Connected and Compliant – Mitigating Legal Pitfalls in Mobile App Development Part I

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"There's an App for that," is a phrase that can now be used over a million times to reference over a million mobile applications, or Apps, and that's just within the Apple platform[1]. While the popularity of Apps initially boomed in the business-to-consumer marketplace, the mobile Apps industry continues to grow with many companies discovering opportunities to launch business-to-business Apps to improve efficiencies, manage operations, and develop business. Even early entrants to the mobile App market find growth opportunities with the introduction of new devices requiring new versions of existing Apps to improve user experience when accessing Apps on smaller or larger screens or utilizing new features, such as voice recognition.

Whether a company is a rookie in the mobile App marketplace or a veteran launching enhanced versions of its App, there are many business and legal considerations to address. Part I of this two-part article provides an overview of the mobile App industry and identifies several business considerations to address prior to App development to avoid potential legal risks. Part II will address various laws and regulations that may be implicated depending on an App's features and functionality and discusses legal issues that should be addressed by contract.

THE MOBILE APPS INDUSTRY

Analyzing and identifying trends in the mobile App industry starts with understanding the mobile device industry. A recent Pew Research Center report found that 64% of Americans own a smartphone, which represented an increase of 29% since the spring of 2011.[2] The same report noted that universally, smartphone owners relied on their smartphones for "text messaging, voice and video calls, internet use, and email," but that increasingly, users reported relying on their smartphones for a variety of services, such as accessing social media accounts, news and entertainment.[3]

But smartphones are only a part of the picture. The Pew report focused on smartphones; however, the mobile device market has expanded in the last four years to include tablets and wearable devices. And as the mobile device market grows, the demand for mobile Apps increases, whether that means developing Apps for different mobile devices or different operating platforms to meet consumers preferences.[4] An infographic produced by the University of Alabama at Birmingham's Online Masters in Management Information Systems predicts that by 2016, 10 billion mobile devices will be

in use globally and that by 2017, App downloads will generate $77 billion in revenue.[5] With App users increasing time spent on Apps from 23 hours per month in 2012 to 37 hours per month in 2014[6], App users are clearly demonstrating that if the Apps are available, they will use them.

While opportunities for growth in the mobile market appear strong, it would be naïve to ignore the statistic that the top 200 Apps generate 70% of App usage in the U.S.[7] So while entering the market may be relatively easy, developing a product with features and functionality that appeal to a mobile audience requires forethought and resources. Addressing the pre-development considerations discussed in the next section will help you identify what value an App brings to your customer, which will be a key to realizing the potential of the mobile App industry.

PRE-DEVELOPMENT CONSIDERATIONS

Taking the time to identify the purpose of the proposed App and to perform due diligence on potential developers will ultimately save time and help to avoid legal complications. The following identifies some of the pre-development considerations to address.

Purpose of the App – Before hiring App development resources or allocating internal resources to an App development project, company leaders should identify and refine the purpose of the App. Consider the following:

- Is the App intended for use by businesses or consumers?
- Will the App primarily deliver content or will the App involve features and functionality that enable users to share content or otherwise interact with the App?
- What type of data is absolutely necessary for the App to function and what data will the App collect while in use?
- Will the App enable users to perform eCommerce transactions or otherwise perform financial transactions?
- Will any of the App's features include location tracking?

Answering these questions will not only help project managers identify the type of resources necessary to develop the App, but also help identify compliance considerations.

Platform – Selecting a platform for the App also involves forethought. While Apple and Android are the most popular platforms, many other platforms exist and may align more closely with your business goals. However, if market share is the primary goal, or if the company is new to Apps, the Apple Store for the Apple platform and Google Play for the Android platform offer development kits widely used in the industry that will result in features and functionality already familiar to users. Each platform, including Apple and Android, requires App owners to operate their Apps under such platform's terms and conditions, which are binding on those who use such platform and are non-negotiable. Apple further requires developers to submit the App for approval prior to distribution through the Apple Store. Apple may reject an App for failing to comply with its App

Store Guidelines. Understanding a platform's terms and conditions and App approval process and evaluating the strengths and weaknesses of the platforms will help you avoid delays or setbacks in development of the App as well as meet your business goals for the App.

Developer Selection Due Diligence – Arguably the most important decision associated with launching an App is selection of the App developer, which justifies time and money spent on due diligence. Fees for development vary, so setting a budget can help narrow the search for the developer. If you intend to offer the App on various platforms, selecting a developer with cross-platform experience may save costs due to familiarity of various platform requirements. Considering the purpose of the App will also help in selection of the developer by narrowing the search to those who have experience in development of similar Apps. For example, if your App involves sophisticated user interaction, such as eCommerce transactions, search for developers familiar with the required functionality, rather than developers focused on content delivery for clients such as news resources or media outlets. Consider what type of post-development support the App will require and what the developer provides after the launch of the App. Many Apps enable users to report bugs and provide feedback, which is only beneficial if a mechanism exists to address such feedback. Further, platform providers will release updates and enhancements to platforms as technology changes and new devices interact with the platform. Such platform modifications may require updates and enhancements to the App. If a company's internal resources cannot provide App support, select an App developer that offers post-development support. Finally, consider the company's internal resources beyond technical support, such as marketing and data security departments, to ensure coordination among all relevant players and the developer.

As society increasingly demands mobility, providing customers with an App that meets their "on-the-go" needs, whether that means productivity or entertainment, will set you apart from your competition and help you realize your potential in the mobile marketplace. Further, identifying the purpose of your App and your mobile goals and performing due diligence to select development resources will help you avoid costly, and potentially legal, pitfalls.

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[1]Clifford, Catherine, By 2017, the App Market Will Be a $77 Billion Industry (Infographic), August 26, 2014, http://www.entrepreneur.com/article/247952.
[2]Pew Research Center, April 2015, The Smartphone Difference, 2, available at http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015.
[3]Id. at 32-33.
[4]Millennial Media, State of the Apps; 2015 Industry Snapshot, 2, Q4 2014.
[5]Clifford, supra.
[6]Nielsen, So Many Apps, So Much More Time for Entertainment, June 11, 2015, http://www.nielsen.com/us/en/insights/news/2015/so-many-apps-so-much-more-time-for-entertainment.html.

[7]Id.