NAVIGATING SOCIAL MEDIA LEGAL RISKS

SAFEGUARDING YOUR BUSINESS

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with ERIC GARULAY

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Dedication

This book is dedicated to all my "monkeys," big, small, and still growing—Justin, Theo, Noah, Finn, Elsie, Sebastian, Gavin, Olivia, Jack, Ethan, Natalie, Alexandra, Max, Maddie, Winter, Jenna, Tage, Davin, Alexa, and Matthew.

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Introduction

Social media for business has evolved from chic, to mainstream, to essential. It represents a monumental shift in marketing because it facilitates unprecedented opportunities for companies to connect with their customers, generate business exposure, attract leads, drive website traffic, improve search rankings, increase sales, and to facilitate enterprise alignment, innovation, collaboration, customer service, and more.

Recognizing the value of interactive communications with their customers, companies are increasingly incorporating social media into their overall communications strategies. Unlike traditional *static* marketing, social media is a *dynamic* promotional tool enabling real-time, organic conversations between companies and their customers and among customers themselves. By directly engaging with their customers, businesses are able to build audiences and reach, establish trust and digital influence, and groom evangelists who wield the power of word-of-mouth endorsements over their social circles. These spheres of influence comprise a landscape where individuals transform themselves into company spokespersons interacting directly with customers on the ever-increasingly networked and social public stage.

Social media for business has evolved from chic, to mainstream, to essential.

Further, compared to advertising campaigns in traditional media (print, radio, and television), the costs associated with adopting and maintaining a social media presence are relatively low. For a modest investment, social media delivers an extraordinary return—allowing companies to engage their customers and prospects directly, track who is following them, monitor what is said about the company and their services and products, update their followers on new products, and obtain instant consumer feedback. It is little wonder that a majority of Fortune 500 companies have either a Twitter or Facebook account and that an ever-growing number of small and medium-sized companies are leveraging social media in a variety of novel and innovative ways.

Despite the transformative power of social media for businesses, it is not without its unique set of challenges. Sadly, human beings are inherently prone to mistakes, misconduct, and both purposeful and inadvertent acts of mischief. It is here where social media's Achilles' heel is exposed. Given the viral nature of social media, a single human mishap can damage a business's reputation, brand equity, and goodwill virtually in seconds. It should come as no surprise, therefore, that the explosion in the business adoption of social media carries with it increased legal risks.

Disclosure of sensitive company information, inadvertent transmittal of customer contacts and business leads, unfair and deceptive company and product endorsements, and unwitting employment and labor law violations are just a handful of the everyday risks arising from the use of social media in the workplace. As the popularity and business usage of social networks continue to grow, navigating the legal risks therein becomes increasingly more challenging.

Note

This book's discussion is "limited" to U.S. law. It is not the author's intention, nor would it be feasible, to address the laws and regulations in every jurisdiction. However, given that the four largest social media networks (Facebook, Twitter, YouTube, and LinkedIn) are U.S.-based, a familiarity with the U.S. laws implicated in this space is indispensable for any company conducting business within our borders. Further, while the solutions proposed in this book may be country specific, the legal questions raised herein have worldwide applicability. At a minimum, readers (wherever located) should be alerted to the categories of potential pitfalls, and the types of questions they need to ask, to appreciate the unique legal challenges social media creates and to better arm their organizations with the tools necessary to implement secure social and mobile marketing programs.

How This Book Is Organized

This book is comprised of 12 chapters, each focusing on an important legal aspect of the business use of social media and the special measures companies can adopt to minimize their potential liability. The book may be read from cover to cover to gain a comprehensive overview of the legal landscape. The chapters also stand well separately on their own, serving as a handy reference guide and offering readers the flexibility to find just the information they need.

Chapter 1: Social Media Promotion Law: Contests and Sweepstakes

Chapter 1 covers the legal rules governing online prize promotions (in particular, sweepstakes and contests). Promotions conducted via social media sites are a valuable means of generating consumer traffic and brand awareness while simultaneously fostering customer loyalty and increasing sales. Nevertheless, advertisers should pay close attention to significant legal compliance concerns. Indeed, under certain circumstances, even innocuous-looking "promotions," such as requiring an applicant to encourage friends to "like" you on Facebook, may unwittingly transform the promotion into an illegal lottery. Advertisers must also comply with platform-specific promotion and contest guidelines. For example, if people enter your contest by "liking" your business page or leaving a comment, or if your promotion is being run on your Facebook page, your promotion violates Facebook's Promotions Guidelines and may result in your business page being suspended or terminated. Although the world of social media might often seem like the Wild West, online promotions are governed by strict rules and regulations, which businesses must take careful steps to observe.

Chapter 2: Online Endorsements and Testimonials: What Companies and Their Employees Can and Cannot Tweet, Blog, or Say

Chapter 2 examines the Federal Trade Commission's updated *Guides Concerning the Use of Endorsements and Testimonials in Advertising*. The FTC guides apply to consumer testimonials, such as reviews and recommendations, that endorse a product or service on any social media site. Employees who post reviews of their employers' products and services on social media sites (either directly or through third-party advertisers) without disclosing their corporate affiliations can expose their employer to an FTC enforcement action. Failure to comply with the guidelines may result in liability for not only the employee endorser, but also for the employer.

Chapter 3: The [Mis]Use of Social Media in Pre-Employment Screening

Chapter 3 examines the permissible use of social media in pre-employment screening and reminds employers to avoid obtaining information that is unlawful to consider in any employment decision, such as the applicant's race, religion, or nationality. Further, employers should refrain from circumventing an applicant's privacy settings on social media sites, because such circumvention could expose an employer to an invasion of privacy claim.

Chapter 3 also alerts employers to the (for most, surprising) fact that social media background checks are subject to the Fair Credit Reporting Act (FRCA), a federal law that protects the privacy and accuracy of the information in consumers' credit reports. For companies that assemble reports about applicants based on social media content and regularly disseminate such reports to third parties (including affiliates), both the reporting company and the user of the report must ensure compliance with the FCRA, including obtaining the applicant's permission before asking for a report about him/her from a consumer reporting agency or any other company that provides background information.

Chapter 4: Monitoring, Regulating, and Disciplining Employees Using Social Media

Chapter 4 examines employer monitoring of employee online postings, together with the National Labor Relations Act's impact on social media-related employee discipline for both union and nonunion employees. In the past two years, employers have faced a mounting wave of regulatory action taken against them for:

- Instituting policies restricting employee use of social media where such policies impermissibly discourage employees from exercising their rights under the NLRA (that is, "to engage in … concerted activities for the purpose of collective bargaining or other mutual aid or protection")
- Unlawfully discharging or disciplining employees for their online communications where the specific social media post constituted "protected concerted activity" (that is, group activity protected by the NLRA) and the subject matter of the post involved wages or other terms and conditions of employment

Importantly, even employees' general complaints (whether on company time or otherwise) about their employment or about their co-workers may fall within the NLRA's purview and be considered *protected concerted activity*. Employers therefore face potentially liability any time they terminate or discipline employees for engaging in social media activity.

In this chapter, you will learn how to avoid unlawfully discharging or disciplining employees for their online communications, and guidelines for properly observing employees' rights to privacy.

Chapter 5: Social Media in Litigation and E-Discovery: Risks and Rewards

Chapter 5 examines the role of social media in civil litigation. With the rapid proliferation of social media, information placed on social networking sites such as Facebook, YouTube, Twitter, and foursquare is increasingly becoming the subject of discovery requests in litigation. Users of these sites may tweet or post detailed status updates without considering the implications of their posts as it effects their (or their company's) litigation position. Courts are increasingly permitting such relevant evidence to be used at trial, despite a party's privacy settings. Further, under both federal and state rules of civil procedure, companies have an obligation to preserve all relevant communications, documents, and information—whether in the form of hard or digital copy, email, social media post, or otherwise—whenever litigation is pending or is reasonably anticipated. A company that fails to properly preserve relevant information can face hefty sanctions by the court, including monetary penalties, dismissal of its complaint, or an entry of default judgment in favor of its opponent. Companies should therefore take time to review and update document-retention policies and ensure that such policies particularly include social media activity.

Chapter 5 also details the impact of the Stored Communications Act (SCA) on social media discovery requests. In addition to limiting the government's right to compel online service providers to disclose information in their possession about

their customers and subscribers, among the most significant privacy protections of the SCA is the ability to prevent a third party from using a subpoena in a civil case to get a user's stored communications or data directly from online providers.

Chapter 6: Managing the Legal Risks of User-Generated Content

Chapter 6 discusses the legal risks for companies in allowing user-generated content (UGC) to be posted on their sites, and the associated legal protections. Two federal statutes in particular—the Digital Millennium Copyright Act (DMCA) and the Communications Decency Act (CDA)—are examined. Because social media sites are not exempt from traditional copyright laws, hosting infringing copyrighted content can create liability for contributory infringement. The DMCA shields online service providers (including website owners) from liability for copyright infringement by their users, provided that certain steps set forth in the DMCA are strictly followed. Importantly, however, DMCA immunity is not available for sites that receive a *direct financial benefit* and *draw* new customers from UGC. For social media sites hosting UGC, it is unclear under what circumstances courts will hold that the site is drawing in new customers to receive a direct financial benefit. Further, the DMCA protects from liability the owners of Internet services, not the users (including marketers) who access them. Marketers utilizing UGC are not shielded under the DMCA with respect to uploading onto a third-party's website copyright-infringing content.

Similarly, the CDA immunizes website operators and other interactive computer service providers from liability for third-party content, including content that may constitute defamation, invasion of privacy, and intentional infliction of emotional distress. The provider, so long as not participating in the creation or development of the content, or otherwise exercising editorial control over the content such that the edits materially alter the meaning of the content, will be immune from state law claims (except intellectual property claims) arising from third-party content. For companies that operate their own blogs, bulletin boards, YouTube channels, or other social media platforms, therefore, it is imperative that they avoid contributing to the *creation or development* of the offensive content so that their immunity is not revoked. In this regard, CDA immunity may be further forfeited if the site owner invites the posting of illegal materials or makes actionable postings itself.

Chapter 7: The Law of Social Advertising

Chapter 7 alerts social media business practitioners that they, like traditional advertisers, are subject to the FTC Act (regarding false advertising vis-à-vis con-

sumers); section 43 of the Lanham Act (regarding false comparative advertisement claims); the Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act; and the Children's Online Privacy Protection Act (COPPA).

The CAN-SPAM Act of 2003 establishes the United States' first national standards for the sending of commercial email, provides recipients the right to opt out of future emails, and imposes tough penalties for violations. Despite its name, the CAN-SPAM Act does not apply only to bulk email; it also covers all commercial electronic messages, including business-to-business and business-to-consumer emails, as well as commercial solicitations transmitted through social media sites. If the primary purpose of a solicitation transmitted through Facebook or other social media site is commercial, care must be made to clearly and conspicuously identify the communication as such and to observe other requirements imposed by the CAN-SPAM Act. This is true whether the electronic communication was submitted by an advertiser or by a consumer who has been induced by the advertiser to send the message.

Further, COPPA, which was enacted in 1998, proscribes unfair or deceptive acts relating to the collection, use, and disclosure of information from children under 13 on the Internet. COPPA requires website operators or other online services that are either directed to children under 13 or that have actual knowledge that they are collecting personal information from children under 13 to obtain verifiable parental consent before such information is collected, used, or disclosed. In 2010, to account for the rapid developments in technology and marketing practices, and the proliferation of social networking and interactive gaming with children, the FTC proposed amending the federal regulations implementing COPPA (COPPA Rule). The proposed changes were finally made public on September 15, 2011.

The proposed changes, if adopted by the FTC, will profoundly impact websites and other online services (including mobile applications that allow children to play network-connected games, participate in social networking activities, purchase goods or services online, or receive behaviorally targeted advertisements) who collect information from children under 13 years old. Under the proposed Rule, operators who merely prompt or encourage (versus require) a child to provide personal information will be subject to COPPA.

Of special note, the proposed revisions to the Rule, among other changes, expand the definition of *personal information* to include not only names, addresses, email addresses, phone numbers, and other identifiers included in the current Rule, but also geolocation information, screen names or usernames, and additional types of persistent identifiers, such as IP addresses, unique device identifiers, and tracking cookies used for behavioral advertising. Similarly, photographs, videos, and audio files that contain a child's image or voice may also be added to the definition of personal information, as would all identifiers that permit direct contact with a

person online, including instant messaging user identifiers, Voice over Internet Protocol (VoIP) identifiers, and video chat user identifiers.

The proposed change would also revise parental consent requirements. Currently, in order for operators to collect, use, or disclose personal information of children, they must first obtain verifiable parental consent.

The proposed changes add new parental consent mechanisms, including submitting electronically scanned signed parental consent forms, consent through video conferencing, and verifying a parent's government-issued identification against databases of such information. Further, the FTC's proposed Rule change would eliminate the less reliable "email plus" method of obtaining parental consent, which currently allows operators to obtain consent through an email to the parent, provided an additional verification step is taken, such as sending a delayed email confirmation to the parent after receiving the initial consent.

Chapter 8: Trademark Protections from Brandjacking and Cybersquatting in Social Networks

Chapter 8 discusses the importance of trademark and brand management in the Web 2.0 universe. In light of the high organic search ranking social media sites achieve on search engine results pages, social network usernames have increasingly become highly valuable commodities. A Google search of your brand can easily produce results from a social media page that appears to be an official brand page, but is in fact a page of a disgruntled customer or parodying competitor. Controlling your business's social network usernames—and securing your ability to protect your brand in each social platform—is therefore critical; after all, you do not want your company's image (or message) to be hijacked by spammers, cybersquatters, impersonators, or competitors. In addition to platform-specific brand-protection enforcement mechanisms, this chapter details the legal remedies available under the trademark infringement and anticybersquatting rules of the Lanham (Trademark) Act.

Chapter 9: Balancing Gamification Legal Risks and Business Opportunities

Chapter 9 explores the unique issues surrounding gamification and social media and the legal considerations that apply when companies employ the mechanics and dynamics of gaming to social media interactions on web and mobile platforms. For example, leader boards, badges, and expert labels (gamification staples) all implicate truth-in-advertisement issues (and FTC enforcement actions) to the extent that such labels imply an expert status that the user does not actually possess with respect to the endorsed product. Further, virtual currencies in the form of points,

coins, redeemable coupons, and so on are subject to federal regulations prohibiting expiration dates less than 5 years after the virtual currency is sold or issued. Likewise, behavioral and hypertargeting—leveraging of social history data (where you are and what you are doing at any given time)—gives rise to a host of federal and state privacy rules regarding recording, storing, handling, and transferring geolocation and other consumer data.

Chapter 10: Social Media's Effect on Privacy and Security Compliance

Chapter 10 discusses the security and privacy compliance obligations of companies that gather personal information of its customers online. In particular, the recent FTC settlements with Twitter, Facebook, and Google highlight the risk of using social media without properly structured and implemented privacy and security compliance guidelines. Companies that collect or otherwise obtain consumer data (via online promotions, business apps, site registration, or otherwise) should conduct an annual review of their privacy and security policies, statements, and practices, and ensure that they are truthful, nondeceptive, factually supportable, and consistent with evolving legal standards and industry best practices.

Chapter 11: Legal Guidelines for Developing Social Media Policies and Governance Models

Chapter 11 provides detailed guidelines on how to write an effective corporate social media policy and how to establish the necessary governance models used to monitor employee and corporate usage of social media. This chapter provides a detailed list of vital social media policy provisions to aid you in drafting a policy designed to help your company get the most out of its social media programs while simultaneously minimizing its legal exposure. A well-drafted and consistently enforced social media policy should enable companies to mitigate liability issues and security risks; ensure compliance with federal and state legislation; protect a company's brand; increase productivity; better monitor and respond to their customers' performance evaluations, feedback, and complaints; and reduce the company's exposure to burdensome, costly, and PR-unfriendly litigation.

Chapter 12: Looking Ahead at Social Media Business Opportunities, Expectations, and Challenges

Evolving technologies, together with emerging platforms and channels of communication, inevitably raise new legal issues that employers must address and manage in the modern digital workplace. Because social media law is still in its infancy,

businesses are advised to keep abreast of the fast-pacing growth of laws giving definition to this space.

Who Should Use This Book?

The book serves as an indispensable and comprehensive guide to the legal risks associated with the business use of social media. It was especially written for business professionals, and can be used as a valuable educational and reference tool to assist companies of all sizes seeking to train their employees on the safe and legal use of social media.

The intended audiences for this book include:

- Chief Executive Officers
- Chief Marketing Officers
- Chief Information Officers
- Chief Compliance Officers
- Business Owners
- VPs, Directors, and Managers of
    - Marketing/Branding
    - Social Media
    - Communications
    - Business Strategy
    - Public Relations
    - Information Technology
    - Customer Service
    - Human Resources
- Community Managers
- Social Media Strategists
- Word of Mouth Marketers
- Brand Evangelists
- Agency Account Managers

Features of This Book

Throughout this book, readers are provided with practical pointers to help ensure that their social media programs comply with the law. Each chapter ends with a Social Media Do's and Don'ts chart that summarizes in easy-to-understand language the principal legal issues addressed in the corresponding chapter.

Further, the appendixes contain the text of the laws referenced throughout this book so that readers might have a handy reference to these original source materials.

A Quick Note about U.S. Legal System

There is no single definitive body of law governing social media. Rather, an amalgamation of both U.S. federal and state law controls activity conducted in this space.

In the United States, courts are set up in a hierarchy:

- United States Supreme Court
- Lower federal courts
- State supreme courts
- Lower state courts

Generally speaking, lower federal/state courts must follow precedent established by a higher federal/state court as to the meaning of the law, even if the lower court disagrees with the higher court's interpretation. On questions of federal law, the U.S. Supreme Court has the final authority.

Further, lower federal courts are bound by the precedent set by higher courts within their "district." There are 94 judicial districts, including at least one in each state. These federal "district courts" (trial courts) must follow legal precedent established by the federal "circuit courts" (appellate courts) with the appropriate geographic-based jurisdiction. By way of illustration, a district court that falls within the First Circuit Court of Appeals (which includes the District of Massachusetts, for example) is not bound by rulings from the 9th Circuit (which includes the District of California, for example), or any of the other remaining eleven circuits.

Because many of the cases cited in this book are from the federal district court level, note that the holdings of these cases are not binding on courts that fall outside of these judicial districts.

Fortunately, courts may rely upon cases from other geographic jurisdictions dealing with similar issues as persuasive (but not binding) authority. This is particularly true for cases of first impression—an apt description for the growing number of social media legal challenges covered in this book.

Legal Disclaimer

The materials in this book, "*Navigating Social Media Legal Risks: Safeguarding Your Business,*" are for informational purposes only. While we believe that the materials will be helpful, we do not warrant their accuracy or completeness. These materials are general in nature, and may not apply to specific individual circumstances. The information is not intended as, nor is it offered as legal advice and should not be relied on as such. Readers should seek specific legal advice with their own attorney before taking any action with respect to the matters discussed herein. We make no representations or warranties, express or implied, with respect to any information in this book. We are not responsible for any third-party websites or materials that are referred to in, or can be accessed through this book, and we do not make any representations whatsoever regarding them.

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Social Media Promotion Law: Contests and Sweepstakes

Social media promotions, including contests, sweepstakes, raffles, drawings, giveaways, and freebies, are an effective means to achieve the most highly sought-after social media business and marketing objectives, including:

- *Growing your company's social influence and reach (for instance, increasing the number of friends, fans, followers, subscribers, group members, and the like within branded social properties)*
- *Growing brand awareness, demand, and loyalty*
- *Fostering brand engagement*
- *Submission of user-generated content (UGC) and the placement of valuable backlinks (for example, getting users to discuss your products and services, post their comments, reviews, endorsements, and so on)*

- Promoting and evangelizing the value of your products and services on your behalf (that is, capitalizing on word-of-mouth buzz and referrals from friends)
- Increasing web traffic
- Improving your site's findability and search rank (through search engine optimization [SEO] practices)
- Increasing sales

In short, social media promotions provide companies with an opportunity to forge real-world connections and lasting impressions with their audiences by way of immersive branded experiences and thereby (it is hoped) sell more products.

Unfortunately, the laws governing the sponsorship and hosting of social media promotions are widely overlooked or misunderstood. This chapter provides a brief overview of the laws you need to know to avoid placing your business at legal risk. The advice here applies regardless of whether you're an independent blogger, a sole proprietor, small to mid-sized business, or a large multinational conglomerate. This chapter also identifies the steps you can take to minimize legal exposure while reaping the benefits of social media promotions.

Online Promotions

Generally speaking, there are three types of online promotions:

- **Sweepstakes**—Sweepstakes are prize giveaways where the winners are chosen predominately by chance. A sweepstakes prize can include anything from a free downloadable music video to an all-expense-paid trip to Paris.
- **Contests**—Contests are promotions in which prizes are awarded primarily on the basis of skill or merit (for example, the best poem or the winner of a trivia game). Entrants in a contest must be evaluated under objective, predetermined criteria by one or more judges who are qualified to apply such criteria.
- **Lotteries**—Lotteries are random drawings for prizes wherein participants have to *pay to play*. A lottery has three elements: prize, chance, and *consideration* (as defined here). Unlike sweepstakes and contests, lotteries are highly regulated and (with the exception of state-run lotteries and authorized raffles) illegal. Further, each state has its own definition regarding what constitutes consideration. Usually, it is money, but it generally also includes anything of value given in exchange for the opportunity to enter and win, including the entrant's expenditure of considerable time or effort.

Note

People often use the words *sweepstakes* and *contest* interchangeably, but the words have different meanings. Generally speaking, a sweepstakes refers to a promotion in which prizes are awarded based on chance, whereas a contest awards prizes based primarily on skill. A sweepstakes can avoid being considered an illegal lottery (prize + chance + consideration) by eliminating the element of consideration. In a contest, however, it is the element of chance that is removed (or predominated over by skill).

Legal Insight

You might be asking yourself what legal risk could there possibly be in offering the chance to win a free prize in exchange for *liking* your Facebook page, *following you* on Twitter, *joining* your LinkedIn group, *uploading* a photo to your Flickr group, *signing up for* a newsletter, or *downloading* an article. Making these actions a requirement to participate in your online promotion could be construed as consideration, transforming your "simple" sweepstakes or contest into an illegal lottery, although (in the absence of any case law to date stating otherwise) this is not a likely outcome. Whereas requiring a simple thumb's up would likely not constitute consideration, some commonly seen requirements perhaps could (for example, requiring the entrant to post a Facebook comment, send multiple retweets, complete a lengthy survey, or refer a friend to the sponsor's dedicated social media site). Bottom line: Make sure your sweepstakes really are *free* to enter—even if participants also have the option to "like" you.

Sweepstakes Laws

All sweepstakes must have official rules, which cannot change during the lifetime of the sweepstakes. To comply with all 50 states' statutes (and corresponding case law), the official rules should typically include the following information:

- Clear and conspicuous statements that "no purchase is necessary" and "a purchase will not improve one's chances of winning"

Make sure your sweepstakes really are *free* to enter—even if participants also have the option to "like" you.

- The method of entry, including a consideration-free method of entry that has an equal chance with the purchase method of entry (so that all entrants have an equal chance of winning the same prizes)
- Start and end dates of the sweepstakes (stated in terms of dates and precise times in a specific time zone for online promotions)
- Eligibility requirements (age, residency, and such)
- Any limits on eligibility
- Sponsor's complete name and address
- Description and approximate retail value of each prize, and the odds of winning each prize
- Manner of selection of winners and how/when winners will be notified
- Where and when a list of winners can be obtained
- "Void where prohibited" statement

Note

Eligibility might be further limited to particular states within the United States that have relatively more stringent legal requirements, including Florida, New York, and Rhode Island, where sponsors are required to register with the appropriate state authorities all sweepstakes and contests where the aggregate prize value exceeds $5,000. In Florida and New York, a bond in an amount equal to—or approximately equal to, in the case of New York—the total value of all prizes must also be submitted with the registration.

Note

To avoid Federal Trade Commission (FTC) and state Attorney General scrutiny (and potential liability), the official rules for online sweepstakes and contests should be clearly and conspicuously displayed, and not hidden in tiny print or accessible through a secret link. At a minimum, the promoter should also include an abbreviated version of the official rules on the same page as the entry form, with the abbreviated version containing the following provisions: no purchase necessary, void where prohibited, deadlines, special eligibility, statement of odds, and where the Official Rules can be found. The sweepstakes or contest promoter may also consider using a click-wrap license that requires entrants to review the official rules and click "I accept" to be permitted to enter the promotion. Care should be taken to avoid pre-checked buttons, however, as these are increasingly becoming the subject of regulatory disfavor.

Whenever consideration is involved in a sweepstakes, a free alternate means of entry (AMOE)—for example, an online entry form, entry by mail, or entry by email—must be offered to maintain the legality of the promotion. This requirement, which would appear simple enough to satisfy in theory, has proven quite tricky in practice, as the concept of "consideration" is deliberately amorphous and subject to different interpretations from state to state.

Note

Although completing and submitting an entry form online is now a commonly used and widely accepted AMOE, Florida once took the position that entering a game via the Internet constituted consideration because of the cost associated with subscribing to an Internet service provider. Recognizing that the Internet is widely available and (in public libraries, for example) accessible for free, and that a consumer would most likely not subscribe to an Internet service solely for the purpose of entering a sweepstakes, Congress expressly excluded Internet access from the definition of consideration when it adopted the Unlawful Internet Gambling Enforcement Act[1] in 2006.

To complicate matters further, some states require the free AMOE be in the same form that is used for the pay method of entry. In 2004, for example, the New York Attorney General challenged the retail-drug store chain CVS for offering an in-store sweepstakes—a "Trip of a Lifetime" sweepstakes with the grand prize trip to Oahu, Hawaii—in which customers using a store loyalty card were automatically entered into the sweepstakes, while non-purchasers were required to enter online. Because not everyone has access to the Internet, the NY AG reasoned, an off-line (that is, in-store) AMOE needed to be offered as well, regardless of whether the consumer has made a purchase.[2]

To preserve the legality of sweepstakes, AMOEs need to be carefully structured to ensure that they are known and made available, with equal prominence, to the same potential population as the paid entries.

Contest Laws

Like sweepstakes, contests are also subject to specific state laws. Generally speaking, for a national contest, the official rules must contain at least the following disclosures (which, absent extreme circumstances or circumstances identified in the rules, cannot be changed during the course of the contest):

- The name and business address of the sponsor of the contest
- The number of rounds or levels of the contest, the cost (if any) to enter each level, and the maximum cost (if any) to enter all rounds

Note

Some states prohibit purchase requirements altogether (for example, Colorado, Maryland, Nebraska, North Dakota and Vermont), even if the contest winners are selected based on skill. You should exclude entries from these states from online contests that have a purchase requirement.

- Whether subsequent rounds will be more difficult to solve, and how to participate
- The identity or description of the judges and the method used in judging (for example, what objective criteria is being used to judge the entrants and what weight is being assigned to each criteria)
- How and when winners will be determined

Note

To avoid being classified as a sweepstakes, contests should remove—or at least significantly reduce—the element of chance from the process affecting either the selection of the winner (for example, "first 100 to respond"), the amount of the prize, or how the prize is won. For example, many so-called contests provide that, in the event of a tie, the winner will be selected by drawing lots. Such a provision transforms the promotion into a game of chance (that is, a sweepstakes) and therefore no consideration can then be required for entry. Accordingly, to minimize the degree of chance present in a skill contest, the choice of a winner should be based on pre-established skill criteria, even in the event of a tie. For example, if two participants receive the same top score in a trivia contest, ties should be resolved through a further test of skill. Alternatively, prizes should be awarded to both top winners.

- The number of prizes, an accurate description of each prize, and the approximate retail value of each prize
- The geographic area of the contest
- The start and end dates for entry (stated in terms of dates and precise times in a specific time zone for online promotions)
- Where and when a list of winners can be obtained

Lottery Laws

When a promotion combines the elements of prize, chance and consideration, it's a lottery—and it's illegal! By eliminating any one of these elements, companies may avoid the illegal lottery designation. In the case of sweepstakes, the element of consideration is generally omitted; in the case of contests, it is the element of chance that is removed—or at least, significantly reduced—to make the promotion legal. Promotions would have little appeal if the prize were removed, so this element usually is left intact.

So what is consideration? In the context of sweepstakes, contests, and lotteries, consideration is generally defined as anything of value given in exchange for the opportunity to participate in the promotion. Consideration generally takes one of two forms: monetary, in which the consumer must pay the sponsor to play (purchasing a product or the payment of an entry fee, for example), or non-monetary, in which the consumer must expend substantial time or effort (completing a lengthy questionnaire or making multiple trips to a store location, for example) to participate.

The majority of states have adopted the monetary approach, providing (by statute or judicial opinion) that non-monetary consideration is not deemed to be consideration for purposes of lottery laws. Further, virtually every U.S. state will authorize a promotion to include a "pay-to-play" component, provided a free AMOE is also made available by the sponsor.

As noted, eliminating the element of chance from a promotion removes it from the ambit of lottery prohibitions. However, depending upon the degree of chance present, a promotion intended to be game of skill (contest) could be unwittingly transformed into a game of chance (lottery).

The determination of whether a contest constitutes a lottery can oftentimes be rather tricky, as there are several factors that must be considered and states generally employ different tests, namely:

- **Dominant Factor Test**—Under this test, followed by a majority of U.S. states,[3] a promotion is deemed a game of chance (lottery) when chance "dominates" the distribution of prizes, even though the distribution may be affected to some degree by the exercise of skill or judgment. In other words, in these states, a promotion is legal if it is based on at least 50% skill, and illegal if based on more than 50% chance.
- **Material Element Test**—Under this test, followed by a minority of states,[4] a contest will be considered a game of chance (lottery) if the element of chance is present to a "material" degree.

- **Any Chance Test**—Under this test, a contest will be categorized as a game of chance (lottery) if there is any degree of chance involved, however small. As virtually every game has some element of chance, most skill games will be categorized as illegal lotteries in those states that apply the *Any Chance Test*.
- **Pure Chance Test**—Under this test, which is rarely followed, a promotion must be entirely based on chance to be an illegal lottery. The exercise of any skill by a participant in the selection or award of the prize removes the promotion from the definition of a lottery.

DOMINANT FACTOR TEST DEFINITION

The *Dominant Factor Test* was defined in 1973 by the Supreme Court of Alaska in *Morrow v State,*[5] which set forth the following four-part test to determine whether skill dominates over chance:

- "Participants must have a distinct possibility of exercising skill and must have sufficient data upon which to calculate an informed judgment. The test is that without skill it would be absolutely impossible to win the game."
- "Participants must have the opportunity to exercise the skill, and the general class of participants must possess the skill. Where the contest is aimed at the capacity of the general public, the average person must have the skill, but not every person need have the skill. It is irrelevant that participants may exercise varying degrees of skill. The scheme cannot be limited or aimed at a specific skill which only a few possess."
- "Skill or the competitors' efforts must sufficiently govern the result. Skill must control the final result, not just one part of the larger scheme.... Where 'chance enters into the solution of another lesser part of the problems and thereby proximately influences the final result,' the scheme is a lottery.... Where skill does not destroy the dominant effect of chance, the scheme is a lottery."
- "The standard of skill must be known to the participants, and this standard must govern the result. The language used in promoting the scheme must sufficiently inform the participants of the criteria to be used in determining the results of the winners. The winners must be determined objectively."

Potential Legal Issues Associated With Public Voting

Companies are increasingly structuring their online promotions to encourage the submission of user-generated content (UGC) and public voting. Such interactive campaigns not only create more views for the contest, but they also increase a company's web and social media page views, number of followers, and brand awareness.

A typical UGC-based promotion allows consumers to upload a photo or video incorporating the sponsor's product for a chance to win a prize. The public is then invited to view the submitted content and vote for the "best" (the funniest or cutest, for example). Usually, the video that is watched the most or the photo that receives the highest number of "likes" is the winner.

The Doritos "Crash the Super Bowl" contest launched in 2006 is a perfect example of the power of social media promotions to generate brand loyalty, good will, and consumer engagement. The "Crash the Super Bowl" contest allows entrants to create and submit home-made Doritos commercials where each year the winning and second placed ads—as voted online by the general public—are aired during the Super Bowl. The success of the Doritos contest has led to an explosion in promotions involving UGC.

Despite the obvious advantages of interactive UGC contests, such promotions are not without legal risk. First, because promotions contain elements of both skill (creating the "best" video) and chance (video popularity with voting public), they may unwittingly convert a contest into a sweepstakes, and thereby effect not just the need for registration and bonding, but the promotion structure and entry requirements (including the need for an AMOE) as well.

As noted earlier, if the promotion is open to residents of Florida or New York and the total value of the prize offered exceeds $5,000, then the promotion must be registered and bonded in those states if the promotion is deemed a game of chance (sweepstakes), and not a game of skill (contest). In both Florida and New York, the failure to register and bond a sweepstakes with a prize value exceeding $5,000 exposes the sponsor to both civil and criminal penalties.[6]

Additionally, if public voting is used to determine an online contest winner, it could render the promotion illegal if consideration was required as a condition of entry. While most states permit the requirement of consideration for entry into a contest, it is unlawful to require consideration to enter a sweepstakes. Without exception, a promotion based on chance that requires consideration or a purchase to enter for a chance to win a prize is an illegal lottery.

Further, as members of the public may try to manipulate the voting process (for example, voting for their friends and encouraging others to do the same), some states may find that public voting injects too much chance into the contest, thereby transforming it into a sweepstakes or (worse) an illegal lottery. Companies running interactive promotions must also be prepared to stave off complaints of fraud or unfairness.

Finally, if public voting is used to determine an online contest winner, it could compromise the promotion's legality. Indeed, in states applying the *Any Chance Test*, any contest which includes public voting as a judging element would most likely be construed as an illegal lottery.

The analysis is much more nuanced (read: complex) in states applying the *Dominant Factor Test* or *Material Element Test*. In assessing the degree of chance versus skill, the following factors are generally considered:

- The degree of skill required to make the submission
- Whether eligible participants are likely to have the degree of skill necessary to win
- Whether the promotion is limited or aimed at a specific skill which only a few possess
- Whether there are distinct voting criteria
- Whether the public is qualified to apply the defined criteria
- The number of rounds of voting and whether public voting is considered in each round
- Whether a qualified judge's vote is considered (and, if so, the amount of weight it is given)
- Whether there is a limit on the number of votes a person can make

A promotion is more likely to be considered a game of chance if voting is unrestricted.

To reduce the legal risks associated with public voting, the promotion rules should limit votes to one vote per person (tracked by IP address), clearly explain the judging criteria applicable for public judging, and require that the selection with the highest public vote count as only a percentage of the overall criteria by which a winner is ultimately selected, with professional judges having the final say.

Note

UGC contests raise additional legal concerns, including compliance with third-party copyright and trademark rights; rights of privacy/publicity (for example, using the name and/or picture of the entrant without his/her express permission); the Children's Online Privacy Protection Act (regarding collection of information from children); the Lanham Act (regarding false advertisement); the Digital Millennium Copyright Act (regarding copyright infringement); the Communications Decency Act (regarding UGC host liability); and the FTC Act (regarding false or deceptive business practices in the collection or use of consumer information). These matters are discussed later in this book.

Keeping Social Media Promotional Campaigns Legal

The settlements of the long-running class-action lawsuits over the legality of allowing consumers to enter sweepstakes offered by popular television shows such as *The Apprentice*, *American Idol*, *America's Got Talent*, and *Deal or No Deal* underscore the importance of having legally compliant social media promotional campaigns and demonstrate how even innocuous-looking sweepstakes entry mechanisms can backfire.

In "Get Rich With Trump" sweepstakes, viewers watching the NBC show, *The Apprentice,* voted for the contestant whom they believed would be the target of Donald Trump's "You're Fired!" by either sending a premium SMS text-message costing 99 cents, plus any applicable standard text messaging charges, or by entering for free online. Correct answers earned the participant a chance to win a prize.

Likewise, viewers of *American Idol* and *America's Got Talent*, for example, were allowed to send their predictions on the outcome of the show via a premium text message, costing 99 cents. Viewers who guessed correctly earned sweepstakes entries.

Prior to the class-actions lawsuits, such network program sweepstakes were rapidly rising in popularity and the promoters of these sweepstakes were amassing fortunes from the entry fees (collected as premium text message charges paid by viewers), without giving the entrants anything of value in return.

However, unlike promotions where a consumer is asked to purchase a product as a condition of entry (a soft drink, for example), consumers participating in these network program promotions received nothing in exchange for their .99 cents, other than a chance to win.

This method of entry quickly came under attack as constituting an illegal lottery, in violation of various states' anti-gambling laws, even though a free AMOE was also available to the participants.

In the lead case of *Karen Herbert v. Endemol USA, Inc.*,[7] the plaintiff challenged the play-at-home sweepstakes promoted by various game/reality shows in which viewers were allowed to register and be given the opportunity to be awarded both cash prizes and merchandise, either via an SMS text message sent from a wireless device or online via the program's website. No fees were charged to persons entering via the Internet, but entrants who registered via text message had to pay a $.99 premium text message surcharge in addition to the standard text messaging fees charged by the viewers' wireless carriers.

In denying the defendants' motions to dismiss, the U.S. District Court for the Central District of California held that the plaintiffs had sufficiently alleged that the defendants' actions constitute illegal gambling as a matter of law, despite the fact that the defendants offered a free AMOE:

> *The critical factual distinction between cases in which a lottery was not found … and those in which a lottery was found … is that the former "involved promotional schemes by using prize tickets to increase the purchases of legitimate goods and services in the free market place" whereas in the latter "the game itself is the product being merchandized." … The presence of a free alternative method of entry in the leading cases made it clear that the money customers paid was for the products purchased (gasoline or movie tickets), and not for the chance of winning a prize.*
>
> *The relevant question here, therefore, is whether the Games were nothing more than "organized scheme[s] of chance," in which payment was induced by the chance of winning a prize. The relevant question is not, as Defendants contend, whether some people could enter for free. In [cases where a lottery was not found], the courts concluded that those who made payment purchased something of equivalent value. The indiscriminate distribution of tickets to purchasers and non-purchasers alike was evidence thereof. Here, however, Defendants' offers of free alternative methods of entry do not alter the basic fact that viewers who sent in text messages paid only for the privilege of entering the Games. They received nothing of equivalent economic value in return.*[8]
>
> —U.S. District Court for the Central District of California (11/30/07)

Pursuant to the terms of the settlement, the defendants agreed to:

- Refund any premium text message surcharges paid by consumers if the consumers did not win a prize.
- Reimburse the plaintiffs more than $5.2 million in legal fees.
- Submit to a 5-year injunction enjoining them from "creating, sponsoring, or operating any contest or sweepstakes, for which entrants are offered the possibility of winning a prize, where people who enter via premium text message do not receive something of comparable value to the premium text message charge in addition to entry."[9]

Although the settlements are not binding on companies that are not parties to the lawsuit, the settlements are nonetheless instructive. As a general rule, it may be best to avoid premium-SMS-entry promotions altogether. For companies that decide to conduct premium text promotions, it is critical that a free AMOE (for example, entry by mail or 1-800 number) is made available *and* that paid entrants are given something of verifiable equivalent retail value in return for what they paid to enter.

Online Promotions Outside the United States

Online promotions are potentially subject not only to the laws of all 50 states but also to the laws of every country in which the promoter's website appears. Notably, certain countries (for example, Belgium, Malaysia, and Norway) prohibit sweepstakes altogether, whereas other countries (for example, France and Spain) require registration and payment of fees. Therefore, it is critical that sweepstakes and contest eligibility be carefully limited, such as, for example, limiting eligibility to U.S. residents.

Sweepstakes Versus Illegal Online Gambling

Internet sweepstakes must also avoid being classified as illegal online gambling; otherwise, the sponsors risk severe criminal and civil penalties under the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA).[10] Since the enactment of UIGEA, it has been illegal for any person "engaged in the business of betting or wagering" to "knowingly accept" most forms of payment "in connection with the participation of another person in unlawful Internet gambling."[11] In other words,

Internet sweepstakes sponsors must avoid promoting campaigns that could force the sponsor to be classified as a "business of betting or wagering," such as conducting ongoing online sweepstakes advertising that participants will receive something of value based on an outcome predominantly subject to pure chance. In such circumstances, sponsors are also legally precluded from accepting credit card payments, checks, or electronic fund transfers as part of their offerings.

Internet sweepstakes sponsors must avoid promoting campaigns that could force the sponsor to be classified as a business of betting or wagering.

Platform-Specific Guidelines

In addition to structuring sweepstakes and contests so as to comply with federal and state law, companies must take care that their promotions also comply with the terms and conditions of social media networking sites, particularly site rules regulating consumer sweepstakes and contests.

LinkedIn

LinkedIn prohibits its users from uploading, posting, emailing, or making available any unsolicited or unauthorized advertising or promotional materials.[12]

Google+

Google+ prohibits online promotions directly from a Google+ page, but allows users to "display a link on your Google+ Page to a separate site where your Promotion is hosted so long as you (and not Google) are solely responsible for your Promotion and for compliance with all applicable federal, state and local laws, rules and regulations in the jurisdiction(s) where your Promotion is offered or promoted."[13]

Twitter

In contrast to the prohibitive policies of Google+ and LinkedIn, Twitter specifically authorizes users to conduct promotions on its platform. In fact, Twitter's Guidelines for Contests on Twitter (which, despite its name, applies to both contests and sweepstakes) appears to encourage promotions provided that the Twitter user experience is not compromised. For example, Twitter requires contest

promoters to disqualify any user who enters a contest from multiple accounts; encourages entrants to include an "@reply to you" in their update so that all the entries are seen; and discourages multiple entries from the same participant on the same day, presumably to discourage posting of the same Tweet repeatedly (à la "whoever re-Tweets the most wins" variety).[14]

Legal Insight

The sheer reach of social media promotions can work both great magic and harm for a company. In November, 2011, for example, Australian airline Qantas launched its "Qantas Luxury" competition on Twitter, asking users to describe their "dream luxury inflight experience" in exchange for a pair of Qantas first-class pajamas and a toiletries kit. Reportedly that same day, more than 22,000 tweets were sent using the designated "#QantasLuxury" hashtag, many critical of the airline for having canceled its flights a month earlier due to a union strike, and many ridiculing the airline's service (and its pajamas!).

Companies should always be prepared with a coordinated legal, PR, and social media marketing crisis response plan in the event their social media contests or sweepstakes backfire.

Facebook

On November 4, 2009, Facebook issued new Promotions Guidelines that contain specific rules for administering sweepstakes and contests on its website. These guidelines were again most recently revised on May 11, 2011. Under this revision of the guidelines, *administering* a promotion on Facebook means "the operation of any element of the promotion, such as collecting entries, conducting a drawing, judging entries, or notifying winners."[15]

As of the date of publication, promotions are subject to the following guidelines:

- **Must use the Facebook platform app**—Facebook requires that all promotions on its site be administered via a third-party Facebook platform application, within Apps on Facebook.com, either on a canvas page (that is, a blank page within Facebook on which to load and run an app) or an app on a page tab. If you do not want to use an app to run your promotion, you should consider running it on your own website or blog, and simply have contest participants like your Facebook page as a part of that contest.

- **Use the allowed functions**—Facebook now allows only three site functions to be used as a condition of contest registration or entry:
  - Liking a page
  - Checking into a place
  - Connecting to your app

Note

With the exception of the three functions noted above, entry into a promotion can never be conditioned upon a user providing content on the site, including liking a Wall post or commenting or uploading a photo on a Wall. In 2011, Scandinavian Airline's Facebook page was temporarily suspended for violating this rule. To promote a million seat fare sale, SAS ran a competition on Facebook where SAS fans could "grab" a free trip (see Figure 1.1). Fans were asked to change their profile picture into the custom made "Up For Grabs" image and post a matching image on the company's Facebook Wall. Although the clever promotion garnered a lot of social media buzz, it used prohibited Facebook functionalities (posting a photo, for example) as a condition of contest registration, in violation of Facebook's rules.

Figure 1.1 *SAS's "Up For Grabs" Promotion.*

- **May not be used for a promotion's registration or voting methods**—Facebook features and functionalities cannot be used as a promotion's registration or entry mechanism, nor as a promotion's voting mechanism. For example, the act of liking a page or checking in to a place cannot automatically register or enter a promotion participant. So, no more "Just like our page, and you'll be automatically entered to win!" If you want to do a promotion for people who liked your page, you need the app you use to offer a way to enter, such as through providing an email address. Accordingly, although companies can condition competition entry on liking a page, the like functionality cannot be used as the actual method of entry itself. The action of becoming a fan can never alone equal an automatic entry into the contest or sweepstakes. Rather, after having liked your page, entrants must be directed toward a separate registration process administered through a third-party app on a separate canvas page (now a link, formerly a tab).

Note

Contiki Vacations' "Get on the Bus" Promotion offered the travel firm's Facebook fans aged 18 to 35 a chance to win a free trip worth up to $25,000 (see Figure 1.2). The "Get on the Bus" promo challenged fans to choose from one of eight travel destinations, gather a crew with four friends together to fill a virtual "bus" (which incorporated music, movies, Likes and other interests that users had in common), and then collect as many votes as possible in order to win. To gather votes, participants were encouraged to ask people to Stumble, Digg, Blog, Buzz, Tweet and Share their bus page, create YouTube videos explaining why their bus should get the most votes, ask celebrities to tweet on their bus' behalf, and create handouts with their bus link to give to friends. Interestingly, just as the "Get on the Bus" promo was launching, Facebook changed its policy about the use of Likes—that is, no Facebook features or functionality, such as the Like button, could be used as a voting mechanism for a promotion. Contiki's response? It created a "Vote" button that was displayed above each bus instead!

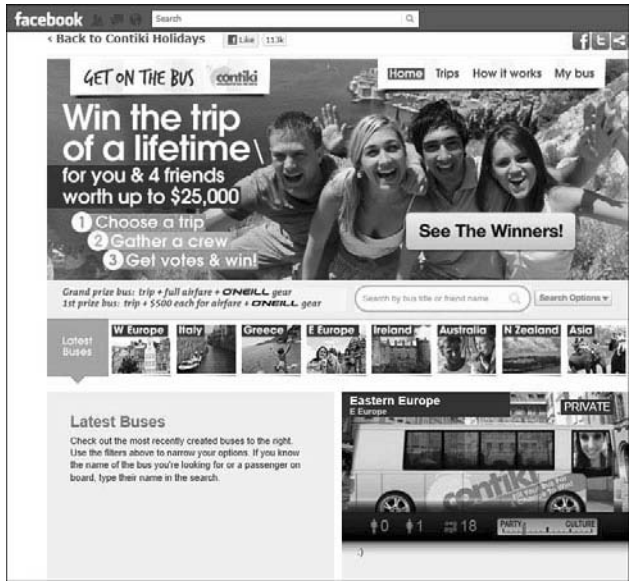

Figure 1.2 *Contiki Vacations' "Get on the Bus" Promotion.*

- **Facebook features may not be used to notify winners**—Companies are not allowed to use any Facebook features to notify winners, such as through Facebook messages, chats, or posts. Companies should establish alternate means of communication with all participants (such as email) to notify winners.
- **Must make proper disclosures**—The guidelines also require that the official rules for a promotion administered on Facebook include specific disclosures, including an acknowledgment that the promotion is not associated with or sponsored, endorsed or administered by Facebook, a provision releasing the social networking site from liability from each participant; and notice that information submitted by participants is being disclosed to the contest promoter, and not Facebook.
- **Do *not* use Facebook's intellectual property**—Companies are not permitted to use Facebook's name, logos, and so on in their promotions, other than to fulfill the required nonaffiliation disclosure.

It is only a matter of time before more and more Facebook accounts of both small businesses and major brands are suspended (or disabled) due to noncompliance.

Many companies appear to be ignoring Facebook's Promotions Guidelines, but it is only a matter of time before more and more Facebook accounts of both small businesses and major brands are suspended (or disabled) due to noncompliance.

Legal Insight

In the first case of its kind,[16] the National Advertising Division (NAD), the advertising industry's self-regulatory forum, determined that Coastal Contacts, Inc. must provide, at the outset of any "like-gated" promotional offer, a clear and conspicuous statement for all material terms and conditions included in its Facebook promotion requiring consumers to like a product page. (*Like-gated promotions* are those in which a company requires a consumer to like its Facebook page to gain access to a benefit, such as a deal, a coupon code, or other savings.)

In this case, Coastal Contacts told consumers on its Facebook page to "Like this Page! So you too can get your free pair of glasses!" Competitor 1-800-Contacts challenged the promotion, however, claiming that Coastal failed to disclose that additional terms and conditions applied (for example, that consumers were responsible for the cost of shipping and handling) until after the consumer entered the promotion by liking Coastal's Facebook page. While restricting a coupon, deal, or discount to users who like a company's Facebook page is a popular promotion technique used by brands and businesses, companies should never use fraudulent or misleading offers to increase the number of likes on their Facebook page (for example, by claiming something is free when it is not). Consistent with FTC advertising guidelines (discussed in detail in Chapter 2), the NAD specifically observed that requiring employees to "like" a company's Facebook page without informing consumers that they work for the company is a fraudulent or misleading means of obtaining "likes." Furthermore, although not addressed by the NAD, to comply with Facebook's Promotions Guidelines, Facebook-based "like-gated" promotions need to ensure that entry is not conditioned solely on liking a page.

This chapter provides only a preliminary overview of the potential legal pitfalls facing companies which operate promotions through social media channels. Further, there are a variety of other statutes covering special types of promotions which were not addressed in this chapter, including: in-pack/on-pack promotions; bottle cap sweeps; preselected winners; everybody wins; retail promotions; promotions aimed at children; Internet and mobile promotions; direct mail promotions; and telemarketing promotions. Social media campaigns conducted in conjunction with these promotional techniques should be exercised with an extra degree of caution.

As the popularity of social media sweepstakes and contests continues to grow, the laws regulating this space will surely follow. It will probably be a few more years before we have a comprehensive statement of the law governing these issues—but even then, the rapid pace of technological advance makes obtaining a definitive set of laws almost impossible. Careful promotional planning, structuring, and oversight are the best means of running successful and legally compliant social media promotions. To that end, companies should heed best practices for social media promotions as summarized in Figure 1.3.

Social Media Legal Tips for Contests and Sweepstakes

DOs	DON'Ts
■ Brush up on your understanding of the basic legal differences between contests, sweepstakes and lotteries. Establish a promotional compliance checklist for each type of promotion to ensure your promotions comply with the laws which govern them.	■ Never structure a promotion based primarily on chance (a sweepstakes) to require any form of payment—otherwise, you may have created an illegal lottery.
■ If the primary method of entry in a sweepstakes involves payment or any other form of "consideration," be sure to provide—and clearly disclose—a free alternate method of entry (AMOE), such as mail-in entry.	■ Do not hide the free AMOE, make it less prominent than the paid method of entry, or make it available to only a few participants or on an unequal basis. The chances of winning must not increase (or decrease) for those who pay versus those that enter via the free AMOE.
■ As a general rule, avoid premium text messaging promotions wherever possible. If using such promotions, make sure you offer something of equivalent retail value (a free ring-tone, wallpaper, or t-shirt, for example) in exchange for the entry charge. This item should be a real product or service, otherwise widely available and marketed for purchase for at least as much as the premium text charge.	■ Do not charge entrants simply for the chance of winning. Establish promotions such that any money customers pay to enter are for the products purchased (for example, a soda, movie ticket, and so on), and not solely for the chance of winning a prize.
■ Companies using Facebook "like-gated" promotions should clearly and conspicuously disclose material terms and conditions of the promotion—such as any additional fees for shipping, handling, and product upgrades, for example—at the outset of any promotional offer, and on a page that is not "like-gated."	■ Do not use fraudulent or misleading offers or other inducements to increase the number of "likes" on a Facebook page (by paying a service to artificially inflate the number of "likes" or requiring employees to "like" their employer's page without disclosing the employment connection for example).
■ Remember that you may require someone to "like" your Facebook page or "check-in" to your place before entering a promotion, but these acts alone can never register or enter the participant.	■ Do not condition registration or entry into a contest or sweepstakes upon liking a Wall post, posting a newsfeed, inviting friends, updating status, uploading a Wall photo, or using any Facebook functionality other than "liking" a page or "checking into" a place.

Figure 1.3 *Social Media Legal Tips for Contests and Sweepstakes.*

CHAPTER 1 ENDNOTES

1 *See* 31 U.S.C.A. § 5362(1)(E)(viii)(I), which provides, "The term 'bet or wager' does not include … participation in any game or contest in which participants do not stake or risk anything of value other than— (I) personal efforts of the participants in playing the game or contest or obtaining access to the Internet …"

2 *See* NY Office of the Attorney General Press Release, *CVS TO AMEND SWEEPSTAKES PROMOTIONS*: *Spitzer Obtains Agreement To Ensure Non-Purchasing Consumers Can Easily Enter Contest* (Jul. 8, 2004), available at http://www.ag.ny.gov/media_center/2004/jul/jul08a_04.html

3 States that appear to apply the *Dominant Factor Test* include: California, Connecticut, Georgia, Idaho, Indiana, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, and South Dakota.

4 States that appear to apply the *Material Element Test* include: Alabama, Hawaii, Missouri, New Jersey, Oklahoma, and Oregon.

5 *Morrow v. State*, 511 P.2d 127 (Alaska 1973)

6 *See N.Y. Gen. Bus. Law § 369-e; Fl. Stat. § 849.094*

7 *Herbert et al. v. Endemol USA, Inc. et al.*, Case No. 2:07-CV-03537-JHN-VBK (C.D. Cal. May 31, 2007))

8 *See Order Denying Defendants' Motions and Joint Motions to Dismiss* (Florence-Marie Cooper, J.) (Document 38) (Nov. 20, 2007) in *Herbert et al. v. Endemol USA, Inc. et al.*, Case No. 2:07-CV-03537-JHN-VBK (C.D. Cal. May 31, 2007)

9 *See Plaintiffs' Memorandum of Points and Authorities in Support of Combined Motion for Final Approval of Settlements* (Document 120) (Nov. 11, 2011) in *Herbert et al. v. Endemol USA, Inc. et al.*, Case No. 2:07-CV-03537-JHN-VBK (C.D. Cal. May 31, 2007)

10 31 U.S.C. §§ 5361-5366

11 *Id*. at § 5363

12 *See* LinkedIn's User Agreement, available at http://www.linkedin.com/static?key=user_agreement

13 *See* Google+ Pages Contest and Promotion Policies, available at http://www.google.com/intl/en/+/policy/pagescontestpolicy.html

14 *See* Guidelines for Contests on Twitter, available at http://support.twitter.com/entries/68877-guidelines-for-contests-on-twitter

15 *See* Facebook's Promotions Guidelines (last revised May 11, 2011), available at http://www.facebook.com/promotions_guidelines.php

16 *See* National Advertising Division's November 8, 2011 Press Release, available at http://www.narcpartners.org/DocView.aspx?DocumentID=8811&DocType=1

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