

## Running an Online Contest without Running Afoul of the Law

**INTERNET CONTESTS ARE INCREASINGLY POPULAR** tools for companies to attract customers to their Web sites, sell products or services, or obtain personal information to be used for marketing. Consider the following hypothetical online contest: The Rutter Hobbs & Davidoff Web Site Refer-a-Friend Promotion. In this promotion, participants will be entered in a random drawing for an iPod once for every referred friend who subscribes to the company's monthly legal e-newsletter. Online contests and promotions such as this are fraught with potential illegalities if the requisite precautions are not taken to ensure that the contest is structured properly. Companies sponsoring online contests must not only comply with the laws governing contests and sweepstakes in general but also address the many particular issues involved in marketing over the Internet.

The first concern when planning any sort of contest, promotion, or sweepstakes—whether conducted online or through traditional media—is to ensure that it does not constitute an illegal lottery. Lotteries may only be run by the 50 states, and non-state-operated lotteries are illegal under federal law and the laws of all 50 states. A lottery is defined as a contest or promotion that contains all three of the following elements: prize, chance, and consideration. In order to avoid conducting an illegal lottery, it is necessary to eliminate at least one of these three elements.

A prize is anything of value awarded to a winner of the contest. Since consumers likely would be uninterested in a contest that did not offer a prize, this element is difficult to eliminate. In the example contest, the prize is an iPod.

Consideration is something of value to the contest sponsor that the consumer provides as a prerequisite to participating in the contest. Consideration may be monetary (an entry fee or a purchase requirement) or nonmonetary (a significant amount of time or effort that the participant expends to the benefit of the sponsor). Common examples of nonmonetary consideration include filling out a lengthy registration form as a prerequisite to entering the contest or providing the sponsor with personal information. Requiring a nominal degree of effort has generally been deemed not to constitute consideration (e.g., telephoning a toll-free number, completing a short survey, or visiting a store).<sup>1</sup> In the example, getting friends to enroll on Rutter Hobbs & Davidoff's Web site may constitute consideration, depending on the length of the registration form and the type of information the friends must provide.

Fortunately, it is relatively easy to remove consideration from a promotion, and sponsors often do so to avoid operating an illegal lottery. The most common way to eliminate consideration is to provide an alternate method of entry, or AMOE. This is usually manifested with "no purchase required" language. In the example, an AMOE could allow consumers to enter the drawing without referring their friends to the Rutter Hobbs Web site. This could be accomplished by mailing in a postcard or calling a toll-free number.

In general, AMOE entrants must have equal chances of winning as the purchasing entrants. They must also have equal deadlines and

equal prizes. Additionally, the AMOE cannot itself rise to the level of consideration, and it must be clearly and conspicuously disclosed in all advertising materials for the contest. In short, the AMOE must not be seen as disadvantageous or burdensome with respect to the purchase entry method. For online contests, sponsors must be particularly careful to ensure that the AMOE provides the same opportunities to entrants as online entries. Thus games in which the first 100 people to respond win a prize could pose a problem, as the AMOE responders clearly would be at a disadvantage relative to Internet responders.

A question has arisen whether needing Internet access to enter an online contest constitutes consideration. Some state regulatory authorities previously answered this question in the affirmative, and contest sponsors had to provide mail-in methods of entry. However, this position has now been generally reversed. State regulatory authorities no longer consider the mere requirement of having Internet access as constituting consideration, for two reasons. First, the sponsor does not directly benefit from the consumer's payment of fees for Internet access. Moreover, it is unlikely that the consumer was induced to purchase Internet access for the purpose of participating in the sponsor's promotion. Thus, online contests that do not require any other consideration to enter generally do not require an AMOE. Requiring special software to be downloaded to the consumer's computer in order to participate in the contest could, however, rise to the level of consideration, and an AMOE should be provided.<sup>2</sup>

A common game of chance is a random drawing. Chance may be eliminated by awarding a prize to every entrant. In the example, chance could be eliminated by awarding an iPod to every person who gets at least one friend to register on Rutter Hobbs & Davidoff's Web site. Alternatively, a sponsor may eliminate chance by conducting a game of skill in which winners are selected on the basis of some sort of ability, knowledge, creativity, judgment, or expertise. This eliminates the element of chance, allowing a sponsor to impose an entry fee or other consideration without creating an illegal lottery. Skill contests can involve photography, essay writing, athletics, cooking, or mathematics. Skill contests must have objective criteria upon which entries are judged, and the judges must have sufficient qualifications to apply such criteria.<sup>3</sup>

### Complying with State Laws

Once a company is confident that its promotion does not constitute an illegal lottery, it must still comply with the laws and restrictions of each state in which the promotion is conducted, bearing in mind that Internet contests are accessible in all 50 states and therefore must comply with the laws of all 50 states.

Unfortunately, state laws vary significantly and impose different procedural requirements. There are, however, a number of rules that have general applicability across the 50 states and should be included

in the official rules of all contests. These include entry instructions, the sponsor's name and address, eligibility and geographical limitations, odds of winning, prize descriptions and their approximate retail value, contest duration and entry deadlines, how and when winners will be selected, limitation on the sponsor's liability, and a disclaimer for lost, late, or damaged entries. A few states also require publication of the winners' list<sup>4</sup> and awarding of all prizes,<sup>5</sup> so these elements should be included in nationwide promotions as well.

There are also several states that have special procedural requirements for certain types of contests. In Arizona, skill contests that require a purchase to enter must be registered with the state attorney general's office.<sup>6</sup> In Florida<sup>7</sup> and New York,<sup>8</sup> games of chance with prizes totaling over \$5,000 must be registered and a bond must be posted, and Rhode Island<sup>9</sup> requires registration of games of chance conducted through retail outlets with prizes in excess of \$500. For many sponsors, it is simpler to exclude residents of these states from participating in their contest rather than comply with these extra, somewhat burdensome procedural requirements; hence the commonly seen limitation in many contest rules, "void where prohibited," or more specifically, "void in Florida, New York, and Rhode Island."

It is important to note that Internet contests, which are technically accessible worldwide, must comply with the laws of not only the 50 U.S. states but also each country in which someone could access the promotion. The laws and regulations of contests and sweepstakes vary widely from country to country. For instance, certain countries (Belgium, Malaysia, Norway) prohibit sweepstakes altogether, while other countries (including France and Spain) require registration and payment of fees. Even Canada has laws that differ greatly from those of the United States, particularly in Quebec, where foreign language requirements apply.<sup>10</sup> International compliance would entail hiring local counsel in every country to provide an analysis of the proposed contest rules and confirmation that they do not violate particular local laws. This is not only prohibitively expensive but also too time-consuming to be a plausible option for most contest sponsors. Thus, U.S. sponsors of online contests are better off limiting participation to U.S. residents only, and perhaps a handful of select foreign countries in which they have checked the rules with local counsel. The key is to clearly and prominently disclose any geographic limitations to entry in the official rules and in other advertising materials.

### **Intellectual Property Issues**

Although all sponsors of contests and promotions must exercise caution not to infringe

upon the trademark, copyright, or patent rights of others when running their promotions, this is an issue of particular concern in the online arena. Promotions over the Internet generally are more high profile and involve greater exposure for the sponsor than more traditional media contests.

Contest sponsors must be careful about advertising prizes by using the brand name of the prize without consent from the trademark owner. Again relying on the example above, Rutter Hobbs & Davidoff could not name its contest the Rutter Hobbs & Davidoff iPod Giveaway. This would infringe upon Apple's trademark and suggest a false association. Apple would most likely have to be a cosponsor of the promotion before it would agree to such use of its trademark in a contest name.

Rutter Hobbs & Davidoff would, however, be able to identify the iPod by name as a prize in the official rules. Contest sponsors may even be able to use brand names in promotional materials for their contests, so long as the trademarked brand is used in a factual manner (i.e., to identify the prize in the contest) rather than in furtherance of promoting the contest. A good general rule of thumb is to identify the trademarked term in a sentence in which all the words are of the same font and prominence and avoid use of the trademark in the name of the promotion or in any other prominent way.

Similarly, contest sponsors may not use trademarked event names, such as sporting events, in their promotion names. For instance, a promotion titled the Rutter Hobbs & Davidoff Super Bowl Sweepstakes would infringe on the National Football League's trademark registration of "Super Bowl" because it suggests a false association between the contest sponsor, Rutter Hobbs & Davidoff, and the event organizer, the NFL.

Copyright laws protect original works of authorship fixed in a tangible medium of expression.<sup>11</sup> Thus, copyright protection may be extended to creative materials embodied in contests and promotions such as music, audiovisual works, animation, graphic designs, illustrations, works of art, or written text. While nobody can copyright the underlying idea or concept of a contest or promotion, someone's original expression of that contest may be copyrightable. In a 1995 case, the plaintiff ran a promotional radio contest, and the defendant subsequently ran a similar contest. The court found that the defendant had infringed the copyright in the printed brochure promoting the plaintiff's contest, even though the underlying radio contest itself was not protected by copyright.<sup>12</sup>

Finally, online contest sponsors should be aware of the growing number of business method patents being granted in connection

with online games, particularly in the context of instant-win technology.<sup>13</sup> Sponsors of online instant-win games should seek the advice of patent counsel to ensure that their game does not infringe upon a third party's patent.

### **Privacy**

Another area of law involved in online contests is privacy. The collection of personal information over the Internet implicates privacy laws. First, a hyperlink to the sponsor's privacy policy should appear on the online entry form and on any page where personally identifiable information is collected.<sup>14</sup>

In an effort to build e-mail databases, a common tool used by online contest sponsors is to require entrants to agree to accept future promotional spam as a condition to entering the contest. While, to date, no cases have been brought challenging this practice, Internet privacy concerns are on the rise, and regulatory scrutiny of this practice may soon occur. Similarly, the concept of viral marketing, in which contest entrants must provide the names and e-mail addresses of others in order to become eligible to enter (e.g., "Refer your friends by submitting their e-mail addresses, and be automatically entered into a drawing to win an iPod.") also may raise concerns under privacy and spam laws.

Another area of concern for game sponsors relating to privacy is COPPA, the Children's Online Privacy Protection Act.<sup>15</sup> This federal statute went into effect in April 2000 and addresses the collection of online personal information from children under the age of 13. The act requires a Web site operator to obtain verifiable parental consent before collecting personal information from children. Thus, a contest or sweepstakes that requires disclosure of entrants' names, addresses, e-mail addresses, phone numbers, and any other information that would allow someone to contact or identify a child, must either exclude children under 13 from participating or else comply with the procedures set forth in COPPA. These procedures include requiring a clear and prominent link to the Web operator's privacy policy, which must set forth the name and contact information of the entity collecting the child's information, the kinds of personal information collected and how it is collected (e.g., directly from the child, or passively through cookies), how the Web operator uses the information (e.g., for marketing back to the child or for notifying contest winners only), whether the operator shares the child's information with any third parties, and other required statements.

Before proceeding to collect, use, or disclose personal information from a child, an operator must obtain verifiable parental consent from the child's parent. This means an

operator must make reasonable efforts (taking into consideration available technology) to ensure that before personal information is collected from a child, a parent of the child receives notice of the operator's information practices and consents to those practices. Operators must use reasonable procedures to ensure they are dealing with the child's parent. The particular mechanisms required are based on a sliding scale, depending on the manner in which the child's information is to be used. If the Web site operator will be sharing the child's information with third parties, it must use more stringent verification of parental consent, such as a signed form sent by postal mail or facsimile, an accepted and verified credit card number, a call from a parent on a toll-free telephone number staffed by trained personnel, an e-mail message accompanied by a digital signature, or an e-mail message accompanied by a PIN or password obtained through one of these verification methods. If the child's information will only be used internally by the Web operator, then verifiable parental consent may be obtained using less stringent methods, such as e-mail from the parent plus sending either a confirmatory e-mail or confirmatory postal mail to the parent, or making a confirmatory telephone call to the parent.<sup>16</sup>

Because compliance with COPPA is fairly burdensome and requires several extra steps, many contest sponsors prefer simply to exclude children under 13 from participating in the contest, particularly in light of significant civil penalties that may be imposed for noncompliance. A recent occurrence in particular has caused Web operators, including online contest sponsors, to exercise extra caution with respect to children. On September 7, 2006, the Federal Trade Commission (FTC) slapped a social networking Web site, Xanga.com, with the largest-ever fine—\$1 million—in connection with alleged violations of COPPA.<sup>17</sup> In light of this, many online contest sponsors and other Web operators prefer not to undertake the risk of inadvertently violating COPPA and being slapped with a stiff fine. Unless the contest is geared specifically toward children, most online promotions limit eligibility to those 13 or over.

### Other Concerns

Any material on the Internet is subject to malfunctions, errors, and viruses, not to mention hackers who may attempt to take advantage of contest offers by, for instance, inundating the contest Web site with entries and thereby preventing others from accessing the site. Accordingly, online promotions should always include a clause that disclaims liability for fraud, viruses, or other events that compromise the integrity of the contest and reserves the right to terminate or modify the

contest in such a situation. Additionally, contest rules should limit entries to a particular number, such as one per day, per entrant.

The duration of the contest, and especially the deadline for entries, should be stated in terms of dates and precise times in a specific time zone.

Contest sponsors should ensure that the how-to-play instructions are clear and that any special technical requirements are set forth in the official rules. For instance, if an entrant's browser must be set to accept cookies in order to effectively participate in the promotion, this should be set forth in the rules. In cases in which the game is relatively complex, entrants should have to indicate their acceptance of the official rules by clicking an I Accept button before being permitted to enter.

Steering clear of illegal lotteries, complying with myriad state (and possibly international) requirements, and respecting intellectual property and privacy laws are only a sampling of the issues facing online contest sponsors. There are various additional state and federal laws that come into play when running certain types of contests, such as instant-win games, contests offered in retail outlets, and direct mail promotions. Thus, sponsors of online contests should obtain proper legal counsel to ensure that they keep

their promotions from running afoul of the law. ■

<sup>1</sup> See Linda A. Goldstein, *Online and On Land Sweepstakes Contests and Games* (Dec. 2003) (Promotion Marketing Association, 25th Annual Promotion Marketing Law Conference) (on file with author).

<sup>2</sup> See *id.*

<sup>3</sup> See *id.*

<sup>4</sup> Florida, Georgia, Maryland, Massachusetts, Minnesota, New York, Rhode Island, Tennessee, Texas, and Wisconsin.

<sup>5</sup> Arizona, California, Florida, Hawaii, Nebraska, and Tennessee.

<sup>6</sup> ARIZ. REV. STAT. §§13-3301 (1)(d)(III), 13-3311.

<sup>7</sup> FLA. STAT. ANN. §849.094.

<sup>8</sup> N.Y. GEN. BUS. §369-e.

<sup>9</sup> R.I. GEN. LAWS §§11-50-1 *et seq.* (2007).

<sup>10</sup> See Alan N. Sutin, *Online Promotions, Privacy and Spam* (Dec. 2003) (Promotion Marketing Association, 25th Annual Promotion Marketing Law Conference) (on file with author) [hereinafter Sutin].

<sup>11</sup> 17 U.S.C. §§101 *et seq.*

<sup>12</sup> *CMM Cable Rep., Inc. v. Ocean Coast Props., Inc.*, 888 F. Supp. 192 (D. Me. 1995).


<sup>13</sup> Linda A. Goldstein, *Conducting Innovative Advertising without Violating the Law, in How Corporate America Is Harnessing the Internet* (PLI Eighth Annual Internet Law Institute Course 2004).

<sup>14</sup> Sutin, *supra* note 10.

<sup>15</sup> 15 U.S.C. §§6501 *et seq.*

<sup>16</sup> Sutin, *supra* note 10.


<sup>17</sup> For the full text of the Xanga.com consent decree, see the FTC Web site at [http://www.ftc.gov/os/caselist/10623073/xangaconsentdecree\\_image.pdf](http://www.ftc.gov/os/caselist/10623073/xangaconsentdecree_image.pdf).




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