

Avoiding Viral Fashion Promotion Malfunctions

Social media promotions can be a great way to market a product and gain market recognition. However, a promotion by Reese Witherspoon and her fashion label Draper James highlights what could go wrong after a seemingly well-intentioned “giveaway” goes astray.

By **Andrew Lustigman and Morgan Spina**

Sweepstakes, contests, and promotions have long been utilized by fashion brands as part of an overall marketing strategy. The pervasiveness of social media marketing has led to an increased usage of online social networking promotions. It is within this context that many companies have again turned to social media to publicly respond to the coronavirus pandemic, utilizing social media and online promotions as a vehicle to simultaneously promote their brand and contribute in some form to coronavirus relief efforts.

Many companies have successfully achieved this dual goal. Others, however, have fallen short and are enduring significant consequences. This is particularly true given the sensitivities associated with the pandemic, and concerns that a business is taking unfair advantage of a situation.

Draper James

A promotion by Reese Witherspoon and her fashion label



Draper James highlights what could go wrong after a seemingly well-intentioned “giveaway” went astray. Draper James, in an attempt to express appreciation for teachers during the COVID-19 pandemic, launched a promotion in which the brand would gift teachers with a dress from its collection. On April 2, 2020, Draper James announced the promotion on its Instagram account stating, “Dear Teachers: We want to say thank you. During quarantine, we see you working harder than

ever to educate our children. To show our gratitude, Draper James would like to give teachers a free dress. To apply, complete the form at the link in bio before this Sunday, April 5th, 11:59 PM ET. (Offer valid while supplies last—winners will be notified on Tuesday, April 7th.)” The promotion went viral and many teachers tried to claim their free dresses. As it turns out, Draper James had only 250 dresses available to give to teachers as part of this promotion.

Once it realized the heightened demand for the free dresses (allegedly almost one million people signed up), Draper James attempted to clarify the parameters of the promotion. In doing so, it notified entrants that the giveaway was a sweepstakes, not a mass giveaway, and posted the actual number of available dresses on its Instagram Stories, promising entrants a 30% discount coupon.

Potentially eligible teachers, however, had already submitted personal information under the guise that they would be receiving a free dress, so this clarification was too late. Calls to “Boycott Draper James and Reese Witherspoon” (and worse) soon spread throughout the social media platforms, turning an attempt to generate goodwill into a public relations nightmare.

Draper James and Reese Witherspoon’s problems have not been limited to their public image. A class action lawsuit has been filed against Draper James and Reese Witherspoon in her individual capacity alleging that the faulty promotion amounted to a false and deceptive sweepstakes or lottery. The lawsuit was removed from the Los Angeles County Superior Court to the Central District of California and the first amended complaint was filed on July 17, 2020.

The plaintiffs, three teachers who participated in the giveaway, allege that 904,342 individual entries were received by Draper James, each of which may be a member of the class. The first amended complaint asserts that the April 2, 2020 Instagram post was an “offer of specific consideration that was open for a limited

period of time” and that in order to accept the offer, teachers were required to provide their contact information and “sensitive education employee identification information, including pictures of their school IDs, the grade level and subjects they teach as well as their school name and state,” constituting consideration.

Therefore Draper James’ failure to hold up its end of the bargain by providing a dress to each eligible participant converted the contractual offer into an illegal sweepstakes or lottery, and the defendants breached their contract with the participants.

The causes of action include breach of contract, violation of the California Consumers Legal Remedies Act, violation of the California Business and Professions Code, and violation of New York General Business Law. In addition to these enumerated causes of action, the plaintiffs raise certain privacy-related concerns, including how the data submitted by participants is currently being treated and how it will be treated in the future. The plaintiffs allege that based on the “vague and rote statements contained in the Draper James privacy policy” it is unlikely that the personal information was being “maintained in a way that would secure it from protection and unauthorized access.”

Privacy is a hot button issue for a lot of companies at the moment, and the privacy-related assertions raised by the plaintiffs in the Draper James case can be used to highlight certain aspects of privacy compliance that may be relevant in the social media sweepstakes context. For example, the CCPA dictates that compliance is required for companies

collecting data from over 50,000 California residents.

The collection of this degree of personal data may be an unintentional consequence of a hugely successful, viral sweepstakes, resulting in a situation whereby a previously excepted company is suddenly required to comply with the CCPA. Moreover, companies should ensure that they have a robust and accurate privacy policy in place, particularly prior to engaging in a sweepstakes or contest where they will be collecting personal information from participants. It is important for companies to be clear on how they are going to use and store this information.

Notably, when Draper James launched the promotion, it failed to include sweepstakes rules, not even an abbreviated set of rules, which are required under a number of state laws. In addition to a compliance gap, a properly structured set of rules could have avoided a number of the issues that were raised in the class action lawsuit. The rules would have included the number of dresses available, covered the privacy-related issues, and otherwise would have included a dispute resolution provision.

Moreover, when launching a promotion in the COVID era, brands should also take into account the fact that governmental restrictions may greatly impact entry and potential prizes. For example, instore related promotions or those that require interaction with other people will be a challenge for the foreseeable future. The same is true for prizing. Instead of a dress, what if the prize was tickets to fashion week, or a photo shoot? Promotions need to take

into consideration the impossibility of awarding a prize, particularly ones that are event related. A robust set of rules can help address these potential problems.

Other Notable Cases

Of course, ill-fated social media promotions are not just a thing of coronavirus times. Rather, several other companies have faced similar issues when utilizing social media promotions. This prior cases help to shape a “best practices” model that should be used by companies today.

In May 2017, Sunny Co. Clothing posted a promotion on its Instagram page displaying a model wearing Sunny Co. Clothing’s “Pamela” red full piece bathing suit, and the caption encouraged Instagram users to repost the photo within 24 hours. The post went on to state that every person that reposted the image and tagged Sunny Co. Clothing would “receive a FREE Pamela Sunny Suit.” The promotion was limited to a 24-hour period, and conditioned only in that participants would be responsible for paying the shipping and handling costs.

It did not take too long for the promotion to go viral, and within a period of hours, the photo had been reposted several thousand times. Like Draper James, when Sunny Co. likely realized that it would be unable to fulfill such a large quantity of orders for free swimsuits, it uploaded a subsequent post attempting to retroactively impose additional conditions on the promotion. The second post stipulated that there were to be no exchanges or returns of promotional swimsuits, that shipping will likely be delayed, taking approximately 3 to 6 weeks,

and that Sunny Co. Clothing would reserve “the right to cap the promotion if deemed necessary.”

Sunny Co. Clothing found itself in the undesirable position of not being able to fulfill its promotional obligations as it simply did not have enough swimsuits to meet the demand. When running a promotion, online or otherwise, it is important for companies to ensure that they are prepared to meet their obligations, regardless of whether a small number of people enter promotion or, similar to Sunny Co. Clothing, the promotion goes viral. Interestingly, the company has been seemingly undeterred by this 2017 kerfuffle and has subsequently run similar promotions.

When discussing social media promotions, it is important to note the role that the Federal Trade Commission (FTC) has played providing relevant guidance as to the appropriate disclosures. The FTC Endorsement Guides state that material connections between a brand and an endorser must be disclosed. As demonstrated by the FTC’s action against Cole Haan, this disclosure requirement is applicable in the context of an online contest.

In this case, the FTC alleged that Cole Haan’s “Wandering Sole” contest, which called on Pinterest users to create boards with images of five Cole Haan shoes for a chance to win a \$1,000 shopping spree, was not properly executed. Cole Haan told participants to use the hashtag #WanderingSole with their photos, but did not instruct them to make it clear that they posted the pins as part of a contest.

The FTC held that the pins constituted an endorsement of Cole Haan and that the chance of

winning a prize by pinning those images was a material connection that needed to be disclosed. The FTC also noted that it did not believe that the #WanderingSole hashtag adequately communicated the material connection. Instead, hashtags such as #Contest, #Sweepstakes, or #Sponsored would suffice.

Conclusion

The tribulations of Draper James and Reese Witherspoon should serve as a stark reminder to brands that social media marketing and promotions can quickly go awry. Brands promoting sweepstakes and contests, particularly during the pandemic, need to take into account the fact that so many things can be beyond their control. Before launching any promotional marketing campaign, it is critical to set forth how the promotion will run and how data will be handled. Equally important is anticipating what could potentially go wrong, and constructing appropriate alternatives and dispute resolution processes to account for these potential snafus.

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