

DANGER, DANGER!

Traps for the Unwary in Social Media and Mobile Marketing in a Digital Age

Preconference Session

Wednesday, March 9, 2011

Moderator:

S. Jenell Trigg, CIPP, Partner, Lerman Senter PLLC

Panelists:

Scott D. Delacourt, Partner, Wiley Rein, LLP

Lois C. Greisman, Associate Director, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission

Jennifer Mardosz, CIPP, SVP & Chief Privacy Officer, Fox Entertainment Group and Myspace

www.privacyassociation.org/summit



Agenda

- ◆ Mobile Marketing and Social Media Overview
- ◆ What is Mobile Marketing and What is Social Media?
- ◆ What Laws and Guidelines Govern Mobile Marketing and Social Media and What Entities Enforce the Laws and/or Guidelines?
- ◆ Key Principles
- ◆ Overview of Technology
- ◆ Basic Legal Requirements
- ◆ Consent Mechanisms, Best Practices and Issues
- ◆ Mobile Marketing via Social Media
- ◆ Mobile Marketing via Apps
- ◆ Marketing to Minor Issues
- ◆ Third Party Service Provider Requirements and Best Practices
- ◆ Contests/Sweepstakes Issues
- ◆ Interactive Exercise – Discussion of Hypotheticals

2

DANGER, DANGER!
Traps for the Unwary in Social Media
and Mobile Marketing in a Digital Age

www.privacyassociation.org/summit



Mobile Marketing and Social Media Overview

- ◆ 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 email, 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 and Social Media Overview

- ◆ “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
- ◆ “Social Networking Dominates U.S. Web Use; Facebook Leads the Way”
 - ◆ Users spend 23% of time on Internet using social networking platforms
 - ◆ 10% of internet time in U.S. spent playing games, which has overtaken email as second most popular online activity

Source: CRN, Aug. 2, 2010, <http://www.crn.com/news/applications-os/226500022/social-networking-dominates-u-s-web-use-facebook-leads-the-way.htm>

What is Mobile Marketing?

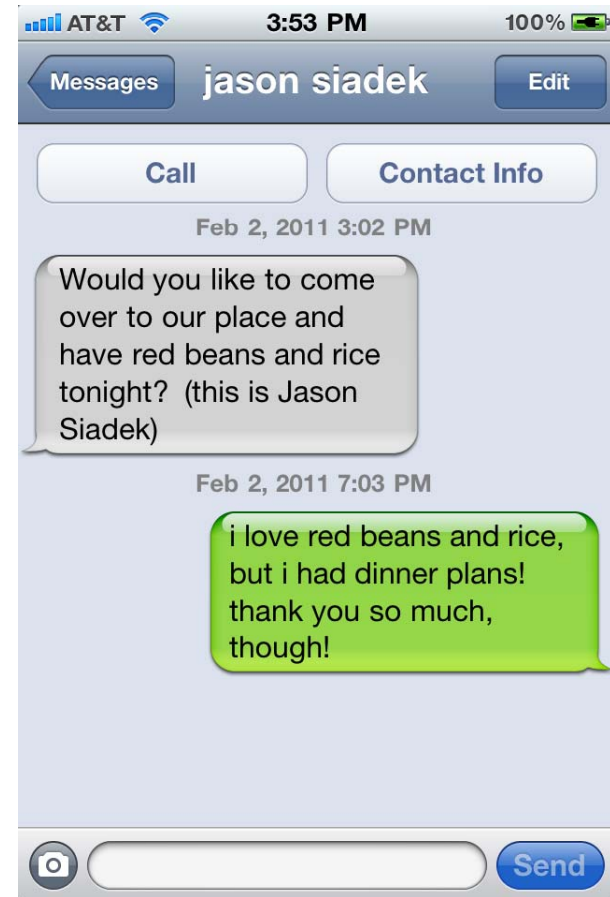
- ◆ Live and pre-recorded voice calls delivered directly to a wireless device
- ◆ Alpha and/or numeric messages delivered directly to a wireless device
 - ◆ Phone-to-phone
 - Short Codes (4-6 numeric characters)
 - SMS/Text messages (maximum 160 characters)
 - ◆ Computer-to-phone
 - Electronic E-Mail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

What is Mobile Marketing?

- ◆ Commercial apps 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

Mobile Messaging Examples

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



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 smoothie and a sign that says "Welcome to TIPSUBURG SAY HELLO TO A BETTER BEACH BODY".

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.

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.

8

DANGER, DANGER!
Traps for the Unwary in Social Media
and Mobile Marketing in a Digital Age

www.privacyassociation.org/summit



Mobile Messaging Examples

Ongoing Mobile Alerts and Subscriptions

The screenshot shows a mobile messaging registration page. At the top, there are navigation links: '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: 'Score Update: Miami Heat 68 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.

9

DANGER, DANGER!
Traps for the Unwary in Social Media
and Mobile Marketing in a Digital Age

www.privacyassociation.org/summit

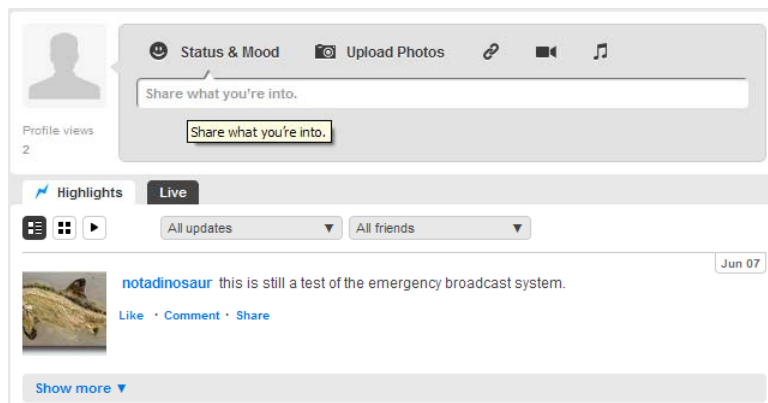


What is Social Media?

- ◆ Online Social Networking Services
 - ◆ E.g., MySpace, Facebook, Togetherville, Linked-In
- ◆ Twitter
 - ◆ Tweets (via internet and wireless device, maximum 140 characters)
 - ◆ Direct Messages
- ◆ Mobile Social Media
 - ◆ Social Networking via mobile browsers
 - ◆ Social Networking via mobile apps
 - ◆ Intra-network messages to other members/friends
 - ◆ Alerts via mobile devices for new comments, friend requests, event invites, etc.

Myspace and Facebook Messaging Examples

- ◆ Myspace and Facebook – Most users share via status update and profile comments. Both sites also have messaging features similar to email.



Twitter Messaging Examples

The screenshot shows the Twitter homepage for user 'shingyin'. The top navigation bar includes the Twitter logo, a search bar, and links for Home, Profile, Messages, and Who To Follow. The main content area is titled 'What's happening?' and features a text input field. Below this is a 'Timeline' section with tabs for @Mentions, Retweets, Searches, and Lists. The timeline displays four tweets:

- y2hecate** (Nikki): 日本のおもてなしが大好きですよ!!とてもおいしい!! \ (^o^)/ (39 seconds ago)
- nomnomtruck** (Nom Nom Truck): Happy Valentines Day Nomsters! We love you! ooh la la! (1 minute ago)
- spankystokes** (spankystokes): RAD RT @tracytubera: ...And YES the 3D shoes Print is 3D! Also comes with 3d Glasses! www.tracytuberaart.bigcartel.com (1 minute ago)
- punkagogo** (Space Pirate Queen): I uploaded a YouTube video -- Traci Dinwiddie and Richard Speight Jr @ SPN LA Con 2011 http://youtu.be/xPRdzd4FbRg?a (2 minutes ago)

The right-hand sidebar is yellow and contains several sections:

- Your Tweets** (2,559): A tweet from 51 minutes ago thanking @lizohanesian and @ShannonCottrell.
- Following** (403) and **Followers** (488): Lists of profile pictures.
- Favorites** (4): A tweet by Gail Simone about being impressed with water on the moon.
- Listed** (40): A list of categories including cartoons, Art, comic, Gamers, comics, and webcomics.
- Trends**: A list of trending topics like Los Angeles, #HeartShapedPizza, #happyvalentinesday, #vday, #nsn3d, Esperanza Spalding, and Finding Nemo.
- Who to follow**: Suggestions for users to follow, including Jerry James Stone, Jonathan Mayer, and TheNewModern.

◆ Twitter – short communications (140 characters)

12

DANGER, DANGER!
Traps for the Unwary in Social Media
and Mobile Marketing in a Digital Age

www.privacyassociation.org/summit



What Laws and Guidelines Govern Mobile Marketing and Social Media?

- ◆ Telephone Consumer Protection Act of 1991 (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 Unique Laws and Guidelines Govern Social Media?

- ◆ State Attorneys General Consent Decrees/Settlement
 - ◆ New York AG and Facebook – Announced new model for FB to protect children online
 - Will promptly respond to user complaints about nudity, pornography or unwelcome contact within 24 hours
 - Allow complaint review process to be examined by an Independent Safety and Security Examiner (ISSE)
 - ◆ 49 State AGs, plus District of Columbia AG and Myspace – “Joint Statement on Key Principles of Social Networking Sites Safety,” 2008
 - Established principles targeted to protection of children engaged in social networking sites
 - Myspace implemented technologies and procedures to help prevent children under age of 14 from use and to protect children over 14 from exposure to inappropriate and unwanted contact by adults
 - Organized industry-wide Internet Safety Technical Task Force for identification and development of online safety tools, i.e., online identity authentication tools
 - Will convey information to help parents and educators protect children and promote an enjoyable and safer online experience
 - Will work with AGs and law enforcement officials to investigate and prosecute Internet crimes

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)

Additional Influences/Developments

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

Key Principles

- ◆ 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.

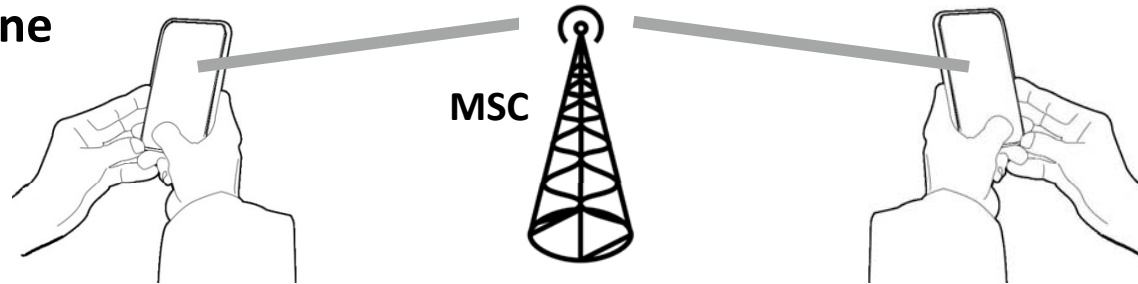
Overview of Technology

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 e-mail messages sent via computer also subject to TCPA

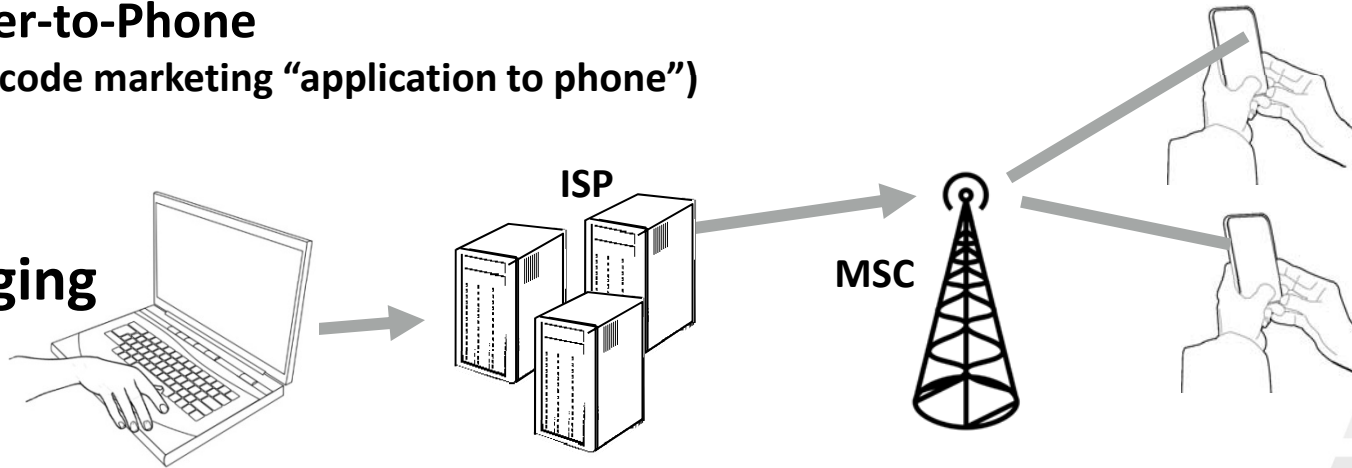
SMS "Text" Messaging

Phone-to-Phone
(“Peer to Peer”)

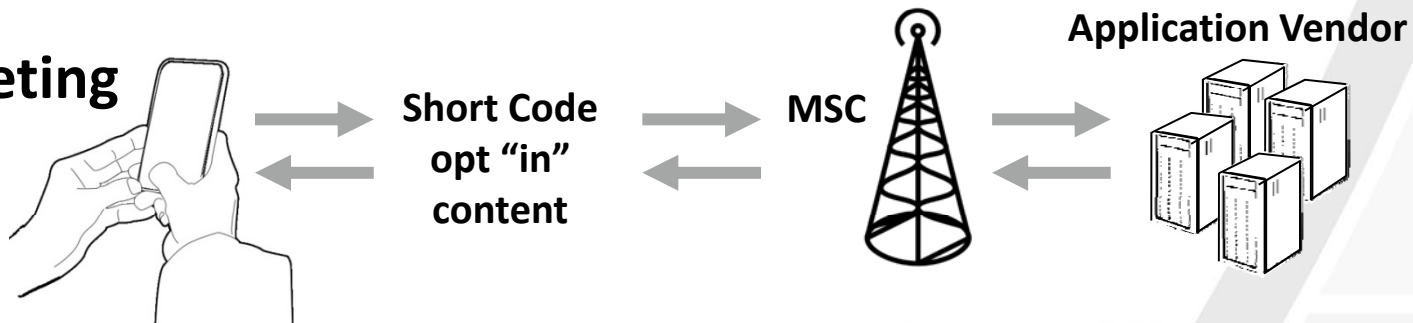


Computer-to-Phone
(For short code marketing “application to phone”)

Messaging



Marketing



Overview of Technology

How does it work and which laws apply?

◆ Twitter

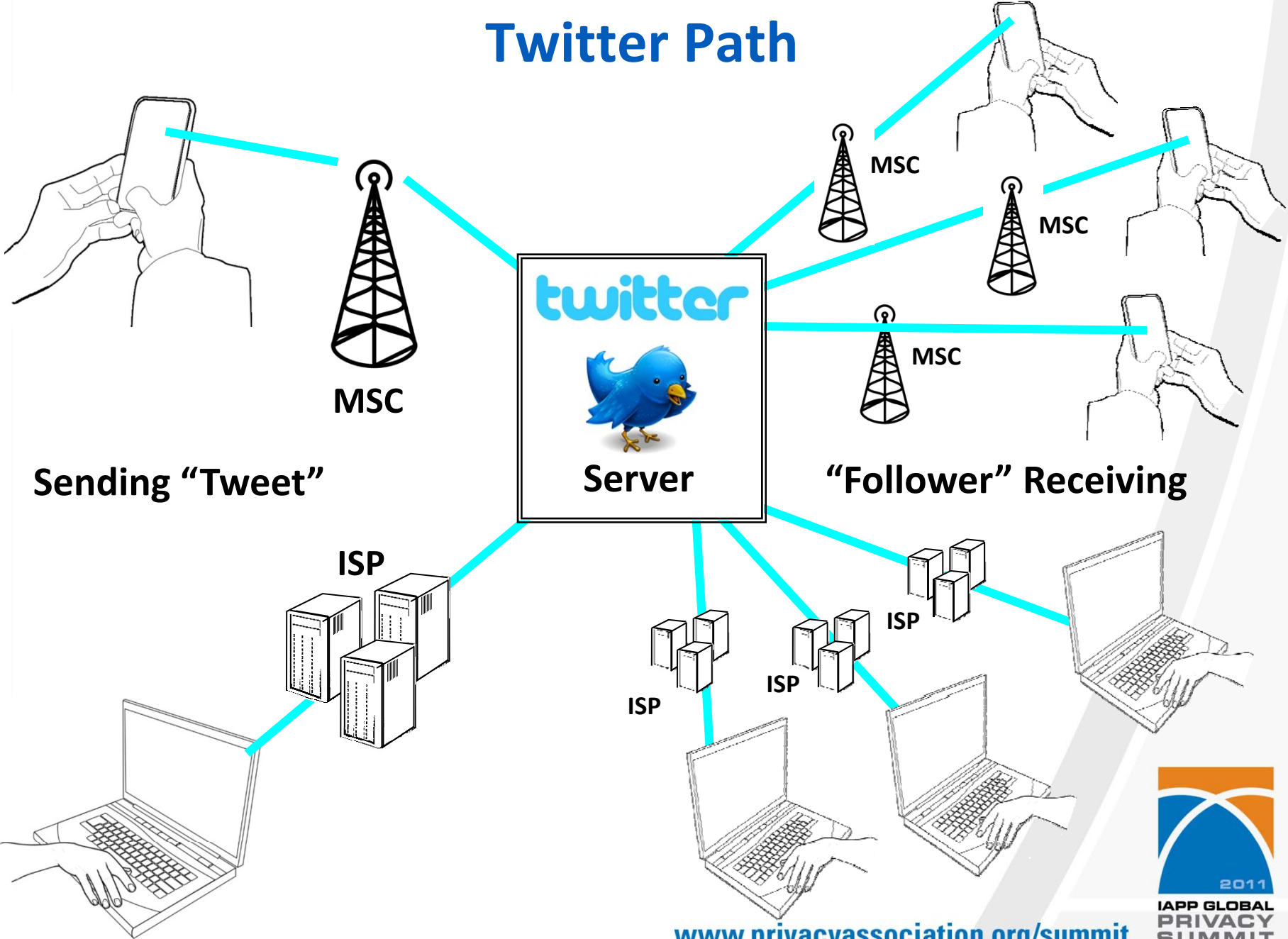
◆ Tweets

- Via computer/internet
- Via wireless device

◆ Direct Messages to Followers

- Via computer/internet
- Via wireless device

Twitter Path



Overview of Technology

How does it work and which laws apply?

- ◆ Mobile Apps for social network
- ◆ Intra-network messages via social network
- ◆ Alerts to mobile device
- ◆ Location-based messages

Basic Legal 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>

Basic Legal 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

Basic Legal 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.

Basic Legal Requirements

FTC CAN-SPAM Act Rules cont.

◆ Definitions:

- ◆ **SENDER** – Person who initiates a commercial message and whose product, service, or Internet website is advertised or promoted by message
- ◆ **INITIATE** – To originate or transmit such message or procure the origination of transmission, but shall not include actions that constitute routine conveyance (such as an Internet Service Provider, e.g., Google, Yahoo, AOL, Verizon, Comcast, EarthLink)
 - More than one person can be an Initiator (or Sender)
- ◆ **PROCURE** – Intentionally pay or provide other consideration to, or induce, another person to initiate a commercial message on one's behalf

Basic Legal 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

Basic Legal 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 included
 - Clear and conspicuous commercial content statement included
 - Clear and conspicuous functioning opt-out mechanism and honor all opt-out requests within 10 business days

Basic Legal Requirements

FTC CAN-SPAM Act Rules cont.

- ◆ 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

Basic Legal 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”
 - ◆ MSCM use a wireless domain name – combination of telephone number with provider’s domain name: XXX-XXX-XXXX@att.mobility.com
 - Wireless telephone number has a corresponding wireless domain name

Basic Legal 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

Basic Legal 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

Basic Legal Requirements

CAN-SPAM Act Enforcement

- ◆ No Private Right of Action for consumers, only ISPs (e.g., Myspace lawsuits)
 - ◆ 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

Basic Legal Requirements

FCC TCPA Rules (Interstate and Intrastate Telephone Solicitations and Unsolicited Advertising via Telephone)

- ◆ 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 Authorization 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.”

Basic Legal 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

Basic Legal 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.

Basic Legal 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.

Basic Legal 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 can be more restrictive
 - Federal law does not always pre-empt state laws for interstate calls
 - » E.g., Nixon v. Beer Nuts Ltd. (Missouri 2000)
 - Different day/time calling restrictions than federal M-Sun 8AM - 9PM (e.g., Alabama, Kentucky, Louisiana, Missouri, Texas, Utah, 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/donotcallists.shtml>

Basic Legal Requirements

- ◆ 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., email 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

Basic Legal Requirements

- 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 email address.

Consent Mechanisms, Best Practices & Issues

- ◆ Express Prior Authorization/Consent
 - ◆ Form of Consent on Small Screen
 - ◆ Contest/Sweepstakes Entry
 - ◆ Consent secured via purchase of ring tones, etc.
 - ◆ Bounce Back Messages with commercial components
 - ◆ Location-based messages
 - ◆ Intra-network Messages for Social Media
 - ◆ Mobile apps
 - ◆ Wireless browser

Consent Mechanisms, Best Practices & Issues

- ◆ Calls to Recipient on Federal Do-Not-Call (DNC) Registry
 - ◆ Need express written consent plus signature and designated telephone number (FCC and FTC Rules)
- ◆ MMA “U.S. Consumer Best Practices Guidelines for Cross-Carrier Mobile Content Services” – 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 number

Consent Mechanisms, Best Practices & Issues

◆ Established Business Relationship Issues

◆ Federal EBR Definitions:

- **TCPA** – prior or existing relationship formed by voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of a subscriber’s purchase or transaction with the entity within 18 months immediately preceding the date of call, or on the basis of subscriber’s inquiry or application regarding products or service offered within the 3 month period immediately preceding the call, which relationship has not been previously terminated by either party
- **TSR** – relationship between seller and consumer based on purchase, rental or lease of goods or services or a financial transaction within 18 months immediately preceding date of telemarketing call, or inquiry regarding product or service offered by seller within 3 months immediately preceding date of telemarketing call

◆ Does EBR apply to B2B relationships?

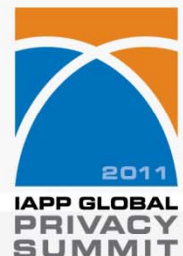
◆ Does EBR apply to pre-recorded calls?

43

DANGER, DANGER!

Traps for the Unwary in Social Media
and Mobile Marketing in a Digital Age

www.privacyassociation.org/summit



Consent Mechanisms, Best Practices & Issues

- ◆ Established Business Relationship Issues cont.
 - ◆ Does EBR apply to calls/messages to wireless devices or Tweets?
 - ◆ Does EBR apply to social media relationships?
 - ◆ Does EBR apply to mobile app subscribers?
 - ◆ State Nuances/Conflicts in EBR
 - Different EBR exemptions or definitions (e.g., Indiana, Louisiana, Missouri, New Jersey, Tennessee, Wisconsin)
 - Don't recognize EBR (e.g., Indiana, Delaware)

Consent Mechanisms, Best Practices & Issues

◆ TM Class Action Lawsuits – Lessons Learned

◆ [Satterfield v. Simon & Schuster, Inc.](#) (9th Cir. 2009)

- Single call to minor child triggered class action litigation
- Definition of “affiliate” did not extend to unrelated third party
- “Capacity” to make auto dialer calls is sufficient to trigger TCPA prohibition for TMs, “actual” use not required
- **\$10 Million Settlement and \$2.725 Million attorney fees**

◆ [Cooley v. McDonald’s Corp.](#) (N.D. Ill. 2008)

- Dismissed voluntarily; 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**

Consent Mechanisms, Best Practices & Issues

◆ TM Class Action Lawsuits – Lessons Learned cont.

◆ [Abbas v. Selling Source LLC \(N.D. Ill. 2009\)](#)

- Dismissed without prejudice but Court stated in dicta that a 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 attorney's fees**

Mobile Marketing Via Social Media

- ◆ Additional legal requirements for sending messages intra-network?
- ◆ Additional requirements in TOU?
- ◆ Potential liability and requirements for hosted pages by private parties and commercial businesses?
 - ◆ Does the Communications Decency Act (CDA) provide a safe harbor from privacy claims on social networks?

Mobile Marketing Via Apps

Unauthorized Use and Disclosure of Consumer Data Issues

- ◆ The importance of “Privacy by Design”
- ◆ 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 Marketing Via Apps

Unauthorized Use and 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.

Mobile Marketing Via Apps

How does the HTML5 Cookie work?

- ◆ HTML5's "cookies," or client side storage, are essentially the same as standard browser cookies (text files containing information) – except they are stored elsewhere on your computer.
- ◆ As a result, clearing cookies via browser settings does not clear HTML5 cookies. This is similar to issue with Adobe's Flash cookies or Local Shared Objects, which must be cleared separately from browser cookies. Essentially, HTML5 cookies are "stealth" cookies that majority of users do not yet know about.
- ◆ Companies that use HTML5 cookies should inform users of their options regarding clearing these cookies.
- ◆ In addition, browser developers should integrate the ability to clear HTML5 cookies into their browsers. Several browser vendors currently provide plugins that will clear these cookies, and some, like Firefox, have already implemented clearing HTML5 cookies as part of their standard "clear cookies" functions.

Marketing to Minors Issues

- ◆ Does COPPA apply?
 - ◆ Voice (live or pre-recorded calls)
 - ◆ TMs
 - ◆ Social Networking sites, messages and individual members/friends (intra or inter-network)
 - ◆ Mobile Apps
 - ◆ Location-based messages
- ◆ 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

Third Party Service Provider Requirements and Best Practices

- ◆ Potential legal liability for call-lists procured from Third Parties, including Affiliates
- ◆ Due Diligence Obligations for Senders
 - ◆ Transmission technology and auto-dialing capacity
 - ◆ Valid state registration or licensing
 - ◆ Enforcement actions or party to lawsuit
 - ◆ Privacy and security practices
 - ◆ DNC policy and 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 actions

Contests/Sweepstakes Issues

Issues Related to Contests/Sweepstakes

- ◆ Contests involve games of “skill, while sweepstakes involve games of “chance”
- ◆ Premium rates charged for sweepstakes entry, notwithstanding alternative free mode of entry
 - ◆ May be illegal lottery – state consideration prohibitions
 - ◆ Several 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. Filed in 2007, cases still pending.
 - Couch v. Telescope, Inc.; Bentley v. NBC Universal, Inc.;
Herbert v. Endemol USA, Inc.; and Cunningham v. Endemol USA, Inc.

Contests/Sweepstakes Issues

Issues Related to Contests/Sweepstakes

- ◆ Issues related to social networking-oriented contests/sweepstakes
 - ◆ User Generated Content (UGC) widely used – How to minimize risks:
 - Don't ask entrants to do anything that may cause them or others harm
 - Do not solicit UGC that makes comparative claims against competitors (e.g., Subway v. Quiznos)
 - Do not provide direction to entrants about the type of claims desired
 - Do not provide examples on your website
 - Follow and enforce your own Official Rules
 - Request entrants to affirmatively consent to licensing agreement and Official Rules
 - ◆ Public Voting – How to minimize risks:
 - Limit to one vote per person, per day
 - Provide judging criteria to users for public voting
 - Avoid leader boards displaying the results
 - The judges make the controlling decision, factoring in public voting as a percentage of the judging criteria

NOTE: When creating judging criteria – AVOID making judging criteria so stringent that no one qualifies!

Myspace Contests/Sweepstakes Examples

Teen Choice Awards Trophy Presenter Contest

The screenshot shows the Myspace website interface for the Teen Choice Awards 2010 Trophy Presenter Contest. At the top, there is a navigation bar with links for Home, Browse People, Find Friends, Music, Video, Games, Events, and More. The main content area features a large blue banner with the contest title "TROPHY PRESENTER CONTEST" and the tagline "MEET THE STARS! BE ON SET!". Below this, there is a "SUBMIT YOUR ENTRY" section with three steps: Step 1: Add this profile as a friend; Step 2: Upload your picture to your profile; Step 3: Select picture from your profile. A "VOTE NOW!" section encourages users to vote and provide feedback. A video player shows "Katy Perry Trophy Presenter Contest Intro". At the bottom, there is a row of colorful surfboards with the Teen Choice logo. The page also includes social sharing buttons for "ADD 2 FRIENDS", "SHARE", and "FORWARD US".

Myspace Contests/Sweepstakes Examples

Glee Karaoke Auditions

1 Million+ friends, 27,000+ Submissions and 85 Million+ Votes



Interactive Exercise

Discussion of Hypotheticals

(Separate Handout)

57

DANGER, DANGER!
Traps for the Unwary in Social Media
and Mobile Marketing in a Digital Age

www.privacyassociation.org/summit



Summary

Legal Requirements and Best Practices for Mobile Marketing and/or Social Media

- ◆ 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
- ◆ 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

Legal Requirements and Best Practices cont.

- ◆ Comply with Social Network site's TOU and Privacy Policy
- ◆ Send additional messages or use contact points only subject to EPA
- ◆ Don't disclose contact points with Affiliates or other third parties for marketing or promotional purposes unless express written consent has been granted
- ◆ Don't use contest/sweepstakes or other pretenses to secure consent for sending commercial messages
- ◆ Don't include fraudulent or misleading advertising content
- ◆ Retain contact points no longer than necessary and keep database secure
- ◆ Procure call-lists from third parties only if conducted due diligence and can ascertain that proper authorizations have been secured

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!

Scott D. Delacourt, Partner, Wiley Rein, LLP – sdelacourt@wileyrein.com

Lois C. Greisman, Associate Director, Division of Marketing Practices,
Bureau of Consumer Protection, Federal Trade Commission –
lgreisman@ftc.gov

Jennifer Mardosz, CIPP, SVP & Chief Privacy Officer, Fox Entertainment
Group and Myspace – Jennifer.Mardosz@fox.com

S. Jenell Trigg, CIPP, Partner, Lerman Senter PLLC –
strigg@lermansenter.com