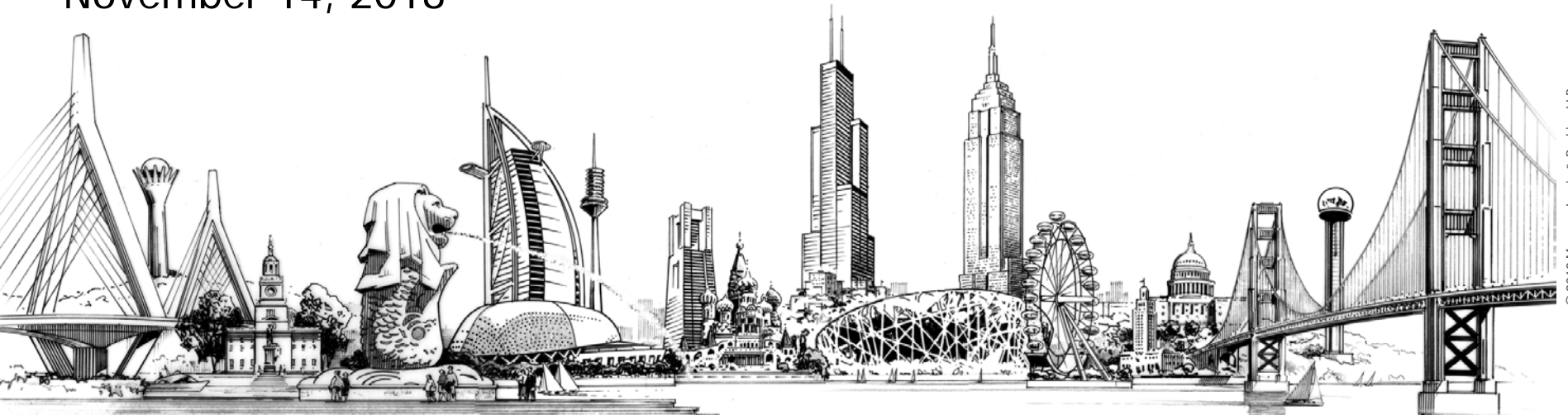


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FREE MONEY, PRIZES AND STUFF: WHAT EVERY IP LAWYER SHOULD KNOW

Sharon Smith and Andrew Gray
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Promotional Marketing Programs

- Popular among consumer products companies but also technology companies.
- Social media and Internet promotional sweepstakes, contests and giveaways have vastly expanded the use and reach of these programs.
- Marketing uses these programs as a fun and creative way to engage customers.
- History of abuse of these programs and sweepstakes scams by unscrupulous fraudsters increases risk and need to ensure legal compliance.

Sweepstakes
Contests
Giveaways

Applicable Laws

- Various federal statutes and regulations
 - FTC Guides and Regulations
 - Deceptive Mail Prevention and Enforcement Act
- Patchwork of State Laws that Have Various Idiosyncrasies
- International Laws Are Vastly Different and May Not Permit Certain Types of Promotional Programs and Games

Golden Rules

Regardless of the type of promotion (sweepstakes, contests or giveaway) whether on social media, Internet or through the mail, you, as the sponsor need:

- (1) Official Rules (simple + clear) that the sponsor must follow
- (2) To Avoid running an illegal lottery

Official Rules

- Best viewed as a contract between the sponsor and the entrants
- Critical element often overlooked
- Attempt to anticipate issues
 - For example, make sure sponsor has legal right to offer the prize
- Draft to avoid ambiguities
- Do not change rules midstream. If absolutely necessary, take care in leveling playing field.
- Do not cancel the promotion if company is not getting marketing traction or number of entries expected
- Avoid long contest periods with multiple stages, in favor of shorter periods.

Official Rules

- Do not rely on or copy third party rules you find on the Internet
- You may be making mistakes without knowing
- Every contest/promotion has different facts and must be analyzed with those facts in mind
- Unique contests require thorough legal vetting
 - McArthur Foundation Contest for \$100M – “100&Change”
- Contests/Sweepstakes with large prizes require extra care

All Promotions and Games Need to Avoid Constituting a Lottery

- Every state and federal law prohibits lotteries (except when operated by the state). Certain international jurisdictions prohibit lotteries.
- Illegal lotteries require all three of these elements to be present in the game/promotion:
 - (1) Chance;
 - (2) Consideration; AND
 - (3) Prize
- Do NOT design a promotion/game using all three elements

Illegal Lotteries: What is Chance?

- If the winner is selected randomly, it is a game/promotion of chance
- The odds of winning, depend on the number of participants and prizes
- If you create a promotion where the winner is selected based on skill, you have eliminated the element of chance.
- Public Voting or Popularity Contests - held to be chance by certain cases because public cannot be expected by vote based on merit and may be subject to manipulation campaigns (i.e., voting for friends).
- Examples cases:
 - Skill:
 - sporting events such as tennis, golf, running
 - Intellectual endeavors such as essays
 - Chance
 - Guessing number of jelly beans in container
 - Roulette

Sweepstakes

- Are Promotions/Games of Chance that Have Prizes
- Sweepstakes avoid being illegal lotteries by removing the element of consideration, i.e., some form of payment or material or substantial time/effort by entrants
- Free Method of Entry (FMOE)
 - If purchase nets the consumer an entry into the sweepstakes a valid method of obtaining a free entry must be provided to avoid the consideration element.
 - All entries must have equal chance of winning-regardless of whether they were free or paid
 - Conspicuously disclose FMOE
 - McDonald's Monopoly Game
- Prizes:
 - Prizes over a monetary threshold require registration and bonding in certain states
 - FL, NY (for certain consumer sweeps) (\$5,000)
 - RI (retail game, contest, promo) (\$500)

Sweepstakes

- Certain types of sweepstakes have various disclosure requirements and limits
 - In California, in-store retail sweepstakes
 - In Florida, sweepstakes that are marketing tools incidental to the sale of products or services must be offered on “limited and occasional basis.” For example, a retail store cannot continuously run sweepstakes for marketing purposes.
- Industry Limitations
 - Regulated industries have special restrictions/rules related to promotional games/sweepstakes:
 - Alcohol beverages
 - Tobacco
 - Gas
 - Dairy
 - Financial Institutions

What is Consideration?

- Consideration may either be monetary or non-monetary
- Monetary Consideration
 - Pay to play / require a purchase or “donation” to play
- Non-Monetary Consideration – a substantial degree of effort or time
 - Completion of lengthy questionnaire
 - Traveling to a specific distant location or multiple trips
 - Requirement to watch lengthy sales or advertising presentation
 - Disclosure of proprietary or personal information

 - Likely Not Non-Monetary Consideration
 - Social media post
 - Sending Text message
 - One visit to a retail store
 - Watching short program or advertisement

Skill Contests

- Skill Contests
 - In the rules, identify the objective criteria on which entries will be judged and the weight afforded to each criteria
 - Use independent qualified judges
 - Require legitimate skill—don't make it too easy
 - Break ties by skill, not chance
- Skill contests typically involve the element of consideration if the entries require substantial effort, such as creating a video or writing an essay.
- If public voting is part of a contest, one practical solution to avoid constituting an illegal lottery if consideration and a prize elements are present—is to make public voting one category of a skill contest that is only a percentage of the overall criteria by which a winner is selected by professional judges.

Skill?

- Examples:
 - Newspaper contest requiring participants to forecast results of football games, held to be an illegal lottery.
 - Jingle contest where standards for winning were not clear and judging was not done by expert, held to be a game of chance.
- A Promotion with a Mix of Skill and Chance—In general, look at which aspect of the promotion/game predominates. For example, a trivia game with multiple choice may be susceptible to chance by guessing.

Giveaways

- FTC Guidelines Regulate offer of “Free” products and services
- All terms of “Free” goods/services must be conspicuously made “so as to leave no reasonable probability that terms of the offer might be misunderstood”
- Carefully scrutinize such aspects of promotions/games

FTC Promotion / Endorsement Regulations

- If sweepstakes, contest, giveaway or other promotion requires or encourages people to endorse the product/service of the sponsor by tweeting, posting, creating or commenting on content about the sponsor, the sponsor must require:
 - Disclosure that such activity is being done in connection with the endorsement/promotion/game/contest/sweepstakes
 - If a person posts on Facebook about a product/service they like without being rewarded or connected to a sweepstakes/contest/promotion, then no disclosure is required.
 - If a person posts for purposes of a contest/sweepstakes/promotion or endorsement, disclosure is required. Includes free products given to influencers/celebrities.
 - FTC guidelines discourage use of “likes” in connection with contests/sweepstakes/endorsements because there is no way to disclose
 - An aside, buying fake “likes” is a form of deceptive advertising per the FTC

FTC Promotion / Endorsement Regulations

- Disclosures must be “clear and conspicuous”
- Examples of endorsement disclosures:
 - Social media: start the post/tweet with #sponsored, #promotion, #ad,
 - In connection with Contests/Sweepstakes require posts/tweets to include #contest, #sweepstakes
 - FTC Guides discourage use of: #ambassador, #advisor or hashtags above at the end of the post/tweet or buried between other hashtags.
 - “Thanks to Colgate for the free toothpaste featured in this review”
 - “Product Review Was Sponsored by Mattel”
 - Superimpose visual with such disclosures on Snapchat and YouTube
- In April 2017, FTC sent warning letters for violations to celebrities such as Lindsay Lohan, Ellen DeGeneres, Niki Minaj.
- In 2015, the FDA admonished Kim Kardashian for endorsement post related to drug for morning sickness.

Non-Consumer Promotions

- **Trade and Employee Promotions**

- Substantive rules remain applicable including avoiding illegal lotteries
- For example, requiring employees to sell employer's products for entry into sweepstakes or raffle can be viewed as consideration

- **Non-Profits**

- Non-Profits Are Not Exempt from Most State Laws
- Many states require registrations for non-profits to run raffles, etc., reporting, and other state-specific rules.

Who Enforces Law Related to Promotions/Contests

- **Federal**

- United States Postal Service
- Federal Trade Commission
- United States Attorneys

- **State**

- State Attorney General
- District Attorney
- City Attorney
- Consumer Protection Bureaus

- **Consumers**

- Class actions and/or private right of actions permitted under certain state laws

SalesForce \$1M Hackathon Contest



Home Participants Rules Submissions Updates Discussions

Salesforce is challenging you to build next generation mobile apps in a \$1 million hackathon.

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- After announcing winner, other entrants claimed favoritism, not following official rules, not applying criteria
- A second \$1M winner was announced, and entrants asserted same complaints and fairness issues:
 - Former employees were allowed to enter
 - Coding could begin before contest period
- Ultimately, matter was resolved but not without negative publicity

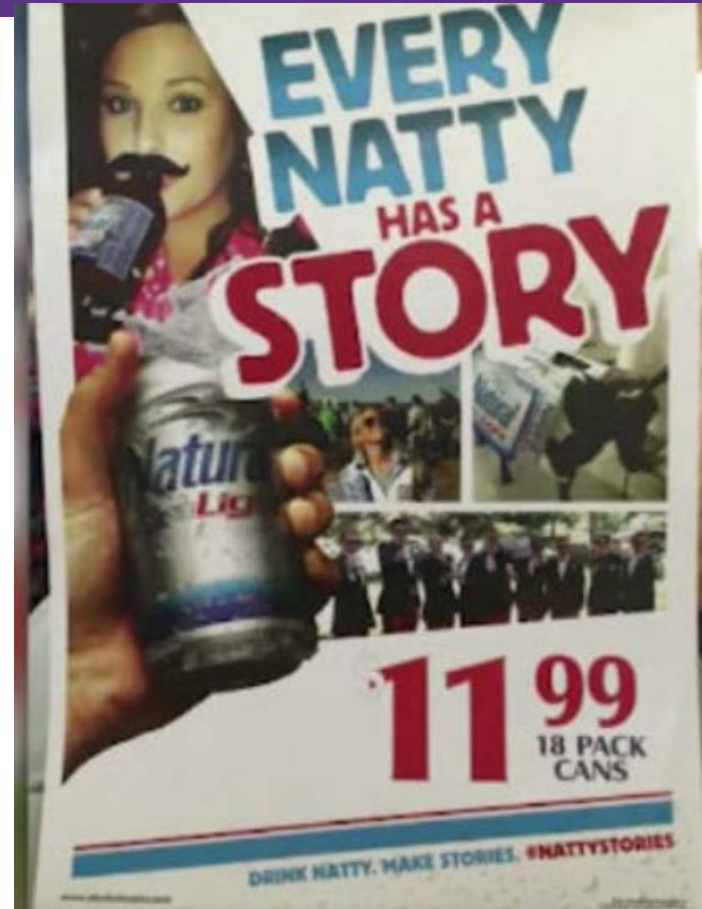
Other Issues...

- Trademark: If the prize emanates from a third party, do not leave the impression that the company making the product is associated with the promotion
 - Apple watch prize, should make clear neither the sponsor or the sweepstakes is sponsored or endorsed by Apple
- Copyright issues—any sponsor that wants to use or promote the content needs assignment or license to use
- Privacy—make the promotion/sweepstakes subject to company's privacy policy and then follow it.
- Promotional claims—accurate and not misleading
- False/deceptive advertising for entries—"You have been selected as a winner"

Anheuser-Busch Contest Sumit Photos on Facebook

- Entrants granted broad right to publicity for use of the photos related to the contest by the Rules
- After the winners were chosen, the company started to use the photos in a separate advertising campaign
- A lawsuit followed by an entrant claiming copyright infringement, right to publicity and invasion of privacy. The lawsuit settled.

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IronMan Fined \$2.8M for Illegal Lottery

- People who did not directly qualify for Ironman could purchase a \$50 ticket for a chance to win entry to the triathlon by random selection.
- US Attorney filed a complaint that this structure was an illegal lottery. Settlement included forfeiture of earnings from lottery.

Biography



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Focusing her practice on complex trials, commercial litigation, intellectual property (IP), and advertising issues, Sharon R. Smith has represented clients in hundreds of complex matters over the past decade. With much of her practice involving complex trials and business and IP litigation, Sharon's work also includes business torts, unfair business practices, fraud, defamation, and breach of contract. Sharon counsels clients on matters involving privacy, trade dress, domain names, copyrights, advertising, unfair competition, and rights of publicity as well as trademark and copyright prosecution and strategy.



Biography



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Serving as the leader of Morgan Lewis's semiconductor practice, Andrew J. Gray IV concentrates his practice on intellectual property (IP) litigation and prosecution and on strategic IP counseling. Andrew advises both established companies and startups on computer and Internet law issues, financing and transactional matters that involve technology firms, and the sale and licensing of technology. He represents clients in patent, trademark, copyright, and trade secret cases before state and federal trial and appellate courts throughout the United States, and before the US International Trade Commission.

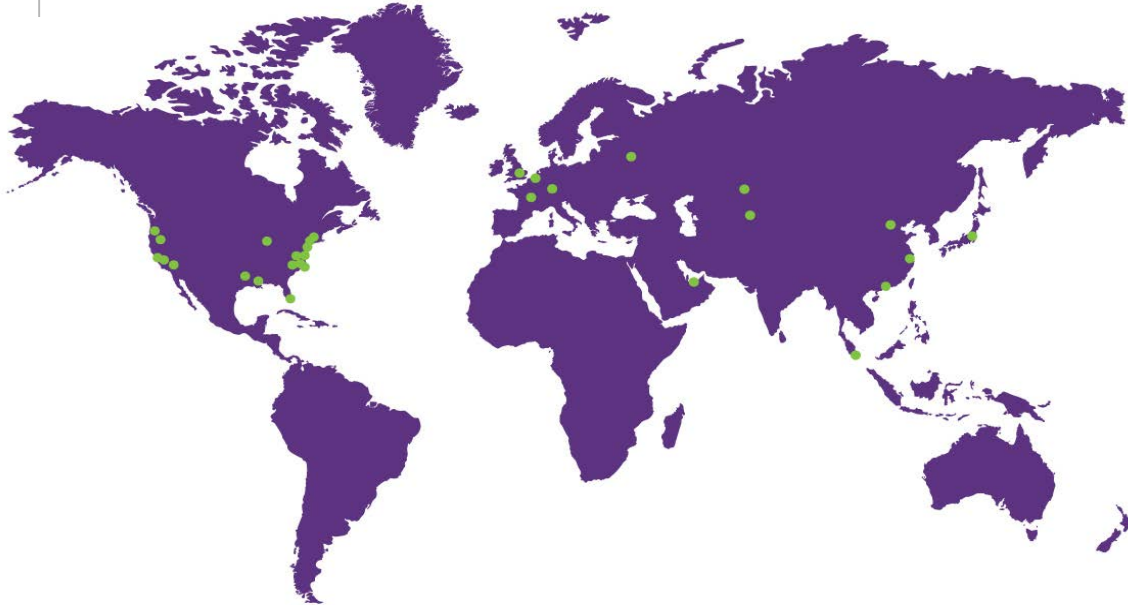


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