

Mobile Marketing Statutory/Regulatory Overview

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LEGAL AND INDUSTRY STANDARDS FOR MOBILE MARKETING: What Is the Environment?

Mobile ecosystem is fragmented—Windows Mobile, Google Android, etc.

Technology is ahead of the law

- Mobile web
- Tracking consumer behavior/privacy issues
- Premium text-messaging sweepstakes/contests
- Mobile couponing

Government regulators actively tracking area:

- FTC had workshop in 2008, issued staff report in 2009 – “Mapping the Mobile Web”
- FCC Rulemaking
- Florida AG very active

Multiple industry standards: Mobile Marketing Association (MMA) the leader; Direct Marketing Association; CTIA, the Wireless Association



Statutes/Regulations that May Apply to Mobile Marketing

The Telephone Consumer Protection Act of 1991 (“TCPA”) and FCC Rules implementing the TCPA

The Federal Trade Commission Act (“FTC Act”) and the Telemarketing Consumer Fraud and Abuse Prevention Act and implementing regulations, including Telemarketing Sales Rule and Do-Not-Call List

The Controlling the Assault of Non-Solicited Pornography and Marketing Act (“CAN-SPAM Act”)

State laws regulating telemarketing, email marketing and privacy

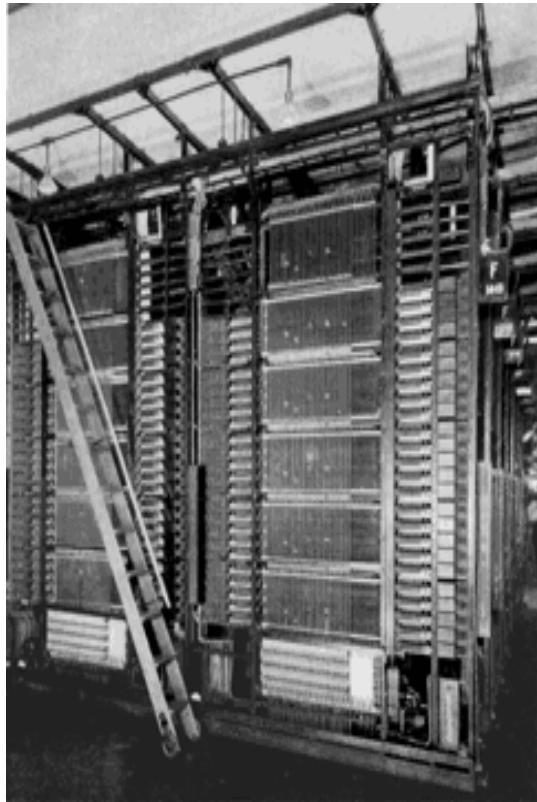
Industry self regulation (e.g., MMA US Consumer Best Practice Guidelines for Cross-Carrier Mobile Content Programs, DMA, CTIA, CARU and other industry guidelines)

Lanham Act/State “Little FTC” Acts/Unfair and Deceptive Trade Practices Acts/false advertising laws

Customer Proprietary Network Information (“CPNI”) Rules



TCPA and FCC Regulations



Prohibit marketers from using automatic telephone dialing systems (“autodialers”) to make “calls”/send messages to wireless devices

Extremely limited exceptions:

- Prior express consent
 - Marketer must be able to show specific/express consent to receive calls from the particular consumer at a certain number. *Cf. Satterfield* (consent to Nextones and its affiliates/brands is not consent to receive marketing from Simon & Schuster)
 - Industry guidelines helpful (e.g., MMA Code) how to obtain adequate consent
- Emergency situations



Key Court Decisions Under the TCPA

1. ***Jaffe v. Acacia Mortgage Corp.*** - TCPA applies whether a text is sent internet-to-phone or phone-to-phone (Ariz. 2005).
2. ***Abbas v. Selling Source, LLC*** – Need not incur text message charges in order to maintain a claim under the TCPA. No. 09-CV-3413 (N.D. Ill. Dec., 2009).
3. ***Lozano v. Twentieth Century Fox Film Corp.*** – District Court rejected defendant’s argument that TCPA only prohibits calls that result in a charge to the recipient; afforded deference to FCC interpretation of what constituted a “call” under the FCA (a term which is left undefined in the statute)(N.D. Ill Mar. 2010).



Key Court Decisions Under the TCPA, cont.

Satterfield v. Simon & Schuster –

Ninth Circuit reversal of District Court summary judgment decision that TM campaign did not violate TCPA

- Consent with sign-up for free ringtones: “Yes! I would like to receive promotions from Nextone affiliates and brands. Please note that by declining you may not be eligible for our free content.”
 - » 9th Circuit: Did the plaintiff consent to receive marketing from Simon&Schuster? No.
- **Three key takeaways:**
 - Deferred to FCC’s interpretation of statute: text message is a “call” under the TCPA;
 - Autodialers may include equipment with the “capacity” to generate random or sequential numbers, whether or not that capacity is in use;
 - Consent to Nextones and its affiliates/brands is not consent to receive marketing from Simon & Schuster = applying the legal construct of affiliate/brands, just saying “Powered by Nextel” isn’t enough.



Costs of Violating the TCPA

2008: Timberland Co. and GSI Commerce settled charges under the TCPA for unsolicited text messages advertising Timberland's holiday sale

- Settlement: \$7 million total fund for the class; \$150 per plaintiff

2010: *Satterfield v. Simon and Schuster/ipsh!* settlement (TCPA violations for sending text messages promoting the Stephen King novel *Cell*)

- Settlement: \$10 million total fund for the class; \$175 per plaintiff (\$2,725,000 in attorneys' fees)



Espinal v. Burger King Corp. **(S.D. Fla. 2010)**

- Espinal alleged that Burger King violated the TCPA by sending unsolicited text advertisements to thousands of cell phones nationwide where reply “stop” feature of the promotion did not function
- October 13, 2010: Federal judge approved a class-action settlement of \$510K
- BK will pay \$250 to each class member who received an unauthorized text message that related to BK promotion
- BK agreed to curb sending of unauthorized text messages in the future



Do Not Call Rules and National Do Not Call Registry

1. Consumers may register their cell phone numbers on the National Do Not Call Registry
2. Companies must also maintain their own DNC lists
3. A marketer may not send a text message to any number registered on the DNC List unless the marketer has:
 - Obtained prior express consent from the consumer or
 - An established business relationship with the consumer (transaction within last 18 mos. or inquiry within last 3 mos.)

Marketers must regularly scrub their lists against both the national DNC list and their own list for the cell phone numbers of consumers with whom they have neither an EBR nor express permission to call.



Federal CAN-SPAM Act

The federal CAN-SPAM Act, 15 U.S.C. § 77001-7703, prohibits sending *commercial* electronic email messages to wireless devices unless the recipient has provided prior express authorization to receive such messages from the sender

A message is *commercial* if its primary purpose is to advertise or promote a commercial product or service (including comment on a commercial website).

- Messages that are “transactional” in nature, such as those that complete or confirm a transaction, are not subject to CAN-SPAM’s requirements.
- *E.g.*, a text message confirming sign-up for a gaming service is transactional, not commercial.



Federal CAN-SPAM Act (cont'd)

The requirements of the CAN-SPAM Act apply to any message sent to an email address that includes a domain name that has been posted on the FCC's wireless domain list for at least 30 days before the message is sent. The domain list is available on the FCC website.

Note that the CAN-SPAM Act applies *only if* the technology used to send a message that references an ***internet domain name*** on the FCC list.

- So, messages addressed to the email address 2125551212@verizonwireless.com might be covered
- BUT phone-to-phone SMS messages that do not include a reference to a domain name are not covered.



Federal CAN-SPAM Act (cont'd)

Obtaining consent under CAN-SPAM:

If CAN-SPAM applies, express prior authorization to receiving email messages sent to mobile devices must be obtained from consumer.

- Consent may be obtained orally (recorded) or in writing, however, because some courts have taken the position that the TCPA applies (see *Jaffe*), it is *highly preferable to obtain written authorization*.
- Requests for authorization must contain the following disclosures/consents:
 - Subscriber consents to receive mobile messages sent to his/her wireless device by a particular sender;
 - Subscriber may be charged by his/her wireless service provider for receiving messages; and
 - Subscriber may revoke his/her authorization at any time.
 - Limited Scope/Transferability of Authorization.

Any prior consent given by consumer will be interpreted narrowly. It will not necessarily be extended to affiliates or partners (*cf. Satterfield*) and consent for one type of email/text message has not necessarily given consent for other types – consenting to weather updates is not the same as consenting to e-coupons.

Authorization cannot be via “negative option” – the consumer must affirmatively authorize messages.



CAN-SPAM Compliant Emails*

Must have accurate “from” line	15 U.S.C. § 7705 (a)(1)
Must have accurate “subject” line	15 U.S.C. § 7705 (a)(2)
Must include internet based opt-out mechanism	15 U.S.C. § 7705 (a)(3)(A)
Must not send email to those who have already opted out (10 days)	15 U.S.C. § 7705 (a)(4)
Must include physical address of sender	15 U.S.C. § 7705 (a)(5)(A)

FTC Act and State UDTPA Statutes

- Section 5 of the Federal Trade Commission Act prohibits unfair or deceptive acts or practices in or affecting commerce
- State Attorneys General also enforce state statutes that prohibit unfair and deceptive acts or practices
- Basic principles of consumer protection/advertising law apply (*e.g.*, clear and conspicuous disclosures, etc.)
- Lanham Act may also apply



State Law: Florida

The Florida Attorney General's Office has been particularly active in the mobile marketing area, with a focus on proper disclosure of material terms.

Florida AG is developing a “zone system” to dictate where material terms on a mobile should be disclosed. AG has indicated that price and terms of offer would need to be within 125 pixels of the submit field, with other information presented in a mandatory minimum font size and a color that contrasted with the background

Recent Florida Cases:

In the Matter of Cingular Wireless, Inc., Case No. L08-3-1219 (Fla. Att’y Gen. Feb. 28, 2008); ***In the Matter of Verizon Wireless, Inc. and Alltel Communications, Inc.***, Case Nos. L08-3-1034 and L08-3-1035 (Fla. Att’y Gen. June 16, 2008).

Settlement with AT&T Mobility over ads involving “free” offers in which AT&T agreed to pay \$2.5 million plus \$10 million in rebates to consumers; requires AT&T to include specific provisions in its agreements with third-party providers that regulate how those third parties market using mobile text messaging and similar mechanisms. Unusual because AT&T is wireless carrier, not advertiser. Settlement with Verizon Communications had provisions that were similar to, but even more specific than, AT&T settlement.

In the Matter of Azoogleads US, Inc., Case No. L07-3-1044 (Fla. Att’y Gen. 2007).

Settlement with Azoogle over the company’s Internet ads for “free” ringtones that offer that in fact required that consumers purchase a subscription to \$9.99/month service to obtain; Azoogle agreed to pay \$1 million and prominently disclose the costs of any offer.



Special Issues for Mobile/Wireless Prize Promotions

- Lotteries are prohibited under federal laws and the laws of all fifty states, usually as a form of gambling.
- A lottery has three elements:
 - (1) prize,
 - (2) chance, and
 - (3) consideration.
- Costs incurred as a result of using a mobile device to enter a promotion (e.g., texting fees) may constitute consideration.



American Idol/Deal or No Deal Cases

In 2007, several class actions challenged text message games promoted via TV shows such as *Deal or No Deal*, *American Idol*, *1 vs. 100*, and *America's Got Talent*. Audience members could enter via text message, but would incur a \$0.99 premium text message fee; they could enter for free via the Internet.

- GA Supreme Court held that ***state gambling law was not violated because participant did not compete against game sponsor, there was no “winner,” and there was not a wager on the outcome.*** (*Hardin v. NBC Universal, Inc. et al.*, 660 S.E.2d 374 (Ga. 2008))
- **CA cases are still pending.** *They challenge the established proposition that an alternative method of entry eliminates the element of consideration from promotional games.* They also raise the question of whether the Internet can be relied on as a free alternative method of entry. (*Bentley v. NBC Universal, Inc.*, No. 2:07-CV-03647 (C.D. Cal.); *Herbert v. Endemol USA, Inc.*, No. 2:07-CV-03537 (C.D. Cal.); and *Cunningham v. Endemol USA, Inc.*, No. 2:07-CV-3643 (C.D. Cal.))



Mobile/Wireless Prize Promotions: Practical Advice

Complying with Laws/Industry Standards for Mobile Prize Promotions

- As with all promotions, must disclose Official Rules prior to entry
- At minimum, need link to complete rules from mobile screen.
 - Ads in other media (online, print, TV) should make more complete disclosures, take advantage of additional space.
 - DMA Guidelines for Ethical Business Practice, MMA Consumer Best Practices Guidelines require clear and accurate disclosures of certain information regarding the promotion; reflect state and federal standards.
 - Promotion sponsors may wish to require registration online for more complicated promotions.
- Must provide free AMOE for all games of chance.
- For premium text messaging promotions, companies should avoid using a method of entry with a premium cost unless there is some value associated with the charges (e.g., ringtone, t-shirt); ensure availability of free AMOE.
- MMA's Mobile Marketing Sweepstakes and Promotions Guide provides procedural guidance regarding the operation of a consumer promotion.



Mobile Coupons, Premiums and Other Promotional Offers

Marketers are increasingly offering coupons, rebates, premiums, or other promotional offers through communications to mobile devices.

- **Examples:** Some coupons redeemable online by entering a coupon code, some must be printed out in order to redeem them, and some are location-based services that use satellite systems to provide mobile promotional offers for nearby retail outlets.
- **Legal Standards:** Mobile coupon and premium offers are subject to the same consumer protection standards that govern traditional coupons, rebates, premiums and other promotional offers, such as the FTC Guides on deceptive pricing and “free” claims, state trading stamp laws, and the FTC’s Mail or Telephone Order Merchandise Rule.
- **MMA and DMA guidelines:** Must comply with applicable federal and state laws and regulations, guidelines’ prior consent and notice requirements, disclose all key terms and conditions.



Industry Self-Regulation & Advocacy

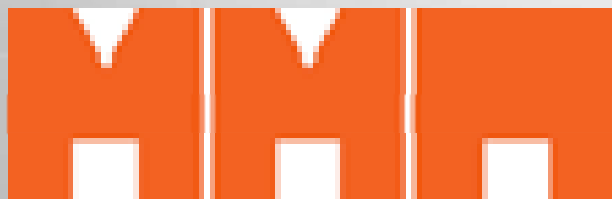
Presented by Claire M. Kimball
Senior Counsel, Turner Broadcasting System, Inc.



A TimeWarner Company

Industry Self-Regulation

- *The mobile industry has strong self-regulatory groups.*
- *One is the Mobile Marketing Association (the 'MMA').*
- *Members include agencies, advertisers, hand-held device manufacturers, carriers, operators, retailers and others.*
- *Website address: www.mmaglobal.com*



MOBILE MARKETING ASSOCIATION

Industry Self-Regulation

- *MMA provides comprehensive guides on mobile marketing, including a best practices guide.*
- *The best practices guide addresses most aspects of marketing to hand-held devices across carrier platforms.*
- *Versions of the guide are available in English and Portuguese.*

Industry Self-Regulation

- *The MMA also provides a Code of Conduct for Mobile Marketing.*
- *The Code of Conduct sets forth the MMA's general guidelines for consumer choice, and consent, customization and constraint*
- *The Code of Conduct is available in English, Spanish and Portuguese.*

Industry Self-Regulation

- *The U.S. Consumer Best Practices Guidelines can be found at:*
<http://mmaglobal.com/bestpractices.pdf>
- *The Code of Conduct can be found at:*
<http://mmaglobal.com/codeofconduct.pdf>



Industry Self-Regulation

- *The CTIA is a non-profit organization representing the wireless communications industry.*
- *Members include wireless carriers, suppliers, providers and manufacturers.*
- *CTIA functions as an advocacy group for the wireless industry at all levels of government.*

Industry Self-Regulation

- *CTIA: www.ctia.org*
- *CTIA has promulgated voluntary industry guidelines, including the Consumer Code for Wireless Service.*
- *The code can be found at:*
http://www.ctia.org/consumer_info/service/index.cfm/AID/10623



Industry Self-Regulation

- *CTIA is primarily carrier focused.*
- *Policy statements and position papers on topics of interest to the wireless industry can be found on the site.*
- *CTIA is primarily concerned with protection and privacy for consumer cell phone billing data and history.*

Advocacy



- *Below are a few of the advocacy groups who have expressed opinions in the mobile marketing/privacy space*
 - ▶ *ACLU*
 - ▶ *Center for Digital Democracy*
 - ▶ *Electronic Frontier Foundation*
 - ▶ *Consumers Union*
 - ▶ *Privacy Rights Clearinghouse*

Advocacy

- *In 2010, the Wall Street Journal began running a series of articles called 'What They Know'*

<http://online.wsj.com/public/page/what-they-know-digital-privacy.html>

- *The series has addressed subjects such as the collection of personal data via websites and on-line ads, online behavioral advertising and GPS tracking technology in cell phones.*

Advocacy

As a result of the WSJ series, in July, 2010, seventeen consumer advocacy groups sent a letter to the Chairman of the FTC asking the Commission to propose a comprehensive statutory and regulatory solution to address the deficiencies in American's privacy rights.

Advocacy

In August, six organizations sent letters to the Chair and Ranking Member of both the House and Senate Commerce Committees asking them to investigate Microsoft Corp. and to hold hearings on consumer privacy issues.

Location-Based Services

Legal and Practical Considerations

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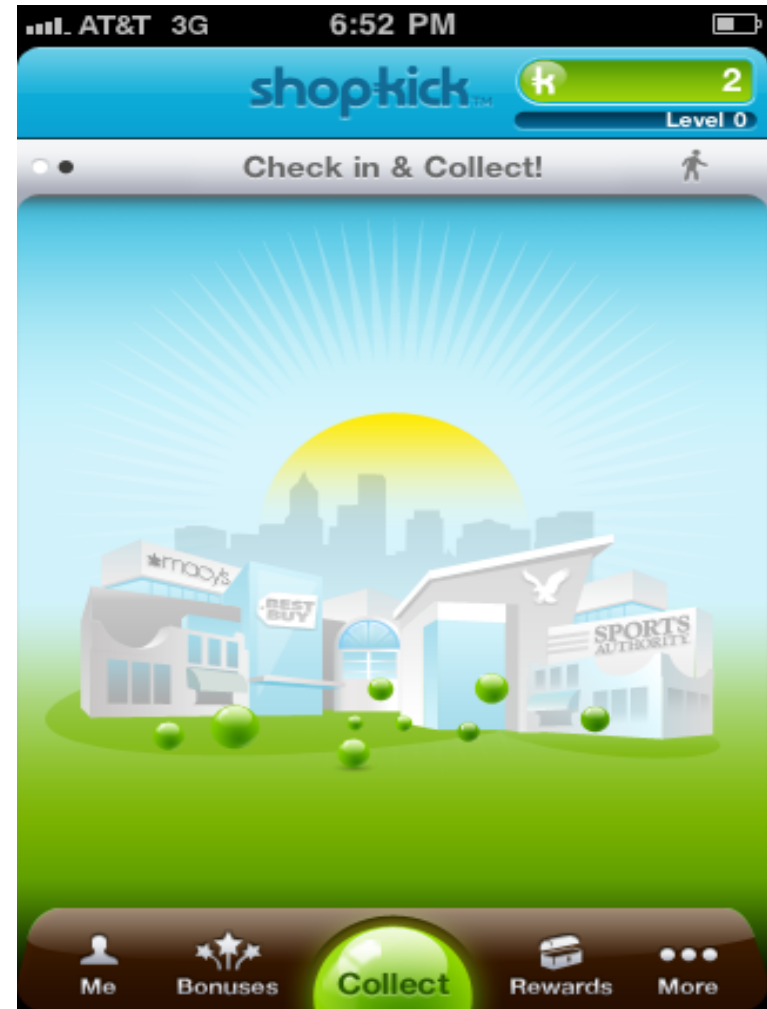
McDonald's and Foursquare Day

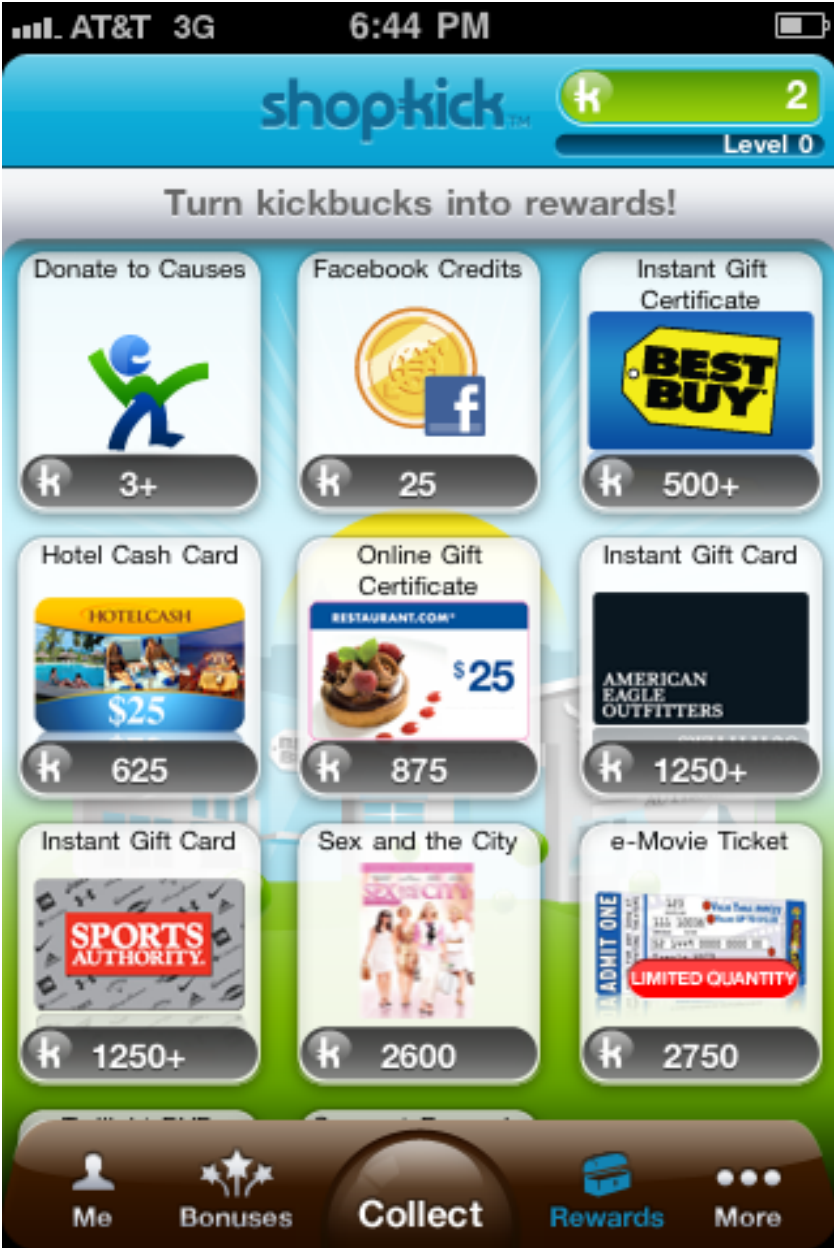
- Foursquare Day Sweepstakes
- Enter for gift card by checking in
- ROI
 - Small Investment
 - Exponential publicity return
 - Sales impact..



Macy's and Shopkick

Location-based
program: collect
Kickbucks for rewards





Refined geo-location
technology: better
assessment of traffic





Issues and Considerations

Privacy

In Data Exchange

- Ensure compliance with your Privacy Policy as well as Industry Guidelines
- Interaction with partner Privacy Policy

Privacy (Cont'd)

In Storage of Information

- If there is PII involved, are you retaining a copy?
- Is your partner retaining a copy?
- For how long?



Related Considerations

- “Creep factor”
- Precise Geo-Location Info: special status?



Patent Exposure

- Small partners = unsteady ground
- Indemnity and insurance issues



Other Considerations

- Advertiser as teacher
- Early adopters run more risk

So Your Client Has an Idea (at 5pm on Friday):

“We’re running a promotion to support the release of our movie on DVD.”



Sweepstakes and Instant Win Game with 3 ways to enter:



Text the word “OSCAR” to the short code 77493 (PRIZE)



“Check-in” at participating retail locations where DVD sold



Enter online for “free” 1x per day

Prizes Include:

- DVD’s (mailed to home address)
- DVD’s issued in the form of QR Code
- 20% off movie branded t-shirts and other movie memorabilia