

Association of Corporate Counsel  
Nonprofit Organizations Committee  
Legal Quick Hit

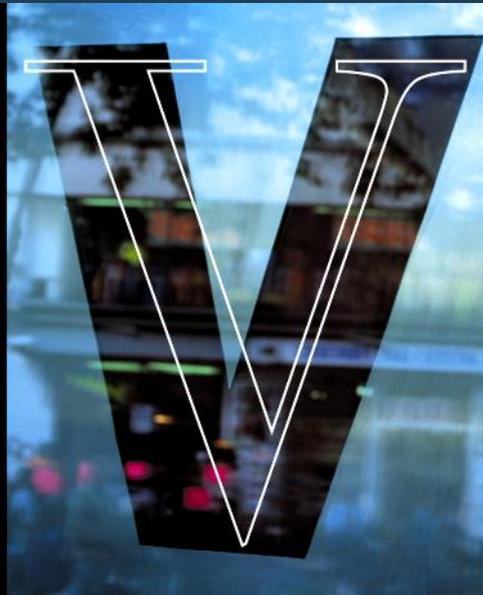
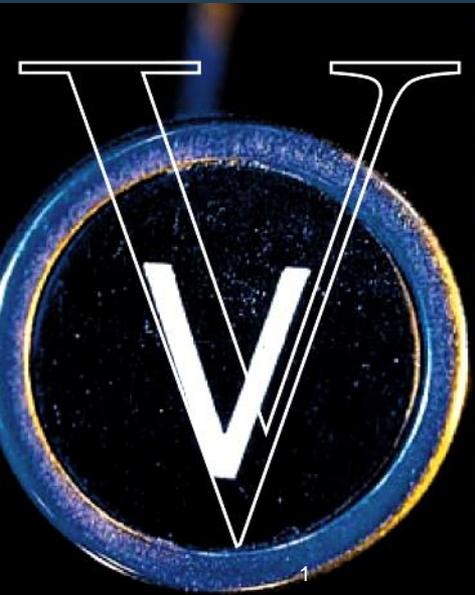
So You Want to Create an App?:  
Legal Considerations for Nonprofits

MODERATOR: JEFFREY S. TENENBAUM, ESQ.

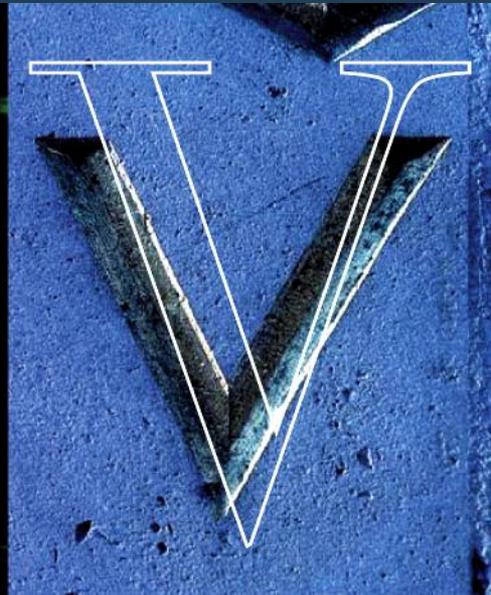
TUESDAY, APRIL 9, 2013

PRESENTER: KRISTA S. COONS, ESQ.

3:00PM ET

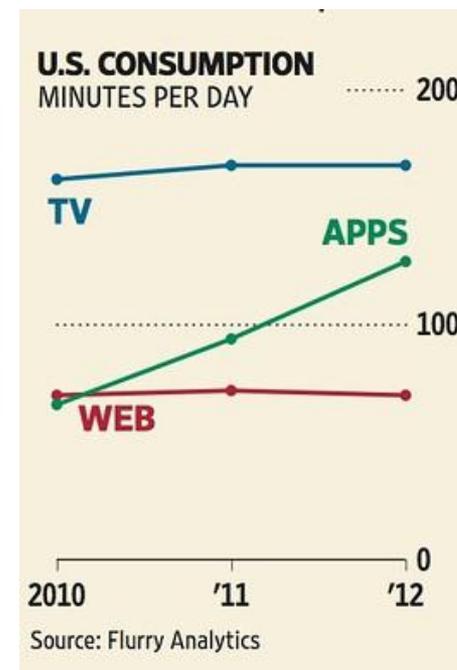


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# Apps! A Mobile Revolution

- The average smartphone user spends *two hours a day on apps*, more than double the time spent two years ago. Flurry Analytics, 2013.



Source: [http://blogs.wsj.com/digits/2013/03/11/the-surprising-numbers-behind-apps/?mod=dist\\_smartbrief](http://blogs.wsj.com/digits/2013/03/11/the-surprising-numbers-behind-apps/?mod=dist_smartbrief)



## But, What Exactly Is an *App*?



- A software application designed to run on smartphones, tablet computers and other mobile devices.
- A user can download the app to a personal device (e.g., smartphone, tablet) from any number of application distribution platforms, which are usually operated by the owner of the operating system on that mobile device, e.g., Apple App Store, Google Play, Windows Phone Store and BlackBerry App World.





# Apps vs. Websites: *A Primer*

## Apps

- An app can target the specific limitations and abilities of each device
- No Internet connection
- Push notifications
- Interoperability
- Must be installed and updated

## Websites

- Options for optimizing are limited in website design because the website must operate within the browser
- Mobile devices limit website operability: tiny screens, loss of certain functionality (double-click/hover), increased imprecision
- Don't need to be updated; consistent user experience

## Legal Considerations Overview

- Contractual Requirements of Chosen Platforms
- Intellectual Property Rights
- User License and Terms of Use
- Issues with Fees
- Data Privacy/Protection Issues
- Related Practical Considerations



## Legal Considerations: Platforms

Each platform has contractual restrictions on the ways in which it can be used.



- Exclusivity
- Substance: *e.g.*, Apple institutes rules regarding type of content, development tools, among others; Android doesn't limit content the same way.



- Fees: *e.g.*, Apple also has instituted special rules about charitable donations (more later) and subscriptions to magazines, music and other media. In the latter case, Apple takes a cut of subscription fees.



# Legal Considerations: IP for Apps



- Copyright
  - Protects the tangible expression of the app itself, including its code, all words and images, and the audiovisual display (*i.e.*, look and feel)
- Trademark
  - Protects all use of your company name, any logos, brands, product names, trade dress
- Patent
  - Protects inventive concepts



## Why Does IP Ownership Matter?

- Only an IP owner intrinsically has the right to stop others' unauthorized use of that IP.
- Only an IP owner has the right to profit from others' authorized use of that IP.
- In some cases, others' unauthorized use of your IP may dilute the strength of your IP, e.g., trademarks.

*Even the best intentions can be spoiled!!*



## Creation of Your App: Who and How

- General rule: organizations own IP created by their employees, but not their contractors
  - BUT, employment status not always clear
  - BUT, must be within the scope of employment
- Hypothetical: A receptionist at the American Red Cross develops interactive first aid app... On her home computer... on the weekend... and sends it to the American Red Cross's marketing department. Who owns it? Does it matter?



## Contractors and Work-Made-for-Hire

- General Rule: All independent contractors and volunteers should sign a written work-made-for-hire agreement and copyright assignment.
- A “work made for hire” is a work specially ordered or commissioned [if it fits into one of nine enumerated categories and] . . . *if* the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. 17. U.S.C. §101.
- Include a copyright assignment as a fallback
- BUT, can't contract around the law

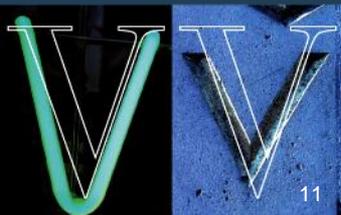


# Protecting Your IP

- Registration
  - Copyright
  - Trademark
  - Patent



- Ensure proper, visible usage of the IP symbols within the app
- Ongoing process



## Legal Considerations: Others' IP

- Within the App. Work-for-hire Agreement should require that all work be original to developer; to the extent stock or licensed images are used, need proof of license and an indemnity.
- Posted by Users. The Digital Millennium Copyright Act provides immunity from liability for copyright infringement, provided you have a policy for receiving and responding to takedown notices and you terminate repeat infringers.



## User Licenses and Terms of Use

- Can be click-through
- Provide user with the legal right to install and use
- Contain basic legal and support terms
- Provide restrictions on user's ability to use, share, copy, etc.
- Does the platform require certain terms?
- Provide you the right to use content uploaded by user
- How will you use data – push notifications?
- Pitfall! Beware integration with other digital media – be sure your terms don't conflict.



# Money Traps

- Make all fees (if any) clear and unambiguous
- If there will be an in-app purchase option, make that clear and unambiguous
- Fundraising considerations
  - Does your distribution platform permit it?
  - May have to take users to external website
  - What fundraising apps are already out there?



# Data Privacy Considerations

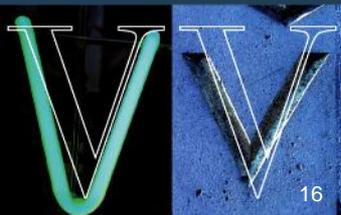
- You must have a privacy policy (California AG + Platform “Joint Statement”)
- More than lip service, *i.e.*, “Privacy by design”
  - What data does the app collect (both intentionally and unintentionally)?
    - users’ mobile device contacts
    - web browsing activity
    - location
  - Where is the data stored and for how long?
  - For what purpose is the data collected?
  - Is the data shared or distributed?
- Special concerns regarding children’s data



## Practical Considerations

- Evaluate whether an app is right for you
- How will you track success?
- Does an app already exist that you can leverage to achieve the same goals?

Questions?



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