

Legal Considerations For Promotions Involving User Generated Content



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As UGC promotions gain popularity, attorneys who advise companies that sponsor such promotions need to be aware of the many new and diverse legal challenges that must be considered and evaluated.

NEW PROMOTIONS are constantly incorporating the latest technology and trends to help capture public attention and generate good will for a company's products. The trend of the moment is to seek user generated content ("UGC")—videos created and uploaded by consumers that somehow incorporate your product. UGC promotions allow marketers to get consumers intimately involved with a brand or a promotion. For example, the Doritos "Super Bowl—You Make It. We Air It" contest had entrants creating and submitting home-made Doritos commercials, and the winning and second place ads were shown during Superbowl XLI. The success of the Doritos promotion has led to an explosion in the use of UGC. However, creating a UGC promotion presents many new legal challenges, including intellectual property issues, rights of publicity, and advertising claims; issues that often go beyond a typical sweepstakes or contest promotion. This article addresses some of the key considerations involved in structuring UGC promotions and the accompanying rules.

THE ADVENT OF UGC PROMOTIONS •

Not too long ago, the idea of uploading and distributing video content over the Internet was considered a unique and novel idea. But vastly increased broadband penetration has led to an explosion of video-sharing sites. UGC now dominates such popular sites as YouTube, MySpace, and Facebook, in the form of videos, songs, and photos created by nonprofessionals and shared with the world online. Many companies are now looking to capitalize on the UGC buzz by incorporating this phenomenon into new promotions.

How They Work

A typical UGC promotion requires entrants to submit a video of themselves showing why they enjoy a sponsor's product. The entrant-submitted videos are usually posted online for public viewing, critiquing, and voting as to which video is the "best," whatever that may mean. The individual whose video is watched the most or receives the highest score at the end of the promotion period is then declared the prize winner. Because people who enter and compete are more vested in their entries and the promotion as a whole, marketers are increasingly incorporating UGC promotions in advertising campaigns to generate not only buzz but brand loyalty and recognition.

In October 2007, the Promotion Marketing Association ("PMA") announced the results of its first survey on perceptions of UGC. The results demonstrate the importance and anticipated growth of these types of promotions:

- 70 percent of respondents have used UGC as part of an integrated campaign;
- 82 percent are considering incorporating UGC in a future campaign;
- "Target engagement" was cited as the single biggest factor (40 percent) that drives the decision to incorporate UGC elements, while 21 percent believe UGC provides insight into brand perception;
- More than half (53 percent) felt that UGC has "some" impact on consumer purchase decisions;
- 59 percent feel that their use of UGC will increase over the next six months, and less than four percent expect it to decrease.

At least for the foreseeable future, UGC promotions promise to be an increasing part of the promotional marketing landscape.

UNIQUE CONSIDERATIONS PRESENTED BY UGC PROMOTIONS •

As promotions embrace the concept of UGC, new and unique legal challenges arise. Having a promotion center around UGC and giving the public the power to decide the winner can create a highly publicized and successful promotion, but it also creates new legal concerns. We address some of the considerations attorneys need to evaluate when presented with a UGC promotion. A clear and binding set of official rules that contestants must agree to is the key legal product that must be developed for the promotion. Once the official rules are published and entries are accepted, the rules should not be changed. The discussion below articulates important items to consider in developing the contest's rules.

What Is The Purpose Of The UGC Promotion?

To properly protect your client's rights and develop appropriate promotion rules, it is critical to first discuss the purpose of the promotion with your client. Questions to consider are:

- What are the goals of the promotion?
- Is the promotion designed to generate excitement and involvement with the brand or a Web site? Does the client want to make further use of the UGC after the contest, such as incorporating it into a new advertisement or ad campaign?
- Is the promotion designed to generate testimonials supporting the client's product or criticism of a competitor's product?

- Where and when are the entries going to be displayed?
- What prizes will be awarded?
- Who will judge the entries and how?
- Is your market one in which target entrants are likely to participate?

Clarification of the overall intent from the outset, will help determine what rights are needed and the level of due diligence that will be required to structure the promotion and the corresponding rules.

What Rights Are Needed?

Assuming the client intends to have the entries transmitted and displayed, intellectual property and privacy rights will need to be cleared. If the intent is to also utilize entries (particularly winning entries) on television or in other forms of advertising, then clearance for those media channels must also be obtained. Does your client need all rights associated with any entry or are the entries needed only for the promotional period? What does your client intend to do with non-winning entries? The rules will need to clearly set forth the potential use of the materials, and be designed to obtain clearance of the images in the promotion entry form so that an entry can be used as intended without having to go back to the entrant.

Statutory Safe Harbor Protections

Sponsors have exposure for copyright infringement whenever entrants use third-party materials without obtaining the necessary rights. However, the Digital Millennium Copyright Act (“DMCA”) establishes potential safe harbors to protect Web site owners from monetary liability and certain types of injunctive relief for hosting infringing materials. These provisions—set forth at 17 U.S.C. §512(c) and (d)—are potentially available for Internet postings if the operator:

- Appoints a designated agent with the United States Copyright Office to receive infringement notices;

- Does not have any knowledge that the material is infringing and infringing activity is not otherwise apparent;
- Acts expeditiously to remove or disable access to the material; and
- Does not receive a financial benefit directly attributable to the infringing activity.

Note that DMCA safe harbor protections are limited to Internet postings, and would not be applicable to the use of the materials in other media channels, such as television. However, for the Internet, it potentially provides strong protections.

Section 230(c) of the Communications Decency Act of 1996, 47 U.S.C. §230(c) (“CDA”), protects computer service providers and users from claims that published materials violate laws concerning obscenity, lewdness, harassment, or are otherwise objectionable. The limits of CDA liability protections are unclear for Lanham Act false advertising claims, and it will not protect against copyright or trademark infringement claims.

UGC promotions that encourage criticism of a competitor may result in a Lanham Act action for false advertising. For example, Subway sued its competitor Quiznos, in part, over a UGC promotion “Quiznos v. Subway TV Ad Challenge,” in which Quiznos sought out contestants to submit video entries comparing a Subway sandwich to the Quiznos Prime Rib Cheesesteak sandwich. In its complaint, Subway alleged that “[t]he advertising statements encouraged and promoted by the Defendants are false and misleading,” in violation of the Lanham Act. In April, 2007 the defendants lost their motion to dismiss based on the invocation of CDA immunity as an affirmative defense. The case is slated for trial.

How Will Intellectual Property And Privacy Rights Be Cleared?

In considering the acceptance of the entry and the potential further use of the image in campaigns, significant thought needs to be given to third-party

clearance issues. For example, the people who appear in any submission must provide written releases permitting their images to be broadcast in the relevant medium. Therefore, promotion rules must provide that the entrant has secured the rights from each person appearing in the submission. Further confirmation from third parties may be needed for other uses—such as in a commercial. Similarly, the right to use any third-party images, sound, trademark, and other intellectual property rights must be cleared. As a result, many UGC contests ban the use of any third-party intellectual property rights other than original content. A developing trend is to provide entrants with a library of pre-cleared materials of sounds, images, and the like for entrants to utilize in creating their entry.

The Promotion's Basics

A UGC promotion will likely be one in which prizes are awarded to winning entries. In awarding prizes to winning entries, the promotion must be properly structured to avoid being considered an illegal lottery. All games of chance (commonly referred to as a sweepstakes) are governed by state and federal statutes that prohibit unlawful lotteries.

Most states follow the “standard lottery rule” in which a game is a lottery if it has consideration, chance, and a prize. To avoid creating an illegal lottery, a promoter must remove one of these three elements (generally either chance or consideration because most promoters will want to award a prize).

The term “consideration” remains a somewhat hard-to-define term in promotion law. Consideration can be either monetary or non-monetary. Monetary consideration involves the expenditure of something of tangible value to enter or play (such as purchasing a product or the payment of an entry fee). Non-monetary consideration involves the expenditure of substantial time or effort that will somehow benefit the sponsor in some material

way (such as watching a sales presentation and then being required to complete a detailed survey).

If a contest sponsor decides that consideration is going to be generally required, then it must offer an alternative method to enter for free (“AMOE”). Although an AMOE may be appropriate in a non-voting type promotion, given the very nature of the requirements to enter a UGC promotion, it may be infeasible to structure a promotion with a valid AMOE.

Is The Promotion A Skill Contest Or A Sweepstakes?

As the requirement to enter a promotion may entail the expenditure of consideration, such as buying the sponsor's product to portray it in the entry video or paying an entry fee, promoters may try to structure the promotion as being a contest—a game of skill—in which the component of chance is removed. Generally speaking, a skill contest is one in which a winner is chosen by evaluating the entry under specific judging criteria disclosed in advance to the entrant. When the winner is chosen on skill, some form of consideration may be present (monetary or non-monetary) because the chance element has been eliminated or minimized. In other words, unlike sweepstakes, skill contests may legally require contestants to buy something or make a payment to enter (although the risk of a promotion being challenged increases greatly by requiring an entry fee).

It is critical to determine whether the degree of chance in a contest would transform a game of skill into a game of chance. The traditional definition of “chance” is that the winner is selected by a random process, for example a random drawing or pre-selection. Some states require that a skill contest only use a bona fide judge to determine the winner. Typically, a judge would be someone who possesses the ability to objectively evaluate entries and critique them based on predetermined criteria. In a state applying this doctrine, a promotion in

which the winner is selected based on popular vote would likely be considered to have the chance element present. Undertaking such a determination can be difficult and imprecise, as there are many factors that must be considered and each state has its own test. Factors to consider in determining the degree of skill vs. chance involved are as follows:

- What degree of skill is required to make the submission?
- Is the person eligible to enter the promotion likely to have the degree of skill necessary to win?
- Is what the entrant is required to submit likely to demonstrate a particular skill?
- Are there distinct voting criteria?
- Is the public qualified to apply defined criteria?
- How many rounds of voting exist and is public voting considered in each round?
- Does the public vote on objective criteria in which they are qualified to opine—such as most entertaining, most informative, most humorous?
- Is a qualified judge’s vote considered? If so, how much weight does it have?
- Is there a limit on the number of votes a person can make? Unrestricted voting is more likely to be considered chance.

In determining whether the promotion is a skill contest or a chance promotion, states generally employ different tests, namely the “dominant factor” doctrine, the “material element” doctrine, the “any chance” doctrine, and the “pure chance” doctrine:

- In states that follow the dominant factor doctrine (a majority), a promotion is considered a game of chance when chance “dominates” the distribution of prizes, even though the exercise of skill or judgment is present to some extent;
- A more difficult standard is the material element doctrine. Under this doctrine, a contest will be considered a game of chance if the

chance element is present to a “material” degree. In these states, a more stringent analysis as to the amount of chance present must be undertaken;

- In states that follow the any chance doctrine, a game will be considered a game of chance if there is any element of chance present whatsoever. Thus, in analyzing a promotion, one must carefully analyze all aspects to determine if there is any degree of chance involved;
- The final approach, which is rarely followed, is the pure chance doctrine. This test is most favorable to promotion sponsors because a promotion must be entirely based on chance to be an illegal lottery. The exercise of any skill by a participant removes the promotion from the definition of a lottery. The more cautious approach (but not always practical) is to eliminate any obligation to purchase the sponsor’s product or to portray the product in an entry.

Non-Monetary Consideration

Sweepstakes that utilize UGC present unique non-monetary consideration challenges. Standard promotions always run the risk of being either illegal or subject to additional laws if an entry fee is required to enter. When the only method of entry is via the Internet, the law seems clear that having Internet access will not be treated as an element of consideration. Indeed, the recently-enacted Unlawful Internet Gambling Enforcement Act of 2006 expressly recognizes that Internet access fees do not constitute consideration. *See* 31 U.S.C. §5362.

But what about situations in which an entrant is required to expend substantial time or effort on his or her promotion entry and the sponsor benefits from those efforts in some way? We are unaware of any recent legal challenges to any UGC promotion on the basis of non-monetary consideration and there are very few clear lines as to how much non-monetary consideration constitutes too much. Nevertheless, a sponsor should explore creating an

alternative method of entry that would allow for participation that avoids non-monetary consideration as a condition of entry.

What Are The Limitations On Submissions?

The contest rules should describe the creative assignment at hand—the call to action regarding what needs to be submitted. The rules should also clearly advise entrants what is required to enter the contest, i.e., the entry criteria. For example, are entrants required to portray the product in the submission or simply a product category (“describe best why you like to eat green eggs and ham in 30 seconds or less”)? If the answer is yes, as discussed above, is the promotion properly structured as a skill contest? The rules should detail the maximum/minimum length of a submission and any language or formatting restrictions. Video length is especially important when the promotion sponsor states it is responsible for judging the entries and is obligated to review each one. The sponsor’s IT department should be consulted to ensure that there is enough bandwidth for the anticipated response. Define the minimum age of any persons in the submission—i.e., are there minors whose parents/guardians need to provide consent, restrictions on obscenity, the use of third-party appearances or rights? Are entries limited to amateurs, and if so, is that term sufficiently described? Finally, all entry criteria should be enforced consistently, particularly once entries are accepted.

Maintain A Privacy Policy

Given that personally identifiable information will likely be collected from entrants (and probably from voters as well), the rules should provide for acceptance of the Web site’s privacy policy. A link to the privacy policy should be provided, along with an express recognition that the person agrees to be bound by it (and of course the Official Rules). The

privacy policy should accurately describe the potential collection and use of the information.

What About Claims That Might Appear In The Submission?

Advertisers must have adequate substantiation for both express and implied claims made in any advertisement. Testimonials must reflect a typical user’s experience or contain an adequate disclosure that the results are not typical, and that individual results will vary.

The Federal Trade Commission (“FTC”)—the federal authority primarily empowered with enforcing prohibitions on false or deceptive advertising—takes the position that marketers are responsible for claims which appear in the UGC entries and that claims made in a UGC promotion must reflect a typical user’s experiences, or be adequately disclaimed. The FTC expects marketers to be responsible for policing such claims, as if the marketer were making the claim itself.

Monitoring Compliance

Some UGC promotions allow entrants to upload and post their submissions without pre-clearance. Contests that do not have a pre-clearance process must effectively monitor entries to make sure that third parties’ rights are not infringed, that the sponsor is not at risk for making false or deceptive claims or unfairly insulting the competition, or that an entry by a minor, or other type of ineligible entry, does not appear. A sponsor should have a monitor reviewing entries throughout the submission process. Once entries that violate the rules are identified, the sponsor should promptly remove the entry and disqualify the entrant. It is therefore critical that the rules provide the sponsor with the unfettered right to remove and disqualify any entry for any reason at any time. Not removing entries that violate contest rules may cause legal problems, as well as a public relations disaster. Sponsors should consider including a statement in the rules such

as, “Entries that are lewd, obscene, pornographic, disparaging of the Sponsor or otherwise contain objectionable material may be disqualified in the Sponsor’s sole and unfettered discretion.”

Who Will Judge?

The rules should specify from the outset what judging criteria will be used, and whether winners will be chosen based on public or professional judging, or some combination of both. As discussed above, depending on who is doing the judging (such as the public) a skill contest could be inadvertently transformed into a game of chance.

Sponsors may use a leader board or standings during the course of a promotion to further excite entrants and voters. If a leader board is going to be used, the official rules should provide that even if a contestant is listed as a winner (or leader) at the end of the promotion period, he or she has not necessarily won a prize. All entrants are subject to verification and must meet all eligibility requirements before an entrant is confirmed and declared the winner.

How The States Handle Registration Of UGC Promotions

Regulatory authorities in Florida and New York require games of chance to be registered and bonded if the total prize value of the promotion is greater than \$5,000. Rhode Island requires registration for retail (including retailers with an online presence) games of chance promotions over \$500. Given that a chance promotion could trigger these registration requirements, it is important to evaluate how those authorities view these types of promotions.

The Florida Department of Agriculture and Consumer Services appears to be following the

dominant factor doctrine discussed above, by informally stating that it is up to the operator or sponsor of the promotion to determine if chance outweighs the skill element. But Florida has not issued a formal opinion on this issue, so sponsors need to exercise care in making this determination with the more conservative sponsors registering and bonding when in doubt. The New York Department of State has taken the position with registrations that the game of chance law does not apply to promotions that require video submissions. Indeed, the New York Department of State has actually rejected such game of chance registrations if a video must be submitted in order to enter. With this statement, New York does not appear to be concerned with other aspects of the promotion such as video content, winner selection, and criteria used. Cautious marketers may nevertheless wish to attempt to register, even if it means that the registration will be rejected.

CONCLUSION • Anticipating problems is one of the most critical jobs attorneys must deal with in structuring promotions. Courts have enforced reasonable terms designed to protect against anticipated errors or problems. Such provisions—known as a “Kraft Clause,” which arose out of a seeding error in which Kraft accidentally placed too many supposedly “rare” game pieces into entries, thereby creating more winners than planned—are designed to deal with winner selection should an error or unanticipated problem develop. The rules should deal with technical failures, hacks, transmission failures, and so on, and provide the solution in case these problems arise, such as determining winners from eligible entries received before contest termination.

PRACTICE CHECKLIST FOR Legal Considerations For Promotions Involving User Generated Content

- Have the rights to use the materials uploaded in the desired medium been obtained?
- Have entrants been told exactly what needs to be submitted and in what form?
- How and when will promotional and publicity releases be obtained?
- How will third-party rights clearance be undertaken?
- Has an agent been registered with the Copyright Office for DMCA notification purposes?
- Who will judge and using what criteria? How many votes does a voter get?
- Do the rules address each aspect of the promotion and contingencies should something unexpectedly go wrong?
- Is there a viable no-purchase alternative method of entry?
- Is there an ongoing monitoring process in place?
- Can an entry be disqualified at any time?
- Have entrants agreed to be legally bound by the terms and conditions and privacy policy?
- Has the promotion been registered and bonded where required?
- Is there a monetary prize alternative should the winning entry be inappropriate or unworkable for use as a promotion?

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