

Prize Promotions & Facebook Policy Changes

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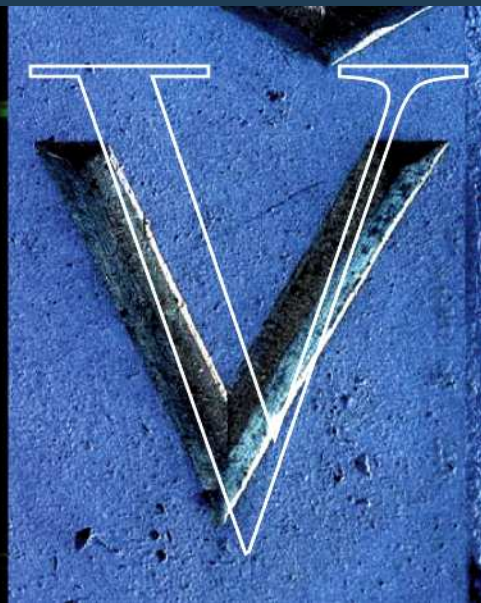
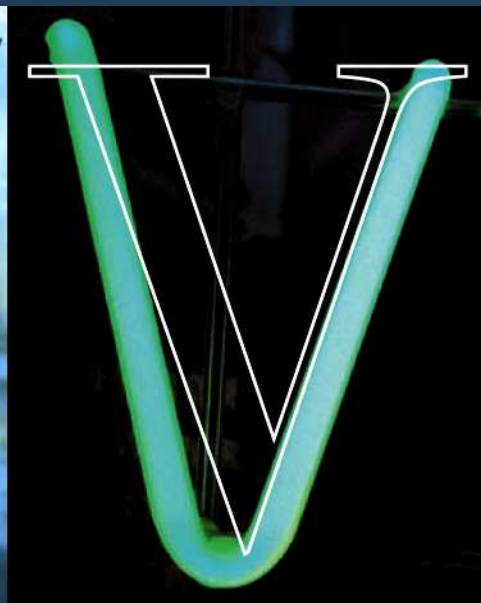
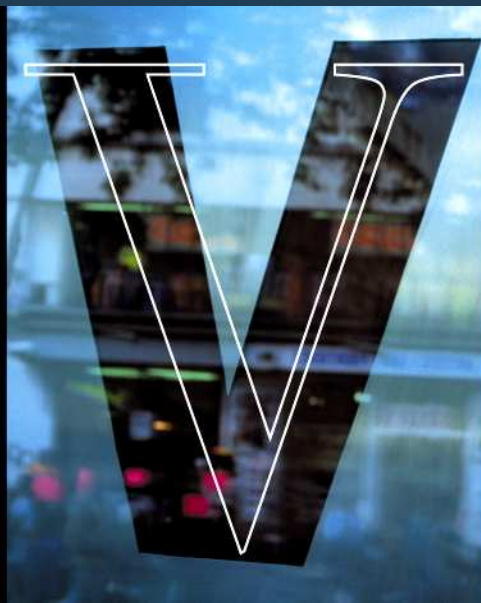
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SOCIAL MEDIA PROMOTIONS AND THE NEW FACEBOOK RULES: KEEPING UP WITH THE EVOLVING RULES FOR PRIZE PROMOTIONS

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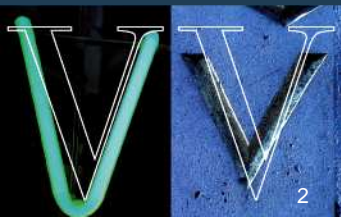


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Introduction

- Basic Principles
- General Considerations in Creating Sweepstakes and Contests
- UGC Contests: Risk Management and Best Practices
- The New Facebook Rules and other Platforms





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Basic Principles

The same rules apply to promotions on social media as to any other type of promotion

- **Must comply with criminal lottery and gambling laws (even wire fraud and racketeering may be implicated)**
- **Follow federal and state sweepstakes and contest laws, general consumer protection/UDTPA statutes**
 - Material terms & rules must be disclosed
 - FTC's ".Com Disclosures" guide – Revised March 2013
- **Follow other laws and regulations for specific types of promotions/claims, e.g., CAN-SPAM, postal, mobile/telemarketing, Endorsements and Testimonials guides, privacy laws**
- ***Social media promotions must comply with the rules of the relevant social platform or risk being shut down ...which can lead to a legal violation, because a promotion that is shut down early may violate the law***



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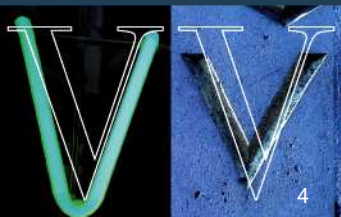


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Sweepstakes and Contests: General Considerations in Structuring Promotions

- First step in evaluating any promotion is ensuring that it is not an illegal lottery (and thus gambling).
- Lotteries generally have three elements:
 1. Participants must submit **consideration** to enter
 2. Winners determined on basis of **chance**
 3. A **prize** is awarded





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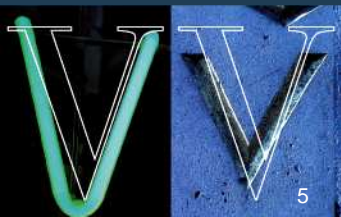
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Sweepstakes and Contests: General Considerations

Key Issues:

- Game of chance or skill?
- What is consideration? Monetary vs. nonmonetary
- Is there a free alternative method of entry? Clearly disclosed? Equal dignity?





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Sweepstakes and Contests: General Considerations

1. RULES:

- Required under state and federal law; should be readily available to all participants and clearly set forth the details
- Include liability disclaimers/releases
- Required disclosures in advertising: odds of winning, eligibility, deadlines, ARV of prizes
- Some states require posting rules (e.g., MA, RI); some states also require posting of winners' lists
- Some social media sites have their own rules, require special disclosures

2. Registration and/or bonding

- Sweepstakes over \$5,000—NY and FL (\$500 for RI)
- “Amusement contests” in AZ (→do you need to think about internet café laws in other states?)

3. Privacy: Use of PII for marketing/data collection purposes; issues under state, federal, international and *social media platform* rules

4. International considerations



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User Generated Content Promotions in Social Media: Risk Management and Best Practices

- While social media/UGC promotions may have many of the same issues as traditional sweepstakes and contests, they present unique issues as well:
 - Consideration Issues
 - Third party platform rules
 - Judging and voting – e.g., cheating and the use of bots
 - Intellectual property
 - Privacy
 - Compliance with FTC Endorsements and Testimonial Guides



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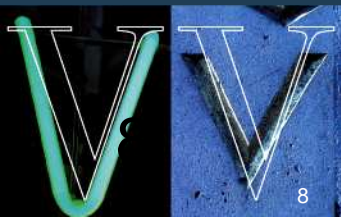


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Can UGC Contests Violate Lottery Laws?

- UGC in games of chance vs. games of skill
- Non-monetary consideration to create UGC (time and effort)
- Inadvertent chance in determining winner?
 - Winner determined by vote only
 - Tie-breaker by random drawing
 - No objective judges/judging criteria





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Submission Guidelines

- Technical and format requirements; e.g.:
 - Must be in .jpg; must not exceed 5 MB in size; must be in English language
- Content requirements:
 - Must be original
 - Must not infringe any intellectual property rights or otherwise violate any law
 - Must not be offensive, derogatory, profane, obscene, defamatory, etc.
- Other requirements: e.g., submission cannot have been previously submitted in a promotion or published.





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Judging in UGC Contests

Rules drafting considerations:

- Judging criteria and value of each should be clear
 - E.g., Faithfulness to topic (30%); Originality (30%); Creativity (40%)
- Judges must be objective, qualified, and must follow the judging criteria
 - Preference for independence



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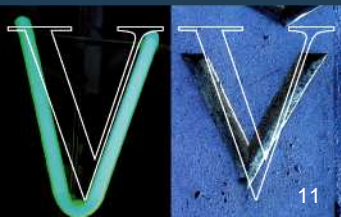


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Intellectual Property and Use of Entries

- Rules should include IP releases so that you can post submissions online, reuse/republish as desired
- Consider future uses
- Should get signed, written release to use commercially
 - Signed writing required under copyright law
 - Affidavit of eligibility and release for winners
 - Copyright assignment?
 - Federal E-Sign Act
- Just ask for the rights you need—people can be touchy





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Public Voting Concerns

- **Ex.: Taylor Swift contest**
- Public voting adds interest but increases the possibility of fraud and hacking
 - Include modification/cancellation clause
 - Identify user by IP address:
 - Limit: one (1) voter per person per email address, per day. Void multiple votes received from any person or email address.
 - Prohibited obtaining votes by any fraudulent or inappropriate means, including, offering prizes /other inducements.
- Leaderboards add “sizzle” but also increase possibility of complaints and fraud
- Undetermined whether voting = chance or skill.
 - Include both voting and judging phases
 - Have public vote on area of expertise – e.g., “public appeal”
- Put in place technology solutions that won’t allow votes to exceed number limit





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Intellectual Property and Ownership in Entries

- **Music and logos can be big problems; also third parties**
- Rules should be clear about third party IP; generally prohibit
 - Need for screening
 - What about fair use?
 - Sponsor may want to provide pool of licensed “clips” for use in creating entry
 - May violate some social media platform rules
 - Consider creating “FAQs” explaining limits
- Laws protect “web site operators”
 - Digital Millennium Copyright Act – need Takedown Policy
 - Communications Decency Act
- Rules should include IP releases so that you can post submissions online, reuse/republish as desired
- Should get signed, written release to use commercially; required under copyright law:
 - Affidavit of eligibility and release for winners
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User Generated Content – Advertising Litigation



Subway v. Quiznos (Doctor's Associates, Inc. v. QIP Holder LLC)

- Quiznos UGC contest asked entrants to submit videos comparing a Quiznos sandwich to a Subway sandwich.
- To generate interest, Quiznos posted user-generated video examples
- Subway sued Quiznos for false advertising under the Lanham Act, claiming examples contained false and misleading statements
- **Issue:** Whether Quiznos was immune to false advertising claims under Section 230 of the CDA, under which no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
- Case settled after court denied Quiznos' motion for summary judgment





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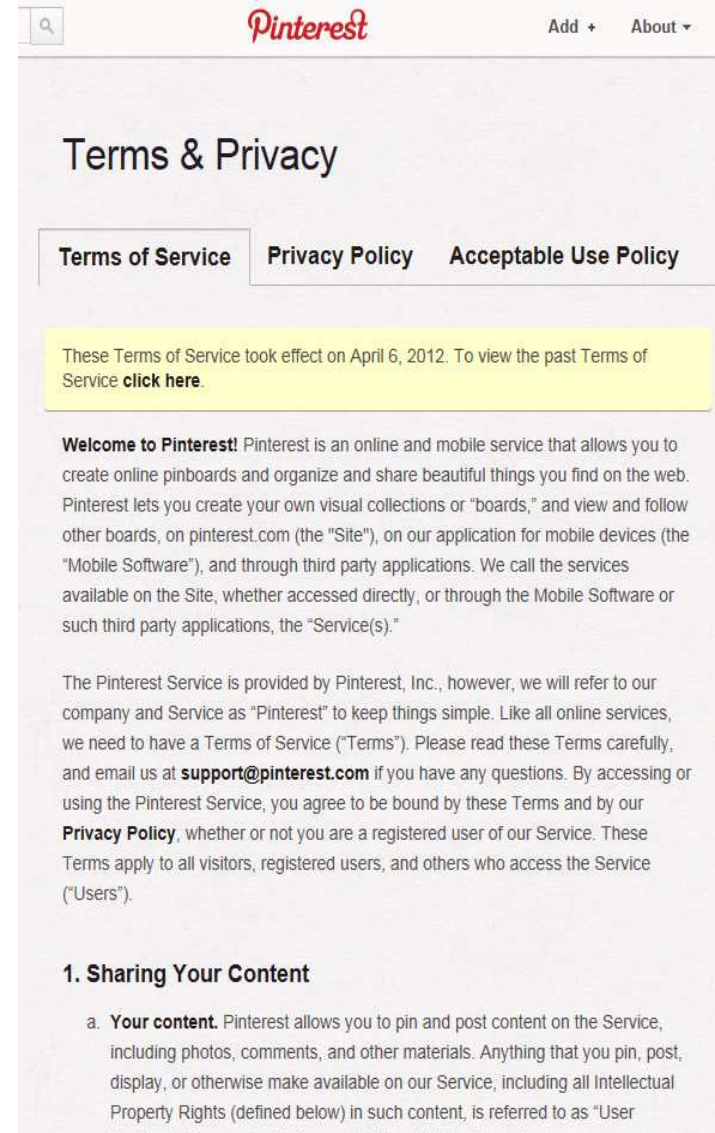


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Understanding the Social Landscape

- Each social network has its own set of rules and usage guidelines
 - They change, too, and fast!
- Make sure your team is familiar
- Consider in structuring your promotion:
 - Are you advertising or administering your promotion on the platform?
 - To app or not to app?
- Consequences of violation? Your promotion may be pulled down!

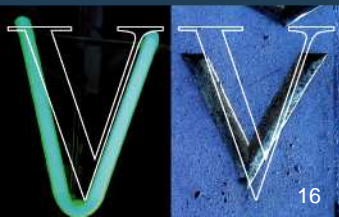




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Recent Changes to Facebook Rules for Promotions

(August 27, 2013)

Previously

- **COULD NOT** run a sweepstakes or contest directly on any Facebook Page
 - Had to be through a third-party application or on a canvas tab
- **COULD NOT** use Facebook functionality as automatic entry mechanism
 - **BUT, COULD** include certain actions (“liking” Page, checking into Place, or connecting to app) as part of entry process
- **COULD NOT** use Facebook features (e.g., “Like” button) as voting mechanism
- **COULD NOT** use Facebook features to announce or contact winners
- **MUST** include specific releases/disclosures re: Facebook
 - Facebook not affiliated, sponsor of promotion
 - Data submitted by entrant is provided to sponsor, not Facebook
 - Releases/disclose in rules and on entry form

Now

- **CAN** run a sweepstakes or contest directly on **non-personal** Facebook pages/timelines
 - **CAN** use an app to run a Facebook promotion
 - **BUT, CAN'T** conduct prize promotions on personal pages/timelines
- **CAN** collect entries by having users comment on a picture or post to be entered, having users message page
- **CAN** use Facebook functionality as automatic entry mechanism, except for posting content on personal timelines
- **CAN** use Facebook features (e.g., “Like” button) as voting mechanism
- **CAN** announce winner on page; require entrants to come back to see who won
- **CAN** tag in entries, but a Page may not tag or encourage others to tag themselves in content in which they do not appear
- **MUST STILL** include specific releases/disclosures re: Facebook
 - Facebook not affiliated, sponsor of promotion
 - Releases/disclose in rules and on entry form
 - **BUT NOT** required to disclose that data submitted by entrant is provided to sponsor, not Facebook





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New Facebook Rules—Traps for the Unwary?

Businesses large and small can now conduct promotions quickly and easily by posting text or a photo and asking people to comment on or like it

Joe's Diner #Contest: Win a FREE #Dinner for Two at Joe's Diner!
Here's How to Win:

1. Like the Post
2. Comment with the name of the person that you would take if you won.

#Winner will be selected this Friday!

BUT: Facebook guidelines make it clear that all applicable laws still apply—and there are still lots of risks:

- *How can marketers make full disclosures, etc.?*
- *Will it be easier to game the system? Will fraud be harder to track?*
- *Is there a higher risk of negative comments/backlash?*
- *And what about more complex contests?*



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Potential Issues with Timeline Contests

- How to make lengthy disclosures in a clear and conspicuous manner—need to either post rules or a link to rules, along with required release of Facebook.
- Promotion slides down timeline (unless pinned to top); hard to reshare multiple times to tell about
- No timestamps on entries—how can you tell whether an entry is eligible/timely?
- Sponsor does not receive an email address with entry, which can make it tough to follow-up/hard to notify winner if not paying attention
- If require both like and comment, can be hard to validate
- How to pick random winner? Already tools springing up
- ***May still be benefits to using an app, particularly when UGC is involved***



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Facebook Best Practices for Timeline Contests

- Have a good picture/explanation
- Make the rules—or at least a set of abbreviated rules with a link to full rules on a website—clear in the post
- K.I.S.S.S (Keep it Short and Simple, Stupid)
- Pin post to top of your page so promotion does not get lost
- Require a comment—then you can tag the person who wins
- Use an app if you
 - Want to collect emails and other PII
 - Reminder: Facebook’s Privacy Policy is not YOUR Privacy Policy—you will need to link to your own. Same goes with a Takedown Policy.
 - Want to run a UGC contest
 - Want to give away a large prize
 - Want to get fancy



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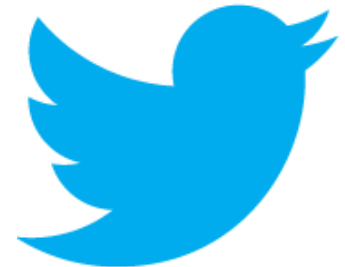


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Twitter Promotions

- Twitter Terms and Conditions discourage creation of multiple accounts; rules regarding retweeting to enter
- Limit on number of tweets/entries to one per day
 - E.g., don't encourage retweets to win
- Recommend including @usernameMention in tweet entries so will be visible in user timeline
- Suggest including relevant "hashtag" topics in tweet entries
 - E.g., #promotion or #companyname)
- *How to provide abbreviated rules?*



Pinterest and Prizing



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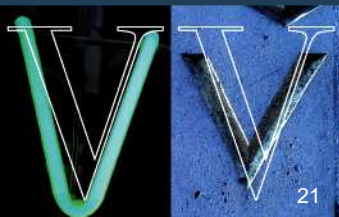
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Marketing Guidelines:

Don't:

- Suggest that Pinterest sponsors or endorses you or the contest.
- Require people to pin from a selection—let them pin their own stuff.
- Make people pin or repin your contest rules. This is a biggie.
- Run a sweepstakes where each pin, repin, board, like or follow represents an entry.
- Encourage spammy behavior, such as asking participants to comment.
- Ask pinners to vote with pins, repins, boards, or likes.
- Overdo it: contests can get old fast.
- Require a minimum number of pins. One is plenty.





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YouTube Guidelines

YouTube *allows only games of skill.*

Extensive guidelines for prize promotions, including:

- Winner must be determined by a set of clear judging criteria
- Must be free to enter
- Cannot use YouTube channel functions, such as video likes or view counts, to conduct the contest
- Contests may be open only to persons 18+ or the age of majority where conducted, if age of majority is over 18
- Any data collected from entrants may be used only for contest administration and cannot be re-used for marketing purposes (even if the user has expressly opted-in to that use)
- *Sponsor must not ask users to give all rights for, or transfer the ownership of, their entry to the sponsor*



Vimeo Guidelines



- Vimeo prohibits users from uploading commercial videos—defined as “videos that promote a product, service, or brand or contain any advertising (e.g., pre-roll ads, post-roll ads, overlay ads, or links)”—unless the user is a Vimeo PRO subscriber, a fee based service.
- Vimeo PRO subscribers cannot share commercial videos on vimeo.com
- Contest videos may qualify as commercial and thus cannot be shared in Vimeo, but even if they are deemed commercial, an exception could apply.
 - Exceptions are made for: independent production companies, authors, artists, musicians, nonprofits, and actors who want to promote the work they have created



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Foursquare Guidelines

- Under Foursquare's terms of use, promotion sponsors must obtain Foursquare's prior written consent before using its service to conduct a prize promotion, other than using an "Add-to Foursquare" link on a website
- Must provide a link to the full terms and conditions
- Discourages selecting winners based on checking into a venue the most number of times, as that method can lead to fraudulent check-ins and compromise the integrity of the prize promotion
- Encourages promotion sponsors to consider the geographical area targeted for the promotion and whether it's possible for everyone to have a fair chance given the prize promotion requirements





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Refer a Friend and UGC Promotions/CAN-SPAM

- Prize promotions with a “refer a friend” component should be vetted for CAN-SPAM compliance
 - CAN-SPAM may apply if coupons, points, additional sweepstakes entries offered in return for forwarding a commercial email, *including a social media message*
 - Facebook message is an email message, so sweepstakes and contests asking you to refer a friend may be subject to CAN-SPAM
 - Platforms like Facebook and Twitter discourage “spammy” behavior
- Requirements:
 1. Opt-out mechanism
 2. Sender’s physical postal address
 3. Disclosure that message is a solicitation (“ADV” not required)
- Prohibitions:
 1. False header information
 2. Misleading subject lines
 3. E-mail address harvesting/dictionary attacks





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Questions?

