



Navigating the Law of Interactive Promotions

By Gabriel Karp

Incentive-based, interactive marketing. Sounds like a mouthful of nothing. But it's a billion dollar industry. Marketers want to build direct relationships with consumers. They want consumers to raise their hands and say, "You can market to me," spend time engaging with their brand, and buy their products and services.

That's what millions of consumers do every day in exchange for something in return, like the chance to win a prize, compete in a contest, or accumulate points in a rewards program (think frequent-flyer mileage). Consumers love these programs because they get free stuff, and marketers love them because they allow them to collect valid, relevant data on consumers that they can use for future sales efforts.

Rewards programs, sweepstakes, online contests, and other incentive-based, interactive marketing campaigns are thought of as big-budget items. But the rapidly evolving Internet and mobile¹ channels have made the interactive promotions industry more accessible to both marketers and consumers. Now small- and medium-size businesses are getting in on the action, and it's only the beginning as we race to keep up with emerging technologies. And guess what? Those small- and medium-size businesses entering into the interactive realm are going to need lawyers, lots of them.

This article is a basic overview of promotion law. Sweepstakes, instant win games, contests, and loyalty programs are regulated primarily at the state level. Since consumers can access an online promotion from just about anywhere, counsel for the promotion sponsor needs to ensure that the promotion complies with each state's laws. While state statutory schemes differ, they are all designed to protect consumers and prohibit lotteries. Only the federal and state governments can conduct lotteries—an extremely profitable enterprise—and those governments have a vested interest in prohibiting private industry from tapping into that income stream.

Legal Promotions Must Avoid at Least One Element of a Lottery

A lottery is generally defined as a promotion in which prizes are awarded on the basis of chance to individuals who are re-

quired to pay consideration to enter. Thus, a lottery consists of three elements:

- (1) **Prize:** Anything of value offered to participants in a promotion.
- (2) **Chance:** Prize winners are determined primarily at random.
- (3) **Consideration:** The payment of anything of value for the opportunity to participate in a promotion. "A cent or a pepper corn, in legal estimation, would constitute a valuable consideration."² Consideration can be monetary or nonmonetary:
 - **Monetary consideration:** An entry fee, product purchase, paid membership, etc.
 - **Nonmonetary consideration:** The expenditure of substantial time or effort or disclosure of highly personal, sensitive information. However, approximately 33 states have statutes or caselaw stating that nonmonetary consideration is not deemed to be consideration for purposes of lottery laws.

Take One Out

To operate a lawful promotion, remove at least one of these three elements.³ The term "sweepstakes" generically describes a lottery without the requirement of consideration. Any free game of chance in which prizes are randomly awarded is a sweepstakes. The typical online sweepstakes is a promotion in which consumers complete an entry form on a website and winners are determined through a random drawing. Sweepstakes can also take other forms, such as an online instant win game, in which consumers instantly find out whether they've won a prize as soon as they register at a website.

The key to running a lawful sweepstakes is to avoid the consideration requirement. While a product purchase (or other consideration) can be included in a sweepstakes, it cannot be required. That's why many states require that ads supporting a

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sweepstakes include statements like: “No Purchase Necessary. A Purchase Will Not Increase Your Chances of Winning.” If the primary method of entry in a sweepstakes involves consideration, sponsors must also provide a free way to enter—an alternate method of entry (AMOE). For example, if the primary method of entry is to purchase a beverage, visit a website to register, and enter a bottle-cap code to verify the purchase, sponsors can provide an alternate online entry form or an online code request form or invite consumers to mail in a postcard with their entry information. A mail-in AMOE has been deemed not to be consideration even though it requires the purchase of a postage stamp (and pen and paper).⁴

Isn't Using the Internet “Consideration”?

Until about 2004, there was industry-wide concern that the Internet itself constituted consideration because to access a sweepstakes website, a consumer would first have to purchase a computer and pay an Internet service fee. However, there is no statute or published court opinion declaring that Internet access consti-

tutes consideration. Moreover, there has been no attempted regulatory enforcement or private action based on that claim. The Internet has woven itself into the very fabric of our society, and virtually all United States citizens have Internet access (anyone who does not own a computer has free access to the Internet at the local public library). Given the lack of any attempted enforcement and the ubiquity of Internet access, there is no longer any concern that such access constitutes consideration.⁵ Therefore, a typical Internet-based promotion involving a product purchase that employs an online AMOE is acceptable in satisfying the “no purchase necessary” requirement.

Note, however, that it is critical to treat entries submitted through an AMOE with “equal dignity” relative to entries earned with a purchase. In other words, sweepstakes sponsors must structure their promotions so that consumers are not able to “buy” more chances to win than they can obtain through the free method.

Winning on the Go

As mobile technology has advanced, so has the demand for conducting promotions through the mobile channel. Promotions can be conducted through common short codes (CSC). A CSC is similar to a phone number, usually four to six digits. Consumers send a short message service (SMS)—the technical term for a text message—to a CSC to enter and may receive a return win or lose message; for example: “Text keyword ‘PLAY’ to 77493 (PRIZE) to see if you'll win a \$25 gift card!”

The lack of legislation specifically addressing mobile technology leaves marketers in a state of legal uncertainty, at least when it comes to analyzing consideration in a game of chance. As long as the primary method of entry in a sweepstakes is online (i.e., free), adding a mobile tie-in is not an issue. However, if a marketer wants to run a purely mobile-based promotion, the uncertainty is whether an AMOE is required. A significant percentage of mobile users have bulk SMS packages included in their monthly service plans and do not incur incremental charges for

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individual text messages. For this group, access to a promotion via SMS is analogous to Internet access when analyzing the element of consideration. Theoretically, it would be lawful to operate an SMS-entry-only sweepstakes if eligibility were limited to those who have bulk SMS included in their monthly wireless service plans (and signed up for those plans before learning about the sweepstakes).

While this analogy breaks down when bulk SMS is not included in a consumer's monthly plan, there is still a viable legal argument that consideration is not present. For those who pay à la carte for SMS, the average text costs 15 cents. To enter and then receive a win/lose or entry confirmation message increases the cost to 30 cents. Keep in mind that to mail in an AMOE sweepstakes entry, consumers must buy a 44-cent postage stamp (plus a piece of paper and a pen), even though it's considered a "free" method. So entering a sweepstakes via SMS is cheaper than entering "for free" by mail. Thus, a regulator attempting to enforce a lottery violation claim against an SMS-based sweepstakes would be left with an absurd argument: "Your Honor, this marketer is victimizing the citizens of our great state by forcing them to pay up to 30 cents in text charges to participate in this promotion; we demand that consumers be able to enter for free [using a 44-cent postage stamp] through the U.S. mail." Clearly, no one could have intended such an absurd result.

As a best practice, marketers need to be mindful of an important concept. One of the reasons a postage stamp is acceptable is that the promotion sponsor does not derive any economic benefit from the purchase of the stamp. The same generally holds true for the sponsor of a promotion requiring entry via SMS. But if the sponsor were to profit from the required entry method (for example, when the sponsor charges an additional premium text-messaging fee, as discussed below, or is a wireless service provider), the intrinsic nature of the promotion would be one that the existing promotion laws were designed to prohibit. The intent is that promotion sponsors should not be able to profit from promotion entries. At least one United States jurisdiction has promulgated regulations consistent with this analysis. In November 2009, Puerto Rico became the first United States jurisdiction to expressly exclude standard text messaging charges that do not benefit the sweepstakes promoter from the definition of consideration in its game-of-chance regulations.⁶

Contests and Loyalty Programs Are Not Based on Chance

A skill-based contest awards prizes not on chance, but on the contestants' skill in contests involving written essays, photo or video uploads, or other user-generated content. When running a contest, it's important to remove—or at least significantly reduce—the element of chance in determining the winners. These promotions are lawful in most states even though they still have the elements of prize and consideration.⁷ True skill-based contests employ judges qualified to evaluate and rank contest entries using objective criteria. The level of a contest judge's qualifications and the objectivity of the judging criteria affect the amount of chance involved in determining winners, and a lawyer review-

ing such a contest must carefully weigh this analysis before giving legal approval.

In addition to games of chance and skill-based contests, marketers are turning to online and mobile-based loyalty programs to create longer-term marketing relationships. A typical loyalty program flows like this: (1) an in-store product package features a code and web address; (2) the consumer purchases the product; (3) the consumer visits the website and creates an account; (4) the consumer deposits the code, which translates into points; and (5) the consumer collects enough points to redeem goods, services, sweepstakes entries, etc. An online auction invites consumers to bid points (or some other proof of purchase) for reward items. Since there is no element of chance, these promotions do not implicate lottery laws.

Federal Regulations

Online and mobile-based promotions also are subject to several federal statutory schemes, including those regulating e-mail and text messages. Once consumers have opted in to receive commercial e-mail from a marketer, those e-mail campaigns are an extremely effective marketing tool. Obtaining consumer opt-ins is often the primary goal of an online, incentive-based, marketing campaign. The Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM)⁸ regulates those e-mails. As mentioned earlier, many promotions also permit participation through mobile devices. Depending on the technology used to send messages to and from a mobile device, those messages may be regulated as commercial e-mail under CAN-SPAM or they may be governed by the Telephone Consumer Protection Act (TCPA),⁹ passed in 1991—long before text-messaging technology existed. It would require an entire article to provide an overview of the federal regulations governing these commercial messages and the potential pitfalls associated with them. Suffice it to say, counsel advising clients on Internet and mobile-based marketing campaigns must be well versed in both CAN-SPAM and the TCPA, as the penalties for violations usually involve multimillion dollar fines.



Until these lawsuits yield some certainty about whether the plaintiffs' claims are viable, marketers would be well advised to steer clear of premium-SMS-entry promotions.



Newest Land Mine in Mobile-Based Marketing

If the legal landscape for mobile-based promotions weren't convoluted enough, there is yet another potential land mine marketers should be wary of: the class action lawsuit.

As mentioned, there is some legal uncertainty about whether standard SMS charges constitute consideration. Prudence requires that SMS entry promotions include a free AMOE to avoid lottery violations. However, when sponsors charge premium fees—a fee in addition to the standard SMS charges consumers incur when entering a game of chance through text messages—an AMOE does not necessarily shield promotion sponsors from legal attack. Civil lawsuits have been filed against four high-profile promotions for their premium SMS charges. The first case was against the “Get Rich With Trump” sweepstakes viewers played while watching the NBC show, *The Apprentice*.¹⁰ As part of the game, viewers voted for the candidates whom they believed Donald Trump would fire by either sending a premium SMS costing 99 cents, plus any applicable standard text messaging charges, or by entering for free via the Internet. Correct answers earned sweepstakes entries into the prize drawings. The other three lawsuits were tied to the *Deal or No Deal* game show, the *1 vs. 100* game show, and *American Idol*. In each promotion, viewers sent their predictions on the outcome of the television show via a premium SMS costing 99 cents. Correct predictions earned sweepstakes entries. Each sweepstakes also had an Internet-based AMOE. All four cases have been consolidated in federal court.

In each case, the plaintiffs alleged that by charging the 99-cent premium for the SMS, the defendants engaged in a pattern of racketeering activity and violated state gambling laws, despite the fact that entrants had the option of entering for free. Unlike promotions involving a product purchase as part of the entry process, the only thing consumers received in exchange for their 99 cents was a chance to win. This is in contrast to the consumer who, for example, purchases a soft drink, goes online, and enters a code from the bottle cap for a chance to win. In that scenario, the consumer receives something of value for his or her purchase—a beverage—in addition to a chance to win. On July 8, 2010, the United States Court of Appeals for the Ninth Circuit dismissed the interlocutory appeal by some of the defendants of the trial court's denial of their motion to dismiss and remanded the cases back to the trial court for further proceedings.¹¹ The consolidated cases likely will take another year or two to wind their way through the courts (if the parties don't settle first). Until these lawsuits yield some certainty about whether the plaintiffs' claims are viable, marketers would be well advised to steer clear of premium-SMS-entry promotions.

In Conclusion, We're Just Getting Started

This is a snapshot of some of the potential legal pitfalls facing marketers who operate incentive-based, interactive promotions through Internet and mobile channels. The legal landscape of this arena is still in its infancy and will evolve quite rapidly relative to other areas of the law. Of course, this legal evolution will most certainly be outpaced by technological advancements, which means that the industry will need to wait several more years before having a comprehensive, definitive statement of law governing these issues. ■

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FOOTNOTES

1. Mobile devices and the networks and technology on which they operate.
2. *Whitney v Stearns*, 16 Me 394 (1839).
3. Raffles are an exception to this general rule. Raffles are a form of lottery. Most states have statutes authorizing raffles within their jurisdictions. In general, raffles must be conducted by charitable organizations—those registered under 26 USC 501(c)(3)—and must be registered and licensed by the state.
4. For example, the Vermont statute regulating promotions states that the “cost of mailing an entry” does not constitute consideration, 13 Vt Stat Ann 2143b.
5. However, it is important to note that the New York Attorney General entered into a private settlement with CVS Corporation on June 22, 2004, regarding a sweepstakes it sponsored, and the settlement contains remedial provisions that suggest an online AMOE might not be sufficient to negate the consideration element in a game of chance. See <http://www.ag.ny.gov/media_center/2004/jul/jul08a_04.html> (accessed September 15, 2010).
6. Commonwealth of Puerto Rico Department of Consumer Affairs, Reglamento 7764: Reglamento de Sorteo (approved October 27, 2009), available at <<http://daco.pr.s52947.gridserver.com/reglamentos.php>> (accessed September 15, 2010).
7. A number of states—including Arizona, Colorado, Maryland, and Vermont—restrict or prohibit a payment requirement even in skill-based contests.
8. 15 USC 7701 *et seq.*
9. 47 USC 227 *et seq.*
10. *Bentley v NBC Universal, Inc.*, California Central District Court Case No. 2:07-CV-03647 (filed June 5, 2007).
11. *Couch v Telescope Inc.*, 611 F3d 629 (CA 9, 2010).