

WHAT'S COOKING IN SWEEPSTAKES AND CONTEST LAW

Any fisherman will tell you to look for cross-currents to produce the most action. So too, the most interesting legal issues arise when the law tries to keep up with advances in technology. The theme this past year in sweepstakes and contest law has been how and whether the law is adapting to technological changes.

Text-to-Win Sweepstakes

Entering sweepstakes by text message is hot. But does charging standard or premium text message rates turn your sweepstakes into an illegal lottery? Since there is a cost associated, an alternate free method of entry ("AMOE") is needed. Because of the ubiquity of the internet (including free availability at many libraries), online entries are generally accepted as the AMOE in text-based sweepstakes. Charging a premium text message fee may still be risky, despite the existence of an AMOE. In April, the Georgia Supreme Court ruled that a *Deal or No Deal* sweepstakes involving a 99¢ premium text message fee did not violate gambling laws because the fee was not a "bet or wager" and was paid regardless of the outcome. *Hardin v. NBC Universal, Inc.*, 283 Ga. 477 (2008). But a few months earlier, a California court denied a motion to dismiss class action lawsuits involving other TV text-based sweepstakes and stated that the critical question is whether payment was induced for the purchase of something of equivalent value in return.

User-Generated Content ("UGC")

Online contests seeking music, videos, games, anime, etc. created by the entrant are very popular, but impose risks of posting infringing or defamatory content. Protection for copyright infringement may be available under the Digital Millennium Copyright Act, 17 U.S.C. §512. To take advantage, you must (1) lack knowledge of the infringement, (2) promptly take down the content, (3) not directly receive a financial benefit from or induce the infringement, and (4) designate an agent at the US Copyright Office. Protection for defamation claims under the Communications Decency Act, 47 U.S.C. §230, is available as long as you are clearly publishing another's statement on the Web – you don't even have to take it down! However, the pending lawsuit concerning a Quiznos contest inviting entrants to submit a video comparing a Subway sandwich to a Quiznos sandwich illustrates the legal minefield that can be encountered in a UGC contest. *Doctor's Assocs. v. QIP Holders*, 2007 WL 1186026.

CAN-SPAM (Controlling the Assault of Non-Solicited Pornography and Marketing Act; 15 USC §7701)

In May the FTC made clear that online sweepstakes offering additional entries for forwarding emails to friends are subject to CAN-SPAM. See www.ftc.gov.

New California Sweepstakes Law

In September, California amended its sweepstakes law (Section 17539.15 of the Ca. Bus. and Prof. Code) by adding numerous disclosure requirements effective January 1, 2009. The law is *drafted* as if targeted only at direct mail sweepstakes, but the legislature refused to clarify the language despite requests. The significant disclosure requirements include: (1) stating "no purchase or payment of any kind is necessary to enter or win this sweepstakes" in capital letters and in a separate paragraph of the rules, (2) stating the winner selection date in the rules, and (3) providing full rules in each "sweepstakes solicitation."

Areas to Watch

Online and text-based promotions, while effective marketing tools, also expose promoters to privacy and data collection concerns: Is complying with my privacy policy good enough? What can I do with the information collected? How can I confirm children aren't participating? What do I need to say in the rules and other disclosures? While laws such as CAN-SPAM and COPPA (the Children's Online Privacy Protection Act) provide answers to some questions, technology is changing faster than the law can keep up. But legislatures and regulators are trying. On the legislative front, at least 44 states have enacted data security laws requiring businesses to notify individuals affected by security breaches; the U.S. Senate held hearings this summer on online advertising and privacy; NY, CT and MA legislators tried to pass laws this year to regulate online behavioral advertising; and the "Do-Not-Text Act of 2008" was introduced in the U.S. Senate to prohibit sending unsolicited commercial emails to cellphones.

On the enforcement front, in November 2007, Craftmatic settled an FTC action by paying a \$4.4 million penalty for placing sales calls to consumers on the Do Not Call List, even though the consumers provided their phone numbers to Craftmatic on the sweepstakes entry form. In a June settlement with the NY AG's office, H&R Block agreed to pay \$245,000 for failing to post rules at its offices and adequately disclose the AMOE in connection with a game where scratch-off cards were given to customers who purchased their tax preparation services.

Ever-developing technology combined with marketers' skills and government oversight will continue to create cross-currents that present turbulent legal issues for creating and administering compliant sweepstakes and contests. Please feel free to contact Rob Laplaca at 203-222-3110 or rlaplaca@levettrockwood.com to discuss these or other promotion law issues.

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