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Beyond Legal: What You Should Know About Social Media Promotions



By JOSEPH I. ROSENBAUM

Much has already been written about advertising, marketing and promotions in the new world of digital media. How do you fit all those disclosures and disclaimers in an SMS text message? What does notice or conspicuous mean on a Web page that must be scrolled to fully see? If I digitally insert a product placement in video or gaming content, when and where and how are disclosures needed? How do I protect my trademarks in cyberspace—everyone is cutting and pasting and copying them? Speaking of cutting and pasting, what about copyright protection? How do I know if a child is responding to a promotion even if the mobile device is registered to an adult?

Clients are often frustrated and confused as lawyers struggle and experiment with untested solutions to novel and challenging problems. Although analogies to traditional paper-based law are useful, they don't always fit and increasingly provide little, if any, precedent. Add to this, the reality that the World Wide Web, the Internet and our multi-billion cadre of mobile devices on the planet, have no real borders in a way that the law has traditionally recognized and no treaties yet to emerge to really confront harmonizing the chaos.

So allow me to add a little chaos, provide some practical guidance and raise some very real and increasingly challenging issues to creating promotions in the new world of social media.

When we think of promotions that involve "inducements," most marketing professionals divide the world

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into two major categories—sweepstakes; contests. Of course, there are also hybrids of the two, but more often than not, the legal characterization of a hybrid promotion will ultimately fall to one of the two. In the good old days before the Web and social media platforms, promotions were essentially a monologue. Marketing professionals would set the parameters, contact their lawyers to develop a set of official rules, create the entry forms, decide on the prizes, define the target demographic and magically a promotion would appear. In a world of television, radio and print, you could be careful; you could control the conversation; you could even reasonably control the distribution and audience reach.

Promotions on Social Media

Enter the world of the Internet and social media. Today, with platforms touting billions of people, interacting billions of time across virtually every national and international boundary, the monologue is a thing of the past. Marketing and promotions are conversations—often multimedia, usually interactive and digital and almost always borderless in their visibility, if not their eligibility. Today, creating and operating promotions on social media platforms is almost a foregone conclusion. You have to be in it, to win it—to borrow a phrase from the lottery.

From a legal point of view, clearly most of the traditional laws and regulations apply, either directly or by analogy. In many cases, regulators have begun updating their formal regulations as well as their enforcement tactics, to meet the challenges of the digital age. What this article is about is the added layer of constraints and requirements that are imposed upon marketing and promotional professionals by virtue of the social media platforms—the rules of the road that aren't created by legislatures or regulators, but by contract and by terms of use and requirements imposed by the social media platform hosts. To have access to their customers, you need to comply with their requirements and much like the patchwork regulatory patterns across multiple jurisdictions, no two platforms have identical requirements.

A few words of caution. The material below describes some of the most popular social media platforms today, but there are others. In addition, the requirements and considerations of today may be different tomorrow or the next day. Unlike federal and state government, which tends to follow a known, deliberative and generally well understood process in creating new law and regulation, social media platform hosts are corpora-

tions, whether privately held or publicly traded, that have wide discretion and significant latitude to create, implement and modify their rules and the contractual obligations by which subscribers and advertisers are bound.

For now, let's use some of the most popular as examples. According to the SocialTimes,¹ in 2014, Facebook had 1.28 billion active monthly users and Twitter had 255 million monthly active users, sending about 500 million tweets per day. Instagram had 200 million active users with over 20 billion photos shared thus far. LinkedIn had more than 2 users signing up every second and the platform reached 200 countries and territories around the world. Pinterest and Vine combined have over 100 million users, and over 6 billion hours of video are watched every month on YouTube (which has over 1 billion users). The sheer scale of social media engagement is planetary.

So let's get to the terms of use, contract requirements and conditions that apply and must be overlaid on the legal and regulatory criteria that already applies to promotions.

Facebook:

Promotions on Facebook are administered through Page Timelines and within Apps on Facebook. In Facebook promotions, there are a variety of ways to operate a promotion. Sometimes submissions are posted on the Timeline as a comment. Sometimes the Like button is used for voting by Facebook users. Entries can be collected by asking users to post to the Page, make a Comment or Like a Page post.

The rules must include a complete release of Facebook from any and all liability by entrants and participants and you must include words such as, "This promotion is not sponsored, endorsed, administered or associated with Facebook." You must also make it clear that to the extent an entrant or participant is providing information in connection with the promotion, that information is being provided to the promotion's sponsor (and anyone else specified in the rules) and not to Facebook—even though some of the information already provided to Facebook may overlap!

Facebook's terms also describe what you may not do. You may not administer promotions on a personal Timeline. Facebook prohibits inaccurately tagging people or encourage anyone to inaccurately tag themselves, in any content if they aren't actually depicted in the photograph. Although you can ask users to submit names of a new product in exchange for a chance to win a prize, you may not ask people to tag themselves in pictures of a new product in exchange for a chance to win the prize.

Twitter:

Unlike Facebook, Twitter has guidelines for promotions. These guidelines may not technically be legally binding, but that doesn't mean you shouldn't comply with them if you want to run a smooth and successful promotion on Twitter. Twitter's guidelines suggest that advertisers tell their users to include @reply so all of their entries can be monitored. Twitter also encourages

advertisers and marketing to make promotions that are relevant to the sweepstakes or the contest—if you opt to include or use a hashtag (#) with the entries, it should be unique to the promotion, but as important, from a practical perspective it should be relevant or it will be confusing.

Promotions on Twitter can involve posting updates using a particular hashtag, tweeting a specific phrase or update—even opting to follow a particular designated Twitter user or users. Twitter specifically discourages creating (or encouraging users to create) multiple accounts to enter a contest or sweepstakes on Twitter. They also discourage posting the same tweet repeatedly as part of the promotion (e.g., don't say "whoever retweets this the most wins.") In general, you don't want to overload Twitter's servers or user accounts with repetitive or multiple re-tweets that are caused by your promotion.

What Twitter does specifically require is that all of the entrants and participants follow the official rules for the promotion and that the rules and the sponsor's operation of the promotion are fully in compliance with applicable laws and regulations.

YouTube:

YouTube is very popular for promotions that ask users to create their own video content. YouTube requires that all promotions must be free to enter and your rules must specify that only users who are 18 or over are eligible (or the age of majority if it is higher in any jurisdiction in which a user can enter and participate in the promotion). YouTube also requires that you must award all prizes as described in the rules.

What should your rules include? According to YouTube, rules and disclosures for promotions must include links to YouTube's Terms of Service and Community Guidelines. You must comply and make any and all disclosures required by applicable law and regulation. Your official rules must also make it clear that YouTube is not a sponsor of the contest and like Facebook, those rules must specifically release YouTube from all liability related to the promotion.

When it comes to the 'don'ts,' YouTube makes it clear your promotion must not infringe on or encourage infringement of any third party rights or encourage any unlawful activity. You cannot use the YouTube embedded player or YouTube API to run a contest off-site and you may not use channel functions such as video Likes or view counts to conduct the promotion. YouTube also prohibits asking for all rights or the transfer the ownership of entries to the sponsor of the promotion—ownership of submissions remain the property of the entrant or participant.

YouTube also requires that promotions have a legally compliant privacy notice and the disclosures must explain how the sponsor will use any personal data collected in the context of the promotion. While that may sound flexible enough, be careful. YouTube specifically prohibits re-use of personal data for marketing purposes and limits your use of data collected in the context of promotions run on YouTube to administration purposes only.

Tumblr:

Like YouTube, Tumblr requires promotions be limited to those 18 years of age or older and while it is reminiscent of general legal and regulatory require-

¹ Shea Bennett, *Facebook, Twitter, Instagram, Pinterest, Vine, Snapchat—Social Media Stats 2014*, SocialTimes, June 9, 2014, <http://www.adweek.com/socialtimes/social-media-statistics-2014/499230>.

ments, Tumblr specifically requires that your official rules fully disclose all of the rules that apply, including, eligibility criteria and restrictions, all methods of entry, information about the prizes and the odds of winning. Not surprisingly, Tumblr also requires that the official rules include a complete release of liability in favor of Tumblr and a clear statement that the promotion is not associated with, administered, sponsored or endorsed by Tumblr.

Unlike some of the other social media platforms, presumably to avoid “international” or multinational promotions, Tumblr further restricts eligibility to enter and participate in promotions on Tumblr, to people who actually live or reside in the sponsor’s country. Tumblr is also unique in that it currently limits awards available in promotions to prizes valued at \$1,000 or less. To my knowledge, it is thus far the only social media platform with such a prize value limitation. Tumblr also prohibits the use of their social platform features as entry mechanisms (e.g., “following,” re-blogging or “liking.”)

Pinterest:

As a general matter, Pinterest presents some unique challenges and legal issues because of all the inherent intellectual property risks involved with the pinning model. A common mistake is to forget that the Federal Trade Commission’s Testimonial and Endorsement Guides apply in social media and on Pinterest it is far too easy to make a mistake if you aren’t careful. You should also take a look at the Pinterest brand guidelines if you plan to use any Pinterest trademarks in your promotion. While it’s probably best to stay away from celebrity images, one of the fundamental differences in the Pinterest model, is that other social media platforms (e.g., Facebook Timelines) includes a thumbnail image and snippet of text from the original site, but ultimately drives you back to the original owner.

To minimize the risk of infringement, the rules should require every entrant to include links to the original sources of pinned content. Sponsors should also require every entrant to specifically disclose that a Pin is part of the promotion. Given the sensitivity to the intellectual property rights inherent in the pinning platform, it bears reminding—and inserting in the rules—that the sponsor won’t allow infringement or encourage infringement of third party rights or unlawful activity and that participants must not disparage any other brand. Your rules and disclosures should make it clear that Pinterest is not a sponsor, nor does it endorse the sponsors or the promotion in any way.

As with all promotions on all social media platforms, don’t ask entrants or participants to post contact details or other personal information publicly. Don’t require people to add Pins from a selection to enter or to vote in sweepstakes with Pins, boards, likes or follows and never require participants in the promotion to Pin your official rules. Avoid encouraging spam by asking participants to comment on the promotional entries and don’t use “Pin it to Win It” to refer to, call or name your promotion.

As a practical matter and similar to Twitter, it is a good idea to create a promotion-specific hashtag to track submissions and ask users to follow at least one of the sponsor’s Pinboards. They can refer to the entry Pin in connection with the promotion, by typing @[your Pinterest account name] in a comment below the entry

Pin. Sponsors might also consider limiting number of images required for a board and designating a specific location from which to gather images to avoid substantial expenditure of time and effort and minimize further the risk of infringement.

Instagram:

Like many of the other social media ecosystems, Instagram requires sponsors conducting promotions through the use of their platform to provide a complete release of liability from every entrant and participant. Instagram requires the sponsor to contractually agree to be and remain responsible for the lawful operation of the promotion (e.g., rules, terms, eligibility requirements, compliance with laws such as registration and bonding, if applicable). Like Facebook, Instagram prohibits inaccurately tagging content or encouraging users to inaccurately tag content—don’t tag photos of yourself or others if the person isn’t actually in the photo).

Once again, as with most of the others, Instagram requires an explicit acknowledgement that the promotion is in no way sponsored, endorsed or administered by, or associated with, Instagram and its terms provide that if you use the Instagram service to administer your promotion, you do so at your own risk. Indeed, Instagram specifically warns sponsors it will not assist in the administration of any promotion and cannot and will not advise a sponsor as to whether consent is required for the use of any user content or the proper means of obtaining any necessary consent. One reasonably unique feature of Instagram’s promotional guidelines: Instagram has a case study and “how to” guide to conducting photo promotions on Instagram, based on the American metal band *Deftones*. Instagram’s guides and suggestions for operating a successful contest are far longer than their actual promotion guidelines.

Conclusion

Hopefully this article has provided a brief, helpful tour of the social media platforms and some issues and considerations that go beyond, and often supplement, the legal and regulatory requirements that apply to promotions in cyberspace. This article describes some areas to watch for and provides practical guidance to help you operate your promotions within the rules of the various social media platforms. By highlighting some considerations that are not always obvious and that sponsors may not have thought about, the “what to do” and “what not to do” is intended to go beyond traditional law and regulation.

Remember also that each social media platform has its own set of requirements and not all of them are identical or equivalent. If you are sponsoring or operating a promotion in the social media arena or you are advising someone who intends to do so, it pays to understand and know the rules that apply—not just the legal and regulatory framework. As lawmakers and regulators increasingly turn their attention to consumer promotions in social media, it is likely the hosts and operators of social media platforms will correspondingly continue to limit their exposure and reduce their risk and liability for contests and sweepstakes developed and operated by others hoping to exploit the vast audience and engaging dialog that takes place daily in the interlinked digital world of social media.