

Social Media Promotion Law: Contests and Sweepstakes

By [Robert McHale](#)

Date: May 30, 2012

[Return to the article](#)



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. It also identifies the steps you can take to minimize legal exposure while reaping the benefits of social media promotions.

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 re-tweets, 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”
- 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 Act¹ 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.

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.

The screenshot shows a YouTube video player for a video titled "SAS Up for Grabs" by the channel "cpbeurope". The video content is a promotional video for a contest where participants can win a trip to Paris. The video includes a grid of photos of people holding keys, a video of Daniel Andersson, and instructions for participants. The video player shows a progress bar at 0:32 / 1:27. Below the video, there are 30,422 likes and 84 dislikes. The video was uploaded by cpbeurope on Feb 17, 2011. The video description is "No description available." The video player has a "Like" button, an "Add to" dropdown, and a "Share" button. The video player also has a "Show more" button at the bottom.

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!

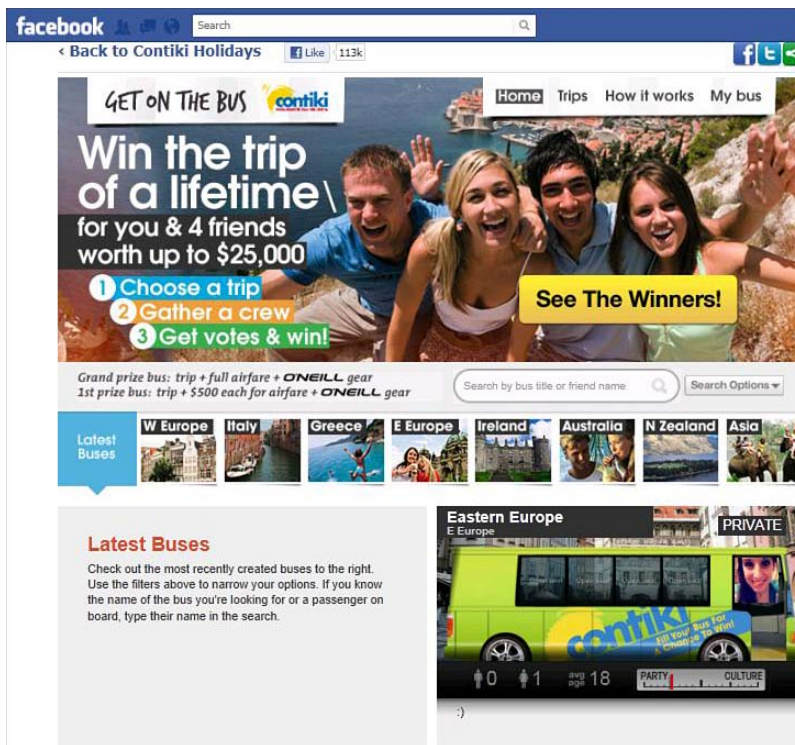


Figure 1.2 Contiki Vacations' "Get on the Bus" Promotion.

- **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.

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](#).

Legal Tips for Social Media Contests and Sweepstakes

DO's	DON'Ts
<ul style="list-style-type: none"> 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. 	<ul style="list-style-type: none"> Never structure a promotion based primarily on chance (a sweepstakes) to require any form of payment—otherwise, you may have created an illegal lottery.
<ul style="list-style-type: none"> 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. 	<ul style="list-style-type: none"> 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.
<ul style="list-style-type: none"> 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. 	<ul style="list-style-type: none"> 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.
<ul style="list-style-type: none"> 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.” 	<ul style="list-style-type: none"> 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).
<ul style="list-style-type: none"> 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. 	<ul style="list-style-type: none"> 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.

Note

The information contained herein is not intended to constitute legal advice or a legal opinion as to any particular matter. The contents are intended for general information purposes only, and you are urged to consult with an attorney concerning your own situation and any specific questions you may have. Robert McHale, Esq. is the founding Partner of [R | McHale Law](#), a full-service law firm whose corporate practice represents clients on a wide variety of IT and intellectual property law matters, including privacy and data security, copyright, trademark, licensing, and other proprietary protections. He may be contacted at: robert.mchale@rmchale.com.

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>

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