

NICOLAI LAW GROUP, P.C.

BUSINESS LAW & LITIGATION

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TO: Clients & Interested Parties

FROM: NLG Professional Staff

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RE: User Generated Content Promotions

New promotions incorporate the latest technology and trends to capture public attention and generate good will. A trend is to get user generated content (“UGC”) - videos created and uploaded by consumers that incorporate a product. UGC promotions get consumers intimately involved with a brand or promotion. The Doritos “Super Bowl - You Make It. We Air It” contest had entrants submitting homemade Doritos commercials. The first and second place winners were shown during the Super bowl.

Creating a UGC promotion has many new legal challenges, including intellectual property issues, rights of publicity, and advertising claims; issues that go beyond a typical sweepstakes or contest promotion. This memo addresses some of the key considerations involved in structuring UGC promotions and the rules.

BACKGROUND

Not too long ago, uploading and distributing video content over the Internet was a novel idea. Vastly increased broadband penetration has created an explosion of video sharing sites dominated by UGC. Many companies now look to capitalize on the UGC buzz by incorporating it into new promotions.

How They Work

A typical UGC promotion requires entrants to submit a video of them showing why they enjoy a product. The videos are usually posted online for public viewing, critique, and voting for which video is “best.” The individual whose video is watched the most or receives the highest score at the end of the promotion is declared winner. People who enter are more vested in the promotion. As a result, marketers are using UGC promotions in campaigns to generate buzz and brand loyalty.

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A 2007 survey on the perceptions of UGC demonstrates the importance and anticipated growth of these promotions: 70 percent of respondents used UGC as part of an integrated campaign; 82 percent were considering incorporating UGC in a future campaign. “Target engagement” was the single biggest factor driving the decision to incorporate UGC elements. 21 percent believed UGC gives insight into brand perception. More than half (53 percent) felt UGC has “some” impact on consumer purchase decisions; 59 percent felt their use of UGC would increase over the next six months, and less than four percent expected it to decrease.

UNIQUE ISSUES

As promotions embrace UGC, new and unique legal issues come up. Having a promotion center around UGC and giving the public the power to decide the winner can create new legal concerns.

A clear and binding set of official rules contestants must agree to is key for the promotion. Once the official rules are published and entries are accepted, the rules should not be changed. Important items to consider in developing the rules are:

Purpose Of The Promotion

To properly protect your rights and develop appropriate promotion rules, it is critical to first clearly understand the purpose of the promotion. Questions to consider are:

- What are the goals of the promotion?
- Is the promotion designed to generate excitement and involvement with the brand or a Web site?
- Do you want to make further use of the UGC after the contest, like incorporating it into an advertisement or ad campaign?
- Is the promotion designed to generate testimonials supporting the product or criticism of a competitor’s product?
- Where and when are the entries going to be displayed?
- What prizes will be awarded?
- Who will judge the entries and how?
- Is your market one in which target entrants are likely to participate?

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

What Rights Do You Need?

Assuming you intend to have the entries transmitted and displayed, intellectual property and privacy rights need to be cleared. If the intent is to also use entries in other forms of advertising, clearance for those media channels must also be obtained.

- Do you need all rights associated with any entry or are the entries needed only for the promotional period?

- What will you do with non-winning entries? The rules need to clearly say what the potential uses are and obtain clearance in the entry form so that an entry can be used as intended without having to go back to the entrant.

Safe Harbor Protections

Sponsors have exposure for copyright infringement whenever entrants use third-party materials without obtaining the necessary rights. The Digital Millennium Copyright Act (“DMCA”) has safe harbors to protect Web site owners from monetary liability and some kinds of injunctions for hosting infringing materials. These provisions are potentially available for Internet postings if the operator:

- Appoints a designated agent with the Copyright Office to receive infringement notices;
- Does not have any knowledge that the material is infringing and infringing activity is not otherwise apparent;
- Acts expeditiously to remove or disable access to the material; and
- Does not receive a financial benefit directly attributable to the infringing activity.

DMCA safe harbor protections are limited to Internet postings, and do not apply to using the materials in other media channels like television. For the Internet, it potentially provides strong protections.

The Communications Decency Act of 1996 (“CDA”) protects computer service providers and users from claims that published materials violate laws about obscenity, lewdness, harassment, or are otherwise objectionable. How CDA applies to Lanham Act false advertising claims is an open question. CDA will not protect against copyright or trademark infringement claims.

UGC promotions that encourage criticism of a competitor may result in a Lanham Act action for false advertising. Subway sued Quiznos over a UGC promotion where Quiznos sought contestants’ submitted video entries comparing a Subway sandwich to the Quiznos Prime Rib Cheese steak sandwich. Subway alleged the advertising statements encouraged and promoted by Quiznos were false and misleading in violation of the Lanham Act.

How Will IP & Privacy Rights Be Cleared?

Accepting entries and planning the further use of the image in campaigns means thought needs to be given to third-party clearance issues. The people who appear in any entry must give written releases permitting their images to be broadcast in the campaign media. Promotion rules must require that the entrant has secured rights from each person in the entry. Confirmation from third parties may be needed for other uses like a commercial. The right to use any third-party images, sound, trademark, and other intellectual property must be cleared. Many UGC contests handle this by banning the use of any third-party intellectual property rights other than original content. Another trend is to provide entrants with a library of pre-cleared material for entrants to use in their entry.

PROMOTION BASICS

A UGC promotion will likely award prizes to winning entries. To do this, the promotion must be structured to avoid being an illegal lottery. State and federal laws that prohibit unlawful lotteries govern all games of chance.

Most states follow a rule where a game is a lottery if it has consideration, chance, and a prize. To avoid creating an illegal lottery, one of these three elements has to be eliminated. That usually ends up being either chance or consideration because you will want to award a prize.

“Consideration” is made purposely hard to define in promotion law. It can be cash or non-cash. Cash consideration means spending something of tangible value to enter or play like buying a product or the paying an entry fee. Non-cash consideration is spending substantial time or effort that will benefit the sponsor in some material way like watching a sales presentation and then completing a detailed survey.

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

Skill Contest Or Sweepstakes?

Since entering a promotion may require consideration, like buying the sponsor’s product to put it in the entry video or paying an entry fee, promoters may structure it as a contest - a game of skill - in which chance is removed. A skill contest is where evaluating the entry under specific criteria disclosed in advance chooses a winner. When the winner is chosen on skill, consideration may be present because the chance element has been eliminated or minimized.

Unlike sweepstakes, skill contests may require contestants to buy something or make a payment to enter. Understand that the risk of a promotion being challenged increases by requiring an entry fee.

It is critical whether the amount of chance in a contest would transform it into a game of chance. The general definition of “chance” is that a random process selects the winner. Some states require a skill contest only use a bona fide judge to determine the winner. This would be someone who possesses the ability to objectively evaluate entries and critique them based on predetermined criteria.

In states applying this test, a promotion where the winner is chosen based on popular vote is likely to be considered a game of chance. Trying to decide whether something is a game of chance is tough. There are many factors that must be considered and each state has its own test. Factors to consider include:

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

- Is there a limit on the number of votes a person can make? Unrestricted voting makes a “chance” determination more likely.

To decide whether a promotion is a skill contest or a chance promotion, states generally use one of four different tests; the “dominant factor” test, the “material element” test, the “any chance” test, and the “pure chance” test:

States that use the dominant factor test (a majority), a promotion is a game of chance when chance “dominates” the distribution of prizes, even though the exercise of skill or judgment is also present.

The material element test is tougher. Under this test, a contest is a game of chance if the chance element is present to a “material” degree. These states require a more stringent analysis of the amount of chance present.

In states that use the any chance doctrine, a game will be considered a game of chance if there is any element of chance whatsoever present.

The final test, which is rare, is the pure chance doctrine. This test is the most lenient. Using this test, a promotion must be entirely based on chance to be an illegal lottery. The exercise of any skill by a participant means it is not a lottery.

Non-Cash Consideration

UGC sweepstakes create unique non-cash consideration issues. Standard promotions always run the risk of being either illegal or subject to additional laws if an entry fee is required. When the only method of entry is by Internet, having Internet access is not treated as consideration. The Unlawful Internet Gambling Enforcement Act of 2006 says Internet access fees are not “consideration.”

Situations where an entrant must expend substantial time or effort on an entry and the sponsor benefits from those efforts are unclear. There are very few clear lines as to how much non-cash consideration is too much. A sponsor should explore creating an alternative entry method that allows for participation that avoids non-cash consideration as a condition of entry.

Limitations On Submissions

The contest rules should describe the creative assignment - what needs to be submitted. The rules should also be clear about what is required to enter the contest, i.e., the entry criteria. Are entrants required to portray the product in the submission or simply a product category?

The rules should detail the maximum/minimum length of a submission and any language or formatting restrictions. Video length is especially important when the promotion sponsor is responsible for judging the entries and is obligated to review each one. The IT department should make sure there is enough bandwidth for the anticipated response.

Define the minimum age of any persons in the submission - i.e., are there minors whose parents need to provide consent, restrictions on obscenity, the use of third-party appearances or rights? Are entries limited to amateurs, and if so, is that sufficiently described? All entry criteria should be enforced consistently, particularly once entries are accepted.

Privacy

Personally identifiable information will likely be collected from entrants. The rules should provide for acceptance of a privacy policy. A link to the privacy policy should be provided, along with an ex-

press recognition that the person agrees to be bound by it (and the Official Rules). The privacy policy should accurately describe the collection and use of the information.

Claims That Might Appear Submissions

Advertisers must have adequate substantiation for all claims made in any ad. Testimonials must reflect a typical user's experience or have an adequate disclosure that the results are not typical, and individual results will vary.

The FTC takes the position that sponsors are responsible for claims that appear in UGC entries used in campaigns and that claims made in the use of a UGC promotion entry must reflect a typical user's experiences, or be adequately disclaimed. The FTC expects sponsors to be responsible for policing the claims as if the sponsor were making the claim itself. This becomes critical when the public at large is being asked to log on and rate submissions.

Monitoring Compliance

Some UGC promotions allow entrants to upload and post submissions without pre-clearance. Contests without a pre-clearance process must effectively monitor entries to make sure third parties' rights are not infringed, that the sponsor is not at risk for making false or deceptive claims or unfairly insulting the competition, or that an entry by a minor, or other ineligible entry, does not appear.

A sponsor should have a monitor reviewing entries throughout the submission. Once entries that violate the rules are identified, the sponsor should promptly remove the entry and disqualify the entrant. It is therefore critical that the rules give the sponsor an open and clear right to remove and disqualify any entry for any reason at any time. Not removing entries that violate contest rules may cause legal problems, not to mention a public relations disaster.

Who Judges?

The rules should specify from the beginning what judging criteria will be used, and whether winners will be chosen based on public or professional judging, or a combination. Depending on who is doing the judging (like the public) a skill contest could be transformed into a game of chance.

Sponsors may use standings during a promotion to further excite entrants and voters. If this is going to be used, the rules should say that a contestant listed as a winner (or leader) at the end of the promotion has not necessarily won a prize. All entrants are subject to verification and must meet all eligibility requirements to be confirmed and declared a winner.

State Registration Of UGC Promotions

Florida and New York require games of chance to be registered and bonded if the total prize value is over \$5,000. Rhode Island requires registration for retail (including online retailers) games of chance promotions over \$500.

The Florida Department of Agriculture and Consumer Services is following the dominant factor test by informally saying it is up to sponsor to decide if chance outweighs the skill element. Florida has not issued a formal opinion on this issue. Sponsors need to exercise care in making this determination. When in doubt, register and bond.

The New York Department of State takes the position that the game of chance law does not apply to promotions that require video submissions. It has actually rejected game of chance registrations if

a video must be submitted to enter. New York does not appear to be concerned with other aspects of the promotion like video content, winner selection, and criteria used.

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