be deleted – not browser-based.

Contests/Sweepstakes

Issues Related to Contests/Sweepstakes

- ◆ Premium rates charged for contest/sweepstakes entry, notwithstanding alternative free mode of entry
 - ◆ May be illegal lottery - state consideration prohibitions
 - ◆ 2007 class action lawsuits in California for “American Idol,” “Deal or No Deal,” “1 v. 100,” and “The Apprentice” text-to-win contests allege contests violate lottery laws in the states of California, New York and Massachusetts. Participants could either enter contest via a TM for premium charge of \$.99 or for free via the Internet. Cases still pending.
 - Couch v. Telescope, Inc.; Bentley v. NBC Universal, Inc.; Herbert v. Endemol USA, Inc.; and Cunningham v. Endemol USA, Inc.

Third Party Service Providers

- ◆ Potential legal liability for call-lists procured from Third Parties, including Affiliates
- ◆ Due Diligence Obligations for Senders
 - ◆ Transmission technology and auto-dialer capacity
 - ◆ Valid state registration or licensing requirements
 - ◆ Enforcement actions or party to lawsuit
 - ◆ Privacy and security practices
 - ◆ DNC policy and employee/contractor training
- ◆ Suggested Contractual Clauses
 - ◆ Detailed Reps/Warranties - generic “compliance with all applicable laws, regulations, and ordinances” statement is no longer sufficient
 - ◆ Indemnification should also cover “investigations and inquiries from any governmental entity”
 - ◆ Insurance coverage/rider that covers governmental and private cause of action

What's Next?

Governmental Reports, Proceedings & Legislation

- ◆ FTC Preliminary Staff Report, “Protecting Consumer Privacy in an Era of Rapid Change,” December 2010
- ◆ FTC “Mapping the Mobile Marketplace,” April 2009
- ◆ FCC “Generation Mobile” Forum, December 2010
- ◆ U.S. Department of Commerce Green Paper, “Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework,” December 2010
- ◆ U.S. Congress – Privacy legislation that requires affirmative consent for tracking and behavioral advertising

Summary

Dos

- ◆ Secure EPA from any recipient of commercial message with requisite disclosures and retain documentation of EPA
- ◆ Honor all opt-out requests in timely manner
- ◆ Integrate “Privacy by Design” principles in development of new services or devices
- ◆ Engage qualified third party service providers
- ◆ Conduct due diligence prior to written agreement with service provider, e.g., transmission used, auto-dialing capacity, DNC policy, violations, lawsuits
- ◆ Execute written agreement to include modified reps/warranties, indemnification and clauses and secure insurance coverage/rider
- ◆ Review state laws and scrub against federal and state DNC registries, when applicable
- ◆ Comply with MMA and DMA guidelines

Summary

Don'ts

- ◆ Don't send additional messages or use contact points not subject to EPA
- ◆ Don't use contest/sweepstakes or other pretenses to secure consent for sending commercial messages
- ◆ Don't include fraudulent or misleading advertising content
- ◆ Don't retain contact points longer than necessary and keep database secure
- ◆ Don't procure call-lists from third parties unless conduct due diligence to ascertain proper authorizations – even from Affiliates

Helpful Resources

- ◆ FCC: www.fcc.gov
 - ◆ CAN-SPAM Act and TCPA: <http://www.fcc.gov/cgb/consumerfacts/canspam.html>
- ◆ FTC: www.ftc.gov
 - ◆ Preliminary Staff Privacy Report “Protecting Consumer Privacy in an Era of Rapid Change,” December 2010: <http://www.ftc.gov/os/2010/12/101201privacyreport.pdf>
 - ◆ Telemarketer Compliance: <http://www.ftc.gov/bcp/edu/pubs/business/marketing/bus27.shtm>
 - ◆ Federal Do Not Call Registry, Business Alert “Q&A”: <http://www.ftc.gov/bcp/edu/pubs/business/alerts/alt129.shtm>
 - ◆ Children’s Online Privacy Protection Act: <http://www.ftc.gov/privacy/coppafaqs.shtm>
 - ◆ CAN-SPAM Act: <http://business.ftc.gov/documents/bus61-can-spam-act-Compliance-Guide-for-Business>

Helpful Resources

- ◆ U.S. Department of Commerce Green Paper, “Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework,” December 2010 :
http://www.ntia.doc.gov/reports/2010/IPTF_Privacy_GreenPaper_12162010.pdf
- ◆ State Child Protection Registries
 - ◆ Utah Child Protection Registry:<https://donotcontact.utah.gov>
 - ◆ Michigan Child Protection Registry:<https://www.protectmichild.com>
- ◆ Mobile Marketing Association: www.mmaglobal.com
- ◆ Direct Marketing Association: www.dma.org
- ◆ California Office of Privacy Protection: www.privacyprotection.ca.gov
- ◆ The Roadmap for Privacy by Design in Mobile Communications: A Practical Tool for Developers, Service Providers, and Users, Information and Privacy Commissioner, Ontario, Canada: www.privacybydesign.ca/content/uploads/2011/02/pbd-asu-mobile.pdf

Thank You and Good Luck!

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