

LET'S GET THIS PROMOTION STARTED

By Nancy Derwin-Weiss & Jesse Brody¹

In today's competitive marketplace, media and entertainment companies are relying heavily on "evolving (or new) media" to structure innovative and edgy promotions. The Internet and mobile platforms have become attractive venues for operating consumer sweepstakes, contests and giveaways. These platforms can provide a flexible and cost efficient way to create a great deal of buzz without the expense and long-term planning involved in creating and placing advertisements in traditional television, radio and print outlets. In-house marketing departments and advertising and public relations agencies are staffed with hip, web-and-mobile-savvy professionals who wish to execute highly elaborate evolving media promotions that often include a mix of user-generated content, text messaging, Twitter messaging, Facebook applications, blogging, viral marketing and other social networking elements. However, these same tech-savvy marketing professionals are often unaware of the complex legal overlay of the digital world and the potential significant financial repercussions for their company's failure to comply.

FOOTNOTES

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² See articles "Growing Promotional Use of Social Media in the Government's Crosshairs—The New FTC Guidelines" and "Proper Use of Social Media for Promotions" in this issue.

³ See article "CARU Cares, and So Should You" in this issue.

Evolving media promotions are wrought with potential legal landmines and each element of the campaign should be carefully vetted by competent marketing counsel. Federal and state authorities regulate and monitor sweepstakes and contests, and there has been considerable consumer litigation, including class action lawsuits, generated in this area. Numerous state laws govern sweepstakes, lotteries and games of chance. Additionally, evolving media promotions typically implicate several federal and state laws and regulations, including, the Communications Decency Act ("CDA"), Digital Millennium Copyright Act ("DMCA"), Telephone Consumer Protection Act ("TCPA"), the Controlling the Assault of Non-Solicited Pornography and Marketing Act ("CAN SPAM"), Children's Online Privacy Protection Act ("COPPA"), federal and state privacy and data security edicts, the Federal Trade Commission's ("FTC's") recently revised Guides Concerning the Use of Endorsements and Testimonials,² and compliance with self-regulatory standards of Children's Advertising Review Unit ("CARU")³ and the Mobile Marketing Association ("MMA"). Set forth below is a high-level overview of the major legal issues that commonly arise out of evolving media promotions.

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DON'T CREATE AN ILLEGAL LOTTERY

One must first understand the fundamental differences between a lottery, a sweepstakes and a contest to structure a legal promotion. A lottery has three key determinative elements: (i) prize; (ii) chance; and (iii) consideration (e.g., buy a lottery ticket for a random chance to win a cash jackpot). Lotteries are government run and prohibited outright in some states. Companies must be careful not to create a lottery as part of a legal promotion. Therefore, a company must remove one of the three elements of a lottery when executing a promotion.

In a sweepstakes, the prize and chance (random selection of the winner(s)) are present. Therefore, the element of consideration must be removed from the equation to structure a legal sweepstakes. Consideration is anything of value and can be found in various forms, including money, entrance via premium text messages, subscription fees, requirement that the entrant receive future non-sweepstakes marketing messaging, purchasing a product or engaging in activities that require a material expenditure of time or effort. Where consideration is present in a sweepstakes, there must be a clearly disclosed alternative "free" means of entering the sweepstakes ("AMOE"), which is typically accomplished via a mail-in entry. The entries received via AMOE must be available to everyone and be treated the same as the entries received through the online or text entry process—the so called "equal dignity" and "universally available" requirements. Thus, where consideration is present and if there are opportunities to gain multiple sweepstakes entries online, then the offline AMOE must provide for the same number of entries available online.

In certain instances, an AMOE may not be enough to make the promotion legal where entrants furnish consideration to enter the promotion and receive nothing of value in return. In the case of a sweepstakes involving products, the product purchaser pays to enter the sweepstakes and receives the product. The AMOE entrant can enter the same sweepstakes without consideration. However, in several recent cases involving text message entry, entrants paid a premium to enter the sweepstakes via text message. Even though an AMOE was provided, by means of a free online entry, these text sweepstakes are the subject of multiple class action lawsuits under the theory that no value was received by the entrant who was charged for the text to enter the sweepstakes and that no legitimate product was promoted by the sweepstakes. See, e.g., *Bentley v. NBC Universal et al.*, No. 07:03647 (C.D.

Cal. filed June 5, 2007); and *Bentley v. Trump et al.*, No. 07-A-01007-4 (Super. Ct. of Gwinnett County, Georgia filed February 2, 2007). In other words, people paid the premium purely to play a game of chance. To avoid this "pay to play" issue, some text message marketers have offered entrants a "ring tone" or "wallpaper," that is otherwise for sale online at the same or greater price than the SMS charge so the entrant receives something of value in exchange for their premium text charge.

In a contest, where prize and consideration are present, the element of chance is replaced with selection of the winner on the basis of skill or intellect. Thus, promotions must include clear criteria for determination of the contest winner. Contests should not include random drawings to break a tie or they run the risk of converting the contest into an illegal lottery if consideration is present, which is frequently the case with contests. Also, states take different approaches with respect to the chance element. Thus, counsel should be consulted when an element of chance may arguably exist in a contest, such as with public voting to determine winners.

Before engaging in a sweepstakes or contest, it is important to remember that the two are sometimes regulated very differently by some states. The determination of whether a promotion is a contest or a sweepstakes affects certain compliance issues such as: (i) required advertising disclosures; (ii) posting of odds; (iii) contents of the official rules; (iv) posting lists of winners; (v) record keeping requirements; and (vi) registration and bonding requirements. Generally, sweepstakes are more heavily regulated than contests and have more mandatory legal requirements that must be met. State laws vary, and thus a company preparing to conduct a contest or sweepstakes must comply with the most stringent states' laws, or exclude participants that reside in states that have requirements that are either too cumbersome or that conflict with the intended operation of its promotion.

OFFICIAL RULES, PRIZE ACCEPTANCE DOCUMENTS AND VENDOR AND CO-SPONSOR AGREEMENTS

Most states require that sponsors must post or otherwise make available official rules for a promotion. Many states have specific requirements, including that certain material terms and disclosures be highlighted upfront. Official rules

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establish the contract with the entrants and must identify all material terms and conditions of the promotion, particularly regarding eligibility and prize. Sponsors can also benefit by including protective provisions in the official rules. Official rules should include, in part, a description of the entrance process, eligibility (e.g., residency and age restrictions), prize description, the ability to substitute prizes (a particular concern here where an event or celebrity visit are at issue), prize conditions and restrictions, odds of winning, winner selection process, discretion of sponsor, winner notification process, tax responsibility, governing law, jurisdiction, dispute resolution, indemnification, grants of rights, releases of liability and limitation on damages and warranties. Contest official rules should include the submission requirements and judging criteria requirements, such as creativity, originality and clarity of expression, and the weight given to each. A video submission contest's official rules should also include file format and size requirements, content guidelines (e.g., proper and positive use of the product), a transfer or license to the intellectual property rights in the submissions, representations and warranties relating to the submissions, and exclusions (e.g., no third-party artwork, trademarks, infringing content, music (unless original, or provided by sponsor). For online registration forms, entrants should also be required to check a box in which they affirmatively acknowledge that they have read and agree to the official rules.

Best practices dictate that sweepstakes and contest winners sign prize-acceptance documentation confirming the official rules and the grants, obligations, waivers and releases set forth therein. The rules and disclosure notices should make clear that execution of such an agreement and release will be required to receive the prize. If a prize awarded in the promotion involves the winner being permitted to bring a guest (e.g., travel companion for a trip/event prize), companies should also consider obtaining guest releases from the winner's invited guest and/or specify that the guest must be a parent if the winner is a child).

Where a fulfillment house, promotional partner, ad agency or other vendor who operates a promotion on behalf of the sponsor will furnish the official rules or otherwise perform any of the marketing activities for the promotion, the sponsors should confirm the promotion has undergone legal review and not merely assume such, and obtain an indemnity agreement from that party. Additionally, the sponsor should own or license all of the materials created by the vendor developing the promotion and should obtain warranties and

indemnifications of non-infringement and legal compliance. If a co-sponsor will be involved with the promotion, the relationship with the co-sponsor should also be clarified and documented, and such documentation should address each party's rights to the submissions and registration data and the parties' respective responsibilities and obligations regarding the operation and marketing of the promotion, particularly with regard to the legal compliance issues discussed above. Depending on the relative responsibilities of the parties, the party that is actually operating the promotion should be required to indemnify the other co-sponsor for legal responsibility in case the promotion goes south.

PROMOTING THE PROMOTION

Print advertisements and point of sale materials must include certain minimum disclosures including: "NO PURCHASE NECESSARY TO ENTER OR WIN. A PURCHASE WILL NOT INCREASE YOUR CHANCES OF WINNING"; start and end dates (and time zones where online, text, or e-mail is involved), AMOE instructions, material eligibility, including age and residency, odds, approximate retail value of prize(s), name and address of sponsor, notations of "void where prohibited" and "subject to official rules" and where to find the rules (e.g., web site URL). Sponsors must include abbreviated rules in all advertising, regardless of whether the promotion is just being promoted on its own web site or in another medium, such as a banner ad or through an e-mail marketing campaign. These abbreviated rules should also disclose any unique conditions, such as if the prize will expire if not used by a certain date. Where there are space constraints, such as banner advertisements, it is common practice to simply disclose "No Purchase Necessary. Void Where Prohibited. Subject to Official Rules." and link directly to the official rules or a page that contains a prominent link to the official rules. Several states require that the abbreviated rules include certain verbiage in capital letters or certain font size.

CAN SPAM governs the sending of commercial e-mails, which requires, in part, that the e-mail identifies the sender, the subject line accurately reflect the contents, the sender provides the recipient the ability to opt-out of receiving future commercial e-mails from the sender, and that senders maintain and scrub against a "suppression list" or prior opt-outs. Before sending e-mails to third party databases, companies should conduct diligence to determine where the e-mails on the list were obtained and if they are available for use for their promotion. New York and Florida have each imposed due diligence re-

quirements on the use of acquired marketing e-mail lists. The TCPA, telecom carrier rules and the MMA Guidelines govern the sending of text messages and e-mails to mobile domain addresses. Sponsors must satisfy certain notice and advance consent requirements before sending a commercial text message to an entrant in a text to win promotion.

OTHER DETAILS OFTEN OVERLOOKED

The failure to timely register and bond a sweepstakes has tripped up many a promoter that, upon discovering the requirement on the eve of the launch, must reduce the value of the prizes, delay the sweepstakes' launch or exclude residents of certain states. Where the prize value in a sweepstakes (but not a contest) exceeds \$5,000 and the sweepstakes is open to entrants in New York and/or Florida, both states require that the sponsor must register the sweepstakes with each respective state and either place the amount of money equal to the retail value of all prizes in a trust or obtain a bond. Florida requires that the sponsor file the bond and registration materials, including a copy of the official rules, at least seven calendar days prior to marketing the sweepstakes. The state of New York requires thirty days' lead time. If the sponsor does not already have a relationship with a sweepstakes bonding company, time must be allocated to complete that application process. Rhode Island has a registration requirement where a sweepstakes is being promoted in a retail establishment located in its state. Arizona requires sponsors to register a contest with the Attorney General's office if there is a purchase or payment as a condition of entry. To protect consumers, many states require the awarding of all prizes, prohibit the requiring of payments to receive a prize and mandate posting of winners' lists. In addition, in order to release the sponsor's bond, both Florida and New York require the sponsor to file a winners' list with those states after the sweepstakes closes.

Where the promotion is open to residents of other countries, local legal counsel should review the promotion to ensure compliance with the country's laws. Canada, for instance, requires that a sweepstakes winner correctly answer a skill-testing question before being awarded a prize. Quebec requires registration and bonding and that the official rules and advertising be translated into French.

USER-GENERATED CONTENT PROMOTIONS

User-generated content promotions present significant legal concerns for companies, advertisers and web site operators. While marketers love user-generated content, users developing their videos may violate the rights of others in the creation of the videos or include negative content about the promoter's brand, product or service. To the extent user-generated content will be published on the company's web site, it may be possible to take advantage of certain protections afforded web operators under the CDA and DMCA from some, but not all, types of content-related infringement and tort claims. While it is possible to block lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable videos, a company runs the risk of losing certain protections where it directs or participates in the content creation or exercises editorial control over the content of the videos. The web site posting the user-generated content will also need to have proper DMCA notice and take-down policies and practices and be otherwise compliant with the DMCA.

For a video submission contest, companies must legally clear the winning video before distributing it to third-party sites or broadcasting it as a TV commercial. Also, it is important to obtain all necessary rights from the entrant, all others who contributed to the creation of the video, and all owners of any existing materials (such as music, graphics or video clips) included in the video. The official rules and instructions for video contests can be set up in a way that facilitates submission of entries that can be cleared for such use. Prize acceptance documents can be used to document the granting of necessary rights. Companies should not forget that use of winning videos as commercials will be held to the same standard of deceptive and unfair advertising as professionally produced ads are held.

PRIVACY AND KIDS

Privacy is another area of law that is intertwined in evolving media promotions. The collection of personal information over the Internet and via wireless devices implicates various privacy laws and regulations. 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. In an effort to build marketing databases, sponsors often require entrants to agree to accept future promotional

marketing messages as a condition to entering the promotion. 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.

Regulation of children's marketing through COPPA and CARU is another area of concern for promotion sponsors. COPPA addresses the collection of online personal information from children under the age of thirteen. CARU governs advertising towards children age twelve and under. CARU works closely with the FTC in its enforcement of COPPA. COPPA requires a web site operator to obtain verifiable parental consent before collecting personal information from a child under the age of thirteen. 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 thirteen 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 only for notifying winners and prize fulfillment), whether the operator shares the child's information with any third parties, and other required statements. With limited exceptions, before proceeding to collect, use or disclose personal information from a child, an operator must obtain verifiable consent from the child's parent.

Compliance with COPPA is fairly burdensome and requires several extra steps. Thus, many sponsors simply exclude children under thirteen from participating in promotions, particularly in light of significant civil penalties that may be imposed for noncompliance. In December 2008, the FTC fined Sony BMG \$1 million for violating COPPA, citing instances where the collection of children's personal information occurred on sweepstakes registration forms. In addition, CARU has specific requirements that apply to advertising geared towards children. In light of this, many online sponsors of promotions prefer not to undertake the risk of inadvertently violating COPPA and CARU and being slapped with a stiff fine.

Depending upon the age requirements to participate, there may be additional special issues to consider, especially where a promotion is open to minors. Because the official rules are a contract with the entrant, the sponsor should ensure that they are legally binding. Generally, a person must be of the age of majority in their state of residence to enter into a binding contract. In most states, the age of majority is 18, except for a few states where the age of majority is 19 or 21. Where the promotion is open to minors, the parent or legal guardian should be required to agree to the rules and prize acceptance documents for the minor to be eligible to win.

INVOLVING MARKETING COUNSEL

Launching a multi-faceted evolving media promotion is an effective way to connect and reach the coveted youth market. While these evolving media tools of the promotions and marketing trade are frequently a cost-efficient way to create a great deal of buzz, they are hardly trouble-free and a myriad of traps await the unwary promoter. As described above, these promotional campaigns require complex regulatory compliance on a federal and state-by-state basis, and significant legal exposure awaits the sloppy and uninformed promoter. As recently as October 9th, 2009, a class-action federal lawsuit was filed against Coors Brewing Company by individuals who were allegedly issued invalid codes for an ongoing sweepstakes. The lawsuit alleges Coors violated various state consumer protection laws by failing to disclose to consumers that some codes were invalid and by misrepresenting to consumers that they could participate in the sweepstakes by purchasing a product and obtaining an instant win code. Involving experienced legal counsel early in the planning process, developing a good set of forms and standard procedures and clearing each promotion, and engaging competent agencies to execute the promotion will help your company operate successful promotions while minimizing the potential risk of liability.

ATTORNEY PROFILE

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Jesse Brody is an associate in the Intellectual Property Department of the Los Angeles office of Wildman Harrold. His practice focuses on legal issues impacting entertainment, technology, advertising and privacy. His experience includes advising companies in matters that involve traditional television and film, interactive games and new media matters such as privacy policies, terms of use, user-generated content, social networks, downloadable software and commercial text messages. He represents a broad range of clients across many industries, including entertainment, new media, technology and consumer products. Jesse advises clients on all aspects of legal compliance for national and local sweepstakes, skill contests, trade, charitable, reality television and other promotions. He also counsels clients on the legal aspects of social networking and user-generated content web sites (including Communications Decency Act advice), viral marketing campaigns and marketing to wireless devices.

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Recognized in 2009 by The Hollywood Reporter in its "Power 100" list, which recognizes the 100 most influential entertainment lawyers in America, **Nancy Derwin-Weiss** works with a diverse range of industries, including motion picture, television, fashion, consumer products, food, social networking, and theatre companies. As the way in which companies compete to reach their audience continues to evolve, Nancy's experience in new media allows her clients to push the envelope in their marketing and advertising initiatives in a field where every campaign competes to be more innovative and cutting-edge than the one before. With innovation, comes challenges, and Nancy has built a knowledge base around the legal issues inherent in new and evolving media campaigns. Nancy works closely with her clients to bring their promotional campaigns from concept to execution, both online and offline, managing the legal aspects of each transaction as they arise. She advises her clients on sweepstakes, contests, user generated content programs, social networking, viral marketing, twitter campaigns, iphone applications and other wireless marketing initiatives.

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CARU CARES,
AND SO SHOULD YOU
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