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Mobile Apps – Planning for Success

Andrew Katz and Usha Guness

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SECTION 1

Mobile Apps – Setting the Foundations for Success

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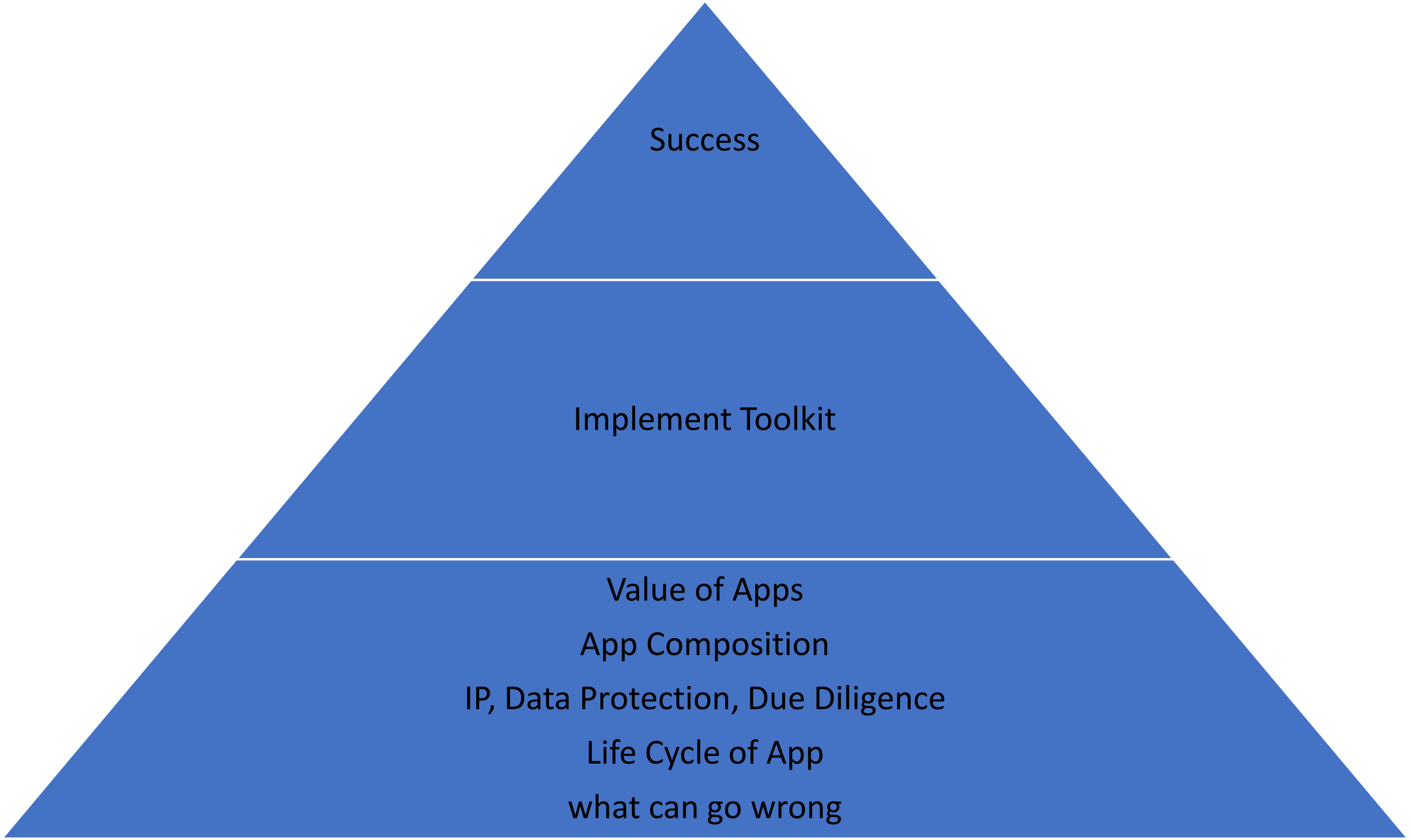
Introduction

- We will start off by looking at why all this hype about mobile apps
- We will look at the composition of apps
- Brief overview of relevant IP for mobile apps and identifying them
- Other issues such as Data protection and due diligence
- We will try and encourage thinking of the issues in terms of the life cycle of the app
- What can go wrong?

Laying the Foundation



Success

Implement Toolkit

Value of Apps

App Composition

IP, Data Protection, Due Diligence

Life Cycle of App

what can go wrong

Why mobile apps?

Worldwide mobile app revenue by 2023 –over 935bn USD.

Number of Mobile app downloads worldwide by 2021 – 258 bn

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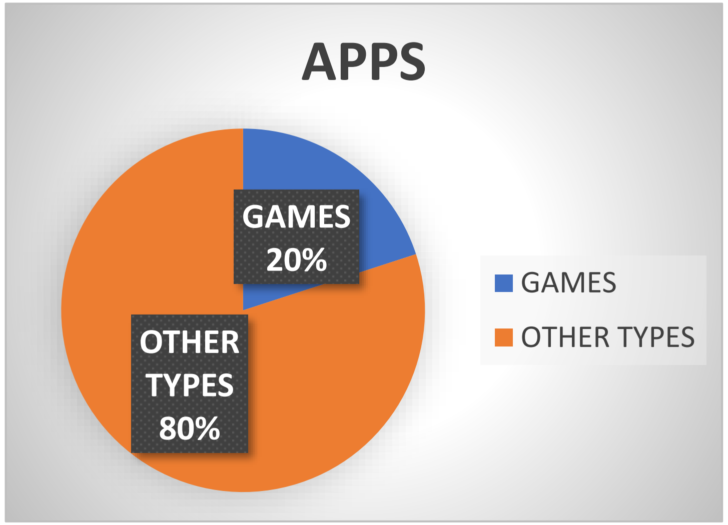
Philippines Mobile App Stats

23 million mobile users (increasing): 100 million population

4,750 apps from Filipino publishers on Google Play alone



Source: 42matters.com

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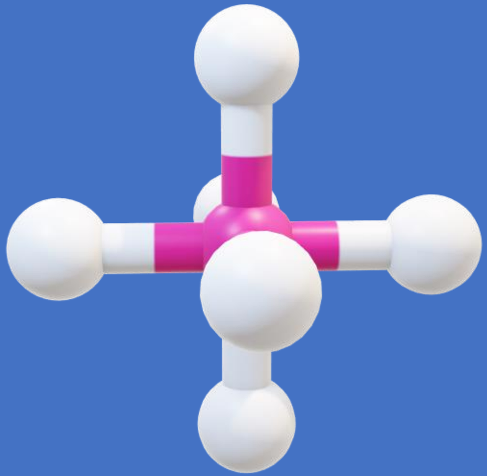
Monetisation of App

- Paid for downloading the Apps
- Pay for In App Purchases
- In App Ads

Composition of app

Mobile app = software + content

Developer Code



Open source code

Own code

Third party code

CONTENT

text
Graphics
music
data (can include personal data)
others

What is “Intellectual Property”?

- Copyright: protects original works of authorship
  - Protects expression (not the underlying idea)
  - It covers software, books, and similar works
- Patents: useful inventions that are novel and non-obvious
  - Limited monopoly to incentivise innovation
- Trade secrets: protects valuable confidential information
- Trademarks: protects marks (word, logos, slogans, colour, etc.) that identify the source of the product
  - Consumer and brand protection; avoid consumer confusion and brand dilution

Copyright Concepts in Software

- Basic rule: copyright protects creative works
- Copyright generally applies to literary works, such as books, movies, pictures, music, maps
- Software is protected by copyright
  - Not the functionality (that's protected by patents) but the expression (creativity in implementation details)
  - Includes Binary Code and Source Code
- The copyright owner only has control over the work that he or she created, not someone else's independent creation
- Infringement may occur if copying without the permission of the owner
- Copyright is by the author, or if they are an employee or there is a separate agreement, it will be owned by their employer.

Copyright Rights Most Relevant to Software

- The right to *reproduce* the software – making copies
- The right to create "*derivative works*" – making modifications
  - The term derivative work comes from the US Copyright Act
  - It is a "term of art" meaning that it has a particular meaning based on the statute and not the dictionary definition
  - In general it refers to a new work based upon an original work to which enough original creative work has been added so that the new work represents an original work of authorship rather than a copy
- The right to *distribute* or *make available to the public*
  - Distribution is generally viewed as the provision of a copy of a piece of software, in binary or source code form, to another entity (an individual or organization outside your company or organization)

Patent Concepts in Software

- Patents protect functionality – this can include a method of operation, such as a computer program
  - Does not protect abstract ideas, laws of nature
- A patent application must be made in a specific jurisdiction in order to obtain a patent in that country. If a patent is awarded, the owner has the right to stop anybody from exercising its functionality, regardless of independent creation
- Other parties who want to use the technology may seek a patent license (which may grant rights to use, make, have made, sell, offer for sale, and import the technology)
- Infringement may occur even if other parties independently create the same invention

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Identifying IP in Apps

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Examples of Copyright

- Images
- Text
- Screen display
- Photos
- Artwork
- Moving images
- Music
- Computer software (object code and source code)

When to register – automatic most countries
Practical Tip: Even where copyright notices or registration are not required, it it is helpful for developers to date and put copyright notice on their materials so as to establish an audit trail for potential infringement claims

Examples of trademarks

- Trademarks
  - Name
  - Logo
  - Slogans
  - Characters

When to register – ideally before launch of app
Why – avoid conflicting mark, registration issues at an early stage
Or at the very least conduct searches

A registered mark + a successful product = valuable asset

Examples of patents

- More than just causing a computer to execute a number of software commands
- Must have a novel and inventive functionality
- It is the functionality that is patented not the software itself

- Patent notices
- should appear in the relevant read-me file and user manuals
- Should be encoded in the software in help/about menu

- Patent infringement
- Infringed even if the infringer does not know of the existence of patent unlike copyright where infringement only if existing work copied or derivative works created

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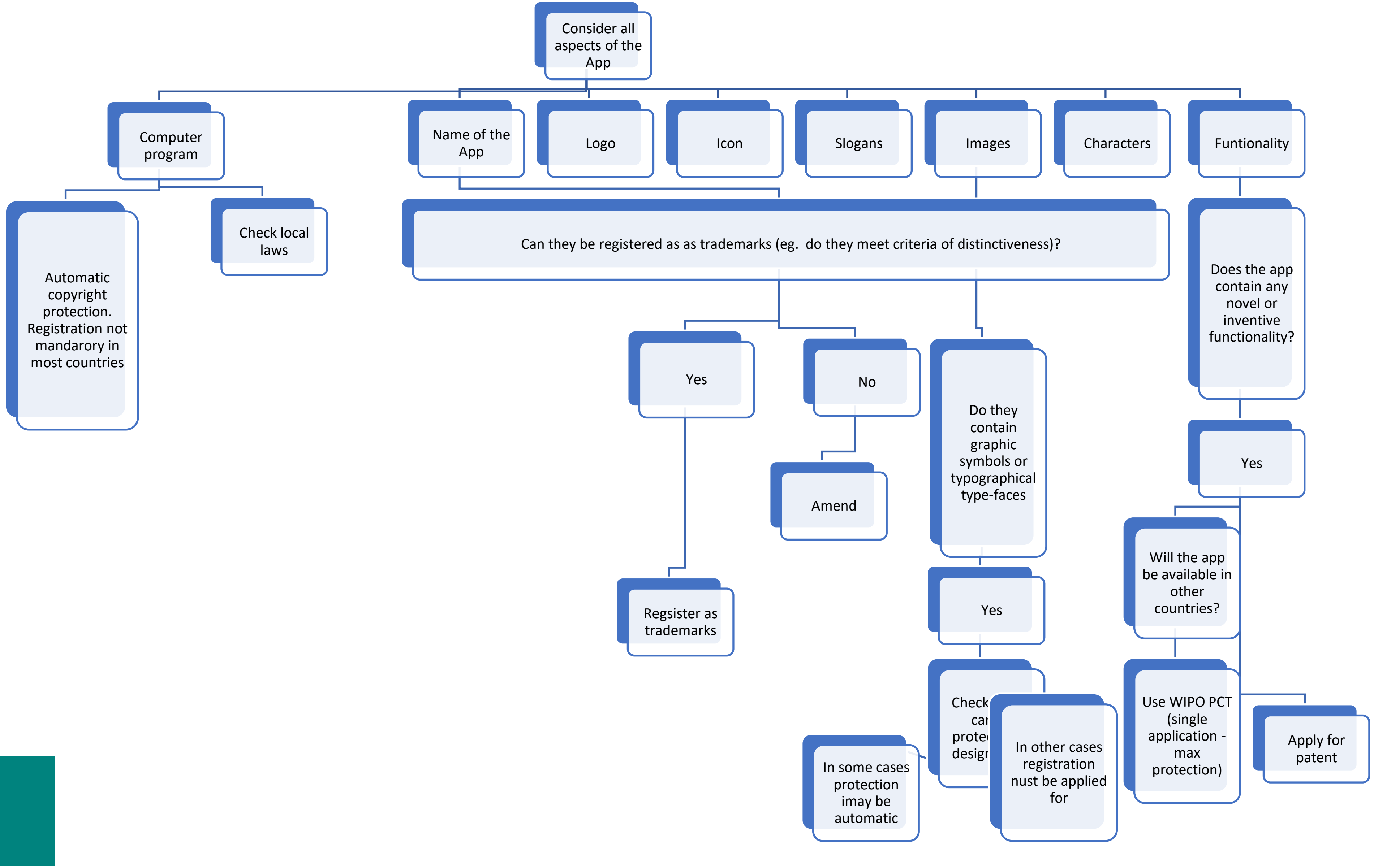

Consider all aspects of the App

Computer program

Automatic copyright protection. Registration not mandarory in most countries

Check local laws

Name of the App

Logo

Icon

Slogans

Images

Characters

Funtionality

Can they be registered as as trademarks (eg. do they meet criteria of distinctiveness)?

Yes

Regsister as trademarks

No

Amend

Do they contain graphic symbols or typographical type-faces

Yes

Check
car
prote
desig

In some cases protection imay be automatic

In other cases registration nust be applied for

Does the app contain any novel or inventive functionality?

Yes

Will the app be available in other countries?

Use WIPO PCT (single application - max protection)

Apply for patent

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Data Protection

- Is the use of the app limited to one country
- Privacy by design

- Impact
- Redesign costs
- Fines
- Brand Damage

Due Diligence

- Are they qualified to perform the work required?
- Do they have appropriate resources and skill?
- Do they understand the importance of obtaining the appropriate IP on behalf of the developer
- Do suppliers hold the IP themselves?

Weed out inappropriate suppliers

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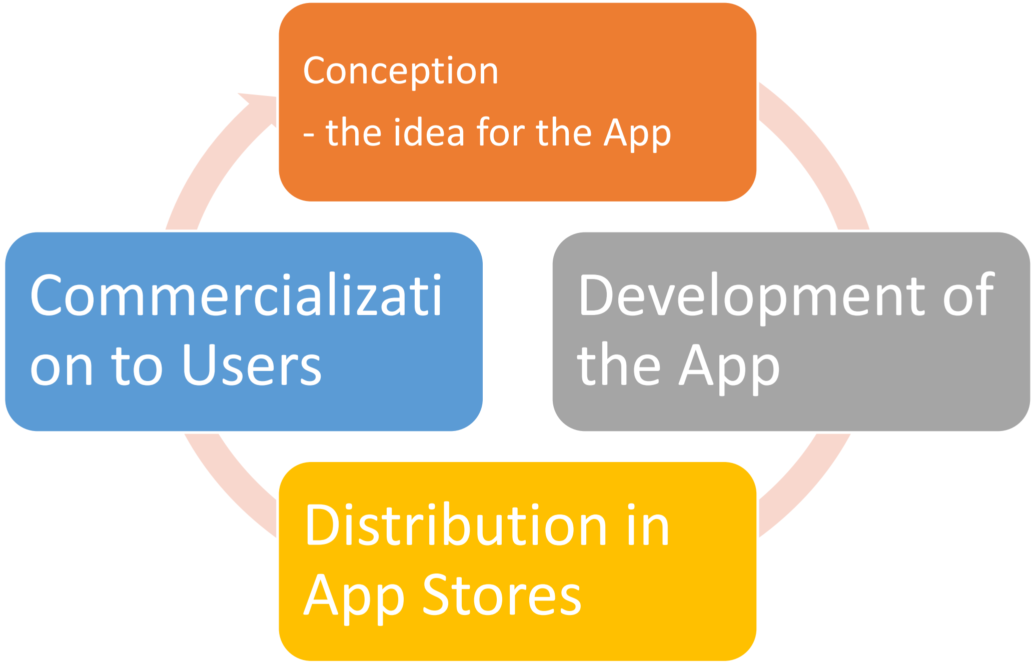
Life Cycle of App



Conception

- the idea for the App

Development of the App

Distribution in App Stores

Commercialization to Users

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Conception stage

- Idea of the App

Development stage

- coding,
  - interface design,
  - adding creative elements,
  - connecting to various databases (for example maps)

- Various parties
  - Coders
  - Designers

IP becomes important

Distribution stage

- App stores
- Generally non negotiable terms

Commercialisation stage

- Value of IP increases
    - Present benefits
    - Future benefits
- EULA

What can go wrong?

- Legal disputes (IP)
- Loss of reputation
- Loss in business value on sale
- Loss opportunities for investor capital
- Loss of time
- Redesign costs

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SECTION 2

Getting It Right the First Time – Learning from Experience

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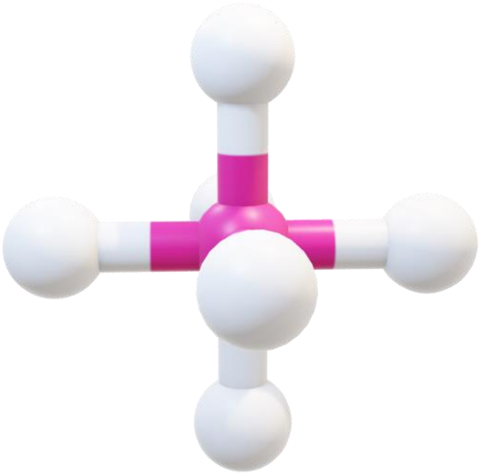
Identifying and avoiding pitfalls

- Confidentiality
- ownership of IP, licensing
- assignment, app stores terms
- third party terms
- end user licences
- as open source and
- third party components
- data protection and
- jurisdictional issues

Composition of App

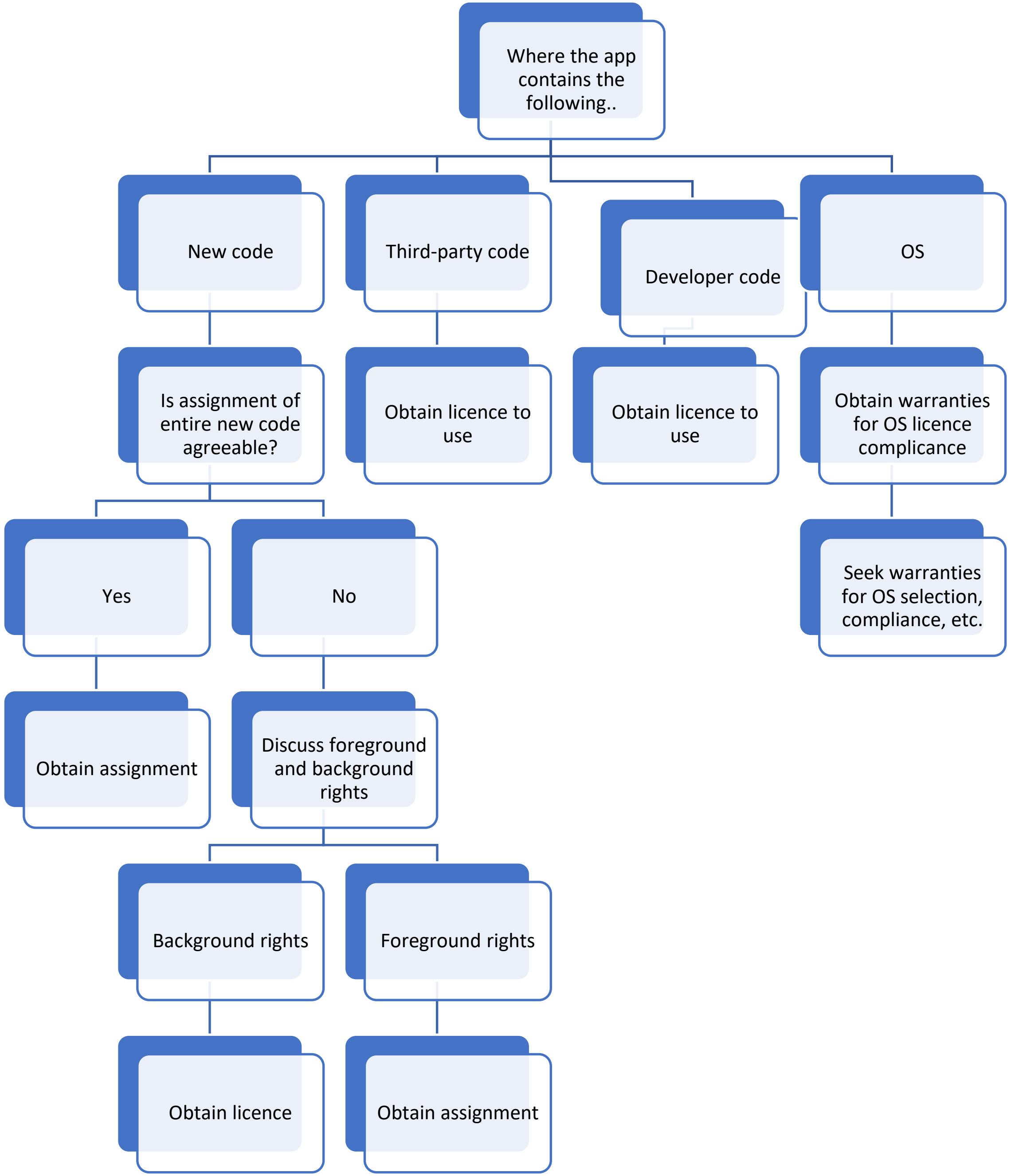
Developer Code



Third party code

New code

Open Source


Where the app contains the following..
New code
Third-party code
Developer code
OS
Is assignment of entire new code agreeable?
Obtain licence to use
Obtain licence to use
Obtain warranties for OS licence complicance
Yes
No
Seek warranties for OS selection, compliance, etc.
Obtain assignment
Discuss foreground and background rights
Background rights
Foreground rights
Obtain licence
Obtain assignment

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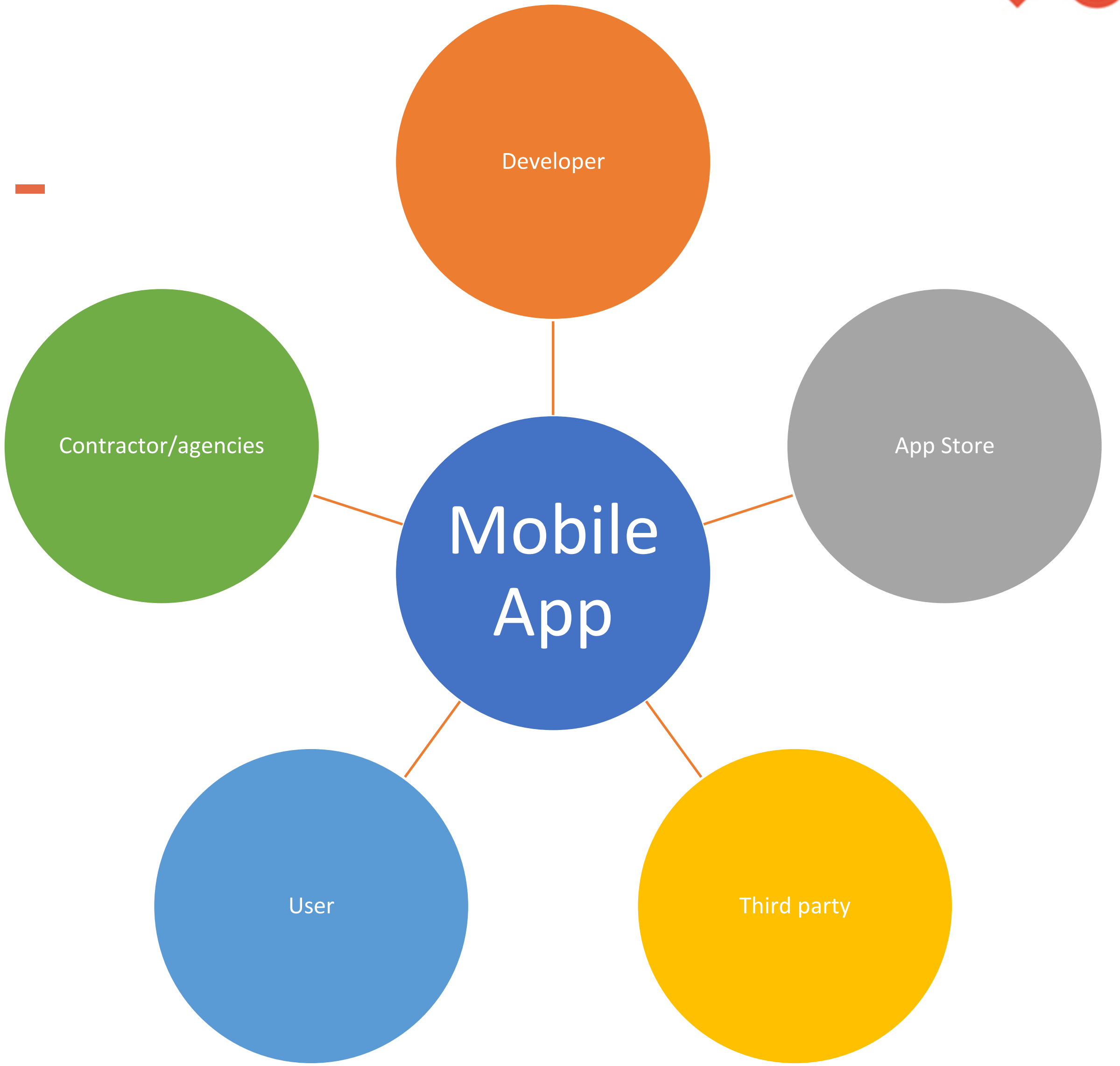
NDA

- Is there confidential information?
- Protect trade secrets
- Protect confidential information
- Minimise risks when working with external specialists
- Operate in stealth mode

Software development - Actors



Software Development

- Be aware of various stakeholders
  - Party commissioning the app
  - Software development agency (via employees or contractors)
  - App store
  - Users
  - Payment service providers
    - Purchase of app
    - Purchase of in app services

- Consider IP – ownership and assignment

Assignment v/s licensing

Assignment	Licensing
Outright ownership	Right to use
No consent for modifications	Consent for modifications
One off fees (usually))	Recurring Fees
Increase in value	Bank of standard codes

Considerations

- Selecting an agency
  - DD
- Requesting Bill of Materials
- Agency Software (separate background and foreground IP)
- Third party and open source
  - Must include licences or sub licences to allows use by end users

- Open Source software
  - Use pre-approved
  - Developer warranty on compliance with licence terms
  - Can use a well know compliance program like Open Chain, simplifies process
- Bespoke Code
  - Assign IP

Considerations

- Ongoing maintenance and updates
- Responsibility for complying with app store terms and conditions
- End of life and transition to a different agency

Other third parties' terms

- Why third parties
  - Cost
  - Speed
  - Value
  - Convenience
  - Business Development
  - Functionality

Other third parties' terms

- Considerations
  - DD
  - Back up service (e.g for payment service provider)
  - Avoid migration later
  - Disruption of service
  - Ability to scale up as business grows
  - Termination rights

Other third parties’ terms

- Considerations

- Uptime and availability of service
- Response times and resolution times
- Contractual remedies (e.g. Service Credits)
- Flow through issues around privacy and data protection
  - Location of hosting servers
  - Technical and organisational measures
- Ability to adjust to changes in specs and roadmap of services
- Privacy by design
- Data loss (compensation for loss, indemnities)

App store terms

- Role
  - Deliver app to end users
  - Payment
  - Middle man (avoid being the trader subject to consumer laws)
  - Standard terms of app stores (distribution agreement)
  - App stores control sale process
  - For end users
    - Can use app stores default terms
    - Have own EULA

App store terms

- Considering
    - Who has primary relationship with app store – developer or agency
    - How to respond quickly to app store takedowns
    - Cost of in app purchase
    - Check license wording
        - avoid transfer of ownership (rare)
        - Avoid exclusivity on one app store
        - Competing apps
        - Warranties from and to app stores
            - To (ownership of IP own and licence of third parties for third party software, compliance with applicable laws)
            - From ("AS IS")
        - Open source (any limit on use of certain)
        - Advertising: control over creative content, licensing of images and characters

Advertising

- Mobile ad networks bring developers and advertisers together
- Standard terms
- Considerations
  - Portfolio of advertisers (app age, jurisdiction)
  - Size and reputation
  - App's performance must not be impaired (default app)
  - Incorporate network's SDK
  - Compliance with local laws on developer
  - Understand payment model (pay per click, pay per impression, pay per action)
  - Selection of advertises (ad co)

End User licence agreement ("EULA")

EULA = copyright license + contract

End User licence agreement ("EULA")

- Considerations
    - Consumer laws (language, cooling off periods etc.)
    - Making EULA binding
        - Check local laws for positive action (eg click)
        - Make EULA available before payment and download
        - Privacy policy
            - Own and
            - App stores

Open Source Licences

- Open Source licences by definition make source code available under terms that allow for *modification* and *redistribution*
- Open Source licences may have conditions related to providing attributions, copyright statement preservation, or a written offer to make the source code available
- One popular set of licences are those approved by the Open Source Initiative (OSI) based on their Open Source Definition (OSD). A complete list of OSI-approved licences is available at http://www.opensource.org/licenses/

Permissive Open Source Licences

- Permissive Open Source licence: a term used often to describe minimally restrictive Open Source licences
- Example: BSD-3-Clause
  - The BSD licence is an example of a permissive licence that allows unlimited redistribution for any purpose in source or object code form as long as its copyright notices and the licence's disclaimers of warranty are maintained
  - The licence contains a clause restricting use of the names of contributors for endorsement of a derived work without specific permission
- Other examples: MIT, ISC, Apache-2.0

Licence Reciprocity & Copyleft Licences

- Some licences require that if derivative works (or software in the same file, same program or other boundary) are distributed, the distribution is under the same terms as the original work
- This is referred to as a “copyleft” or “reciprocal” effect
- Example of licence reciprocity from the GPL version 2.0:

You must cause any work that you distribute or publish, that in whole or in part contains or is derived from the Program or any part thereof, to be licensed [...] under the terms of this Licence.

- Licences that include reciprocity or Copyleft clauses include all versions of the GPL, LGPL, AGPL, MPL and CDDL

Proprietary Licence or Closed Source

- A proprietary software licence (or commercial licence or EULA) has restrictions on the usage, modification and/or distribution of the software
- Proprietary licences are unique to each vendor – there are as many variations of proprietary licences as there are vendors and each must be evaluated individually
- Open Source developers often use the term “proprietary” to describe a commercial non-Open Source licence, even though both Open Source and proprietary licences are based on intellectual property and provide a licence grant to that property

Other Non-Open Source Licensing Situations

- Freeware – software distributed under a proprietary licence at no or very low cost
  - The source code may or may not be available, and creation of derivative works is usually restricted
  - Freeware software is usually fully functional (no locked features) and available for unlimited use (no locking on days of usage)
  - Freeware software licences usually impose restrictions in relation to copying, distributing, and making derivative works of the software, as well as restrictions on the type of usage (personal, commercial, academic, etc.)
- Shareware – proprietary software provided to users on a trial basis, for a limited time, free of charge and with limited functionalities or features
  - The goal of shareware is to give potential buyers the opportunity to use the program and judge its usefulness before purchasing a licence for the full version of the software
  - Most companies are very leery of Shareware, because Shareware vendors often approach companies for large licence payments after the software has freely propagated within their organizations.

Other Non-Open Source Licensing Situations

- “Non-commercial” – some licences have most of the characteristics of a Open Source licence, but are limited to non-commercial use (e.g. CC-BY-NC).
  - Open Source by definition cannot limit the field of use of the software
  - Commercial use is a field of use so any restriction prevents the licence from being Open Source
  - A non-commercial licence CANNOT be an open source licence.

Public Domain

- The term **public domain** refers to software not protected by law and therefore usable by the public without requiring a licence
- Developers may include a *public domain declaration* with their software
  - E.g., “All of the code and documentation in this software has been dedicated to the public domain by the authors.”
  - The public domain declaration is not the same as a Open Source licence
  - Public domain declarations do not work in many countries (e.g. UK)
- A public domain declaration attempts to waive or eliminate any intellectual property rights that the developers may have in the software to make it clear that it can be used without restriction, but the enforceability of these declarations is subject to dispute within the Open Source community and its effectiveness at law varies from jurisdiction to jurisdiction
- Often the public domain declaration is accompanied by other terms, such as warranty disclaimers and/or a very broad fallback licence; in such cases, the software may be viewed as being under a licence rather than being in the public domain

Licence Compatibility

- Licence compatibility is the process of ensuring that licence terms do not conflict.
- If one licence requires you to do something and another prohibits doing that, the licences conflict and are not compatible if the combination of the two software modules trigger the obligations under a licence.
  - GPL-2.0 and EPL-1.0 each extend their obligations to “derivative works” which are distributed.
  - If a GPL-2.0 module is combined with an EPL-1.0 module and the merged module is distributed, that module must
    - (according to GPL-2.0) be distributed under GPL-2.0 only, and
    - (according to EPL-1.0) under EPL-1.0 only.
  - The distributor cannot satisfy both conditions at once so the module may not be distributed.
  - This is an example of *license incompatibility*.

The definition of “derivative work” is subject to different views in the Open Source community and its interpretation in law is likely to vary from jurisdiction to jurisdiction.

Notices

Notices, such as text in comments in file headers, often provide authorship and licensing information. Open Source licences may also require the placement of notices in or alongside source code or documentation to give credit to the author (an attribution) or to make it clear the software includes modifications.

- **Copyright notice** – an identifier placed on copies of the work to inform the world of copyright ownership. Example: Copyright © A. Person (2016)
- **Licence notice** – a notice that specifies and acknowledges the licence terms and conditions of the Open Source included in the product.
- **Attribution notice** – a notice included in the product release that acknowledges the identity of the original authors and / or sponsors of the Open Source included in the product.
- **Modification notice** – a notice that you have made modifications to the source code of a file, such as adding your copyright notice to the top of the file.

Multi-Licensing

- Multi-licensing refers to the practice of distributing software under two or more different sets of terms and conditions simultaneously
  - E.g., when software is "dual licensed," the copyright owner gives each recipient the choice of two licences
- Note: This should not be confused for situations in which a code is simultaneously to more than one licence, and you must comply with *all* of them (e.g. GPL code which also contains MIT components).

Data Protection

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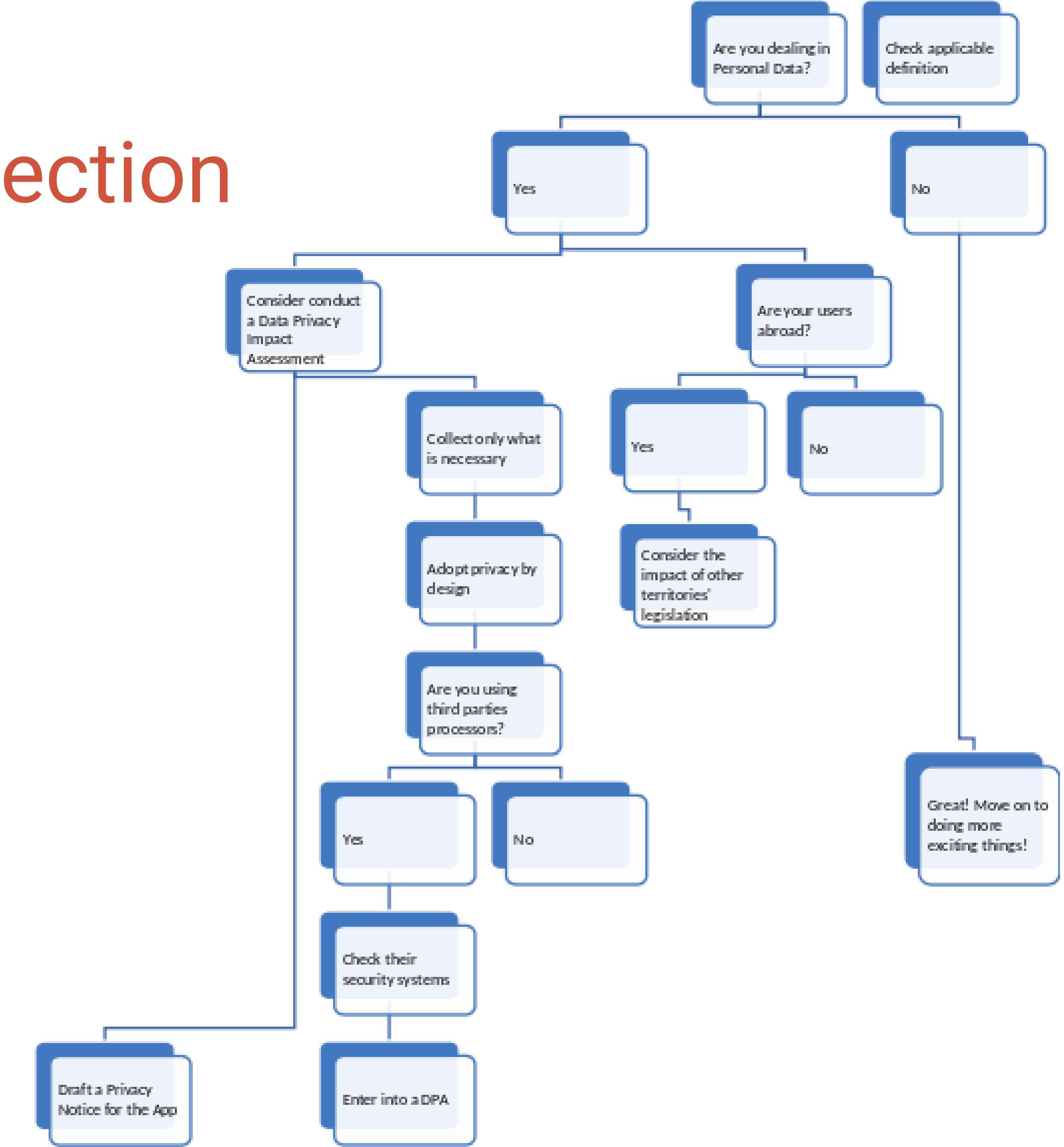

Are you dealing in Personal Data?

Check applicable definition

Yes

No

Consider conduct a Data Privacy Impact Assessment

Are your users abroad?

Collect only what is necessary

Yes

No

Adopt privacy by design

Consider the impact of other territories' legislation

Are you using third parties processors?

Yes

No

Great! Move on to doing more exciting things!

Check their security systems

Draft a Privacy Notice for the App

Enter into a DPA

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Other Jurisdictional issues

- Consumer laws
- Variation of IP laws
- Formalities when executing contracts
- Language requirements

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SECTION 3

Mobile Apps – Planning for Success and avoiding traps

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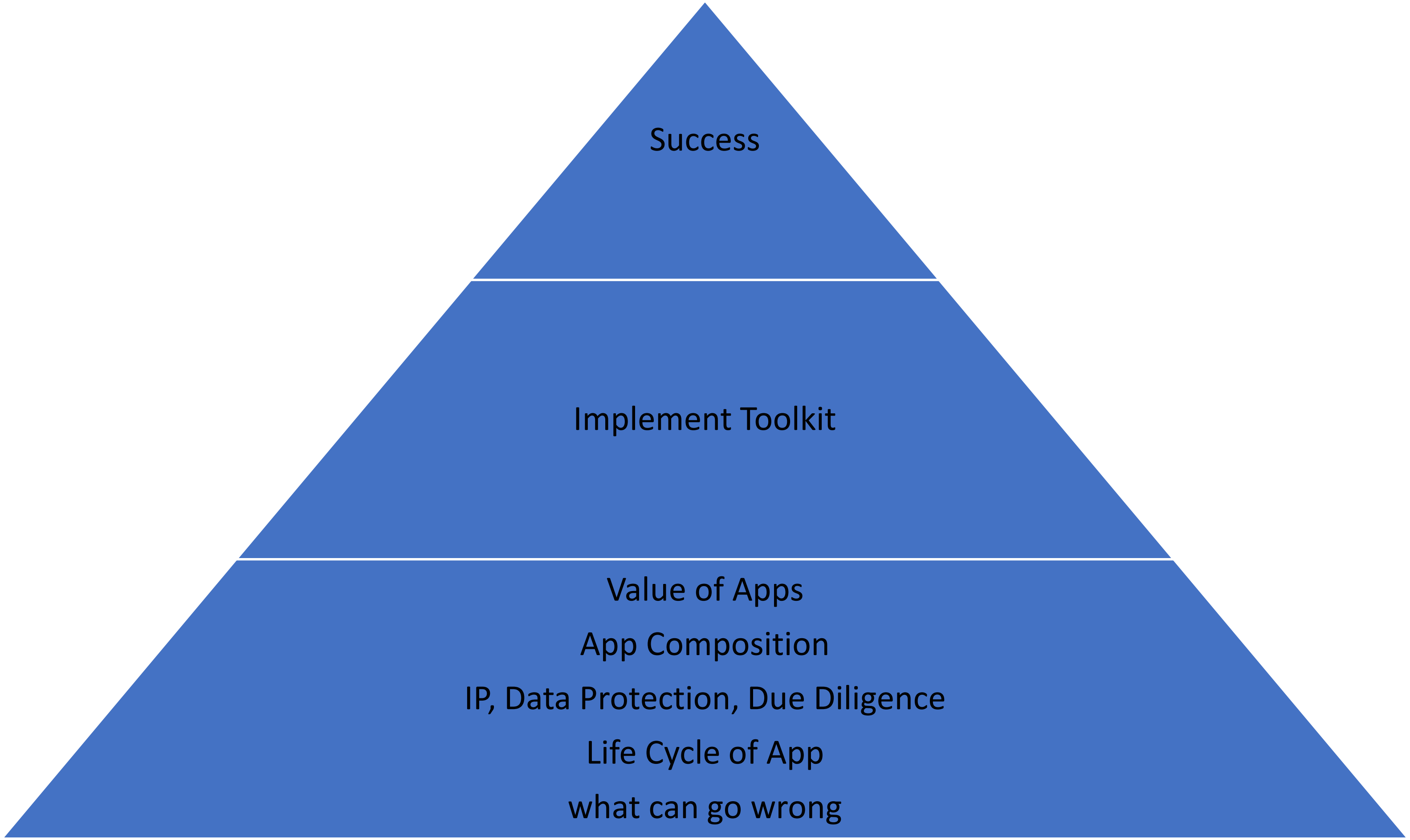

Success

Implement Toolkit

Value of Apps

App Composition

IP, Data Protection, Due Diligence

Life Cycle of App

what can go wrong

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Adopt ‘doing it right the first time’

Planning for Success and avoiding traps

- Contracts

Contract	Issue
NDA	Confidentiality
Software development	Roles, IP
Third parties’ terms	
App store terms	
EULA	Restrictions, liability

- Data protection and IP

Key Contracts Summary

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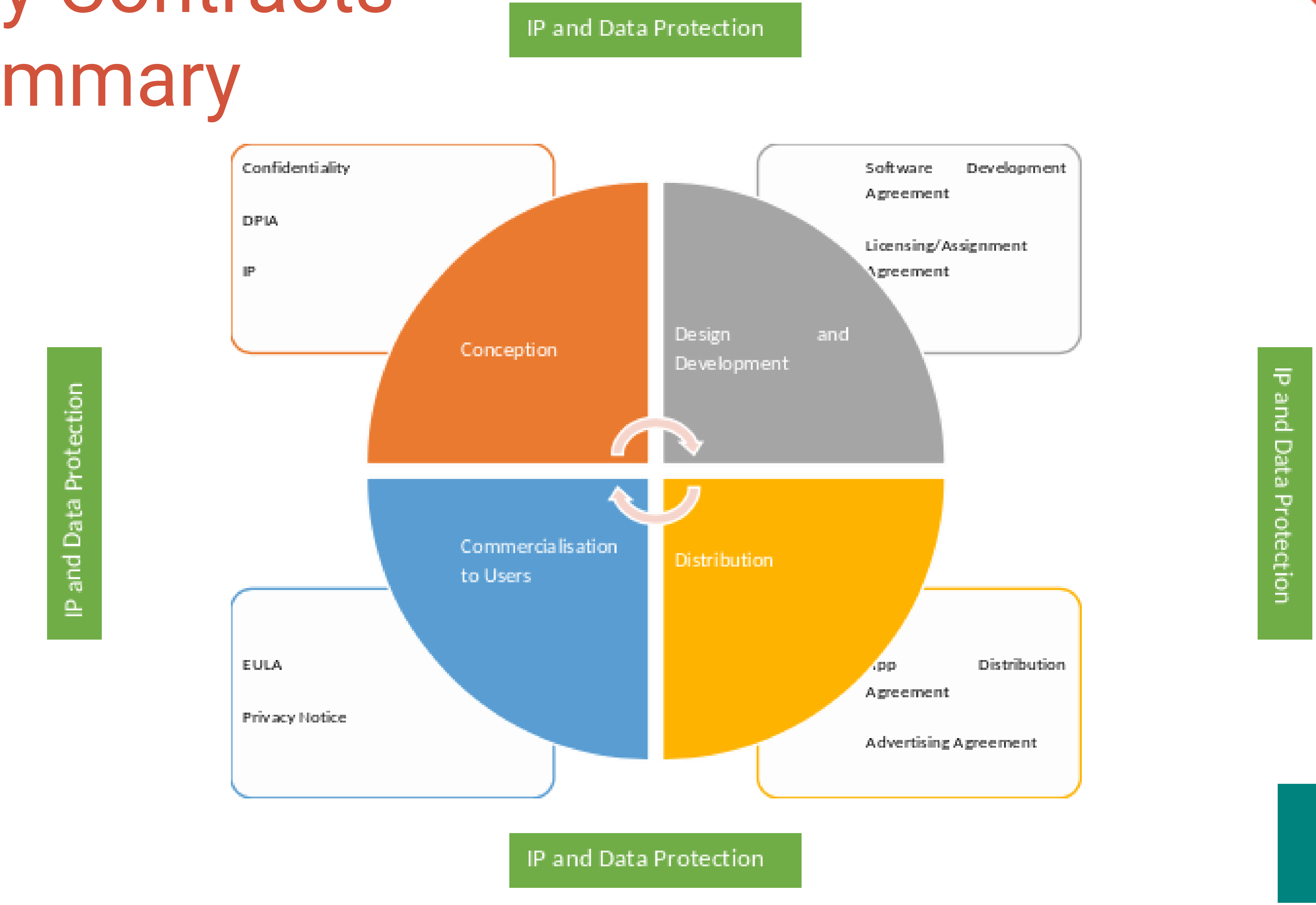

IP and Data Protection

Confidentiality

DPIA

IP

Software Development Agreement

Licensing/Assignment Agreement

Conception

Design and Development

Commercialisation to Users

Distribution

EULA

Privacy Notice

App Distribution Agreement

Advertising Agreement

IP and Data Protection

IP and Data Protection

IP and Data Protection

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Planning for Success and avoiding traps

If all fails, dispute resolution mechanism

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Questions & Answers

Andrew Katz

Andrew.katz@orcro.co.uk

Andrew.katz@moorcrofts.com

Usha Guness

Usha.guness@orcro.co.uk

Usha.guness@moorcrofts.com

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