



Advanced Sweepstakes and Promotions

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Introduction

Sweepstakes Continue To Be Heavily Regulated

- ***FTC v. Traffic Jam Events***, 2:20-cv-1740 (June 2020): FTC took action to halt a scheme that allegedly deceived consumers with “prize” mailers directing them how to obtain federal COVID-19 stimulus benefits, which instead lured them to a used car sale.
- ***Next-Gen, Inc.***, 4:18-CV-0128 (W.D. Mo., March 2019): FTC and Missouri AG settled with Next-Gen, Inc. and related defendants, which sent mailers informing consumers they had “won” but would need to pay to collect a prize. Other mailers were disguised as newsletter subscriptions or games of skill that involved a fee and an unsolvable puzzle. Settlement included **\$21 million** in cash plus personal property and liquidation of the companies; the full amount of **\$114.7 million** is suspended.
- ***Indiana v. Hopkins and Raines Inc.***, 55C01-1904-PL-000718 (Morgan County Circuit Ct, April 2019): Indiana AG sued marketer that ran ads on behalf of car dealerships and sent mailers to consumers representing they won a large prize based on a specific combination of winning numbers and symbols, when each recipient received the same combination and the prizes were substantially smaller than what was advertised and had to pay taxes for the prizes.
 - The promotion was not technically a sweepstakes or a contest, but was instead a “free gift” promotion (ironic air quotes on free), and that was a large part of the issue; ***if chance is not a factor, then it should not be presented as such.***

How Do We Review Prize Promotions?

- **The first step** in evaluating any promotion is ensuring that it is not an illegal **lottery** (which is gambling, i.e., a criminal offense).
- **Lottery** = three elements:
 - A **prize** is awarded.
 - Winners are determined on basis of **chance**.
 - Participants must submit **consideration** to enter.
 - **Consideration** (something of value that must be given to participate)
 - **Monetary** (i.e., a payment or purchase)
 - **Non-monetary** (e.g., an expenditure of substantial time and/or effort)



General Requirements

▪ Rules/Advertising Disclosures

- Rules are required under state and federal law; should be readily available to all participants and clearly set forth details such as eligibility, prize details, how to enter, start and end dates, odds, etc.
- Required disclosures in advertising: odds, eligibility, deadlines, prize details/ARV, sponsor
 - Florida game promotion regulation provides good rules of thumb for material terms disclosures (FL Adm. Code Sec. 5J-14.0001), but other states may have different requirements.
- Some social media sites have their own rules, requiring special disclosures and releases.
- Generally a good idea to include publicity and liability disclaimers/releases; right to modify rules; link to privacy policy.
- Follow the FTC’s “4 P’s” and .Com Disclosures

▪ Registration and/or Bonding

- Sweepstakes over \$5,000—NY and FL (\$500 for RI)
- “Amusement contests” in AZ
- Other countries? E.g., Quebec/Canada, Brazil

▪ Posting

- Some states require posting rules (e.g., NY, RI); some states require posting or provision of winners’ lists on request (NY, FL, TN).



Consideration: What Is Permissible Non-Monetary Consideration?

- Consideration=something of value that must be given to participate.
- May be **monetary** or **non-monetary** (e.g., an expenditure of substantial time and/or effort).
- **Non-Monetary Consideration** may render a promotion illegal in certain states – but it’s not always clear what that means
 - States where the law expressly specifies that non-monetary consideration is illegal are: Delaware, Florida, Georgia, Iowa, Kansas, Michigan, New Jersey, Ohio, Rhode Island, South Carolina, Texas, and Wisconsin.
 - **High-Risk Entry Requirements:** clear examples are required download of a paid app; offering entry only to paid conference attendees; requiring response to a lengthy survey; multiple visits to a location/scavenger hunt
 - **Low-Risk Entry Requirements:** short survey questions; requiring an app download when the app is free and available to all; requiring a social post or comment on a free platform; watching a TV program or listening to a radio program; return postage; single store visits (except OH, MI).

Target Audience: Special Considerations

- Your target audience may have important legal implications
 - **Trade/employee promotions:** Some states don't regulate trade or employee promotions, but other issues may be triggered.
 - **Trade promotions:** Consider the commercial bribery laws and obtain employer consent/exclude government employees.
 - **Employee promotions:** Tax/compensation issues; issues with hourly employees; potential work-for-hire issues when soliciting UGC
 - Why do we exclude employees from sweepstakes anyway?
 - **Promotions targeting children**
 - Children's Online Privacy Protection Act requires parental notification and consent, with a few narrow exceptions.
 - CARU requires plain language disclosures
 - California Consumer Privacy Act/GDPR

Discrimination, Civil Rights, and Promotions Law

- State public accommodations and civil rights laws prohibiting discrimination may reach to discrimination in sweepstakes and promotions on the grounds of race, gender, ancestry and religion, marital status, sexual orientation, gender identity, and/or age-based discrimination.
- Interpretation of these statutes varies, and has resulted in a split--some court find discrimination in promotions violates the law on its face, while others balance harm with the rights protected.
- E.g., **California's Unruh Act** states “all persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”
 - In 1985, the CA Supreme Court found a car wash “Ladies’ Day” discount was prohibited. More recently, the CA Superior Court found that a 2005 “Mother’s Day” tote bag giveaway at an Angels’ game was simply a gift and not a de facto discount, and therefore did not violate the Unruh Act.

Modification and Termination Clauses: When Can You Use Them?

- ***A sweepstakes is a contract with a consumer protection overlay***--several states (e.g., CA, FL) require that all advertised prizes be awarded; fairness and other consumer protection principles must always be kept in mind.
- **Modification/Cancellation Clause**
 - Typically provides substantial latitude for sponsors to make decisions “in [their] sole discretion.”
 - A well-drafted modification and cancellation clause should leave some room to craft a remedy if there is a delay.
 - That said, under sweepstakes and UDAP laws, modification is viewed as a remedy of last resort, to be used only in situations, for example, where there has been force majeure or fraud or there is impossibility.
 - In modifying , keep in mind contract law requirements.
- **Force Majeure Clause**
 - Force majeure is supposed to free both parties from liability upon an unanticipated (unforeseeable) supervening event or circumstance beyond the control of the parties. Has come up frequently with COVID-19.
 - *See also* doctrines of impracticability and frustration of purpose.
 - Best Practice: Include specific language concerning a pandemic or epidemic, or at least a health event, in a force majeure clause.

User-Generated Content

- **Different types (i.e., not all UGC promotions are contests), with similar issues:**
 - UGC contest
 - Closed “feedback” or “advisory” community
 - Open submission program/Request for Submissions
 - Program created specifically with user participation (“crowdsourcing”)
- All need terms and conditions

- **Risks vs. Benefits:**
 - Risks inherent in asking public for content: You can get really creative entries, or you can end up with a baseball team named the Pizza Rats...
 - IP infringement
 - Contest law compliance...vs. public participation and new content



User-Generated Content Promotions

While UGC promotions may have many of the same issues as traditional sweepstakes and contests, they present unique issues as well:

- Absence of chance means that consideration may be required, EXCEPT that some states (e.g., AZ, MD, CO, ND) prohibit a purchase or payment requirement even in skill contests
 - How to address, particularly when contest asks for “best results” or product reviews?
 - Arizona may require registration for “amusement gambling contests” (where purchase is required)
- Need for entry/content guidelines and moderation
- Winner selection: Judging and voting present special concerns
 - Need for judging expertise/independence
 - Clear winner selection guidelines
 - Possibility of voter fraud
 - Is a voting contest even a skill contest? (Or, the merits of a two-step winner selection process)
- FTC Endorsements and Testimonials Guides
- Compliance with third-party platform rules
- Intellectual property considerations

Third-Party Rights and Contests

The problem: Users own any original content they post on social media—no right for sponsors to report user or third-party content.

- Platform rules typically make content available to advertisers to use in apps, on websites, etc. (including text, photos, other materials posted by platform users).
- BUT questionable whether advertisers can reuse for commercial purposes without first getting the consent of the owner, due to intellectual property protections/third-party rights:
 - **Copyright:** Videos and images, such as drawings and photographs, are protected by copyright law; so is music.
 - **Trademark:** Many company names and most company logos and slogans are protected by trademark law. Also need to be aware of “False Association or Sponsorship” claims.
 - **Right of Publicity:** A person’s name, voice, likeness, and image are generally protected by that person’s right of publicity.
- Ideally, have entrants submit UGC through a website or app and obtain “click wrap” licenses/agreement to rules. There is still the problem of third-party content, though.

Copyright and Trademark

- **Will fair use be a defense to copyright infringement?** Extremely limited circumstances. Four factors:
 - Purpose and character of the use, including whether the work is transformative: commercial use not likely to be protected
 - Nature of the original work: creative
 - Amount and substantiality of portion used in relation to the work as a whole
 - Effect of use upon potential market for or value of copyrighted work
- **Digital Millennium Copyright Act/Communications Decency Act:** May provide limited safe harbor for republication of third-party UGC such as music—but do you just want to exclude or use another approach?
- **Beware: Dangerous Trademark Owners and Trademarks—sporting associations and others.** Need to obtain permission/license from the trademark owner when using third-party trademark.



Right of Publicity

- **State right of publicity laws** provide that photos, videos, or other content that includes or identifies specific people should not be used in commercial campaigns without permission
 - Applies to names, quotes, even social media handles
 - In some states, right is inheritable – extends to deceased individuals’ descendants/heirs
- **Important to get permission – in writing – to use a person’s image, name, etc. for promotional purposes.**
 - Check how long the release/permission extends
 - *Can be a big issue in images/video provided in UGC contests, with retweeting of celebrity posts*
- **Anyone can claim an infringement of his/her publicity right, although best-known cases involve celebrities**
 - **Facebook settlement (2013):** \$20 million class action settlement involving allegations the site violated users’ rights when it used their name and profile picture, along with assertion the person “liked” a particular advertiser, in “Sponsored Stories.”

Consent on Social Media

- How do I get consent to reuse UGC?
 - Remember, social platform terms do not grant consent to commercial re-use --if you plan to re-use social posts (esp. on a different platform/medium), need clear consent
 - Simply having someone respond “yes” to a statement like “Fantastic photo! Do you approve of us featuring it? is too broad and too fraught with possibilities of misunderstandings to use. Instead, make specific request attaching/linking to release and asking for clear signifier of consent. :
 1. Make a specific request and instruct participants to use a hashtag, or even two, that is/are so unique that there is very little chance you could inadvertently capture photos
 - May also comply with FTC’s Endorsements Rule at the same time!
 2. Hyperlink terms and conditions that are posted on either your profile or in some linked area (website, profile) that explain what is and is not acceptable content (e.g., nothing obscene or inappropriate content, no third parties, no trademarks or logos, etc., which could also include a link to privacy policy); and
 3. Moderate the feed to ensure that the photos submitted comply with (1) and (2)

UGC Best Practices

- **Social media platform rules** do not necessarily grant the rights you need.
- **Terms and conditions:** Need clear delineation of IP rights:
 - Participants should ideally “accept” terms
 - Clear submission guidelines
 - Moderate/screen entries
 - Reference the requirement for signing winner agreement in the rules
 - IP reps and IP license
 - Publicity rights
 - Prizes or gifts given are subject to all applicable laws
- **Third-party clearance:** Does not rely on participant reps/warranties
- **Submitter/Winner agreement**
- **Consider a background check for winners**

Social Media Promotions: Understanding the Social Landscape

- Each social network has its own set of advertising rules and usage guidelines—strictest for sweepstakes and contests.
- IP rights grant does not necessarily give you the right to use for commercial purposes.
- You don't always get the right to contact users.
- Consequences of violation? **Your page/promotion may be pulled down!**



Facebook Rules for Promotions

- **You MUST** include specific releases: Facebook not affiliated with or a sponsor of promotion
- **You CANNOT:**
 - “Likegate” a promotion.
 - Conduct prize promotions on personal pages/timelines.
 - Require people to post content on their personal timeline, share content, or tag themselves in content where they do not appear—no “share on your timeline to enter” or “share on a friend’s timeline for additional entries.”
- **You CAN:**
 - Collect entries by having users comment on a picture or post to be entered or message a page.
 - Use Facebook functionality as automatic entry mechanism (except for posting content on personal timelines).
 - Use Facebook features to vote.
 - Announce winner on non-personal page/ask entrants to return to see who won.
 - Tag in entrants.



Instagram Rules for Promotions

- **MUST** include specific releases/disclosures re: Instagram - whether Instagram is used to run the promotion or simply to advertise the promotion.
- **MUST** request permission to re-use user photos in rules - **according to Instagram's terms of use, users retain ownership rights of their photos.**
- **MUST** say in the official rules that having a public profile on Instagram is an eligibility requirement for the contest (otherwise won't be able to see entries!).
- **MUST** require word like "promotion" or "sweepstakes" or separate hashtag along the same lines in post-to-enter promotions (per FTC).
- **CAN** tag in content (like photos), but you **CANNOT** tag content inaccurately or encourage others to tag content inaccurately.
- **CAN** post the official rules via a static link in the picture, a reference to a link in bio, or a "track-back" reply to any commenters.
- **CAN** structure entry and winner selection by having an entrant comment on a picture that includes an explanation of the basics of the sweepstakes/contest.

What about using Facebook and Instagram Stories for promotions?



Twitter Promotions

- Twitter Terms and Conditions discourage creation of multiple accounts and other “spammy” activities such as automation.
 - Automation rules
 - Limit number of tweets/entries to one per day.
 - Don’t encourage retweets to win.
- Make sure the rules require entrants to set their Twitter account to “public” so you can see entries!
- Recommend including @usernameMention in tweet entries so it will be visible in user timeline.
- FTC: Any tweet-to-enter promotion must require a word like “promotion” or “sweepstakes” or separate hashtag along the same lines.
- Distinctive hashtag also minimizes possibility of including photos from random users using the tag.



YouTube Guidelines

- Must have official rules which:
 - Include links to YouTube’s Community Guidelines,
 - State all disclosures required by federal, state, and local laws, and
 - Are compliant with the YouTube Terms of Service.
- Must include a privacy policy.
- Must state YouTube is not a sponsor and give releases.
- May not associate with YouTube without express consent.
- May not manipulate metrics on YouTube (including likes, dislikes, etc.)—no using likes for voting, etc.
- Contest must be free to enter.
- Must not ask users to give all rights for, or transfer the ownership of, their entry to the sponsor, and cannot infringe upon or encourage infringement of third-party rights or participation in unlawful activity.



Other Platforms

LinkedIn

- LinkedIn does not allow advertisements for promotions on their platform

Snapchat

- Work with a lawyer to write official rules that comply with local law
- Must provide release for Snapchat
- Expressly state Snapchat is not a sponsor of, affiliated, or administering the sweepstakes
- No encouraging spammy or illegal behavior
- Don't use Snapchat logos or marks
- Follow Snapchat terms and policies

Pinterest

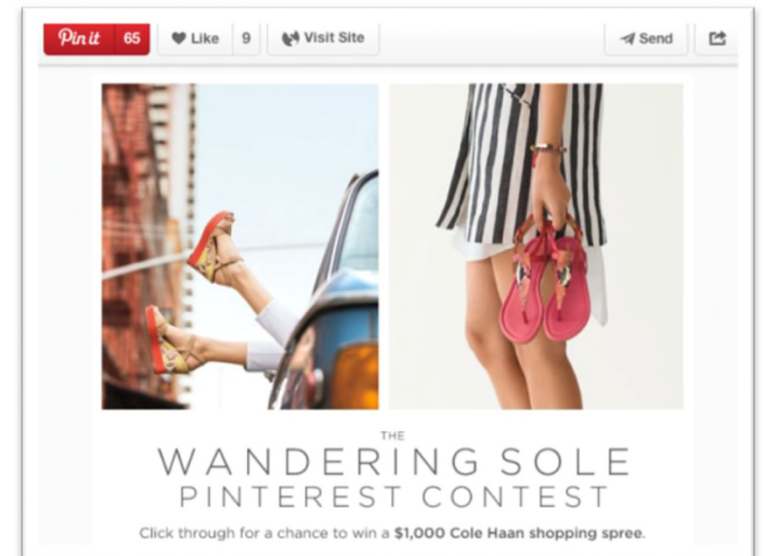
Encourage authentic behavior, keep Pinterest spam-free and be sure to comply with all relevant laws and regulations.

- Don't require participants to save a specific image
- Don't allow more than one entry per participant
- Don't suggest that Pinterest sponsors or endorses the promotions
- Make sure participants use the word "contest" or "sweepstakes" in their descriptions or images when they save Pins for the event
- Don't direct people to click on Pinterest buttons to get money, prizes or deals



FTC Endorsements Rule Disclosure Requirements

- **Basic rule:** Under FTC's Endorsements and Testimonials Rules, if an endorser (e.g., influencer) has received material consideration in return for talking about a product on social media, it should be disclosed
- **Sweepstakes/Contests corollary:** *Must require sweepstakes entrants to include disclosure indicating their entry (tweet, post, etc.) has been incentivized.*
- **Acceptable disclosures/hashtags include but are not limited to:**
 - #[company]Sweepstakes
 - #contestentry
 - NOT #sweeps or other abbreviations
- Employees should also disclose connection.
- For reviews, disclosure is especially important.



Refer a Friend and UGC Promotions / CAN-SPAM

- *Facebook, Inc. v. MAXBOUNTY, Inc.* (2011): Facebook message is an email message under CAN-SPAM
- All prize promotions with a “refer a friend” component should be vetted for CAN-SPAM compliance
 - CAN-SPAM Act may apply if coupons, points, or additional sweepstakes entries offered in return for forwarding a commercial email, *including a social media message*
 - Platform rules for Facebook and Twitter discourage “spammy” behavior
- Prohibitions:
 - False header information
 - Misleading subject lines
 - E-mail address harvesting/dictionary attacks
- ***Key element: “Referred” friends must be vetted against your internal “do not email” list...***

Mobile Marketing/Text Promotions

Under federal law (TCPA), marketer must obtain ***express prior written authorization*** to send marketing messages via text message

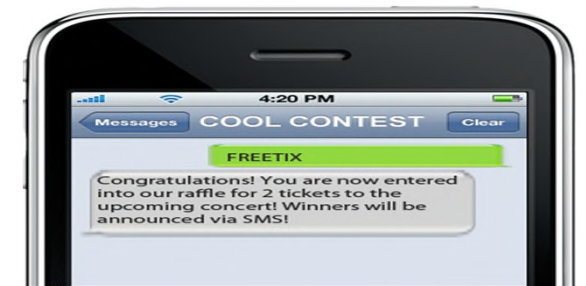
- Private class actions are a big risk here:

E.g., *Hamza v. Dunham's Athleisure Corporation* (U.S. District Court, Eastern District of Michigan, Case No. 2:16-cv-11641): Alleges Dunham's sent Hamza and a proposed class unauthorized text messages in connection with a promotional sweepstakes. Hamza recently won a motion to dismiss

- Large class actions, e.g., class action settlement of \$75 million involving Capital One

How do you make adequate disclosures with limited space available?

- FTC Dot.com Disclosures provide guidance; FTC has issued mobile privacy guidelines
- FTC has stated promotions/disclosures must be mobile-optimized
 - Recent Instagram influencer guidance—disclosures must be made before “click for more”
 - Disclosures in rules as well
- Trade association guidelines include industry protocols for signup; include additional disclosures in rules



Are Text Messages Consideration?

Text messages may potentially be consideration

- Premium text messages are almost certainly consideration
 - *American Idol/Deal or No Deal* cases; *Hardin v. NBC Universal, Inc. et al.*)
- Whether a standard text message is consideration has not yet been addressed by courts; some AGs have indicated they think it is.
- Best practice is to include free AMOE

Surprise and Delights



- Surprise and Delight promotions are promotions where free gifts are given away to consumers – **but neither the free gifts nor the promotion is advertised before gifts are distributed.**
 - If the gifts really aren't promoted prior to distribution, advertisers should not need to disclose any terms of purchase or redemption because there is no “call to action” that consumers are asked to accept.
 - The more the Surprise and Delight promotion is talked about in advance by the advertiser, the greater the risk that it triggers legal disclosure requirements.
 - No consideration may be required to participate in promotion.
 - Analysis may change if promotion is run on a regular basis (so people come to expect to be rewarded for certain behaviors).
- Suggested Best Practices:
 - Avoid pre-announcement of the promotion or complex requirements for participation.
 - Consider giving recipients of prizes clear guidelines about what to post/not to post on social media when discussing the S&D promotion.
 - May need to get signed releases from prize/gift recipients for use of images/content.

Charitable Promotions

- **Charitable Promotion or Commercial Co-Venture (CCV)** – Arrangement between a charity and a business in which the business advertises in a sales or marketing campaign that the purchase or use of its goods or services will benefit a charity or charitable purpose
 - (1) Not a charitable solicitation (or raffle)
 - (2) Tied to purchase of goods/services (*MA)
 - (3) Benefit charity or charitable purpose
- **26 states have laws that regulate CCVs**
- **Issues/regulatory requirements:**
 - Registration/bonding (4 states)
 - Written contract
 - Advertising disclosures, e.g., amount/minimum donation, dates, fundraising registration number
 - Accounting and recordkeeping

Charitable Sweepstakes and Auctions

- Increasing popularity of sweepstakes run by nonprofits, or commercial entities working with nonprofits.
 - Are these similar to raffles? Sweepstakes? CCVs?
 - What laws apply?
 - Fla. Rev. Stat. Sec. 849.0935?
 - Professional fundraiser laws?
 - California attorney general settlements with Prizeo et al.
 - Are they gaming for gaming's sake?
- State auctioneer laws

International Considerations

- How do we address compliance and risk in multijurisdictional promotions?
- Online gaming and sweepstakes law can vary drastically across countries.
- Important to check with counsel if sweepstakes or game will occur outside of U.S.
 - Some countries prohibit cash awards (e.g., Brazil).
 - Others require rules translation/disclosures in particular language (e.g., Canada).
 - Several require registration (e.g., Brazil (both sweepstakes and contests), Mexico, Quebec, Canada, Australia (certain provinces)).



Promotions Gone Wrong

Beatrice Co. Football



Questions?



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Upcoming Events:

- **February 11, 2021: *Breaking Down Oral Argument in AMG Capital Management v. FTC***



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