

FTC releases privacy guidelines for mobile app developers

Following a public workshop held earlier this year, on 5 September, the Federal Trade Commission issued a set of truth-in-advertising and privacy Guidelines for mobile device application developers. Mark W. Brennan, an Associate at Hogan Lovells LLP, explores the FTC's guidelines and the developments surrounding mobile apps and privacy.

Titled 'Marketing Your Mobile App: Get it Right From the Start,' the Guidelines provide an overview of key issues for all app developers and other members of the mobile app ecosystem to consider as they engage in the app marketplace¹.

Legal framework for mobile app privacy

Currently, there is no universal US privacy law expressly applicable to mobile apps or other mobile data services. Nevertheless, persons or entities that collect, use, share, or retain personal information - including mobile app developers and other service providers - are subject to various laws at the Federal level, including Section 5 of the Federal Trade Commission (FTC) Act. Section 5 of the FTC Act prohibits and makes unlawful 'unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.'²

A major component of contemporary US privacy law comes from the targeted enforcement actions of the FTC, which takes the position that the Section 5 prohibition on deceptive and unfair practices applies to the collection, use, and disclosure of information collected from and about the users of an app³. Although the FTC does not have authority under Section 5 to

promulgate privacy rules, its ad hoc enforcement actions have collectively created a 'common law' of consent decrees that signal what is expected from businesses regarding the collection, use, and protection of personal information. The FTC has entered into several high-profile settlements over the past couple of years with companies providing internet and social networking services, including Google (two settlements)⁴, Facebook⁵, RockYou⁶, and MySpace⁷. The FTC also announced a settlement in August 2011 with mobile app developer W3 Innovations, LLC (d/b/a Broken Thumbs Apps)⁸.

The new Guidelines

At the outset, the FTC makes clear that the Guidelines are intended to apply to all app developers, large and small, start-up and established. It notes, however, that there is no 'one-size-fits-all' approach to advertising and privacy compliance.

The privacy section of the Guidelines includes several key recommendations:

- Build privacy considerations in from the start (i.e. Privacy by Design);
- Be transparent about your data practices;
- Offer choices that are easy to find and easy to use;
- Honour your privacy promises;
- Protect kids' privacy;
- Collect sensitive information only with consent; and
- Keep user data secure.

Privacy

● Build privacy considerations in from the start (i.e. Privacy by Design). The Guidelines recommend that parties incorporate privacy protections into their practices, limit the information they collect, securely

store collected information, and dispose of it safely when it is no longer needed. They also encourage parties to select default app settings based on what people using the app would expect. For any collection or sharing of information that is not apparent, the Guidelines state that app developers should obtain express agreement from users.

● Be transparent about your data practices. App developers should 'be clear to users' about their practices and explain what information is collected and how it is used. Interestingly, the Guidelines also reference an expanded disclosure for third-party sharing - 'if you share information with another company, tell your users and give them information about that company's data practices.'

● Offer choices that are easy to find and easy to use. The Guidelines state that app developers should provide users with tools to exercise control how their personal information is collected and shared. Such tools should also be easy to find and use, and companies should honour users' choices.

● Honour your privacy promises. App developers must live up to their privacy promises. They also need to obtain affirmative consent to make material changes to their privacy policies. The Guidelines note that such promises should also be made in clear language; easy to read on a small screen; and use colours, fonts, and other design elements to bring attention to key information.

● Protect kids' privacy. Apps designed for children or that collect personally identifiable information from children under age 13 may have additional requirements under the Children's Online Privacy Protection Act (COPPA) and the FTC's COPPA

Rule⁹.

- Collect sensitive information only with consent. The Guidelines encourage parties to obtain affirmative consent before collecting 'sensitive' data such as medical, financial, or precise geolocation information.

- Keep user data secure. The Guidelines state that even if parties do not make specific data security promises, they 'still have to take reasonable steps to keep sensitive data secure.' They also recommend that parties: (1) collect only the data they need; (2) secure the data by taking reasonable precautions against well-known security risks; (3) limit access to the data on a need-to-know basis; and (4) safely dispose of data that is no longer needed. App developers that work with contractors and other third parties should 'make sure' that the third parties also comply with these standards.

Truth-in-Advertising

With respect to truth-in-advertising, the Guidelines advise parties to:

- Tell the truth about what your app can do.
- Be transparent about your data practices.

The Guidelines encourage app developers to look at their product - and their advertising - from 'the perspective of average users, not just software engineers or app experts.' Objective claims need to be backed up with solid proof, also referred to as 'competent and reliable evidence.' Health, safety, or performance claims may need competent and reliable scientific evidence. Disclosures need to be 'big enough and clear enough that users actually notice them and understand what they say.' In other words, avoid burying important terms and conditions.

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Other developments

The Guidelines build upon other efforts this year to promote increased mobile app data privacy and security. For example, the FTC's February 2012 Privacy Report recommended that companies providing mobile services improve their privacy practices, including through the use of shorter, more meaningful disclosures¹⁰. As noted above, the FTC also held a workshop on 30 May 2012 to address mobile privacy disclosures¹¹.

In February, six leading mobile app platform operators (including Amazon, Apple and Google) entered into an agreement with the Attorney General of California to promote transparency¹². They agreed to include, as part of their app submission process, optional fields for app developers to describe an app's privacy practices or provide a link to a privacy policy. The operators will also provide a mechanism for app store users to report apps that do not comply with applicable laws or terms of service. They will also develop a self-regulatory enforcement process for addressing such non-compliance. Facebook agreed in June to abide by the agreement, covering the Facebook App Center¹³.

In July, the NTIA (the National Telecommunications & Information Administration) convened a privacy multi-stakeholder effort intended to develop a voluntary, enforceable code of conduct for mobile application transparency¹⁴. Those meetings remain ongoing.

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1. <http://business.ftc.gov/documents/bus81-marketing-your-mobile-app>.
2. 15 U.S.C. § 45(a).
3. States also have privacy and data security laws comprised of a patchwork of varying

statutes, enforcement actions, and private litigation. Most have 'mini-FTC Acts' that grant authority to take enforcement actions in response to unfair or deceptive trade practices against residents of the state.

4. See Google Will Pay \$22.5 Million to Settle FTC Charges it Misrepresented Privacy Assurances to Users of Apple's Safari Internet Browser, Federal Trade Commission Press Release (9 Aug 2012), <http://www.ftc.gov/opa/2012/08/google.shtm>; Google, Inc., FTC File No. 102-3136 (2011), <http://www.ftc.gov/os/caselist/1023136/index.shtm>.

5. Facebook, Inc., FTC File No. 092-3184 (2011), <http://ftc.gov/os/caselist/0923184/index.shtm>.

6. RockYou, Inc., FTC File No. 102-3120 (2012), <http://ftc.gov/os/caselist/1023120/index.shtm>.

7. Myspace LLC, FTC File No. 102-3058 (2012), <http://ftc.gov/os/caselist/1023058/index.shtm>.

8. W3 Innovations, LLC, FTC File No. 102-3251 (2012), <http://www.ftc.gov/os/caselist/1023251/index.shtm>. The settlement related to alleged violations of the Children's Online Privacy Protection Act.

9. 15 U.S.C. §§ 6501-6506; 16 C.F.R. Part 312.

10. Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers, FTC Report, 13-14 (Mar. 2012), available at <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>.

11. In Short: Advertising & Privacy Disclosures in a Digital World, Federal Trade Commission Workshop (May 30, 2012), at <http://ftc.gov/bcp/workshops/inshort/index.shtml>.

12. See Attorney General Kamala D. Harris Secures Global Agreement to Strengthen Privacy Protections for Users of Mobile Applications, Press Release, California Department of Justice Office of the Attorney General (Feb. 22, 2012), available at http://oag.ca.gov/news/press_release?id=2630.

13. Facebook to require privacy policies for all apps in App Center, Los Angeles Times (22 June 2012), available at <http://articles.latimes.com/2012/jun/22/business/la-fi-facebook-ag-20120622>.

14. See NTIA, Privacy Multistakeholder Process: Mobile Application Transparency, <http://www.ntia.doc.gov/other-publication/2012/privacy-multistakeholder-process-mobile-application-transparency>; see also NTIA, 12 July 2012 Privacy Multistakeholder Meeting: Details (26 June 2012), at <http://www.ntia.doc.gov/other-publication/2012/july-12-2012-privacy-multistakeholder-meeting-details> ('The objectives of the 12 July 2012 meeting are to: 1) promote discussion among stakeholders concerning mobile app transparency by employing a structured, open process; and 2) provide a venue for stakeholders to agree on the schedule and format of future meetings.')