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OLIVIA WHITCROFT

“Design and coding are fundamental to app creation, but there are also legal matters to consider”

Designing an app? Set clear legal terms from the outset of your project – you’ll save yourself time, money and a lot of headaches in the long run

Last week, I saw a post from a friend on Facebook asking whether anyone could help her company to create an app. I replied right away, saying I’d be delighted to provide legal advice. “Thanks Liv, but we’re really looking to build one,” was the response. Okay, I’ll admit that the design and coding are fundamental parts of the process, and likely to be the first thing on one’s mind. But there are also legal matters to consider, and you can save yourself time and expense by building these into your plans from the outset.

Needless to say, this isn’t always how it happens. At night, I dream of a client coming to me at the outset of a project, asking: “What legal issues should I be considering right now, before I get in too deep, to guide the development of my project?” Then I’m awoken by a phone call. “My app launches tomorrow: will you draft a privacy notice for it? I’ve also agreed to share ownership of the code and data with our new business partner, so can we put something in writing to ping over to them that this afternoon?”

I received just such a phone call this month and, after a brief conversation, I sadly had to advise the client that it wouldn’t be as quick and easy as they’d hoped. For a start, it emerged that the app had been developed by an external contractor. No contract was ever signed, but the code was delivered on time and my client was happy with the result. So, no problem there, except for the fact that, in the absence of an assignment, the contractor probably still owns the copyright to the code. Rather than helping my client to share ownership with their business partner, I had to divulge that they may not actually own it themselves.

What about sharing the data? It technically isn’t possible to own data, but I was



Olivia Whitcroft is principal of the law firm OBEP, which specialises in IP and computer law @ObepOlivia

“When you start a project, the first thing to consider is intellectual property”

BELOW A clear privacy policy is not an optional extra

able to suggest that if a consent feature could be built into the app, this could allow my client to share the data collected by the app with their business partner. Since the data being collected includes users’ names, email addresses and location information, I mentioned that the privacy notice would need to clearly set why such information was needed and what would be done with it.

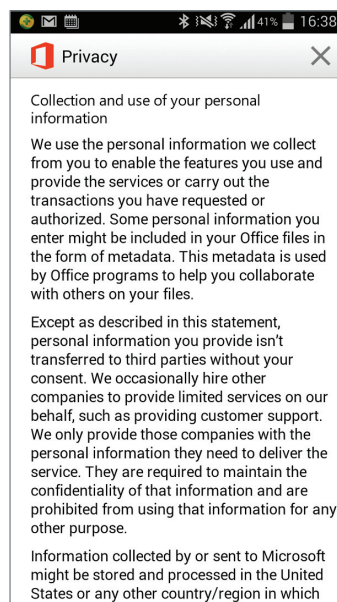
Following a few sighs, my client finished the call and went off to see whether the launch of the app could be postponed while the legals were “fine-tuned”. No doubt this was a blow to their plan, and one that could have been avoided if they’d been aware of the relevant issues earlier.

Intellectual property

When you start an app project, one of the key matters to consider is intellectual property. This is likely to include rights to designs, brand, know-how, software and content, all of which require protection against being copied or misused by competitors. Some IP is best protected through registration: for example, registering your name and logo as a trademark is a good way to protect a brand.

The actual code may be automatically protected by copyright. A common assumption is that if you pay someone to create code for you, the copyright must be yours – and for software created by your own employees, this is usually the case. Unfortunately, if you’ve engaged a contractor or other third party, the extent of ownership will depend on your agreement with them.

Complete ownership of the code isn’t the be-all and end-all, but make sure you have what you need for your business plan. If you plan to manage, maintain and adapt the app in the future, you’ll





LEFT A spot in the iTunes App Store comes with strings attached

need the source code, and the rights to copy and modify it. If you don't have ownership of the copyright, it may be enough to obtain an extensive (perhaps exclusive) licence that allows you to copy and modify the code, and to sublicense it to customers and business partners. Such a licence can then be transferred to purchasers of the business, as and when Google offers you \$2 billion.

It's worth noting that the developer may not be able to assign all the copyright, since it may include third-party components, or proprietary modules that the developer needs to reuse for other customers. Clearly, if you're taking on outside expertise for your project, it's vital to specify in the contract exactly what you're buying – before the work begins.

Data protection

Many app projects are based (at least partly) on collecting and exploiting user data. The thinking behind this is that such information about users and how they interact with the app can help to improve the service, while also providing a means to more targeted marketing. The data itself may be saleable to business partners and other third parties, making it even more valuable. So why not?

To give providers credit, there is some awareness of data-protection requirements. A client may come to me and say "I need a privacy policy, so users can confirm their consent to our use of their data. A clickthrough will be fine: if they don't like it, they can always choose not to use the app."

This line of thinking isn't completely off the mark. It can be perfectly legitimate to collect data for analytics and profile-based marketing, and even as a commercial justification for giving users the app for free. An unambiguous consent from users can also assist in satisfying data-protection and privacy requirements.

Unfortunately, it only goes so far. As I touched on last month (*see issue 242, p23*), the fact that users have a choice over whether or not to use an app doesn't give you free rein with their data. And the user's agreement to a short, hastily drafted privacy policy won't necessarily constitute the consent you're looking for.

To address data-protection issues properly, it's necessary to take a much more detailed look at precisely what information will be collected, how and why it will be used, who will use it, where it will be stored or sent, how it will be kept secure and so forth. What you plan to do must be spelt out to the users, and specific consents may be required for activities such as profiling, marketing and data sharing. Clearly, these are best addressed during the design and development of the app.

Aside from compliance risks, it's also worth considering the perception of users. If people consider your activities too intrusive, they may simply choose not to use your app!

Relationships with other parties

If you're developing an app, you're likely to be running it on Android, iOS or Windows – or maybe even a combination of the three. You may also want it to interface with third-party services such as Facebook and Google Maps. So you're going to need to use a selection of SDKs and

APIs, all of which invariably come with their own terms. App stores have rules – for example, your app may be removed if there are complaints about content or quality – but did you know that third-party platforms come with their own stipulations? Facebook, for example, requires your app to be able to handle permissions for user data, while if you use Google Maps within your app, your service must be free and publicly accessible.

Clients like to dismiss these issues as "standard stuff". While much of it is standard, it's important to know exactly who is taking responsibility for ensuring the rules are followed. If you're relying on the experience of an external developer, it would be wise to say so in the contract. Ultimately, do you want to get into a dispute with a big name such as Apple?

You may also have arrangements with third parties to host content, manage users, contribute advertising, provide add-on services, conduct data analytics, purchase information and so on. And when dealing with business partners, don't over-promise: the client I mentioned above wasn't the first I'd seen who'd entered into an agreement to share data without checking whether it was actually lawful to do so.

"A short, hastily drafted privacy policy is likely to leave important issues unaddressed"

A thing of dreams?

Although the legal issues I've touched on are important, they only skim the surface. Depending on what your app does, you may also need to comply with consumer-protection laws, rules on in-app purchases, requirements for regulated services and many other matters.

The reality is that no matter how diligent you are, time, resources and other commercial demands probably won't allow you to perfectly itemise and sign off all potential legal issues before your app launches. The key, therefore, is to identify and address the most important concerns from the outset, and proceed with your eyes open to any remaining risks.

Right from the start of your project, alongside your design and coding, you should allocate time and budget to the legal issues. Remember, this isn't only about restricting what you can do: a strong legal foundation can assist with the success of the project, protect your intellectual property, facilitate your use of information and enhance the value of your app.

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The above commentary provides general information on the subject matter and is not intended to be relied upon as legal advice.