

PITFALLS, ILLEGALITIES, AND POTENTIAL TRAPS OF RADIO AND NEW MEDIA CONTESTS AND PROMOTIONS

What Attorneys Should Know When Counseling Their Clients

By Todd Redden and Thomas N. Doty



Fast Facts:

Jurisdiction by the Federal Communications Commission (FCC) and the Federal Trade Commission (FTC) is not mutually exclusive. It is important to note that just because the FCC has jurisdiction, it doesn't mean the FTC does not, and vice versa.

Telecommunications rules and regulations fall under Title 47 of the Code of Federal Regulations. AM, FM, and TV broadcast stations fall under Part 73 of Title 47.

The FTC has governing power through Section 5 of the FTC Act, which was amended in 1938. The FTC requires the announcing of material rules as a way to prevent unfair or deceptive acts or practices.

As companies fight for brand recognition in an attempt to draw traffic to their retail locations and websites, more and more businesses turn to contests to get the job done. Whether it is a radio contest to give away a pair of concert tickets, an online contest to see the taping of a show, a text-to-win contest for a retail gift card, or an onsite contest for a car, the object is to draw attention to a product, brand, or company. When people hear about a contest, they usually listen for the prize and details on how to win. For attorneys advising businesses on contests and promotions, there is much more involved than how to enter or win the prize. Most potential contestants have heard or tried to read the legalese associated with a giveaway. One would think the words appearing in small text or quickly flashed on screen or voiced are unimportant since they are barely comprehensible, but that is far from the truth. Those words are known as the material terms of a contest. They are the template mandated by statute and caselaw for how a contest will ultimately be administered.

For better insight into how contest rules and material terms affect a business, one must first consider what constitutes a contest, the governing laws, what the governing body requires for proper material terms disclosure, the ramifications of not disclosing those terms (or not properly informing consumers of the material terms), and, finally, how to avoid potential pitfalls when advising clients who have expressed an interest in conducting a contest.

The first concern when planning any contest or promotion is ensuring it does not constitute an illegal lottery.¹ A lottery is defined as a promotion or contest containing all the following elements: prize, chance, and consideration.² To avoid conducting an illegal lottery, it is necessary to eliminate at least one of these three elements. What good is a contest if it does not offer a prize? This is the most difficult element to eliminate and is rarely done since almost all rewards, goods, or services could be interpreted as prizes. When creating a contest, most promoters have an idea

regarding whether they will require a skill (e.g., submit a photo, write a jingle, solve a puzzle, answer a trivia question, etc.) or rely on chance (e.g., have a random drawing) to determine the winner. If a promoter goes with the skill option to determine a winner, the element of chance is eliminated. Another way to get around the chance element is to give a prize to each entrant. Since this is not a practical way of conducting a contest, a promoter may look to eliminate the final element of an illegal lottery—consideration. The consideration element is commonly removed to get out of an illegal lottery situation. Consideration is anything of value given to the contest sponsor that the consumer provides as a prerequisite for participating in the contest. Consideration can be easily eliminated in most states when a contest promoter provides an alternate means of entry, which generally means a free method of entry.

Once it is determined that a client has a contest and not an illegal lottery, of next concern are the laws or regulations governing the contest or associated with the promotion.

Governing Laws

The introduction of the Internet further complicates compliance with the several bodies of governing law. A contest broadcast on a local radio station in southeast Michigan can be received not only by its target listening market but extended to other states such as Ohio and Indiana, and internationally to Canada.

Once a company is confident that its promotion does not constitute an illegal lottery, the contest must still comply with the laws and restrictions of each state in which it is conducted, bearing in mind that Internet contests are accessible nationwide and therefore must comply with the laws of all 50 states.

Rules with general applicability across the U.S. should be integrated in the official rules of all contests. These rules include:

- Entry instructions
- The sponsor's name and address
- Eligibility and geographical limitations
- Odds of winning, prize descriptions (and their approximate retail value), contest duration, and entry deadlines
- How and when winners will be selected
- Limitation on the sponsor's liability
- A disclaimer for lost, late, or damaged entries

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A few states also require publication of the winners' list³ and awarding of all prizes,⁴ so these elements should also be included in promotions that could have a nationwide audience.

As easily as a Michigan radio broadcast could reach out internationally, online contests are technically accessible worldwide and, as such, must comply with the laws of not only the 50 states but also of each country in which someone could access the promotion. The laws and regulations of contests and sweepstakes vary widely from country to country. For instance, certain countries prohibit sweepstakes altogether⁵ while other countries require registration and payment of fees.⁶ Canada's laws differ greatly from those of the United States, particularly in Quebec, where foreign language requirements apply.⁷

International compliance entails hiring local counsel in every country to provide an analysis of the proposed contest rules and confirmation that they do not violate particular local laws. This is prohibitively expensive and too time consuming to be a plausible option for most contest sponsors. As such, U.S. sponsors of online contests are better off limiting participation to U.S. residents and perhaps a handful of select foreign countries in which they have checked the rules with local counsel. The key is to prominently disclose in the official rules and other advertising materials any geographic limitations to entry.

Federal Trade Commission vs. Federal Communications Commission

In many enforcement actions, the key question focuses on the determination of who is administering the contest. Is the client, brand holder, or business running its own contest or did it contract that responsibility to an advertising entity or broadcaster?

Although not exclusive, if the entity administering the contest is a licensed broadcaster, it would be governed by Federal Communications Commission (FCC) regulations. Although the FCC governs contests run by its license holders, this requirement can be further complicated by broad statutes prohibiting "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice."⁸

In most common situations when a contest is run by a non-FCC license holder, the Federal Trade Commission (FTC) has governing



power, as does the state in which the contest is being conducted. The FTC is an independent agency established to enforce the Federal Trade Commission Act (the Act). Its mission is protecting consumers from fraudulent, deceptive, and unfair business practices.⁹ Section 5 of the Act prohibits “unfair methods of competition” and was amended to prohibit “unfair or deceptive acts or practices.”¹⁰ In its role of protecting consumers from misleading advertising, the FTC requires the announcement of the material terms of a contest. The FTC rules require the disclosure of contest elements through the federal Deceptive Mail Prevention and Enforcement Act (DMPE Act), which was enacted for the purposes of “establish[ing] strong consumer protections to prevent a number of types of deceptive mailings.”¹¹ The FTC regulations set out in the DMPE Act govern contests administered by non-FCC license holders.

The FTC may bring enforcement actions and impose civil penalties for violations of its rules. The FTC retains authority under Section 5 of the Act to examine information practices for deception and unfairness, including those in use before the rule’s effective date. In interpreting Section 5 of the Act, the FTC has determined that a representation, omission, or practice is deceptive if it is likely to (1) mislead consumers and (2) affect consumers’ behavior or decisions about the product or service.¹²

The FCC regulates interstate and international communications by radio, television, wire, satellite, and cable in all 50 states, the District of Columbia, and U.S. territories. It was established by the Communications Act of 1934, and operates as an independent U.S. government agency overseen by Congress.

The FCC defines the term “contest” under Title 47 of the Code of Federal Regulations as “a scheme in which a prize is offered or awarded, based upon chance, diligence, knowledge or skill, to members of the public.”¹³ A radio or television station holding an FCC license “that broadcasts or advertises information” concerning a contest it conducts must “fully and accurately disclose the material terms of the contest, and shall conduct the contest substantially as announced or advertised.”¹⁴ As public trustees, broadcast licensees have the “affirmative obligation to prevent the broadcast of false, misleading or deceptive contest announcements”¹⁵ and conduct their contests substantially as announced.¹⁶ Contest descriptions must not be “false, misleading or deceptive with respect to any material term.”¹⁷

Material terms, “which define the operation of the contest and which affect participation therein,” may vary depending on the contest, but generally include factors that define the operation of the contest and affect participation such as how to enter or participate, eligibility restrictions, entry deadline dates, when prizes can be won, the nature and value of the prizes, time and means of selection of the winner(s), and tie-breaking procedures.¹⁸ Additionally, “the obligation to disclose the material terms arises at the time the audience is first told how to enter or participate and continues thereafter.”¹⁹

Thus, if a contest is being conducted by an FCC license holder, the material rules need to be disclosed, provided the contest does not fall within one of four exceptions: (1) the contest is not broadcast to the general public or to a substantial segment of the general public, (2) the contest is one in which the general public



is not requested or permitted to participate, (3) it involves the commercial advertisement of a nonlicensee-conducted contest, or (4) the contest is conducted by a nonbroadcast division of the licensee or by a nonbroadcast company related to the licensee.

Disclosure of material terms must be by announcements broadcast on the station; nonbroadcast disclosures of material terms can be made to supplement, but not substitute for, broadcast announcements.²⁰ Importantly, posting contest rules on a station’s website does not satisfy Section 73.1216’s requirement that a licensee broadcast the material terms of a contest it conducts.²¹

Finally, a contest’s rules must be disclosed using the same method as the standard promotion. So if a contest is conducted solely at a retail location, the material terms must be disclosed only on the point-of-entry materials (entry forms, posters, entry box, etc.). If a contest is promoted using radio or television spots, the material terms for the contest must also be disclosed using radio or television spots.²²

The FCC and FTC in Action

An example best illustrates the differences in the FCC and FTC rules for contests. The West Coast Broadcast Company (WCBC) has a client that would like to bring brand awareness to its new vehicle, the RD2. As a way of doing so, the client purchases an advertising package from WCBC. As part of the package, WCBC agrees to run an online contest to give away a new RD2 with on-air promotion of the contest. Entrants are required to submit a jingle for the RD2 on WCBC’s website. After all the entries are received, visitors to the WCBC website can vote on the jingle they like best. The person who submits the jingle receiving the highest number of votes wins the RD2. To promote the contest, WCBC runs promos on-air guiding its listeners to the WCBC website to enter. The official rules are stated on the website, but no material rules are stated on-air.

In this instance, WCBC, as an FCC license holder, would be in violation of the FCC rules requiring disclosure of material terms since it did not disclose the terms of the contest on-air as required by Section 73.1216. Although the contest was based online, the fact that it was promoted on-air meant WCBC had to disclose the material terms of the contest on-air. If the contest had no

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on-air promotion and was strictly advertised online along with the online entry method, there would not have been an FCC material terms violation.

Ramifications of Not Disclosing Material Facts

As stated earlier, the FCC and the FTC provide the primary legal requirements for governing contests. On July 25, 2008, the FCC received a complaint alleging that Clear Channel Communications, the ultimate parent company of the licensees of commercial radio stations KOST-FM, KHHT-FM, KBIG-FM, KYSR-FM, KIIS-FM, and KFI-AM in Los Angeles²³ failed to conduct its Chevy contest "in accordance with its advertised terms and the FCC's rules."²⁴ The complainant alleged that Clear Channel conducted a contest over its stations in which listeners were invited to prepare and submit video commercials for Chevrolet in an effort to win the prize of an automobile.²⁵ Additionally, it was alleged that the contest was rigged because the prize was awarded to a friend or family member of an employee of the licensee and the winning video was submitted after the contest submission deadline.²⁶

The FCC found Clear Channel willfully violated Section 73.1216 of the FCC's rules by failing to "fully and accurately disclose the material terms of the contest."²⁷ Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.²⁸ If a promoter or broadcaster fails to conduct a contest substantially as announced or advertised more than one time, it can be viewed as apparently willful and a repeated violation of Section 73.1216.²⁹

Clear Channel asserted that the contest was conducted "on the Station websites" and implied it was not subject to the FCC rule's requirements, or that, alternatively, its method of disclosure was otherwise mitigating or exculpatory.

The FCC had on previous occasions found a licensee liable under Section 73.1216 when the licensee promoted its contest through broadcast even though the contest itself was conducted principally through its website.³⁰ The FCC stated that licensees cannot avail themselves of alternative nonbroadcast announcements to satisfy the requirement that they accurately announce a contest's material terms.³¹ The FCC's rules clearly provide that

"[t]he material terms should be disclosed periodically by announcements broadcast on the station conducting the contest."³² Finally, the rules provide that while disclosure by nonbroadcast means (such as on a website) can be considered in determining whether adequate disclosure has been made, any nonbroadcast disclosures must be "[i]n addition to the required broadcast announcements" and cannot substitute for them.³³

Under the Act, the FCC may assess a forfeiture for violations that are merely repeated and not willful.³⁴ The Act defines a violation as "repeated" if it was committed or omitted more than once or lasts more than one day.³⁵ The FCC found Clear Channel liable for a monetary forfeiture of \$22,000.

Nondisclosure of Material Terms

As a rule of thumb, if the general public would be under the impression that it is the client's contest, it probably is. Some elements in determining this include who is drafting the rules, whether the rules list the client as a sponsor, who is receiving the entries, and who is drawing a winner. Regarding entries, counsel must consider whether they are being sent to the FCC license holder or the client. If entries are being collected online, whose website is being used—the FCC license holder's or the client's? If entries are made on-air, is the client being mentioned as a sponsor or administrator of the contest?

Other elements to take into account involve state laws such as illegal raffles and consideration. Also, there are international issues for contests that reach outside the United States and governing bodies that involve minors. Contest houses can provide more information to help clients with contests. FCC license holders usually have a refined template for contests, including material terms, and legal firms are available to assist clients with contest elements.

Issues of Preemption, Intellectual Property, and Privacy

Preemption of state law, although possibly an easier solution, was explicitly rejected in favor of a limited, nonpreempting federal regulatory regime.³⁶ Contest sponsors must be cautious when advertising the brand name of a prize without consent from the trademark owner. Any association with a brand name would infringe on the owner's trademark and suggest a false association. A brand owner would likely need to cosponsor the promotion before it would agree to such use of its trademark in a contest name.

Another concern in online contests is privacy. The collection of personal information over the Internet implicates privacy laws. A hyperlink to the sponsor's privacy policy should appear on the online entry form and any page on which personally identifiable information is collected.³⁷ If an entrant's browser must be set to accept "cookies" to effectively participate in the promotion, this should be explained in the rules. In cases in which the game is relatively complex, entrants should be required to indicate acceptance of the official rules by clicking an "I Accept" button before being permitted to enter.

Conclusion

The complex and varying requirements attorneys must evaluate when developing or advising a client's promotion are beyond the scope of this article. Many states follow the federal standards, including the assessment of economic value of entering the contest, and have viewed that participation as consideration. Michigan courts have held consideration to exist in the mere act of a customer visiting the sponsoring business. Other governmental enforcement entities could include state attorneys general, the Department of Justice, and the U.S. Postal Service. With this many elements of review, the promoter must begin to comply with the applicable laws discussed. Therefore, a company looking for guidance in creating a nationwide-compliant contest should be aware of applicable federal statutes as a starting point and certainly not a comprehensive statement of all promotional game-related compliance duties nationwide. ■



Todd Redden, sole partner of The Redden Law Firm, PLC, concentrates in sports and entertainment, corporate/business, and real estate law. His legal and marketing knowledge allows him to counsel entertainment clients from project concept to completion and assist with their business and real estate issues. He is also the marketing manager for WXYT-FM and a member of the

SBM Arts, Communications, Entertainment and Sports Section, currently serving as secretary.



Thomas N. Doty received an LLM in intellectual property from the Franklin Pierce Law Center and concentrates his practice on international trade issues related to copyright and digital rights management. Licensed in Michigan and California, he consults on technical and legal strategies relating to digital transmissions and digital rights issues. He is currently chair-elect of the SBM Arts, Commu-

nications, Entertainment and Sports Section.

The views and statements presented in this article are those of the authors and not CBS.

FOOTNOTES

- This article is distinctively different from a 2010 *Bar Journal* article on sweepstakes promotions, as it does not focus on whether a sweepstakes is a lottery versus a lawful promotion and what the author noted as "a basic overview of promotion law." See Karp, *Navigating the law of interactive promotions*, 89 Mich B J 25 (October 2010), available at <<http://www.michbar.org/journal/pdf/pdf4article1747.pdf>>. All websites cited in this article were accessed August 12, 2012.
- Federal Communications Commission, *Broadcasting Contests, Lotteries and Solicitation of Funds* <<http://transition.fcc.gov/cgb/consumerfacts/contests.pdf>>.
- Florida, Georgia, Maryland, Massachusetts, Minnesota, New York, Rhode Island, Tennessee, Texas, and Wisconsin.
- Arizona, California, Florida, Hawaii, Nebraska, and Tennessee.
- Belgium, Malaysia, and Norway.
- France and Spain.
- See Alan N. Sutin, *Online Promotions, Privacy and Spam*, Remarks at the Promotion Marketing Association's 25th Annual Promotion Marketing Law Conference (December 2003).
- 18 USC 1343.
- 16 CFR § 0.1; see 15 USC 41 *et seq.*
- 15 USC 45(a)(1).
- S Rep No 106-102, pt 1 (1999).
- See Federal Trade Commission, *FTC Policy Statement on Deception*, available at <<http://www.ftc.gov/bcp/policystmt/ad-decept.htm>>.
- 47 CFR § 73.1216.
- Id.*
- See *In re Application of WMJX, Inc.*, 85 FCC 2d 251, 269 (1981) (holding that proof of actual deception is not necessary to find violations of contest rules, and that the licensee, as a public trustee, has an affirmative obligation to prevent the broadcast of false, misleading, or deceptive contest announcements); *In the Matter of Amendment of Part 73 of the Commission's Rules Relating to Licensee-Conducted Contests*, 60 FCC 2d 1072 (1976).
- See *In the Matter of Headliner Radio, Inc.*, 8 FCC Rcd 2962 (1993) (finding that the airing of a misleading advertisement concerning a licensee's contest violated the FCC contest rules because the contest was not then conducted "substantially as announced or advertised").
- 47 CFR § 73.1216.
- Id.* at Note 1(b).
- Id.* at Note 2.
- See *id.* ("material terms should be disclosed periodically by announcements broadcast on the station conducting the contest").
- See, e.g., *In the Matter of AK Media Group*, 15 FCC Rcd 7541, 7543 (2000); *In the Matter of Service Broadcasting Group, LLC*, 24 FCC Rcd 8494, 8498 (2009).
- See generally *In the Matter of Clear Channel Broadcasting Licenses, Inc.*, 15 FCC Rcd 2734, 2735 (2000) (finding a contest rule violation for failure to broadcast a contest's material terms and holding that posting rules at the station's website, standing alone, does not satisfy the rule's requirements).
- Stations KOST-FM, KHHT-FM, KBIG-FM, and KYSR-FM are licensed to AMFM Broadcasting Licenses, LLC; Station KIIS-FM is licensed to Citicasters Licenses, Inc.; and Station KFI-AM is licensed to Capstar TX LLC. At the time of the complaint, the licensee of KFI-AM was Capstar TX Limited Partnership. On December 18, 2009, the FCC approved the assignment of Station KFI-AM's license from Capstar TX Limited Partnership to Capstar TX LLC (File No. BALH-20091202AIC), which was consummated on December 31, 2009. Also at the time of the complaint, the licensee of KIIS-FM was Citicasters Licenses, L.P. On December 9, 2008, the FCC approved the assignment of Station KIIS-FM's license from Citicasters Licenses, L.P. to Citicasters Licenses, Inc. (File No. BAL-20081201DGA), which was consummated on December 31, 2008.
- In the Matter of Clear Channel Communications, Inc.*, 27 FCC Rcd 343, 344 (2012).
- Id.*
- Id.*
- Id.* at 345.
- 47 USC 312(f)(1).
- See 47 CFR § 73.1216.
- See *In the Matter of AMFM Broadcasting Licenses, LLC*, 24 FCC Rcd 1529, 1532 (2009) (rejecting Clear Channel's argument that the contest in that case was conducted solely via the station's website when on-air announcements were also made).
- See *AK Media Group*, n 21 *supra* (finding a contest rule violation for failure to broadcast a contest's material terms and holding that posting rules at the station and on a website do not suffice to satisfy the rule); *In the Matter of Clear Channel Broadcasting Licenses, Inc.*, n 22 *supra*.
- 47 CFR § 73.1216, Note 2.
- Id.*
- See, e.g., *In the Matter of Callias Cablevision, Inc.*, 16 FCC Rcd 1359, 1362 (2001) (issuing a Notice of Apparent Liability for, inter alia, a cable television operator's repeated signal leakage).
- Id.*
- "Nothing in the provisions of this title (including the amendments made by this title) or in the regulations promulgated under such provisions shall be construed to preempt any provision of State or local law that imposes more restrictive requirements, regulations, damages, costs, or penalties." PL 106-168, § 109, 113 Stat 1806.
- See Sutin, n 7 *supra*.