

# Mobile Marketing

or

## I Know Where You Will Be Next Summer & Other Mobile Marketing Myths

Digital Marketing Committee  
Association of National Advertisers  
May 10, 2011; New York, NY

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## Change is in the Airwaves

Wireless devices add the combined utility of the fixed telephone, Internet, computer, credit card, game console, library, radio and TV, to name only a few.

Because of its multi-functional characteristics and its reach, and because mobile devices will continue to cannibalize some or all of the features and functions of an unparalleled number of other applications and inventions, these devices will impact our lives in more ways than we can imagine. . . . .



# Carrying Vast Amounts of Information About Us



# Mobile Marketing

## Who's Investing?

### AOL & Patch

- Acquired for \$7 million in June 2009
- Invested \$50M in April 2010
- As of August, launched more than 100 communities; 400 more in next 6 months

Patch

### Yahoo & Associated Content

- Acquired in May 2010 for a rumored \$100 million
- Thousands of contributors to cover local content

YAHOO! + associated content

### Facebook launched Places August 18

- 500M active users; 150M access the site via mobile device
- The day after launch, FourSquare had it's biggest check-in day ever



### Microsoft & Skype

- Microsoft announces \$8.5 billion cash deal to acquire Skype
- Skype owned by Silver Lake which acquired from eBay in 2009 for slightly more than \$2 billion



ANA

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# Mobile Marketing

## Who's Playing?

Partnerships with Travel Channel and H&M (virtual goods)

3M users (up from 500k in Jan, 130k new users a week,)

Averages 70 minutes of playtime per user |



Presence for 1.1M online local merchants  
Backed by IAC



Presence in 88 cities; 22 countries

13 million subscribers

\$135M in Series C funding with \$1.35 billion valuation April 2010



100M comments from 20,000 towns and cities across US

7.8M unique users (Top 10 online newspaper site)

Backed by Gannett, Tribune and McClatchy



# Types of Mobile Ads

SMS



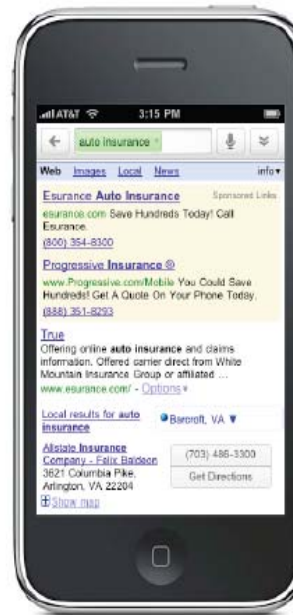
SMS Ads

WAP



Wap Display Ads

Search



Search Ads

App Display



App Display Ads

Push



Push Notifications



# Yesterday's Demographic?

## OMG! Ads Trgt TiVo Usrs +



**Marketers Try to Be 'Kewl' With Text-Message Lingo**

**Unilever's OMG Moment**

“Brace yourself, big marketers are getting hip to text-message lingo. In ads that begin in two weeks for a new line of Degree deodorant for teen girls, Unilever is highlighting “OMG! Moments.”

The Wall Street Journal, April 3, 2008

Unilever



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# Today's Demographic





# Mobile Advertising & Marketing

## Mobile is

- Personal – always attributable to one individual
- Pervasive – one screen unites everything
- Instant – here and now
- Local – it goes where you go

**First thing you check when you wake, last thing you check before going to bed!**

**Within reach over 80% of every day !!**

**92% of owners cannot get through a typical day without using their mobile phone**

Source: The Mobile Life, YouGov Survey 2006

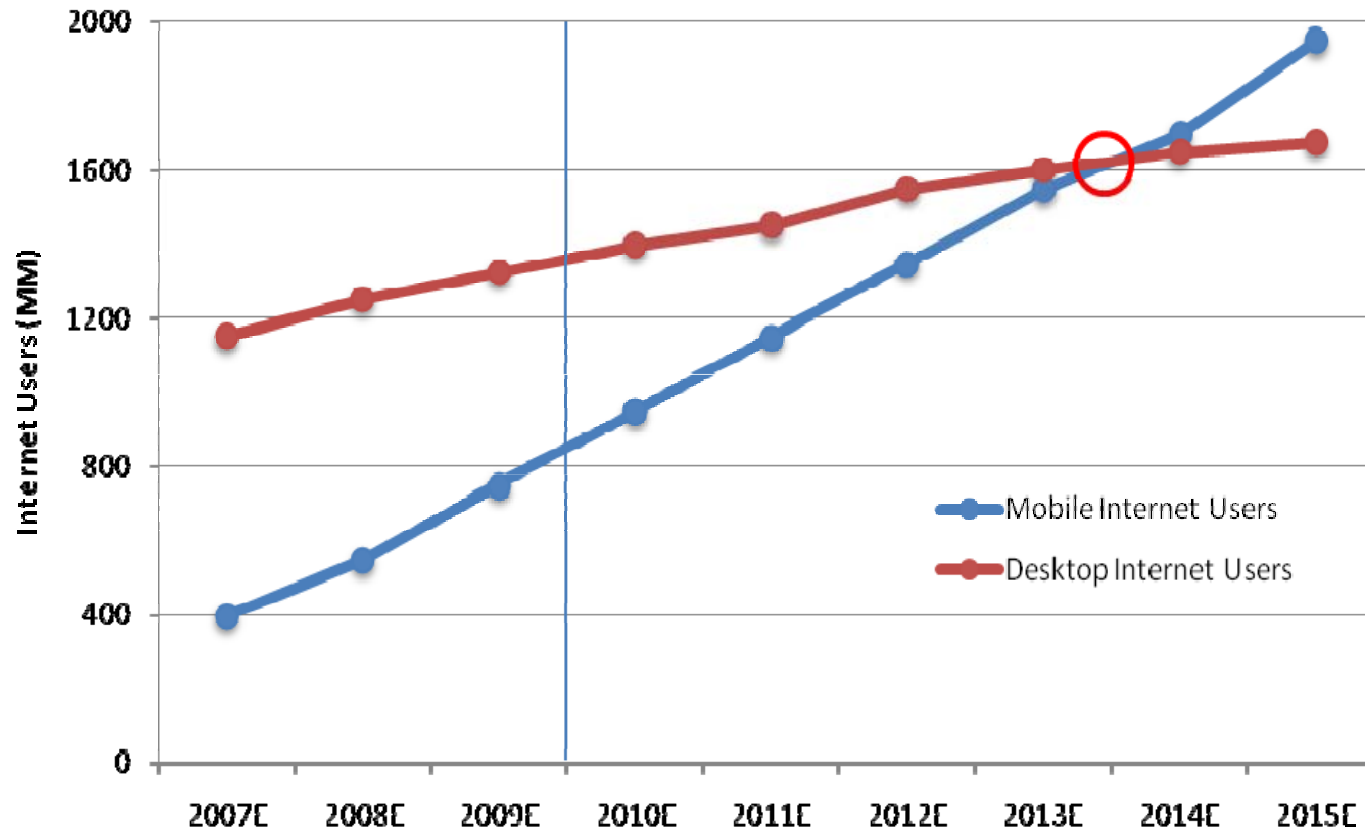
Why do you think they call it a 'sell' phone ?



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# Mobile Factoids

## Global Mobile vs. Desktop Internet User Projection, 2007-2015E



Source: Morgan Stanley

**40% of US Adults now surf the web on their smart phone\***

\*Source: Pew Research Center, July 2010



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# Growth in Mobile Shopping

## Mobile Shopping Growing Dramatically [Thursday, January 20, 2011]

According to a new study from **ForeSee Results**, the US edition of the **Report on Mobile Shopping** indicates that 33% of all survey respondents had accessed a retailer's website using a mobile phone (compared to 24% in 2009), and an additional 26% said that they plan to use their mobile phone to visit a company's website, mobile website, or mobile application in the future. . . The study found that the use of mobile phones to access companies' websites, mobile websites and applications for shopping purposes is increasing dramatically, indicating that any retailer who is not wholeheartedly embracing the mobile trend is leaving money on the table for competitors, says the report.

11% of web shoppers reported having made a purchase from their phones this holiday season, compared to only 2% at this time last year

56% of shoppers who used their phones did so to compare price information while 46% of shoppers used their phones to compare different products to look up product specifications

69% of mobile shoppers used their phones to visit the store's own website while in physical stores, and 46% also used their phones to access a competitor's website  
Highly satisfied shoppers with a mobile experience say they are 30% more likely to buy from that retailer online and 30% more likely to buy offline.

ForeSee Results used the methodology of the American Customer Satisfaction Index (ACSI) is able to show how customers' satisfaction with mobile websites and applications impacts their future purchase intent, loyalty, and recommendations across all channels



# Why You Should Care



- If you want to understand the latest trends in local, geo-location and mobile marketing
- If you need to drive offline purchases & behavior



- If you have regionally differentiated products



- If your message needs to be localized



## Geo-targeting Delivers ROI

### GEOTARGETING YIELDS HIGHEST RETURN

Return on investment (ROI) for select search targeting tactics, according to U.S. search marketers, May 2008 (percent of respondents):

	High ROI	Medium ROI	Low ROI
Geotargeting	49%	40%	11%
Contextual targeting	38%	48%	14%
Behavioral targeting	35%	52%	13%
Demographic targeting	30%	55%	15%
Testing different search engines	27%	46%	27%
Dayparting	17%	57%	25%
Weekparting	16%	53%	31%

Note: n=1,928; numbers may not add up to 100% due to rounding

Local ads in a local context are 4X more effective\*

\* Mindshare Interactive Sprint case study



# Mobile Factoids

“Smartphone sales to pass computers in 2012”

Source: Morgan Stanley

“By 2013, mobile phones will overtake PCs as the most common Web access device worldwide”

Source: Merrill Lynch report

“In 2011, more than 85% of the handsets shipped globally are expected to include a browser”

Source: Focus.com



# Mobile Factoids

- The number of smart phones in use is expected to hit 1.7 billion globally by 2013. [Source: Analysys Mason, July 2010]
- Approximately 58% of mobile operators believe SMS and MMS-based messaging will be one of the top 3 forms of marketing/advertising by 2015. [Source: Airwide Solutions, November 2010]
- Forrester Research says SMS campaigns regularly get response rates of 5% to 25%. [Source: Forrester Research, May 2009]

## Mobile advertising

### Impressions

- Worldwide requests from Android devices increased 97% from October to December. [Source: Experian Hitwise, January 2010]
- In June 2009, AdMob served ads on more than 16mm unique iPhone and iPod Touch devices globally. [Source: AdMob, June 2009]

### Advertising response

- 61% of mobile operators predict coupons and vouchers will be the most widely accepted form of mobile marketing/advertising by 2015. [Source: Airwide Solutions, November 2010]
- Women are 85% more likely to respond to mobile advertising than men. [Source: GfK /Limbo via ReadWriteWeb, February 2009]

### Mobile internet

- Web-enabled smart phones now make up 20% of the 3 billion mobile devices worldwide, with market share heading towards 50% over the next 3-5 years. [Source: comScore, September 2010]



# Mobile Marketing

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**WHY SHOULD YOU CARE?**

**BECAUSE MOBILE ADVERTISING & MARKETING IS  
A FORCE TO BE RECKONED WITH**





# We've Seen Mobile Services



# And of course, the 'Apps'

## Gartner: App Sales To Top \$15 Billion In 2011

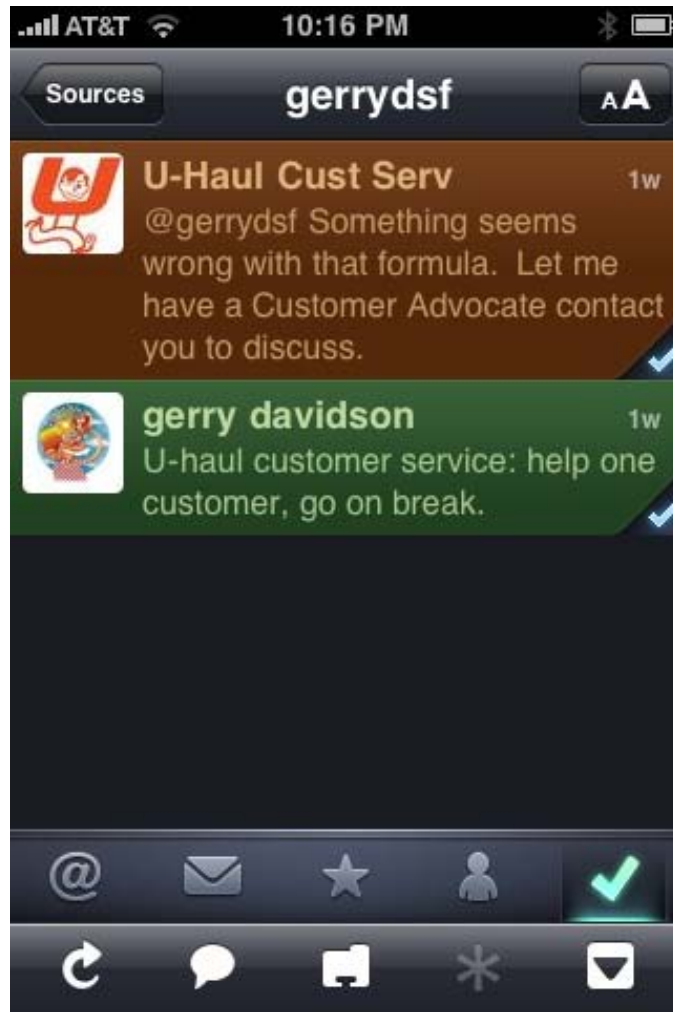
Mark Walsh, Jan 26, 2011 02:37 PM



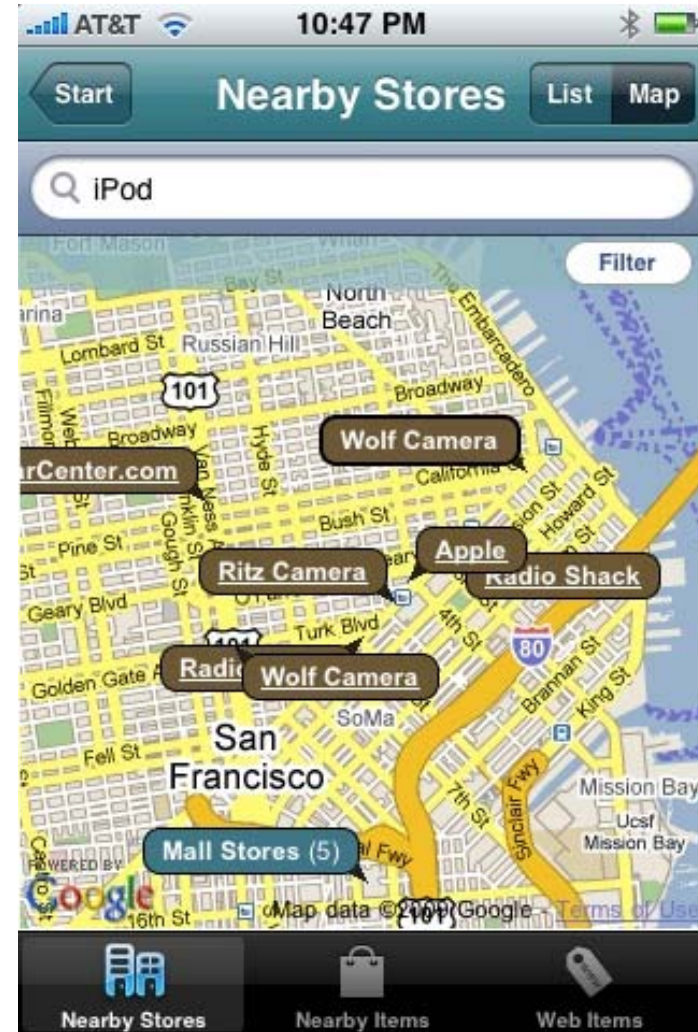
Mobile apps are here to stay, according to a new forecast from Gartner. The technology research firm projects app store downloads worldwide will more than double this year to 17.7 billion. App revenue in 2011 will hit \$15.1 billion, up from \$5.2 billion in 2010. By 2014, app downloads will jump to 185 billion.

"Many are wondering if the app frenzy we have been witnessing is just a fashion, and, like many others, it shall pass. We do not think so," said Stephanie Baghdassarian, research director at Gartner, in a statement. While Apple's App Store gave rise to the app explosion of the last two years -- and last Saturday [announced](#) its 10 billionth download -- alternatives are gaining [traction](#).

# Mobile: As Local as it gets



Customer service as marketing



Direct consumers to purchase

. . but mobile social climbing?



Given that studies consistently show consumers trust other consumers – their peers – more than advertisers (and government) when it comes to product and service recommendations, does it come as any surprise that ‘influence’ peddling has now been extended to consumers.



On the Web:

If I search for you on Google and don't find you

Google . . . do you exist?

But with  
a mobile  
device



I synch,  
therefore  
I am . . . .



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# Enforcement –

## Government & Industry Partnership...

- Federal



- State



- Industry Self-Regulation



and now . . .



# Competition Laws at Work



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# Legal Landscape of Mobile Marketing

## Rise of Consumer

- Integration
- Engagement
- Power

## Digital Distribution Platform

- Unique Privacy Regulations

## Threat of Regulation & Legislation

- Anecdotal Evidence
- Overlapping Jurisdiction
- Dynamically Evolving Technology

## Changing Perceptions of Privacy

- National
- Social
- Cultural
- Age Demographics

## Intellectual Property

- Confusion
- Dilution

## Threats to Privacy

- Who You Are
- Where You Are
- What You Are Doing
- When You Are Doing It
- And With Whom?

## What is Private?

- My 'Space'?
- Information About Me?
- Sharing Information About Me?
- Use of Information About Me?

## Marketing to Children and . . .

BLURRING THE DISTINCTIONS BETWEEN  
INFORMATION, ENTERTAINMENT and ADVERTISING





# Mobile Advertising & Marketing

## Which Rules Apply?

- Federal Trade Commission Act
- Federal Communications Commission
- State Consumer Protections, Unfair and Deceptive Acts or Practices Statutes, Privacy & Identity Theft Statutes
- Controlling the Assault of Non-Solicited Pornography and Marketing Act (“CAN-SPAM Act”) and the corresponding Federal Trade Commission (“FTC”) rules
- The Telephone Consumer Protection Act of 1991 (“TCPA”) and the corresponding FCC rules
- Do-Not-Call Rules
- Customer Proprietary Network Information (“CPNI”) rules
- Industry Guidelines – e.g., ANA, IAB, MMA, DMA, AAAA, CARU, CTIA.



# FTC Landscape

- Heightened Consumerism – Activist Philosophy
- Section 5 of the FTC Act prohibits unfair and deceptive acts or practices in or affecting commerce
- Regulate Behavioral Advertising
- “Do Not Track” – Geo-location Legislation
- Seeking a seat at many different industry tables including FINANCIAL SERVICES, HEALTH CARE, PHARMA, SECURITIES and more...



# FTC Privacy Roundtables

In 2009 and continuing into 2010, the FTC started a series of public roundtable discussions to explore the privacy challenges posed by the vast array of 21st century technology and business practices that collect and use consumer data.

They include:

- Social networking
- Cloud computing
- Online behavioral advertising
- Mobile marketing
- Collection & use of information by retailers, data brokers, third-party applications & others



# Express Consent

- What is legally sufficient consent?
  - Clear and conspicuous
  - Prior to sending message
  - Terms to include
    - Opt-out ability
    - Other issues (kids, blocking access)

## FTC Workshop:

# “Mapping the Mobile Marketplace”

*Staff Report Released April 2009*

<http://www.ftc.gov/opa/2009/04/mobilerpt.shtm>

### Conclusions – FTC will:

- Continue to monitor cost disclosures and work with industry to improve self-regulatory enforcement
- Continue to monitor the impact on consumers of unwanted mobile text messages, malware, and spyware, and take law enforcement action as needed.
- Expedite the regulatory review of the Children’s Online Privacy Protection Rule (“COPPA”) to determine whether the rule should in any way be modified to address changes in the mobile marketplace. Review began in 2010.



# Deceptive Advertising

## COMPLIMENTARY RINGTONE

(OR REALTONES, MONO RINGTONES, POLY RINGTONES, WALLPAPERS, JAVA GAMES, SCREENSAVERS, ALERTS) WITH PAID SUBSCRIPTION FROM \$9.99/MONTH\*

ENTER YOUR MOBILE NUMBER

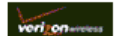
▶▶ [ ] - [ ] - [ ] ◀◀

**SUBMIT**

3 Easy steps

- 1 Enter Your Number
- 2 Confirm Your PIN\*
- 3 Choose your content

AT&T



**\* TERMS OF SERVICE**

Complimentary Ringtone offer is only for compatible handsets on AT&T, Centennial Wireless and Sprint PCS. This is a Ringtone Viva Value Club 2 Poly Ringtones, Joke subscription service. By signing up for this service and by entering your personal PIN Code which will be sent to the cell phone number supplied by you on this website, you acknowledge



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# Misleading Advertising

Admirer's name prediction with flirting tips subscription, sent to your cell, as low as \$5.99/week or \$9.99/month  
\*See carrier specific pricing in T&C section below. To cancel, text STOP to 66047.

## Admirer Calculator

Admirer Calculator:

**Step 4, Enter UR cell #**

( enter UR real cell number and we'll send UR  
Admirer's Name to your phone!)

(  )  -

**Next**



*Who wants  
you?*

*Do you  
have game?*

*Who is your  
secret admirer?*

*Will you  
find love?*

*Love  
Predictions*

*Flirting  
Tips*

### Summary terms:

You agree that in connection with subscribing for the services, (i) Nextel, Sprint, Cellular One, Alltel, Verizon Wireless, and Virgin Mobile USA customers will receive Flirting Tips at \$9.99 per month, (ii) Boost customers will receive the Flirting Tips at \$6.99 per month on code 66047, (iii) Centennial Wireless and Cincinnati Bell customers will receive Flirting Tips at \$5.99 per week, and (iv) AT&T customers will receive the Flirting Tips at \$4.99 per week. For customer care, please email



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# No Pricing

Jamster - Top Realtones to your cell phone

http://ad.jamster.com/landingpages/campaigns/int\_o\_flow/noselect\_123/?adv\_partner=0010&partner\_var=217

Outlook Online

MySpace.com - Mafia Wars

Jamster - Top Realtones to you...

**Jamster™**

## Get REAL Music Ringtones!

+ Games\*, Graphics & More - 20 Downloads Every Month

**STEP : 2**  
**Enter Your PIN**

Jamster is sending you a password by text message.

Enter password

Yes, I have read the [Terms of Service](#) and accept them

**1. Enter**  
Your mobile number to receive PIN

**2. Confirm**  
your PIN #

**3. Choose**  
your Ringtones

Choose from over 100,000 products. Get your first download in 30 seconds - no credit card needed.  
\* Games not available on Verizon Wireless

Questions/Need help? Click [here](#) to use our Live Service Chat.

[Terms of Service](#) [Plans & Pricing](#) [Privacy Policy](#)

\*You must be 18 years old to sign up. If between 13-18 years old, you must have parental consent to sign up. By entering your mobile phone number and submitting PIN code sent to your mobile phone, you certify that you are a) the account holder or b) have account holder's permission to do so and you expressly agree to these terms, as well as, the Jamster Terms of Service. You will be charged **\$9.99 per month** for the Jamster XXL Subscription Plan which includes credits for 6 ringtones/videos, 10 graphics and 4 games/apps (games/apps not available for Verizon Wireless & Virgin Mobile customers). Unused credits roll over to the next month. The XXL Plan automatically renews if not cancelled. Charges will appear on your cell phone bill or will be deducted from your pre-paid balance. Standard text messaging rates, data charges and other charges may apply. A carrier data plan is recommended. Not available on all carriers or on all cell phone models. To cancel your plan, text "STOP" to 75555. For help, you can text "HELP" to 75555, send an email to [info@jamster.com](mailto:info@jamster.com) call (866) 856-JAMS(5267).

Jamster content is available on the following wireless carriers: AT&T, Verizon Wireless, Sprint, T-Mobile, Alltel, Virgin Mobile, Cellular One and Cincinnati Bell.

AT&T Sprint **verizon** wireless T-Mobile Alltel Virgin mobile CELLULARONE Cincinnati Bell CREDO

Read ad.jamster.com



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# Obscure Pricing

Love Compatibility Calculator - Match your name and horoscope with that special someone's name!

http://www.mcbularity.net/usluv\_npp/p6\_pin.php

Get Your Horoscope With Subscription From As Low As \$5.99 A Week Or \$5.99/Month \*See Carrier Specific Pricing in T&C Section Below

Your Result will freak you out!

The Freaky Love Compatibility Calculator

**Fg, Check Your Phone!**  
Almos: There! Your PIN Will be Arriving Within... 01 min 58 sec

**YOUR PIN**

Tick here to accept terms & conditions and find out your love test results now!

**CONTINUE**

**Summary of Terms & Conditions:**  
For help, 76336@stms-softdesk.com, or call 1800 235 7125 for automated help or call 1800 416 6129 for a live operator. All carriers will be billed \$9.99 per month, with the exception of Boost and Cricket, which will all be billed at \$4.99 per month. Click here to see full Terms and Conditions. By signing up for this service and by entering your personal PIN Code which will be sent to the cell phone number supplied by you on this website, you acknowledge that you are subscribing to our service. You may stop this subscription service at any time by sending a text message with STOP, to short code 78026. Your phone must have text messaging capability. You must be the owner of this device and at least eighteen years old. All carriers will be billed \$9.99 per month with the exception of Boost and Cricket, which will all be billed at \$4.99 per month. This is an automatically renewing subscription on shortcode

# Clear and Conspicuous

It's all About Your Cell!

All the top downloads for \$9.99/m

## Download Ringtones to Your Cell Now! Get Realtones!



Enter Your Cell Number:

 -  - 

Please agree to the Service Terms

[I agree to the Terms and Conditions](#) I also understand that standard messaging rates do apply when receiving my PIN. You may qualify to receive 10 complimentary ringtones for the first month and your service will continue at nine dollars and ninety nine cents per month. Cancel at any time and keep all my downloads. Please note that you must be 18 or older in the state of Florida to participate in this offer.

Minimum age restrictions may apply. You must be 18 or older to participate in the following states: Florida



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# Clear & Conspicuous - 3 Zones

## 3 Zones

- All zones must be “above the fold” / visible to consumer w/o scrolling
- All font types must conform to Web Standard size equivalencies
- W3C Color Contrast standard applies to all disclosures in all zones (125 min.)
- All disclosures must be visible at all times throughout the order path

### **Zone 1 – Price and Term (\$9.99 per month)**

- Must be disclosed entirely within 125 pixels in any direction from the cell-submit field and the P.I.N. code submit field.
- 12pt. minimum font size
- Must be disclosed in numerical format 0-9 and include \$
- For Non-Google Compliant Pages, Price disclosure must not contain any other text except price and term (\$9.99 per month)

### **Zone 2- Types of Content (Ringtones and Other Text Services)**

- Disclosure no greater than 20 pixels from Offer Description (Get 10 Bonus Ringtones)
- Other Text Services no smaller than 50% of font size of the Offer Description (Get 10 Bonus Ringtones) Minimum font size is 20pt.

### **Zone 3 – Age / Other T’s and C’s**

- Age description must be above T’s and C’s. Minimum 12pt. font size.
- 3 lines of other T’s and C’s must be visible above the fold.



# Clear & Conspicuous - Contrast

**Colour Contrast** Based on the formula created by the World Wide Web Consortium (W3C).

$$((\text{Red value} \times 299) + (\text{Green value} \times 587) + (\text{Blue value} \times 114)) / 1000$$

Difference in Brightness

175	<p><b>\$9.99 per month</b></p> <p>\$9.99 per month</p> <p>Red - #b4041c Blue - #d2f7f8</p>	<p><b>\$9.99 per month</b></p> <p>\$9.99 per month</p> <p>Yellow - #f9f284 Green - #1a5308</p>	<p><b>\$9.99 per month</b></p> <p>\$9.99 per month</p> <p>Grey - #999999 Black - #000000</p>
150	<p><b>\$9.99 per month</b></p> <p>\$9.99 per month</p> <p>Red - #fca2a2 Blue - #02333f</p>	<p><b>\$9.99 per month</b></p> <p>\$9.99 per month</p> <p>Yellow - #f1eca3 Green - #3c6031</p>	<p><b>\$9.99 per month</b></p> <p>\$9.99 per month</p> <p>Grey - #999999 Black - #000000</p>
125	<p><b>\$9.99 per month</b></p> <p>\$9.99 per month</p> <p>Red - #ff0000 Blue - #96dbf5</p>	<p><b>\$9.99 per month</b></p> <p>\$9.99 per month</p> <p>Yellow - #faee2a Green - #327d1b</p>	<p><b>\$9.99 per month</b></p> <p>\$9.99 per month</p> <p>Grey - #999999 Blue - #0000ff</p>
100	<p><b>\$9.99 per month</b></p> <p>\$9.99 per month</p> <p>Red - #e7364f Blue - #84f5f9</p>	<p><b>\$9.99 per month</b></p> <p>\$9.99 per month</p> <p>Yellow - #f5ed6b Green - #41ab20</p>	<p><b>\$9.99 per month</b></p> <p>\$9.99 per month</p> <p>Grey - #999999 White - #ffffff</p>
75	<p><b>\$9.99 per month</b></p> <p>\$9.99 per month</p> <p>Red - #fd4646 Blue - #b4cfd6</p>	<p><b>\$9.99 per month</b></p> <p>\$9.99 per month</p> <p>Yellow - #faf386 Green - #75c05e</p>	<p><b>\$9.99 per month</b></p> <p>\$9.99 per month</p> <p>Grey - #999999 Red - #ff0000</p>

**\$9.99 per month**

\$9.99 per month

BLACK on WHITE has a colour difference of 255 (maximum).



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## FTC: CAN-SPAM ACT

- “Commercial” email messages sent to an email address that contains a wireless telephone number and a wireless carrier’s domain name on the FCC’s wireless domain list
  - For example,  
2125555000@wirelesscarrier.com
- A message is “commercial” if its primary purpose is to advertise or promote a commercial product or service, including content on a website operated for a commercial purpose



# FTC: CAN-SPAM ACT

- Prior express authorization
  - May be written or oral
  - Written authorization must include the subscriber's signature, including an electronic signature
  - Input of email address
  - Authorization narrowly construed (scope and parties)



# FTC: CAN-SPAM ACT

- Required disclosures:
  - Agreement to receive messages
  - Wireless provider charges may be incurred
  - Authorization may be revoked at any time  
(Note: If consent revoked, must be honored within 10 days)
- Other CAN-SPAM requirements apply (including opt-out requirement)



# Advertising ~~Goes~~ Has Gone Mobile

## Web Technology, GPS, RFID & Mobile Increases Privacy Concerns Over Behavioral Advertising

- ❖ User Search & Input
- ❖ Geo Targeting – Location, Location, Location
- ❖ Coupling Location with Context
- ❖ Coupling Location with Behavior
- ❖ Location Sharing Capabilities
  - Among Users
  - Among Devices
- ❖ Social Networking with Location Sharing
- ❖ Surveillance Capabilities





# Hot “New” Privacy Rights

- ❖ What is Collected? From Whom? When? How?  
Aggregate; Non-Identifiable; Personally Identifiable;
- ❖ How Will Information Be Maintained? Shared? Used?
- ❖ Who Will Have Access? When? For What?
  - Federal Laws (CAN-SPAM; TCPA; GLB; HIPAA; etc)
  - State Laws (Privacy; Publicity; Data Breach)
  - Disclosures (Where? When? How?)
  - Consent (Opt Out? Opt In? Consent)
  - Rights (Revoke; Modify; Parents & Children)
  - Modifications to Policy (Materiality; Purpose)
  - NEW: “Do Not Track”
  - NEW (old): Opt Out vs Opt In



# Privacy Activists Advertising

Want to stop this  
from happening?

**Take Action!**

Replay the movie?



# Cover Your Apps



CYA...Cover Your Apps or more important . . .

**CALL YOUR ATTORNEY!**



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# What's on the FCC's Agenda?

- Participating in Online Behavioral Targeting Discussion
- “Consumers should stay alert, recognize the potential risks associated with cyber crimes and take some simple precautions to help reduce their chances of falling victim to scams.” FCC Chairman Genachowski, 10.09.09
- Implement the Child Safe Viewing Act of 2007
- Use-Based Pricing
- Net Neutrality (still; again)



## FCC Wireless Inquiries

- FCC Notice of Inquiry – Serving and Protecting Children and Empowering Parents in an Evolving Media Landscape (October 2009)
- FCC Seeks Public Input on Draft Rules to Preserve the Free and Open Internet (October 2009) (“Net Neutrality”)
- FCC Announces Wireless Innovation and Investment Notice of Inquiry (August 2009)
- FCC Announces Notice of Inquiry on Mobile Wireless Competition (August 2009)
- FCC Seeks Comment on Additional Opportunities to Protect and Empower Consumers in Communications Marketplace (August 2009)
- FCC Truth In billing (August 2009)



# Alcohol, Tobacco, Firearms & . . . . .

**Remove before use**

**This device is capable of determining its (and your) physical, geographical location and can associate this location data with other customer information. To limit access to location information by others, refer to the User Guide for Location settings and be cautious when downloading, accessing or using applications and services.**

COURTESY: VERIZON



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FCC:

## Telephone Consumer Protection Act (“TCPA”)

- TCPA prohibits making “any call...using any automatic telephone dialing system or an artificial or prerecorded voice...to any telephone number assigned to a...cellular telephone service” or to use “any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement.”
- Judicial interpretation prohibits marketers from sending messages to wireless devices using an automatic telephone dialing system (“auto-dialer”) without “prior express consent”
- Significant Private Enforcement



# State Enforcement

## Florida Attorney General

- Azoogle (2007): Internet ads for “free” ringtones that required \$9.99 service – \$1 million
- Media Breakaway (2008): Internet ads for “free” ringtones and wallpaper; \$1 million + clear and conspicuous disclosures on Internet transaction pages
- Mobile Message Americas (2009): Internet ads for “free” ringtones that required subscription service - \$1 million + clear and conspicuous disclosures on Internet transaction pages
- AT&T Mobility (2008)
- Verizon Wireless (2009)





# State Enforcement

## State Enforcement – AT&T Settlement

AT&T – \$3 million + refunds + third-party provider restrictions

- Restriction on “Free” if costs associated unless costs are clearly disclosed with the initial representation
- No “pre-checked” boxes
- Disclose network and device restrictions
- Separate consent to promotional messages required
- Price of the recurring charge and billing period disclosed immediately adjacent to the cell phone and pin submit
- Additional submit disclosures (any additional charges; negative option aspect; how to cancel; how will be charged; must be authorized by account holder)



# State Enforcement

## State Enforcement – Verizon Wireless Settlement

Verizon Wireless AVC – \$1.5 million + refunds + third-party provider restrictions (June 2009)

- Additional conditions
- Minimum color contrast value of 125 and 12 pt font size for price and billing period disclosure within 125 pixels of the cell number submit and pin submit fields
- Numeric and dollar sign requirement (\$9.99)
- Attorney General will seek to apply to other carriers



## Private Litigation

### *Satterfield vs. Simon & Schuster* (June '09)

Consumer became registered user of Nextone services and checked the “yes” box indicating she read and agreed to company’s Terms and Conditions permitting marketing offers from Nextone and its “affiliates” and “brands”

Consumer received text message “pwrld by Nextone” on behalf of Simon & Shuster

Consumer filed class action claiming violation of the Telephone Consumer Protection Act (TCPA)



# Private Litigation

## The Ninth Circuit found:

- Text messages are considered “calls” under a reasonable construction of the TCPA;
- Under TCPA an auto-dialer includes equipment with “capacity” to generate random or sequential numbers, whether or not that capacity is in use;
- There was no “express prior consent” as required by the TCPA where customers agreed to receive messages from an “affiliate” or “brand” & the messages sent were from a company with no corporate relation to the sender and not part of any brand associated with sender; and
- Following a message with the phrase “powered by [Sender]” was insufficient to “brand” the message as coming from the sender or constitute an “affiliate”



# Private Litigation

## Consideration

59595 – NBC’s “Deal Or No Deal” Play At Home



Play along with the show from the comfort of your home for a chance to win \$10,000. Simply watch “Deal Or No Deal” on NBC and then **text your chosen case number to 59595**, before the case is opened. The winner will randomly be chosen from those that correctly picked the Lucky Case. You can enter up to ten (10) times per show. **There is a charge of \$0.99 per entry or enter online for free.**



## SMS Class Actions Against Networks & Carriers

- Class actions launched against contests incorporated into popular shows *American Idol*, *Deal or No Deal*, *1 vs. 100*, *Lucky X*, *The Hell's Kitchen*, *America's Got Talent*, and *The Apprentice*.
- Enter for free on website entry method or
- Enter via premium text messaging – 99 cent charge per entry (plus standard text message rates).
- Representative actions filed under California's liberal Business and Professions Code as well as class actions under Connecticut and Massachusetts law and in Georgia.
- Allegation: charging a fee to enter **without receiving anything of bona fide substance in return** = illegal lottery.

# Private Litigation

## California Class Actions

- *Herbert et al. v. Endemol USA, Inc.*, (CD Cal).
- District court denied defendants' motion to dismiss finding that the claims asserted viable causes of action – lottery law problem
- Defendants have asked the 9th Circuit to certify the issue to the Supreme Court of California because a matter of first impression
- Ninth Circuit decision pending



# Cause Related Marketing

- Traditional conditions of charitable solicitation laws will still apply
- Commercial Co-Venturer v. Charity Direct
- Don't overstate amount given to charity
- Careful with immediacy claims
- What consent are you obtaining for future SMS?





## Nike ID – SMS Collection



- Nike erected a large, interactive billboard in Times Square and passers-by could use their cell phones to text in their own custom design and receive a free pair of Nike IDs.
- Individuals went nuts when they saw their own shoes posted live on the Jumbotron in front of them. Nike gave away 3000 pairs of shoes in this promotion and participants were just as excited by their design on the billboard as they were by the free footwear

# QR Tagging



**QR Codes turn your phone into a bar code scanner. These codes can not only be used on retail merchandise tags and clothing imprints but also on billboards, print and even web-based advertising**

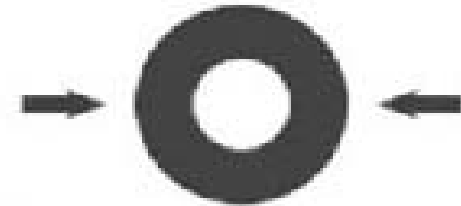
# Bluetooth



With pago you can now send digital cash mobile to mobile.

Get started right here. We'll send a pago message directly to your mobile, and you could win pago cash.

1. Activate your infrared or Bluetooth and change your settings to 'Visible', 'Shown To All' or 'Find Me'.



2. Point your infrared port at the circle above and wait to accept the pago message.



# Multi-Channel Integrated Mobile

## Hotels.com

The screenshot displays the Hotels.com mobile app interface. At the top, it shows the Hotels.com logo and a confirmation message for a booking. Below this, there is a 'Quick Reference' section with a 'Mobile Hotel, Bed & Breakfast' card for 'COURTYARD MERRICK'. The card includes details like the address (22200 Merrick Road, Merrick, NY 11566) and phone number (516-241-1111). There are also icons for 'Map/Get Directions', 'Reservations', and 'Check-in/Check-out'. Below the card, there is a 'Weather' section showing a 3-day forecast for Merrick, NY, with temperatures ranging from 62°F to 77°F. To the right of the weather section, there is a 'TRIPBUDDY' advertisement. At the bottom, there is a 'Questions or Problems?' section with contact information for 'Online Customer Care Center' (1-800-275-6226) and 'Retail Customer Care' (800-999-1999).

A key element of the program includes a **unique phone number tied directly to specific emails...**

When someone clicks a link in the email, the phone number that appears at the top of **all subsequent web pages on the site is this special call center number specific to that email.**



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## Art Meets Mobile Social Media



SMS as graffiti: You send your text message to a central system and the messages are then projected onto buildings (interior or exterior) in specific shapes or formats. The text messages appeared in speech bubbles.

Finland's roadside toilets:

## now accessible only by SMS

Posted Feb 5th 2008 1:05PM by [Darren Murph](#)

... People traveling through Western Finland will need to take out their handsets to relieve themselves in select public restrooms.

They will require restroom visitors to text "Open" (in Finnish, of course) in order to let themselves in.



# Mobile Marketing – Legal's Do's and Don'ts

- Obtain Express Consent to contact and to order;
- Don't assume consent received by others is sufficient consent for you (co-sponsors, co-promotional partners, lead generators, co-reg partners, etc.);
- Scrub against DNC/Neustar/Internal;
- Provide an opt-out;
- Use links to include additional disclosures;
- Prominently display recurring charges;
- Provide *bona fide* value for premium SMS entries;
- Don't overpromise.



# Contracts – App-etite for Risk?

Does your contract

- restrict the developer from doing the exact same thing for a competitor? Do you care?
- require complete, verifiable delivery of the code prior to completion of payment? Why not?

Who is responsible for upgrades, enhancements, fixes/ patches, compatibility with future operating system releases?

Should you worry about operating system interoperability, device porting, warranty issues, distribution, app restrictions? Even if, on the distribution side, it may be easier and more cost effective for the developer to register the app with various platforms (they may have a pre-existing relationship with retailers/aggregators) in whose name is the registration? Remember the domain name wars? (Soon to get worse)

Is the app a download that sits locally or a hosted app? If so, who is providing the hosting? If hosting is provided by a third party, do you have an SLA?





# Contracts—Open Source



Not all open source licenses are created equal;

What are the disclosure and attribution requirements;

Apps may have multiple open source code components;

Brands, App stores and App developers may all be liable for license compliance and should ensure compliance in the development process (liability and indemnification may be limited).

Expect to see more enforcement actions in the future!

# Contracts – App-etite for Risk?

Do your terms and disclosures match the requirements applicable to your license (e.g., EULA)?

Do you have a development, deployment and support compliance policy and program to ensure integrity (e.g., what would a regulator, a court think is reasonable?)

Do your contracts give you the rights you think you have (or want) – different platforms have different requirements and different contract terms?

- Liability
- App Stores
- Deep pockets or judgment proof – follow the money

Who owns the code/designs, both what makes it in & what falls to the cutting room floor.

Who owns data generated from or by the app – user information, usage statistics, metrics, sales figures?



Is there really an 'app'  
for that?



# Resources



[www.LegalBytes.com](http://www.LegalBytes.com)

[www.AdLawbyRequest.com](http://www.AdLawbyRequest.com)

[www.advertisingcompliancelaw.com](http://www.advertisingcompliancelaw.com)

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### Adlaw News

[Group Releases Report on TV Violence; Urges Advertisers To Weigh In](#)  
**January 29, 2007** - The advertising industry—which regularly takes a beating from consumer groups for a whole host of reasons—is now being prodded to go beyond focusing on the content of commercials to take the lead in curbing violent television programming.

### Adlaw Features

[Douglas Wood, Lead Negotiator for the Joint Policy Committee on Broadcast Union Talent Relations chairs panel on the 2006 SAG/AFTRA/JPC Extension Agreement](#)  
**January 30, 2007** - At the 3rd annual ANA Advertising Law & Business Affairs Conference in New York City on January 18, Douglas Wood, General Counsel to the ANA and the advertising industry's Lead Negotiator opposite the unions regarding rates, ratified the provisions of the

### Adlaw Forum

[The Prozac Case](#)  
by Gerhard W. Volz  
[Read more](#)

Ratiopharm España, a Spanish manufacturer of generic pharmaceuticals, challenged



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# White Papers



- **Cloud Computing:**

[www.reedsmith.com/cloudcomputing](http://www.reedsmith.com/cloudcomputing)

- **Social Media:**

[www.reedsmith.com/networkinterference](http://www.reedsmith.com/networkinterference)

- Coming Soon: *Mobile Marketing*



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# Time for Your Questions



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