

Consumer-Generated Content Is Hot

How to Avoid Getting Burned

By David Ervin and Gonzalo E. Mon

Over the past year, a growing number of companies have begun to sponsor promotions involving consumer-generated content. For example, Frito-Lay and Unilever each ran contests in which consumers were invited to create commercials and the winning spots were aired on television. These types of promotions offer many advantages for marketers. If a promotion is executed well, it could generate publicity for a relatively small investment. Consumers are also likely to spend more time on a company's Web site watching videos and learning about the company's products than they would otherwise. Moreover, a company may end up with a great commercial at a fraction of the price they would have had to pay an agency to develop it.

Along with these advantages come a number of legal challenges. Promotions like those sponsored by Frito-Lay and Unilever are subject to contest laws in every state, so sponsors need to make sure they comply with the laws in each state in which a promotion is offered. When a sponsor turns control of content over to consumers, it may lose the ability to ensure the content complies with applicable laws. Because sponsors could be liable for the content posted on their sites, they need to take steps to protect themselves against the possibility that consumer-generated content will infringe the rights of third parties or contain false claims. And, if sponsors aren't careful, they may be limited in how they can use content submitted in a contest.

PROMOTIONS LAWS

Promotions in which consumers are invit-

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ed to submit entries for the chance to win prizes are subject to a patchwork of laws in every state. These laws may regulate, among other things, how winners may be selected and whether consumers can be asked to incur any costs to enter. Failure to comply with these laws can — and often does — lead to complaints from consumers and inquiries from regulators.

In a contest, it's important to ensure winners are selected on the basis of skill (as opposed to chance). In order to ensure a promotion is skill-based, a sponsor must generally establish objective judging criteria, communicate the criteria to entrants, and use judges that are qualified to employ the criteria. If the sponsor selects winners, it's fairly easy to ensure these conditions are satisfied. But if a sponsor incorporates public voting, it can become more difficult. For example, members of the public may simply vote for their friends and thus inject an element of chance into the promotion. If public voting is important, a sponsor can reduce these risks by using qualified judges to narrow the entries down to a smaller number and then invite the public to vote based on criteria which they can evaluate.

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-contest, there are still a number of states in which such a requirement would be unlawful. Therefore, if a sponsor plans to offer the contest to residents of all states, it must generally make sure that no purchase or payment is required. This could be tricky if a product must be featured in the video. If, on the other hand, the sponsor wants to impose such a requirement, it must identify states in which such a requirement would be unlawful and void the promotion in those states.

INTELLECTUAL PROPERTY LAWS

Although a company can ensure that its own content complies with applicable laws, it's more difficult to ensure that consumer-generated content is lawful. The more con-

trol a company gives to consumers, 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 on the Web site. Sponsors should clearly disclose that any content submitted by entrants may not contain any copyrighted elements other than elements owned by the entrant and, if relevant, content owned by the Sponsor. In addition, the sponsor should state that any submissions that contain copyrighted elements not owned by the entrant will be disqualified. Whether a sponsor can actually screen all of the submissions as they are posted depends on the amount of resources at the sponsor's disposal, the technology used and the number of videos submitted.

If the sponsor cannot screen all submissions, it may be able to take some comfort in the Digital Millennium Copyright Act (DMCA). The DMCA provides a safe harbor from a claim of damages to "service providers" that employ a take-down process and promptly take down content after receiving a notice alleging that content infringes a third party's copyrights. The term "service provider" has been broadly interpreted by courts and should include most websites that host consumer-generated content. But the safe harbor isn't automatic. Companies need to take a number of steps to enjoy the safe harbor and may lose their protection if they have knowledge of infringement or are aware of facts from which infringement should be apparent.

It isn't clear at what point a company may lose its safe harbor. For example, in March, Viacom sued YouTube for copyright infringement and argued that the company shouldn't be able to take advantage of the DMCA's safe harbor because it has the requisite knowl-

edge of infringement. YouTube, on the other hand, has argued that it cannot screen all content on its site and that it promptly removes videos upon proper notification of infringement. Companies that work with consumer-generated content should pay careful attention to this case as it unfolds. In the meantime, they can reduce their risks by making the disclosures suggested above and responding promptly to infringement notices.

USE OF A THIRD PARTY'S LIKENESS

If a video contains the likeness of any identifiable person, that party may complain to the sponsor if his or her likeness was used without authorization. The party may argue, for example, that the use of the image violates that person's rights of publicity. If the unauthorized image is of a consumer, it may be difficult (and expensive) for that consumer to maintain a lawsuit because it may be hard to prove what damages were suffered as a result of having his or her image in a video. The risks are much higher, however, if the unauthorized image belongs to a celebrity. A celebrity may argue, for example, that the unauthorized use of his or her image in a commercial for one company interferes with his contractual obligations to another company or falsely implies an endorsement of the company or its products.

A sponsor can reduce its risk of liability related to any unauthorized use of a third party's likeness by clearly stating that submissions cannot depict any person other than the entrant or persons from whom the entrant has explicitly received permission to be depicted in the video. In some cases, the sponsor may want to go further and actually confirm that everyone in the commercial has actually granted that permission.

DEFAMATION

An individual may also complain that the unauthorized use of his or her image in a video is defamatory or that the video contains defamatory statements. Fortunately, Sec. 230 of the Communications Decency Act (CDA) essentially grants most Internet service providers immunity from liability for publishing false or defamatory material as long as that material was provided by another party. The CDA should provide protection to sponsors of promotions involving consumer-generated content as long as they don't edit or modify the videos with the allegedly defamatory content.

FALSE ADVERTISING

Advertisers must be able to substantiate any claims that a reasonable consumer may take away from an advertisement, regardless of whether the advertiser intended to make those claims. Therefore, it's possible a company may be held liable if a video on its website contains false or misleading claims

about the company's products or a competitor's products. This risk exists even if the claims in a video featured by the company were made by a consumer. For example, last year, the owner of Subway restaurants sued Quizno's over comparative claims made in a number of ads, including consumer-generated commercials submitted as part of a contest. The case is still pending.

The risk of liability under a false advertising claim may depend in large part on how the commercials are presented and whether a reasonable consumer would believe that the claims in the commercial are made or endorsed by the sponsor. If a sponsor clearly discloses that it doesn't endorse claims made by consumers or won't allow use of competitors' names or products in submissions, the risk of liability may be lower for videos that are simply posted by consumers on the Web site. However, if a company were to actively promote a video with false or misleading claims or encourage the use of such claims, it will likely lose the ability to distance itself from the claims. Therefore, if a company plans to use a video submitted by a consumer, it must ensure that it can substantiate any claims made in that video.

RIGHTS TO SUBMISSIONS

Just because a consumer submits content in a contest doesn't mean the sponsor owns it. A sponsor must carefully think about the rights it wants to submissions and find a way to secure those rights from consumers. When companies first consider the question of what rights they want to videos posted on their sites, many are tempted to ask for a broad range of rights, including ownership. But this may not always be the best option. For example, if a company owns all videos posted by consumers on its website, it may also own all of the legal problems associated with the videos. A better approach may be to simply secure rights to display all of the videos on the site (in the sponsor's discretion), but then separately secure ownership of videos the company has cleared.

If a sponsor plans to secure rights to content submitted by consumers, the sponsor should be clear about its intentions. At the very least, the sponsor should clearly disclose in the official contest rules what rights consumers will give up by virtue of entering the contest or winning a prize. It's also a good idea to include a checkbox on the entry form where consumers must indicate that they agree to the rules. In most cases, this should suffice if a company merely plans to display the videos on its website. But if the company has other plans for the videos — including broadcasting them on TV — the company should obtain written releases from the entrants who submitted the videos (and, in some cases, from third parties that appear in the videos).

AGENCY ISSUES

Sponsors that plan to broadcast consumer-generated content can run into additional problems if they try to involve their advertising agencies in the preparation of the content for broadcast. Most agencies (and a smaller number of advertisers) are signatories to the SAG and AFTRA agreements. Under these agreements, agencies may be prohibited from using non-union created materials in commercials or combining them with union materials. Thus, an advertising agency may not be able to assist in preparing a commercial submitted by a consumer for broadcast. It's important to note, though, the SAG/AFTRA requirements only apply to signatories and to the production of commercials. If a commercial is produced by a non-signatory and doesn't contain any union-produced content, the producer shouldn't be liable to SAG/AFTRA. The day may also come when top-line agencies participate in these contests. When they do, any content they submit is likely to be union-produced and subject to royalty payments if broadcast or used by the sponsor.

PLANNING A SUCCESSFUL PROMOTION

For all of their benefits, contests involving consumer-generated content present significant legal risks. Sponsors can reduce their exposure by: 1) ensuring that a promotion complies with contest laws in each state the contest is offered; 2) discouraging consumers from posting infringing content and acting expeditiously to remove content upon proper notification of infringement; and 3) securing the proper rights to the videos it plans to use. These steps go a long way towards protecting a sponsor from potential claims related to videos posted by consumers on its Web site. But if a sponsor plans to use the videos outside of the site, it must take extra steps to ensure the videos comply with applicable laws. This includes making sure it has rights to all content in the videos and making sure it can substantiate all claims in the videos.

It's also important to keep in mind that because contests involving consumer-generated content are relatively new, there are still a lot of uncertainties from a legal perspective. For example, it's still unclear exactly at what point a company may be liable for content submitted by a consumer as part of a contest. Therefore, in addition to taking the steps outlined above, companies that sponsor these types of promotions need to pay close attention to changes in the legal landscape and be prepared to respond quickly.

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