

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).¹ 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.²

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.³

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

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.¹⁶

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.¹⁷ 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. ■

¹ 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).

² See *id.*

³ See *id.*

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

⁵ Arizona, California, Florida, Hawaii, Nebraska, and Tennessee.

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

⁷ FLA. STAT. ANN. §849.094.

⁸ N.Y. GEN. BUS. §369-e.

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

¹⁰ 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].

¹¹ 17 U.S.C. §§101 *et seq.*

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


¹³ 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).

¹⁴ Sutin, *supra* note 10.

¹⁵ 15 U.S.C. §§6501 *et seq.*

¹⁶ Sutin, *supra* note 10.


¹⁷ 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.




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