

Online Sweepstakes, Improperly Done, Lead to Penalties, Bad Publicity

By Maria Recalde

The effective use of online promotional sweepstakes can drive traffic to your business' Web site and help you attract new customers.

While they can be an effective marketing tool, sweepstakes are heavily regulated in the U.S. and abroad. Failure to comply with applicable laws can result in civil and/or criminal penalties, not to mention bad publicity.

Because the applicable laws vary from state to state and country to country, a specific review of the current laws of each state or foreign country from which you choose to allow entries should be conducted by your attorney before you launch.

This article addresses some of the legal issues to consider in connection with setting up and administering online sweepstakes.

Avoid an Illegal Lottery. Federal and state laws prohibit lotteries. A lottery is defined as a promotion that involves the following elements: 1) awarding a prize, 2) on the basis of chance, 3) to a person who has given "consideration" — something of value — to enter the promotion.

To avoid being considered illegal, sponsors need to eliminate one of these elements from the promotion. Because a promotion almost always involves a prize, a sponsor must either eliminate the chance or consideration element in order for a promotion to be legal.

Since a sweepstakes is a promotion in which a prize is awarded on the basis of chance rather than skill, it is the remaining element of consideration that must be eliminated.

Exactly what constitutes consideration may vary from state to state and the definition has become more uncertain with online promotions. A requirement that participants make a payment or purchase in order to enter, or



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an entry procedure that requires the expenditure of considerable time or effort by participants, generally will be deemed consideration.

A purchase requirement includes not only any direct payments, but also the payment of indirect fees, long-distance telephone charges, Internet access fees and substantial efforts such as required store visits, completion of long survey questionnaires or extensive navigation of a Web site.

Mailing an entry form, calling a toll-free number or completing a brief survey generally do not constitute a "purchase."

To avoid any purchase-related issues, an alternative means of entry, such as entry by mail, should be

offered. If the sweepstakes is a true game of chance, the odds of winning should be the same whether the participant enters online or by mail. The odds of winning should be stated.

In addition, the fact that no purchase of a product or service is necessary should be set forth clearly and conspicuously at the beginning of the sweepstakes' rules.

The rules constitute a contract between the sponsor and each participant. The sweepstakes' rules generally will be interpreted as a contract between the sponsor (whose name and address should be provided in the rules) and each participant. They should be thorough and should include, at a minimum, the start and end dates, eligibility requirements (age, residency, non-affiliate status) and how the sweepstakes will be conducted and the winner selected. They should be clearly posted and easily accessible so that no participant could ever argue that he or she entered without notice of the rules.

Consider making residents of certain states ineligible to avoid registration and/or bonding requirements. If your promotion meets certain criteria, you may be required to register and post a bond in certain states.

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New York and Florida, for example, require sponsors to register any sweepstakes where the total value of all prizes exceeds \$5,000 (retail value). In such cases, these states also require the sponsor to obtain a trust account or post a bond in an amount equal to the total value of the offered prizes.

Rhode Island requires registration of sweepstakes where the total value of all prizes exceeds \$500.

If registration is required, sponsors also may need to comply with designated waiting periods before the promotion commences, as well as with certain ongoing notification requirements.

Have your attorney check for other state-specific requirements. You may then decide to exclude residents of certain states from participating in order to avoid any registration and/or bonding-related problems.

Consider Making Non-U.S. Residents Ineligible. Online sweepstakes' sponsors must also be wary of foreign laws governing sweepstakes, as users in virtually every country in the world may have access to your Web site. In many foreign countries, sweepstakes are either prohibited or involve complex registration and approval requirements. To avoid the consequences of violating these laws, sponsors should restrict participation to residents of the U.S. and those countries in which local laws have been reviewed and with which the sweepstakes is in compliance. Participation should be restricted both in the sweepstakes' rules and by filtering the addresses of participants.

Void Where Prohibited. In the U.S., every state establishes its own set of rules for sweepstakes. While every effort should be made to ensure your sweepstakes complies with applicable federal and state laws, the inclusion of a "void where prohibited" clause provides additional protection against inadvertently running an illegal sweepstakes.

Identify the Prizes Before Sweepstakes Commences. Prizes (and their retail values) for each promotion should be clearly identified prior to the applicable commencement date, along with a disclaimer that prizes may or may not be substituted for their cash value or for products of equal or lesser value.

Use of Personal Information. If you plan to sell or make available to others the information you gathered in connection with the sweepstakes (e.g., names, addresses, etc.), you need to clearly indicate this fact in the rules and offer to let participants opt out.

Maintain Thorough Records. Several states have record-keeping requirements and a contract claim could be brought generally for up to six years following the termination of the sweepstakes. You should, therefore, retain thorough records with respect to each participant, each winner and each alternate winner (assuming you select alternate winners in case the winner turns out to be ineligible), as well as with respect to the rules and conduct of the sweepstakes.

Avoid Trademark or Copyright Infringement. The name of the sweepstakes should be searched and cleared by your legal counsel to ensure that it does not infringe on the trademark rights of third parties. To the extent a sweepstakes refers to a third party's trade name or trademark (in describing a prize, for example), such use should be factual and accurate, and a false sense of association or sponsorship between the sponsor and the third party should be avoided. If a sweepstakes includes copyrightable graphics or images of another, such copyright issues must be resolved prior to posting such graphics or images on the Internet.

Comply With COPPA. Sponsors that open their online sweepstakes to children under the age of 13 also must comply with the provisions of the Children's Online Privacy Protection Act, a federal law that restricts the collection of children's personal identifiable information online.

The domestic and foreign laws governing sweepstakes are vast, complex and constantly changing. You should retain legal counsel knowledgeable in this area of the law before launching an online sweepstakes.

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