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Location, Location, Location: Is Apple Drawing a Line in the Sand in the Mobile Ad Space?

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Apple recently posted an “App Store Tip” on its iPhone Dev Center putting developers on notice that location-based applications, whose primary purpose is to deliver geo-targeted ads, will no longer be permitted in the Apple App Store. Apple permits developers to use Apple’s “Core Location” framework included in the iPhone OS software to build location-based apps to determine the current location of users and deliver geographically targeted information (e.g., local weather, nearby ATMs, restaurants, etc.). However, Apple requires developers to solely distribute apps which provide “beneficial information” rather than apps that “primarily enable mobile advertisers to deliver targeted ads based on a user’s location”. Apple has stated that it will return any apps that fall into the latter category to the developer for modification. Location-based advertising services use location-tracking technology in smartphones like the iPhone to identify a consumer’s location and provide advertising companies the ability to send geo-targeted ads to consumers about businesses in their proximity. Google and Apple have each established themselves as the big players in this emerging mobile ad space by making strategic acquisitions of mobile advertising companies. In January of this year, Apple officially entered the mobile advertising space by acquiring Quattro Wireless, a mobile advertising company, at the same time Google introduced its much anticipated Nexus One smartphone. Apple’s acquisition came on the heels of Google’s \$750 million all-stock acquisition of the giant mobile ad network AdMob, a competitor of Quattro, which Apple had been interested in as well. It is not yet clear what the rationale is behind Apple’s new policy, how Apple plans to implement the policy and what it means for consumers and other players in the mobile advertising space. Whether the policy will act as a blanket prohibition on development of geo-spam apps used primarily as tools for serving ads (i.e., ad-serving engines) remains to be seen. In light of Apple’s acquisition of Quattro, some have surmised that Apple could be trying to curtail competition with its own products as its integrated advertising strategy evolves. On the other hand, perhaps Apple’s intention is simply to protect its customers from apps designed solely to deliver possibly unwanted ads. The updated terms of Apple’s iPhone Developer Program License Agreement give Apple the right to “revoke the digital certificate of any of Your Applications at any time” meaning it can essentially kill an app. This is not uncommon for end-user license agreements but could have widely felt ramifications for the more than 100,000 developers of iPhone apps. Steve Jobs confirmed in 2008 that there is an iPhone ‘kill switch’ which

allows Apple to remotely disable apps already installed on a device. The terms of this latest developer agreement seems to allow that. So while the language of the Apple Store Tip leaves open some ambiguity about how Apple will apply its policy regarding mobile apps, it now appears that the agreement every developer of apps must sign gives Apple the right to reject any app, including location based apps if it "has reason to believe that such action is prudent or necessary." Although this sector of mobile-advertising is still currently a nascent business, it is quickly growing as the use of GPS-enabled smartphones and other similarly equipped mobile devices become increasingly popular. Companies, particularly smaller, local businesses, could increase their ability to reach potential in-market consumers and consumers may be better served by an improved user-experience. Mobile advertising spending was estimated at just \$416 million in 2009, compared with \$24 billion spent overall on online advertising, but is expected to reach \$1.56 billion by 2013 and possibly more with the synergies of smartphones and mobile advertising companies. Excitement in the mobile ad space is tempered by the scrutiny of the Federal Trade Commission ("FTC") and various consumer protection groups trying to balance privacy challenges and protection of consumers against the beneficial uses of new technologies such as geo-targeted ads. A complaint filed last year with the FTC by the Center for Digital Democracy and the U.S. Public Interest Research Group asks for an immediate investigation into mobile advertising and certain practices in particular, which include location-based targeting. Currently, behavioral advertising in the mobile space, including location-based advertising, is subject to self-regulation. But the FTC is continuing to look into whether, how, and to what extent more formal regulations may be needed to regulate emerging technologies. To that end, it has scheduled a series of public roundtables to discuss proposals for regulations, including for mobile marketing. The FTC has long been interested in trying to regulate consumer privacy in the online behavioral advertising space by establishing guidelines. The 2009 FTC Staff Report, titled "Self-Regulatory Principles for Online Behavioral Advertising" (which was the subject of a previous post in connection with online behavioral tracking technology), updates the FTC's 2007 guidelines and emphasizes principles of "transparency and consumer control"; "reasonable security, and limited data retention for consumer data"; "affirmative express consent for material changes to existing privacy promises" and "affirmative express consent to (or prohibition against) using sensitive data for behavioral advertising". The FTC has said that the first principle of transparency and user control, which requires companies to notify consumers and give them the opportunity to opt-out of data collection practices, also applies to mobile technologies. In addition the FTC's efforts in the mobile advertising space, industry groups like the Mobile Marketing Association have established policies and guidelines and consumer best practices guidelines in connection with mobile advertising as well. As the FTC continues to grapple with defining the parameters of mobile marketing guidelines and turning them into industry standards, key market players like Apple and Google will likely shape the mobile ad experience for service providers, advertisers and consumers alike. At stake in this growing mobile-advertising sector is the potential for big money for service providers and advertisers and improved user experience for consumers weighed against possible privacy concerns. We will continue to follow the legal and economic developments in this mobile-ad space and its implications for our clients.

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