

Handling Consumer- Generated Content Without Getting Burned

Over the past few years, a growing number of companies have begun to incorporate consumer-generated content into their promotions. For example, the makers of Doritos® chips have recently run two contests in which consumers were invited to submit content for the chance to be featured in a Super Bowl commercial. The success of these types of promotions has emboldened other companies to experiment with consumer-generated content as well. But for every success story, there are multiple promotions that have been plagued by missteps. A few of these missteps have been highly publicized or resulted in lawsuits. Many other missteps have gone unreported due to skillful damage control on the part of sponsors.

Promotions with consumer-generated content can offer many benefits to sponsors. If a promotion is successful, it could generate publicity for a relatively small investment. Consumers are also likely to spend more time on a company's website interacting with the content and learning about the company's products than they would otherwise. But these types of promotions also pose a number of challenges. In addition to the legal requirements that apply to all types of promotions, there is an inherent risk in putting so much power in the hands of consumers. The more control that is given to consumers, the less control a sponsor will have. Fortunately, there are strategies that companies can employ to reduce these risks.

PROMOTIONS LAWS

Most promotions involving consumer-generated content are run as contests in which prizes are awarded to winners. All 50 states prohibit companies from running chance-

based promotions in which consumers are required to make a payment or purchase. Although it may be lawful in most states to require a purchase or payment for a skill-based contest, there are a number of states with broadly-worded statutes that could restrict such a requirement. Therefore, sponsors should pause and evaluate these restrictions before offering any promotion in which consumers are required to pay money or purchase a product.

In a contest, it is important to ensure winners are selected on the basis of skill (as opposed to chance). It may be easy to do this if the sponsor selects the winners, but if the public is allowed to vote, it is harder to ensure they select the winner based on skill. For example, members of the public may simply vote for their friends and thus inject an element of chance into the promotion. In addition, many sponsors have found that entrants try to manipulate the vote by getting friends to rate their entries highly while giving low ratings to competitors. This often results in consumer complaints and forces sponsors to engage in damage control.

If public voting is important, there are various strategies a sponsor can employ to minimize the risks. One possibility is to combine public voting with an internal judging process. For example, in some cases, it may be beneficial to have judges narrow entries down to a group of finalists and then invite the public to vote. In addition, it is usually a good idea to limit the number of times each member of the public can vote in order to minimize the effects of any manipulation or fraud.

LIABILITY FOR CONTENT POSTED BY CONSUMERS

Although a company can ensure that its own content complies with applicable laws, it is more difficult to ensure that consumer-generated content is lawful. The more control a company gives to consumers to post content, the more creativity the company is likely to see. However, this also introduces a greater chance that submissions will contain content — including music, images, and shots of other people — that could violate a third party's rights. If a third party finds that its intellectual property or publicity rights have been violated by a video posted on the sponsor's website, that party may take action against the sponsor.

The first line of defense is a good set of disclosures in the contest rules and advertisements. Sponsors should clearly disclose that entrants may not submit content that contains, for example, any elements that violate a third party's copyright or trademark rights and that content should not depict any individuals that have not granted their permission to be in the videos. In some cases, it may be beneficial to screen submissions, but whether that is possible may depend on the amount of resources at the sponsor's disposal, the technology used, and the number of videos submitted.

Sponsors can also take some comfort in laws that provide immunity for content that is posted by others. For example, the Digital Millennium Copyright Act ("DMCA") generally provides a safe harbor to service providers that employ a "takedown process" and promptly take down content after receiving a notice alleging that content infringes a third party's copyrights. Section 230 of the Communications Decency Act ("CDA") essentially grants Internet

service providers immunity from liability for publishing false or defamatory material as long as that material was provided by another party.

The limits of protection offered by these laws are currently being tested in recent lawsuits involving consumer-generated content. In one lawsuit, Viacom is arguing that YouTube should not be able to take advantage of the DMCA's safe harbor because YouTube receives a financial benefit attributable to the infringement and has the right to control it. In another lawsuit, Subway is attempting to hold Quiznos liable for statements made by consumers, notwithstanding the protections offered by the CDA, because Quiznos allegedly encouraged those statements. Companies that work with consumer-generated content need to pay close attention as these cases develop.

ADVERTISING LAW PRACTICE

Attorneys in Kelley Dye's Advertising Law Practice Group have substantial experience assisting clients in structuring a wide variety of promotions, including promotions with consumer-generated content.

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