Using Customer-Facing Platforms in Multi-Channel Approach

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Announcer
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Julian Dibbell
Hello and welcome to Tech Talks. Our topic today is opportunities and risks in customer-facing digital platforms. We'll say a bit more about what we mean by that concept in a bit. But first, the introductions. I'm your host, Julian Dibbell. I'm a senior associate in Mayer Brown's Technology & IP Transactions practice. I'm joined today by my colleagues Rohith George and Corina Cercelaru, who are also members of our Technology & IP Transactions practice. Rohith is a partner based in Northern California. He advises clients on a wide range of complex technology and IP transactions, including platform integrations, cloud computing, software licensing, and data analytics. Corina is a senior associate based in Chicago, and she focuses on advising clients on digital transformation projects, data protection and privacy, and e-commerce issues. Rohith and Corina, welcome to the show.

Rohith George
Thanks, Julian. Great to be here.

Corina Cercelaru
Thank you, Julian. I'm excited to talk about this topic.

Julian Dibbell
As am I. So let's start with the basics here. As promised, let's say a little bit more about what we mean by customer-facing platform in this context.

Rohith George
Sure, I'll start. And I do think it's a good place to start because the term platform or platform agreement is used in so many different contexts. It can mean a lot of different things. So for purposes of our discussion

today, what we're really talking about are websites, portals, apps that are hosted, maintained, operated by one company and that ultimately enable or facilitate the delivery of products or services by another company.

If you think of any company, whether it's a bank, a retailer, airline, whatever you can think of, each of those companies has its own website or its own app through which it interfaces with its customers, delivers services to its customers, and that website or app, you know, that platform it's often held under lock and key by the company because it wants to tightly control its relationship with its customers. You want to ensure quality, you want to maintain your reputation, you want to track how your customers are using your platform and so on. But your own app is really just one channel through which you can reach your customers and it requires your customers to come to you, you know, to come to your website, to download your app. Sometimes though, it makes sense to go to them, to the apps that they're already using, the websites that they're already visiting.

Some industries have long had multichannel approaches to their services. Retailers are probably the easiest example. There are many retailers that sell their products directly through their own platforms. But, you know, with Amazon, many have also over the years taken a multichannel approach and they sell through Amazon as well because ultimately, they made the decision that it increases their reach, increases their sales. So what we're increasingly seeing is that beyond the traditional industries where this type of multichannel approach is common, other companies across industries, we're seeing partner with platform providers because it's just like many retailers are seeing potential benefits to taking this kind of multichannel approach that in some ways hands over the customer relationship to a third-party platform provider. Similarly, there are similar benefits in other industries as well.

Julian Dibbell
Okay, well, the Amazon example certainly brings the concept home. That's something I and I'm sure many listeners can easily wrap their heads around. Could you give us some examples though from other types of industries like you were mentioning?

Rohith George
Sure. I'll give you one that we just recently worked on. We had a client who manufactures equipment for heavy vehicles, and their customers are generally commercial fleet owners. And part of the services that they provide for people who purchase their vehicles or purchase vehicles that contain their equipment is a kind of data service. They track data that comes off the equipment. They provide insights regarding how it's performing. It suggests preventative maintenance when needed. Perhaps it even allows adjustments to how the equipment is operating and so on.

Now, their customers are primarily companies that own big commercial fleets of vehicles. Each of these vehicles contains a whole range of equipment from a wide range of equipment manufacturers. Each of those manufacturers has, over the years, started to develop very similar services to our client service. In order to deliver those services, basically each manufacturer has its own app. Now, you might be starting to see the issue. Basically, if I own a fleet of vehicles, even if they're all the same make and model of vehicle, all of a sudden I have three different, three, four, five, six different apps that I need to monitor in order to manage my fleet, each one doing something different. So either I diligently do that at some level of frustration to myself, or it's just too overwhelming and I ignore all of them. But either way, it's not really the desired result for our client.

This area was ripe for a single-platform solution to rise up that could integrate all of these different services into a unified customer-friendly app. With that app, the fleet owner can track their vehicles, manage their fleets, perform software updates, so on. Then, once you have enough services, enough different manufacturers on one platform, there's kind of an inertia to it where It makes sense for all the manufacturers to make sure their services are on the platform as well. So that's one very real-world example that we've seen this occurring.

Corina Cercelaru
And another example that we see, Julian, is in the healthcare industry. So there the customer-facing platforms are connecting the patients, providers and payers. So in that example, the platforms integrate services from the various healthcare providers: doctors, hospitals, pharmacies and labs, as well as insurance companies or wellness programs. Similar to Rohith's example, here the platform is a one-stop shop for the patients, providers, and payers. From the patient's perspective, they can use the platform to access their medical records, book appointments, receive prescriptions, pay bills, and monitor their health. From the provider's perspective, they can use the platform to manage their practice, communicate with patients, access clinical data, and submit claims. Then, the payers, they can use the platform to verify eligibility, process payments, and offer incentives.

Julian Dibbell
Okay. Well, it sounds like these platforms are convenient for the users, right? Because they aggregate various types of services that they might have to go out to various places to get. From the business's perspective, what are the benefits of partnering with a platform provider?

Rohith George
I think one key benefit that I think I may have highlighted already is that these platforms can provide companies with increased market reach, increased visibility, because they often have an existing wide customer base. So when a company integrates services into the platform, it can therefore tap into this established network and sometimes it's about entering a new market for the business or the company, sometimes reaching a new demographic, or it could be just about penetrating deeper into a particular market. Either way, the objective is that you access potential customers that you might not have otherwise reached for your traditional channels.

Another benefit is the potential for data and data analytics. Platforms often gather vast amounts of user data, not just about how your customers use your services, but even broader than that, you know, how they use other services, how they interact with the platform, potentially, you know, generating valuable insights into customer behavior, customer preferences. It's possible to get access to this collective data, which we'll talk about later. Then you can utilize that data to further tailor your services, improve your engagement strategy, your customer engagement strategy, and so on.

Of course, another benefit is that partnering with these platforms could help enhance your company's brand and reputation. By delivering services through a robust, user-friendly platform, you can meet the end-customer's expectations of a seamless online experience and improve customer satisfaction in the process. All those are the kind of benefits that factor into a decision to go into this kind of partnership.

Julian Dibbell
That all makes sense and sums up some pretty impressive examples of how customer-facing platforms can transform the way services are delivered and consumed to the benefit of everybody involved. On the other hand, though, I imagine that these platforms also present some unique challenges and

considerations for businesses that want to partner with them. What are some of the key risks here that businesses should be aware of when they're engaging with customer-facing platform providers?

Corina Cercelaru
That's a great question, Julian. Indeed, there are many issues that businesses should consider carefully before entering into this type of agreements. I will touch briefly on some of these key issues.

The first one is control over the platform. Companies typically have little control over the development and evolution of the platform. That is because this is primarily in the hands of the provider. Similarly, related to the issue of control over the platform, companies may also lose direct control over the customer experience. That could be problematic because it could affect the company's reputation and customer satisfaction.

Another issue to consider is the competitive dynamics on the platform. So companies may face competition from other businesses that either are offering similar or complimentary services on the same platform.

Data usage is another critical issue. Companies will want to understand who can use the data that they provide to the platform or data that is generated through the platform and what are the rights, responsibilities and restrictions that apply to that data. And, data security and data privacy are top of mind, especially given the amount of the end-customer data that is on these customer-facing platforms. So here the company will want to consider whether the platform has robust security measures in place and ask whether this measures, do they align with the company's data security standards?

Rohith George
I will add a few more to Corina's list, which I thought were all good. One is around platform lock-in. So, you know, your hope going in is that this is a hugely successful endeavor, that you reach new customers, and that they love using the platform. It's great for your brand and your reputation. But, if all that turns out to be true, there's a risk that there's really no easy way to close this new customer-facing channel without causing massive disruption to your business or to your customers. Then when you're trying to close it, for whatever reason, you're not fully in control, you're reliant on the platform provider to make sure it's as seamless as possible for your customers and notably at a time at the end of the relationship where they may possibly not be all that inclined to be helpful. So that's one issue.

Another issue is around regulatory compliance. This is tied to the issue that Corina mentioned around control. Once your own platform, you control all aspects of it. If there's a new law or your regulator is providing additional guidance that requires you to make a change to the platform or that you think requires you to make a change to the platform. When it's your own platform, you decide when and how to make that change. When it's the provider's platform, this becomes a negotiation. Do they agree that there's a change needed on their end? Is there a cost associated with making that change? Will they prioritize it the same way you will? All these are issues that can come up over the life of a deal.

The third issue is around service quality. Companies are often used to controlling the quality of the services they deliver here. You're handing over and handing off key customer-facing aspects of this to the platform provider. While they have an independent interest in making sure they do a good job, ultimately your brand and reputation are on the line in connection with your particular product. So, how do you get comfortable the platform will deliver the services at the desired level of performance and can scale up as the business expands, etc.

Finally, an issue that pops up because these platform providers or technology companies, and in some cases, small technology companies, although not always the case, but in that case, an issue that pops up is around disruption to the platform, whether it's through bankruptcy or insolvency, how do you account for and address that particular risk and how do you ensure business continuity and transition in that scenario? So, I think those are a few additional ones I want to throw in there.

Julian Dibbell
Just a few. No, that's really quite a lot of issues and you know companies are going to have to think through all of those as they engage with the provider. How do you see them then addressing those risks through the contract in any case? Are they able to do that?

Corina Cercelaru
We think that many of the risks that we mentioned earlier can ultimately be mitigated through carefully crafted contract provisions. For example, earlier I mentioned the issue of control over the platform. Here the platform provider has an independent interest in ensuring that the platform remains technologically relevant. As Rohith mentioned earlier, for example, it may provide regular updates and enhancements. But even so, companies may still want to consider having provisions in the contract that at least gives them visibility into what are the upcoming changes, especially if those changes are with respect to disruption between the integration with the platform.

In some cases, the company may also want to consider including the right for the business, for the company to request or even direct and certain business-critical changes to the platform. The other issue that I mentioned earlier is the extent to which the business has the ability to control the customer experience. And here the business will need to consider what type of contractual provisions are needed to protect the company, both from a reputational perspective, but also from a regulatory perspective. So, for example, the company will want the user experience to align with the company's brand values. So, one consideration to address that is to have a complaint-handling process that is consistent with the company's policies and also any applicable laws.

The company must make sure that it maintains control and approval rights over the provider's use of the company's branding. But here, of course, it is a balancing act because at the same time, it must also give the provider enough flexibility that the provider can modify certain aspects of the look and feel of the platform.

Finally, the issue of data usage that I mentioned, not surprisingly here for some companies, data-use rights can be a deal breaker. So what we typically see is companies want to stipulate that they retain ownership of their data and that the platform can only use this data under specific circumstances. For example, solely to perform the services. The more complex issue is with respect to the data that is generated by the platform. So for this data, both parties may reasonably feel that they should have rights to use this data. So it is really important to craft clear agreements regarding what are the rights, responsibilities, and restrictions regarding the use of the data that is generated by the platform.

Rohith George
I'll cover a couple of other ones. The one issue that we mentioned is around the lock-in concept. So as mentioned, not having a clear way out is a risk. To mitigate that risk, it's critical for businesses to carefully plan for an exit strategy. And this is sometimes overlooked because of the contracting phase. Everyone's focused on the way in rather than the way out. But, ultimately, the contract should specify the procedures, the terms for ending the relationships: what data can you take with you, what's left behind, you how the

service is wound down and over what period of time, and ultimately where the rights of each party with respect to the customer after the agreement terminates and the obligations. So, all this should be considered and accounted for in the agreement so that there's no room for dispute at the end. That helps kind of mitigate some of the risks associated with lock-in.

Another issue I mentioned is around compliance. If you're not in a regulated industry, this may not be a major point of contention. You just make sure that the provider has an obligation to comply with any laws that are applicable to it. But for those that are, in an regulated industry, it's very important to maintain enough control in order to ensure that this new customer-facing channel doesn't result in you getting in hot water with your regulators.

So, what does that mean? Well, typically there would be a process for raising these types of what I call mandatory changes. Some of them the provider isn't going to care about because it requires no material effort on their part to change. Some might require some effort to change, but they may be getting the same request from multiple parties, so they may have no issue with it. But, you there will be some that you may run into some form of disagreement. So a defined process for handling these types of mandatory-ish changes can be very helpful to include. Ultimately, if you really can't come to agreement, then there needs to be a way for the company to pause or suspend the delivery of services to the platform, so as a matter of last resort, I think that's kind of what you fall back on.

Another point we mentioned was around service quality and of course I think what you look to do is address it through service-level agreements in the contract, detailed performance metrics, you may have financial credits associated with against fees, if there are fees, sometimes there aren't fees. But ultimately, I think the primary solution here is not contractual. By entering into this relationship, you are relying somewhat on the fact that they will be independently motivated to ensure that their platform is up and available and operating at peak performance. So that's kind of the primary way we see this working out.

Finally, we talked briefly about the potential of disruption to the platform provider to the extent that they have financial instability. As part of diligence at the front-end, it's important for a company to evaluate the platform provider's financial stability and for smaller providers, you may consider including protections in the contract to address the possibility of a business disruption as a result of this kind of poor financial performance instability; for example, you may want to include a termination right if there's a significant drop in certain financial metrics or credit ratings and so on. You may also try to include in the agreement, know, rights to receive regular financial reports and rights to terminate associated with falling below certain predefined thresholds. These are all kind of mechanisms to at least get advanced insight into whether issues may be upcoming and therefore be able to plan to transition away.

Julian Dibbell
Well, those are some great recommendations. Any final thoughts?

Rohith George
I would say there's no one-size-fits-all approach for these agreements. There's a lot that varies depending on the nature of the platform, the company's role in growing that platform, your business, and so on. But in general, what we'd recommend is that companies take a balanced approach to these negotiations, to these types of deals, because they aren't the same as your traditional SaaS agreement or your traditional customer-service provider relationship. You've got your goals and interests and making sure that your products and services are delivered well and high-quality in compliance with law. They've got a very aligned interest. The provider has a very aligned interest in ensuring that their platform performs well and

grows in usage and they grow their customer base as well. Try to find the middle ground that addresses your needs, mitigates your risks while keeping in mind the interests of the provider in operating, improving, growing its own platform and obviously consider getting expert representation from experienced lawyers to assist in these kinds of transactions.

Julian Dibbell
Always good advice. Well, thank you, Rohith and thanks, Corina. I really appreciate your insights.

Listeners, if you have any questions about today's episode – or an idea for an episode you'd like to hear about anything related to technology and IP transactions and the law – please email us at TechTransactions@mayerbrown.com.

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