

# IF YOU CAN'T BEAT THEM - JOIN THEM

## CALIFORNIA ATTORNEY GENERAL LAUNCHES MOBILE APP!

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**EVEN IF IT DID,  
THE LAW  
DID NOT  
APPLY  
TO MOBILE  
APPS**

California's Attorney General, Kamala Harris appears to have finally seen the utility of mobile apps and embraced the proverb, "if you can't beat them – join them." On September 9, 2013, Attorney General Harris issues a press release announcing the launch of "JusticeMobile app." The announcement is particularly noteworthy as Harris in December 2012 initiated the first lawsuit in California against Delta Airlines alleging Delta's mobile app violated California's Online Privacy Protection Act. According to The Yale Book of Quotations, which attempts to trace all famous quotations to their earliest findable occurrence, the earliest citation given, in the form "If you can't lick 'em, jine 'em," is from the Atlantic Monthly, February 1932. The phrase is described as one of Senator James E. Watson's "favorite sayings." It appears that Harris has embraced this saying in the political climate created after a San Francisco Superior Court dismissed her case against Delta Airlines on the grounds that

California law did not even apply to Delta Airlines mobile app.

After giving Delta Airlines notice that she believed Delta's mobile app violated the law, Harris filed the complaint in December 2012. In the complaint, Harris alleged that Delta failed to "conspicuously post a privacy policy in its Fly Delta app" and failed to comply with its own website privacy policy. The complaint alleged that these violations of California's Online Privacy Protection Act (CalOPPA), constituted Unfair Competition. California law requires commercial operators of online services to conspicuously post privacy policies informing users of what personally identifiable information is being collected and how it will be used.

In March 2013, Delta attached the basic allegations of the complaint. Delta argued that California law did not apply, that even if it did, the law did not apply to mobile apps and that Delta complied by including a notice in its website. On May 9, 2013, the Superior Court of

California for the City and County of San Francisco's agreed with Delta's argument that California law did not apply. In a brief two-page order, the court sustained Delta's demurrer to the complaint. "We are pleased the Court has confirmed our view that the California statute does not apply to airlines because it is preempted by federal law," Paul Skrbec, a Delta spokesman, stated on May 10. "The protection of customer information is something that Delta takes very seriously."

Initially, according to Lynda Gledhill, a spokeswoman for the AG's office, the California AG's office was reviewing the decision and had no further comment. Apparently, after reviewing the decision and the complaint, the AG's office felt that it wanted another bite at the apple – so it filed an appeal. As of the date of this article, the parties are waiting for the Court of Appeals to tell them when their briefs will be done. Given the short lived life of the underlying case, the briefing on this matter

justice information. Until now, officers have had to use a phone or radio to contact personnel to obtain this information."

JusticeMobile was tested over the past five months by more than 600 San Francisco Police Department (SFPD) officers. Now, JusticeMobile is being rolled out to all SFPD officers, giving them access to internal SFPD, California DOJ and federal law enforcement databases. Justice Mobile will soon be available to law enforcement agencies across the state. The Los Angeles Police Department plans to equip 3,600 officers with the technology.

"We have mobile apps for everything from banking to board games on our phones. But, incredibly, law enforcement hasn't had the tools to access important criminal justice information on handhelds and tablets until now," said Attorney General Harris. "JusticeMobile is a quantum leap forward for public and peace officer safety, and it demonstrates our commitment to facilitating the



Image 1

information gathered by the app? According to the AG's release, "JusticeMobile employs many rigorous security standards, including:

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should be concluded by March 2014 and oral argument will likely occur during early summer.

Despite this bitter defeat, the California AG's office is joining the 21st Century by launching its own mobile app, "JusticeMobile app." The AG's office joined San Francisco Mayor Ed Lee and San Francisco Police Chief Greg Suhr to launch the app. According to the AG's office, "JusticeMobile is a mobile app that gives law enforcement agents, for the first time, secure and immediate access to state and federal criminal

adoption of new technology by law enforcement. I thank Mayor Lee and Chief Suhr for their partnership on this important project." The press release goes on to tout the app by stating, the "JusticeMobile smartphones give officers on the streets instant access to law enforcement data where information in real time counts."

Given the AG's push toward online and mobile app privacy laws, the question becomes – just how does this app protect people's privacy and maintain the security of the

strong password requirements, a Virtual Private Network requiring two-factor authorization, encryption, limits on downloads and backup/syncing, and prohibiting copying or screen captures." This sounds promising, but so did the Foreign Intelligence Surveillance Act (FISA) until a leaked copy of a top secret court order revealed that the NSA required Verizon to hand over all telephone records in its systems. As the app is also being used to check the identity of gun buyers against the Bureau of Firearms Armed Prohibited

# APPARENTLY THE USER CAN TAP INTO RECORDS FROM THE DEPARTMENT OF MOTOR VEHICLES, CRIMINAL RECORDS AND EVEN MENTAL HEALTH RECORDS.



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Persons (APPS) database, one questions whether the proper notices are being provided to consumers.

The AG's office posted electronic images of portions of the app on its website to help preview the app. The app looks just like any other app on an iPhone (**Image 1**), but appears to be a very powerful tool. The opening page of the app (**Image 2**), while not the most visually pleasing, employs the use of easily identifiable icons to assist the user in navigating through its various levels.

Apparently the user can tap into records from the Department of Motor Vehicles, criminal records and even mental health records. Clearly each category includes what California would consider, personal identifiable information. The real issue for the AG's office and Ms. Harris involves whether people are notified that their information is going to be used and accessed through a mobile app.

Initially, you might say; Is that really necessary? People already know that their information is being accessed through various data bases over the internet. According to the AG's lawsuit against Delta Airlines, that is not enough.

One of the key allegations in the lawsuit involved the interplay between the privacy notice contained on Delta's website and the alleged lack of a compliant notice in the actual mobile app. According to the AG's complaint, merely because Delta had a privacy notice on its website, did not shield it from liability when California consumers used the Fly Delta mobile app. So, simply telling people that their information is being used online, does not shield a company from using the same information in a mobile app. Based on Ms. Harris' own argument, it appears she will need to insure that California consumers who's mental health, criminal records or DMV records are accessible on line are also told that their information may be accessed via a mobile app. The



**Image 2**

release does not address these issues so it remains to be seen whether the use Ms. Harris' own app will comply with the CalOPPA by somehow disclosing to California consumers that their personal identifiable information will be used in a mobile app.

It is truly ironic that California's Attorney General, who has been at the forefront of insuring compliance with privacy laws to mobile apps, has launched a mobile app that inherently relies on the culling and use of personal identifiable information. While seemingly ironic, the AG's move actually reinforces the value of mobile apps. Apps are tools that help consumers accomplish a myriad of tasks, store information, gather information from numerous locations, to name only a few uses. However, apps are also used as a means of gathering information from user for again, a myriad of uses.

As indicated by the California AG's application of CalOPPA to mobile apps, the gathering of information is entirely permissible, the operation just needs to inform the user. Thus, by launching the JusticeMobile app, the California Attorney General realized, since she could not beat them, she might as well join them. We will just have to see what happens to the Delta case on appeal and if the app draws criticism from the FTC or non-governmental privacy advocates. ❖