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Practical Tips for Social Media Promotions: Sweepstakes, Contests and More



BY GONZALO E. MON

Social media has revolutionized the way companies run sweepstakes, contests, and other promotions. Not only does social media make it possible to do things that weren't done a few years ago, it also makes it easier—maybe too easy. Because social media tends to be a casual medium and it is possible to launch a promotion in minutes, many marketers tend to think that laws governing the promotions they run in other mediums do not apply in social media. Unfortunately, that's not the case. The same laws apply, even though it is not always easy to figure out how to comply with them.

Complying with promotions laws is only the first step, though. If you run a promotion on a third party platform, you have to consider whether the platform has additional requirements. (The most popular platforms for promotions do.) But perhaps the trickiest aspect of social media promotions is related to consumer involvement. The more input you give consumers, the more likely they are to be engaged. But sometimes consumers get "too engaged" and create problems for you. Moreover, because many of these promotions are public, any problems will often play out in public as well.

This unique set of issues needs to be considered in the early stages of planning a social media promotion. Following are some of the key issues.

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Legal Requirements

Marketers often use the words "sweepstakes" and "contest" interchangeably, but the words refer to different types of promotions that can be subject to different legal requirements. In general, a sweepstakes is a promotion in which prizes are awarded based on chance, and a contest is a promotion in which prizes are awarded based on skill.

Don't assume that just because a promotion doesn't include a random drawing it automatically is skill-based, though. A promotion can be chance-based even without a drawing. Different states have different thresholds for what constitutes skill, so it is not always easy to figure out which side of the line you're on.

Keep in mind that there is not a single sweepstakes or contest law. Instead, these types of promotions are subject to a patchwork of laws that are spread out across all 50 states, as well as a few laws on the federal level. Fortunately, though, there are more similarities than differences. The most important principle under these laws is that people can't be required to make a purchase or payment in a promotion in which winners are selected based on chance. There are two common ways to deal with this prohibition: do not require a payment or don't involve chance.

In most cases, you can have a method of entry that involves a purchase, as long as you also provide a free method of entry. You need to think about what works best in your situation, but common options are to allow people to enter for free online or by sending a request through the mail. It is important to ensure that both methods are treated equally. For example, you cannot place a limit on the number of free entries but allow people to get unlimited entries by making purchases. It is important to clearly disclose the free option. A lot of companies have gotten in trouble for burying that in the fine print.

A company has more flexibility to require a purchase in a skill contest, but it is not easy. States define skill differently, so a promotion that qualifies as skill-based in one state may not qualify as skill-based in another. A lawyer's first instinct is to look at previous cases for guidance. Unfortunately, those cases aren't always helpful. Most are decades-old and involve games that bear little resemblance to today's games. Even if you can ensure that your game is skill-based, keep in mind that some states prohibit purchase requirements, even in skill contests. So, if a company wants to have a purchase requirement, needs to engage in a state-by-state analysis.

Most states require companies to make certain disclosures about their promotions. It may be tempting to simply copy what someone else has done, but it also is dangerous to assume that someone else has it right or that their disclosures apply to what you plan to do. In addition to the disclosure requirements, keep in mind that some states may require companies to register, and even post a bond, before they can launch certain promotions. For example, Florida¹ and New York² both require companies to register and post bonds if a sweepstakes includes more than \$5,000 worth of prizes.

That is a lot to know, and companies still must ensure they abide by other promotions laws, privacy laws, intellectual property laws, tax laws, or other laws that frequently apply to promotions.

Platform Requirements

It may not be enough for a company to ensure that it complies with relevant federal and state laws. If it runs a promotion on a third-party platform, it needs to check to see if that platform has its own requirements.

Facebook's promotion guidelines³ place several restrictions on how companies can utilize Facebook's features in their promotions. For example, a promotion cannot condition entry upon a person taking any action using any Facebook features other than liking a page, checking into a place, or connecting to an app. Keep in mind that although an entry may be conditioned on a person taking the actions specified in the previous sentence, the actions themselves cannot result in an entry. Instead, promotions have to be run within apps on a Canvas Page or Page Tab, and those apps must contain an entry form.

Just as Facebook features or functionality cannot be the entry mechanism, Facebook features may not be voting mechanisms. For example, a company cannot invite fans to vote for their favorite entries by clicking on the Like button. Again, if fans are allowed to vote, the voting has to be conducted through an app. Similarly, winners may not be notified using Facebook features, such as Facebook messages or posts on profiles. Instead, collect email addresses, phone numbers, or mailing addresses on the app's entry form, so that winners may be contacted.

Facebook also requires companies to include the following disclosures in their promotions: (a) a complete release of Facebook by each entrant; (b) an acknowledgment that the promotion is not sponsored, endorsed or administered by, or associated with Facebook; and (c) that any information provided by participants is provided to the company, not to Facebook. Make sure those disclosures appear on your rules or on the app.

Twitter also has guidelines governing promotions.⁴ For example, Twitter asks companies to discourage users from creating multiple accounts and from posting the same tweet repeatedly. Accordingly, a promotion in which a prize is awarded to the person who tweets the same message the most times would violate the guidelines. (Twitter has shut down at least one such promotion.) If people have to include a hashtag in tweets, keep

in mind that hashtag topics need to be relevant to the tweet. Encouraging users to add a hashtag to unrelated tweets might cause them to violate the Twitter rules.

As other platforms become more popular, you should check whether they have any guidelines. Although many companies are experimenting with promotions on Pinterest, the platform does not have any guidelines (yet). Google recently imposed guidelines for its Google+ platform, though.⁵ The Google+ Pages Contest and Promotion Policies state, in part: "You may not run contests, sweepstakes, offers, coupons or other such promotions ("Promotion") directly on your Google+ Page." A company can run a promotion on another site and include a link to it on its Google+ Page, but that is about as far as it can go.

Violating platform guidelines can result in being kicked off the platform, so make sure to know and follow these rules. Also, keep in mind that just because you comply with the platform guidelines does not mean that you are complying with the laws.

User-Generated Content

Many social media contests invite consumers to submit content, such as photos or videos, to be judged. Although a company can usually ensure its own content complies with applicable laws, it is harder to ensure that user-generated content is lawful. Unfortunately, companies themselves can get in trouble for what consumers do in the context of a company's social media campaign, even if a company did not authorize it. Indeed, over the past few years, companies have been sued over content that consumers posted on their sites when that content allegedly violated someone's copyrights, included false claims, or included defamatory statements.

The first step toward avoiding (or reducing the risk of) liability, is to clearly disclose what consumers can and cannot submit. Take some time before the promotion is launched to think about what types of problems are likely to arise and proactively guard against those problems. For example, a company should disclose that entrants have to submit original content and that they cannot include content that violates someone else's copyrights. If you invite consumers to talk about your products, you may also want to take steps to ensure entries do not make false claims about those products or ones sold by competitors.

Despite your best efforts, people may still post problematic content. Fortunately, some laws can protect a company. For example, the Digital Millennium Copyright Act (the DMCA)⁶ can provide a "safe harbor" from potential liability that arises from publishing content that infringes a third party's copyrights if that content was posted by another person. But the safe harbor does not provide blanket immunity. Companies need to take a number of steps to enjoy the safe harbor and may lose their protection if they have knowledge of infringement or are aware of facts from which infringement should be apparent.

The Communications Decency Act (the CDA)⁷ may also provide protection if consumers post content that includes defamatory statements or false claims. Courts

¹ Fla. Stat. § 849.094 (2012).

² N.Y. Gen. Bus. Law § 369-e (2012).

³ The guidelines are available at http://www.facebook.com/page_guidelines.php#promotionsguidelines.

⁴ The guidelines are available at <http://support.twitter.com/articles/68877-guidelines-for-contests-on-twitter>.

⁵ The policies are available at <http://www.google.com/intl/en/+policy/pagescontestpolicy.html>.

⁶ 17 U.S.C. § 512 *et seq.*

⁷ 47 U.S.C. § 230 *et seq.*

have been generous in applying these protections but, again, the protections are not unlimited. For example, when Quiznos invited consumers to make commercials showing why Quiznos subs were better than Subway subs, Subway sued, arguing that many of the commercials included false claims. A court held that Quiznos could be liable if it played a role in developing the problematic content, and noted that a jury should decide whether the company crossed the line.⁸ The case later settled.

The key point is that a company can generally avoid liability for problematic content posted by rogue consumers, but if it invites those problems, pointing the finger at those consumers will not make those problems go away. Think carefully about what to ask consumers to submit and be sure to warn them against submitting various types of problematic content. You should also ensure that you are set up to comply with the safe harbor requirements under applicable laws. Also remember that while liability may be avoided for problematic content posted by consumers, it will not to the extent that the company uses that content itself.

Other User-Generated Problems

In addition to the problems that can be associated with content submitted by consumers, many companies run into problems when they invite consumers to play a role in selecting winners. Imagine, for example, a contest in which consumers are asked to name a company's newest product, and the winner will be selected entirely by public vote. What will be done when the person whose entry the company hates the most manages to rally all of his friends to vote for him day and night? If complete control to consumers, a company may not like

the results. Indeed, many companies have had their promotions hijacked by consumers.

Another problem with public voting is that it tends to invite cheating. In some cases, the cheating can be so extensive that it can derail a promotion. Some companies have spent countless hours trying to plug holes, respond to complaints, and regain control of their promotions after cheating occurred. It's OK to give consumers some input, but do not give them complete control. At a minimum, there should be a limit on the number of times a person can vote to prevent any individual from having too much influence over the outcome. But it's not enough to set up the limit—a company needs to be able to enforce it.

Plan and Think Before Acting

Most of the social media promotions that have gone wrong in recent years have not gone wrong because companies failed to comply with laws or platform rules—instead, the companies failed to appreciate the risks that are inherent in the social media space. Remember that although there are benefits to turning over some control to consumers, there are also risks. Before you launch a promotion, take the time to think through the potential issues. Hopefully, that will keep you out of trouble, but sometimes things still go wrong.

When they do, they often go wrong in public. Most companies try to address problems quickly to prevent bad news from spreading. Keep in mind that those solutions may also play out in public. Sometimes, an ill-thought-out solution can be worse than the original problem. There are times when taking down a problematic post is the right answer, and times when it could make things worse. And there are times when consumers will respect a company for admitting a problem, and times when that admission will be used against the company. If something goes wrong, assemble the relevant stakeholders and carefully think through your options before you act.

⁸ *Doctor's Associates v. QIP Holder*, No. 3:06-cv-1710-VLB (D. Conn. Feb. 19, 2010) (denying Defendant's Motion for Summary Judgment).