

# **TRADEMARK, COPYRIGHT AND SWEEPSTAKES BASICS: LEGAL CONSIDERATIONS FOR MARKETING, BRANDING, AND PROMOTIONS**

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**Austin Padgett**  
Attorney

**Frost  
Brown Todd<sup>LLC</sup>**  
ATTORNEYS

2200 PNC Center  
201 East Fifth Street  
Cincinnati, OH 45202-4182

(513) 651-6753  
(513) 651-6981  
apadgett@fbtlaw.com  
www.frostbrowntodd.com

**Austin Padgett**  
Attorney  
2200 PNC Center  
201 East Fifth Street  
Cincinnati, OH 45202-4182  
(513) 651-6753

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Austin Padgett is an attorney with Frost Brown Todd LLC and practices in the Intellectual Property Practice Group. He represents domestic and international clients in a wide array of intellectual property matters, with particular emphasis on trademark and copyright prosecution, litigation, and licensing and e-commerce transactions.

Austin also helps his clients navigate advertising and marketing issues, including advertising review and clearance, sweepstakes and promotions, commercial co-venturing, charitable sales promotions, compliance with FTC and FDA requirements for advertising and websites, and advertising-related litigation and regulatory challenges

Frost Brown Todd has assembled a team of attorneys such as Austin who genuinely understand the legal needs of the hospitality industry. Our attorneys focus on issues important to lodging, food service, and recreation including acquisitions and mergers, financing, titles, construction, contracts, tax, franchising, labor and employment, immigration, advertising, intellectual property, litigation, mass torts, premises liability, licensing, and dram shop laws.

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# TRADEMARK, COPYRIGHT AND SWEEPSTAKES BASICS: LEGAL CONSIDERATIONS FOR MARKETING, BRANDING, AND PROMOTIONS

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Austin Padgett

## I. SCOPE OF ARTICLE

Contests involving some element of skill (“contests”) or games of chance (“sweepstakes”) aimed at consumers are often an integral part of a promotional and brand-building effort. They can range in size and complexity from a chance to win a free meal from a restaurant’s “business card fish bowl” drawing to a complex internet and mobile promotion with tens of thousands of dollars in prizes, including cars, vacation trips, houses and other large awards. Regardless of the details of your promotion, various federal and state laws and regulations apply and should be followed whenever you sponsor a promotion of any kind. Indeed, in the day of internet promotions, intellectual property rights are becoming a key issue for businesses that operate promotions.

This article sets forth the key legal and practical issues you should consider when operating a promotion. These issues are best taken up early in the creative process to avoid costly revisions or being forced to scrap a nearly completed promotion.

## II. YOU CAN’T WIN WITH ILLEGAL LOTTERIES

Generally, any entity other than a state is prohibited by law from conducting a “lottery.” A promotion, whether it qualifies as contest of skill or a sweepstakes that contains each of the following three (3) elements is considered a lottery and illegal under both federal and state law:

- Some element of *chance* (even if the promotion involves some element of skill, if luck, randomness, or chance plays any part in the determination of winners, chance may be present. If skill predominates over chance, the game may be a game of skill rather than a game of chance. State laws vary on the amount of *chance* required to constitute an illegal lottery.);
- A *prize* (anything of value awarded to one or more winners, but not all participants in a promotion); and
- *Consideration* (monetary or non-monetary, e.g., an entry fee, the requirement of a purchase, or requiring a consumer to expend substantial time or effort that directly benefits a sponsor).

Accordingly, one of these three elements must be removed before any promotion may proceed.

### **A. Eliminating “Consideration”**

For a sweepstakes—a game of chance—to avoid being classified as an illegal lottery, you must eliminate the element of consideration from the promotion. Some sweepstakes automatically include an element of consideration. For example: (1) requiring the participant to purchase a meal or a hotel room, (2) requiring the participant to sign up for a credit card (even if there is no fee for the card), or (3) requiring the participant to make a toll call. Even requiring the consumer to visit a store location in order to enter the promotion might be deemed “consideration” in Michigan, Missouri and Ohio. Where consideration is a part of the sweepstakes, the promotion must include an free alternative method of entry, such as a mail-in entry, a toll-free phone number, or a free internet entry. So, you do not necessarily have to eliminate *all* consideration from the sweepstakes—rather, you must have a free entry method as an alternative.

Even when you do include an alternative method of entry, you must ensure that free entries are afforded “equal dignity” with the paid entries. That is, a person who enters through an alternative method has the same opportunity to win as someone who enters through the standard method of entry. There should not be a different set of prizes, a different deadline, or a different drawing for those people who use the free alternative method of entry. Also, any advertisement of the sweepstakes must explain how to use the alternative method of entry or reference that a cost-free method of is available.

### **B. Eliminating “Chance”**

If you do not wish to eliminate the element of consideration, you can still administer a legal promotion by converting the sweepstakes to a contest by eliminating the element of “chance.” To do this, you must structure the promotion so that the winners are picked solely on the basis of “skill.” An example of a contest is one in which participants submit recipes, pictures, movies, stories, or most any other content, and the judges select submissions to win the contest. The contest’s official rules should clearly define the criteria by which the participants or their submissions will be judged.

Further, the judges must be qualified to apply the judging criteria to the entries. For example, a professional chef would be qualified to judge a recipe contest. Often, you may want to involve popular voting to choose winners. Though the winner may be determined by the highest number of votes, some states may consider popular voting to be an element of chance in the promotion—possibly creating an “illegal lottery.” Including popular vote introduces an element of risk, which may often be managed by limiting popular voting to a portion of the total scoring scheme for the contest.

Remember, a contest should have no element of chance—though the states vary on what they consider “chance” to encompass.

### **III. THE NUTS AND BOLTS OF OFFICIAL RULES**

Every promotion that your company sponsors requires a set of official rules. These rules must give a detailed account of how the promotion works and instructions for entering the promotion. At a minimum, the rules must include the following information:

- A description of how to enter, including the beginning and ending dates and times during which entries will be accepted;
- A “No Purchase Necessary” disclosure when the promotion involves games of chance;
- The name and address of the companies running the promotion (the “Sponsors,” “Administrator,” etc.);
- Who is eligible (including any restrictions on eligibility such as age, residence, exclusions for Sponsors’ employees, agents), and whether there are any numerical limits on eligibility (e.g., “one entry per household” or “only the first [number] entries received are eligible”);
- A detailed description of the prizes and their approximate retail values, the total value of all prizes, the number of prizes, how many contestants will win, the approximate odds of winning each prize, how the winners will be selected, and when winners will be selected;
- Disclosure of any conditions on a winner’s receipt of the prize, such as any requirement that the winner must sign a release;
- How and when to obtain a list of winners (which the Sponsors must provide upon request);
- Appropriate disclaimers (such as “All federal, state and/or local rules and regulations apply; Void where prohibited by law; Winners are responsible for any and all taxes associated with their acceptance of any prize; Allow 6-8 weeks for prize delivery; Sponsors reserve right to terminate or modify sweepstakes”); limitations on Sponsors' liability; disclaimers of liability for lost, late, misdirected entries, etc.;
- Explain how substitute winners will be determined in the event of a disqualification or if a winner declines a prize;
- Minors Clause: If minors can enter, prizes will be delivered to parents or legal guardian.

When structuring your promotion, remember that there may be rules or practical limitations upon who is able to enter. For example, employees of the sponsors and their immediate families are ineligible to enter. Less obvious, opening entry to minors may pose many more requirements, including requiring parental signatures for entry and prize distribution or child privacy and protection statutory requirements.

Further, sweepstakes and contests conducted over the internet or through mobile devices pose unique situations that should be addressed through the following additional provisions in the official rules:

- Time restrictions must be narrowly defined. A deadline should specify not only the date but the time of the deadline and the time zone for the deadline, e.g., 11:59:59 p.m. EST;
- Entry instructions must be sufficiently clear. Technical personnel should work closely with those drafting the “How to Play” instructions to be sure that any special technical requirements are adequately set forth in the rules;
- No unfair advantages may be given to online entrants over other entrants. Particular attention must be paid to ensure that other entrants receive the same opportunities as on-line entrants. Thus, ensure that entry dates are parallel, on-line and off-line entries are fully integrated and afforded equal number of chances, and that speed of response is not the basis for selection;
- Choice of law and venue should be included to reduce the risk of worldwide exposure. The official rules should provide that the laws of the United States apply and that any claims must be resolved in the United States;
- Internet identity may lead to conflicting accounts as to who actually won a prize. The rules should include a provision indicating that, in the event of a dispute regarding who submitted an online entry, the entry will be deemed submitted by the holder of the e-mail account (as determined by the issuer of the e-mail address);
- Sponsors should reserve the right to modify or cancel an online promotion in the event it becomes technically corrupted, and should reserve the right to proceed with offline entries;
- If the Sponsor is collecting data about the participants, references should be made to the Sponsor’s Privacy Policy;
- Likewise, if users are required to provide an e-mail address to participate in the promotion, they should be told how those e-mail addresses will be used by the Sponsor in the future (e.g., “E-mail addresses will only be used to notify potential winners.”) If the e-mail address will be included in a database for future promotional correspondence, you should state that and advise how users can opt-out of receiving such communications (e.g., “E-mail addresses may be used by Sponsor for promotional purposes. To opt-out of these communications, see Sponsor’s Privacy Policy or use the “unsubscribe” included in any such e-mail.”);

Whenever a vehicle or trip is offered as a prize, you should structure the promotion and rules accordingly to account for taxes, additional liability, and insurance that would not necessarily be a problem for other prizes. For vehicle prizes, all entrants must be at least 16 years old. Also, the winner must be responsible for complying with all license, registration, and insurance regulations. For trips, you should include a very detailed description of the prize in the rules, including classes of travel and accommodations, and whether ground transportation and incidentals are included. Additionally, a promotion with a trip prize that is open to minors requires special consideration. Although children age 13 years and older may enter a promotion in which a trip is a prize, any winner under the age of 18 (or 19 or 21 in certain states) must take their parent or guardian as their guest. If the prize does not include a trip for a guest, a parent or guardian must accompany the child at their own expense.

As soon as the promotion begins, the complete official rules need to be available wherever contestants can enter the sweepstakes or contest, whether the place of entry is at a retail establishment, a web page (where a link to the rules is sufficient), a Facebook app, or anywhere else. In addition, whenever the promotion is advertised, an abbreviated version of the official rules should be included in such advertisements or marketing materials, and participants must be informed of where they can obtain the full official rules.

#### **IV. REGISTERING AND BONDING**

In some circumstances, you will need to register and bond your promotion. New York and Florida require registration for games of chance with prize pools in excess of \$5,000. New York requires registration thirty days prior to the start of the sweepstakes, and Florida requires registration seven days prior to the start.<sup>1</sup> Rhode Island requires registration for games of chance conducted by or through retail outlets with prizes in excess of \$500. This requirement may also apply to online chance promotions.<sup>2</sup>

Additionally, sponsors conducting sweepstakes in New York or Florida where prizes are in excess of \$5,000 must post bonds or establish trust accounts in those states. Florida, however, may waive the bond requirement where a sponsor that has conducted promotions within the state for five consecutive years without violating the state's relevant statutes or regulations.

For contests, Arizona requires registration for intellectual contests which require a purchase. See Ariz. Rev. Stat. § 13-3311.

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<sup>1</sup> N.Y. Gen. Bus. Law § 369-e (McKinney 2009); Fla. Stat. § 849.094.

<sup>2</sup> R.I. Gen. Laws § 11-50-1, *et seq.*

## V. USER-GENERATED CONTENT PROMOTIONS

Many promotions now require that participants submit a picture, a movie, a song, or another kind of “user-generated content” (“UGC”) for either entry into a sweepstakes or as the skill to be judged in a contest. There are two key considerations when administering a UGC-based promotion: who is judging the contest and who has rights to the UGC.

First, UGC promotions offering prizes and involving genuine skills should be set up as contests. In most instances, this will require, at a minimum, judging of submissions on reasonably identified criteria by qualified judges. The contest rules should include information on the judging criteria and standards.

Second, UGC promotions present a host of copyright issues. Promotion participants should warrant that the content submitted is free of material that is subject to rights of third-parties, including intellectual property rights.

Of course, depending on how the promotion is set up and how winners will be selected, these types of promotions can be considered either a sweepstakes or contest. In the context of online UGC promotions, some entities claim ownership over the UGC submitted by the entrant. The desire to use some or all of the UGC in future marketing, and to prevent the entrant from allowing competitors to use the UGC, both play a role in this approach. Even so, in most instances, it is best to take only a license to the UGC. Due to other legal considerations, you should generally not claim ownership over UGC collected and posted online. Properly drafted, a license can provide sufficient marketing use rights and restrictions on the entrant’s future use of the content and can provide protection from competitor use. To obtain a license to the UGC, you should include a “grant of rights” provision in the official rules for the promotion. This provision allows you to use the UGC in future marketing. Below is a sample provision, but any provision you use should be tailored to the type of content at hand:

**GRANT OF RIGHTS:** Except where prohibited by law, by entering this Contest, entrants grant the Sponsor and its affiliates and licensees the absolute right and permission to edit, modify, cut, rearrange, add to, delete from, copy, reproduce, translate, dub, adapt, publish, exploit, and use the content of and elements embodied in the entries, in perpetuity in any and all media, including but not limited to digital and electronic media, computer, audio and audiovisual media (whether now existing or hereafter devised), in any language, throughout the world, and in any manner, for trade, advertising, promotional, commercial, or any other purposes without further review, notice, approval, consideration, or compensation.

## VI. ONLINE AND TEXT MESSAGE PROMOTIONS; OTHER RULES

As discussed above, contests and sweepstakes are governed by state and federal laws and regulations. Additionally, online promotions require you to be aware of another body of rules—the online forum’s rules. If you are hosting promotions on your own website, there may be no additional rules. Facebook, a popular forum for online promotions, however, has special rules that you should consider at the earliest stages of the creating the promotion.

### A. Facebook Promotion Entry and Administration

Facebook’s Promotions Guidelines mandate certain requirements regarding the entry process of promotions administered on Facebook:

- The promotion must be closed to people under 18 years of age.
- Do not require promotion participants to buy anything or complete a lengthy task to enter the sweepstakes.
- Do not require promotion participants to take actions on Facebook; for example, update a Facebook status, post a comment on a Profile page, or upload photos directly to Facebook. **Exception:** You may condition entry on the participants becoming a fan of your Facebook Page.
- You may require entrants to like your Page, check in to your Place or connect to your Platform integration before they provide their full entry information, such as name and contact information.
- You may use a third-party application to condition entry of the promotion upon a participant providing content (e.g., upload a photo to a third-party application for entry).
- Participants may only enter the promotion from the canvas page of an app or an application box in a tab on your Page.
- You must include the following language adjacent to the promotion entry field: “This promotion is in no way sponsored, endorsed or administered by, or associated with, Facebook. You understand that you are providing your information to [list your company and any additional recipient(s) of information] and not to Facebook. The information you provide will only be used for [disclose any way that you plan to use the user's information].”

Regarding the practical administration of the promotion, Facebook requires certain actions that you should be aware of when planning your promotion:

- You must administer the promotion through a Facebook application.
- You must avoid creating the perception that you are partnering with Facebook in any of your promotional materials. Generally, you may only reference Facebook when explaining the directions for entry.

- When identifying winners, you may not do so through Facebook (e.g., messages, chat, posts on profile pages). You may, however, collect mail or e-mail addresses through a third-party application.
- You must provide official rules for the promotion.

### **B. Administering a Text Messaging Promotion**

Many promotions, particularly sweepstakes, include a text message entry option. Any fees incurred by participants in using a mobile device to enter a text message promotion will constitute consideration, whether the fee is charged by the Sponsor as part of the promotion (i.e., premium) or by the mobile carrier based on the participant's applicable rate plan. These fees typically take the form of a flat rate for each text message sent and received, but in some instances participants can incur mobile carrier data rates or other fees for participating in a promotion. Regardless of the type of text message related fee imposed on a participant, all text message sweepstakes must include a free alternative method of entry to permit the participant to avoid such fees or costs.

In the event a participant uses a mobile device to participate in a promotion, there are certain standard—but unique—advertising disclosures that must be made – e.g., “Standard mobile carrier text/data rates may apply”. Depending on the relevant terms of the promotion, other disclosure may also be needed. In this context, it is important to think through the terms of the promotion, and the associated terms that may need to be disclosed, due to certain inherent limitations in connection with mobile devices. For instance, placement of disclosures is an important consideration for text message promotions given that most mobile devices provide very limited screen space. In addition, text messages afford a limited number of characters (i.e., 160 characters). In most instances, these limitations will require the use of additional methods to promote the text message promotion outside of the mobile device (e.g., television or print advertising, websites, etc.) in order to disclose all relevant terms and provide the complete rules.

It is important that all promotions involving mobile devices (particularly those involved text messaging) comply with the Mobile Marketing Association's (“MMA”) Mobile Marketing Sweepstakes and Promotions Guide.<sup>3</sup> These guidelines mostly provide industry standard technical requirements associated with each mobile carrier, as well as best practices to address the unique issues associated with promotions facilitated through mobile devices (e.g., opt-in/opt-out requirements for text messaging, etc.). In most instances, the company will use a third party vendor to facilitate the mobile device promotion and interact with the applicable mobile carriers. Each such vendor should, at a minimum, represent and warrant that it is facilitating the promotion in compliance with the MMA's guidelines.

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<sup>3</sup>Available at [www.mmaglobal.com/mobilepromotions](http://www.mmaglobal.com/mobilepromotions).

## **VII. CONCLUSION**

Sweepstakes and contests are often developed by marketers and reviewed by counsel, if at all, after the promotion has begun or during stages when changes are difficult or costly to make. The boom of online marketing has enabled complex and exotic types of contests that, if handled properly, may be structured to manage any risk of government or consumer action against the sponsor. There are many ways to structure promotions so that they are legally sound and still effective with consumers, but these decisions become more difficult in the later stages of development—after time and money has been poured into a risky promotional campaign. Marketers and their counsel would be well-advised to consider the structure of the promotion in the beginning creative stages.