

Chapter 4

Protecting Yourself and Your Company Online

This chapter is intended to provide you with detailed information about the legal aspects of online promotions. The information contained in this chapter should help you focus your online promotional efforts so that they stay within the boundaries of current state and federal legislation. While this chapter is intended to help you protect yourself and your company against common legal pitfalls when launching online promotions, the best way to stay out of legal trouble is to hire a law firm or promotional agency that is expert in this area of the law. This is not a new business pitch. The laws and regulations that affect online promotions are constantly changing. Even as I write this chapter, there are new laws pending or going into effect and old laws are being reinterpreted by state and federal legislators. While I provide current examples of this changing legislation, as soon as this book is printed I'm sure there will be new laws passed that may affect your upcoming online promotions.

So if the legal aspects of online promotions are constantly changing, why read this chapter?

The truth is that while new laws are being passed and new interpretations of existing laws will affect how the official rules of online promotions are written, the legal foundations generally remain constant. By understanding the basic premise of the laws that affect your online promotions, you will spend less time on the clock with your lawyers and more time thinking up new and better ways to legally accomplish your marketing objectives. Furthermore, as new laws are passed, they often reflect or are based on the premises or intent of prior legislation. By understanding the base legislation, the new laws will make more sense than they would if you didn't already understand their basic underlying premise.

I would like to take this opportunity to thank Ken Florin, who is both an attorney for Loeb & Loeb and a close personal friend of mine, for reviewing this section of the book. I have worked with Mr. Florin for the past four years, and he continues to keep me informed and out of trouble. While neither Ken Florin nor Loeb & Loeb is responsible (read: cannot be held liable) for this chapter, I feel more confident about sharing what I have learned about the legal aspects of online promotions when my own legal counsel has reviewed my work product before it was printed.

Privacy and Security Issues

Let's cut to the chase. Privacy, security, and the Internet will continue to be hot topics in the years to come. Today, even with the explosion of legislation and consumer advocacy groups, there are still a lot of gray areas with respect to privacy and security issues, which can be both a blessing and a curse. The good news is that because the market is still evolving, the governmental bodies that legislate privacy and security issues have, to a large extent, allowed companies to come up with their own best practices in many areas. The bad news is that if you don't use good judgment or understand the issues associated with privacy and security, you may end up becoming a "test case" and the subject of regulatory scrutiny.

In this section, I will speak to the broad issues of privacy and security and then dive deeper into specific legislation such as the Children's Online Privacy and Protection Act (COPPA) and recent email legislation.

Privacy: What's Your Customer's Information Worth?

Before jumping into all the issues that surround privacy, the first question is, "What information should be kept confidential?" First, anything you declare will be kept confidential (via your privacy policy) should always remain confidential. Also, any specific information about a consumer that was provided by the consumer. That is, even demographic information, such as the name, address, phone and email address of a consumer, should not be used for any purpose other than what it was collected for in the first place.

The underlying issue behind all the debates over privacy is the conflict between a marketer's desire to provide relevant product offerings by knowing as much as possible about an individual versus the individual's desire not to share his or her personal information with companies who may or may not abuse the privilege of knowing personal information. It's important to consumers that they are able to identify the kinds of companies that they wouldn't mind sharing personal information with in exchange for relevant product offerings, deep discounts, and other marketing perks. The problem is that once personal information is shared with an *irresponsible* company who abuses their trust and shares this personal information with others without consent, it is difficult (if not impossible) to stop the sharing of this personal information with other companies.

The issue of privacy becomes crystal clear if you place a value on your personal information and treat it like a competitive advantage and a well-kept secret. When you begin to think of your personal information as a form of a secret, you can see what all the fuss is about. If you were to tell a close friend a secret about yourself, you would trust that your friend would not blab that secret to other people. If your friend protects your secret and doesn't share it with anyone, then the bond between you and your friend becomes stronger. The more secrets you tell your friend, the tighter the relationship and the more trust your friend earns, the more likely you are to tell more secrets to your trusted friend. But when your friend (either out of anger or bad judgment) breaks your trust and tells others about your secrets, then the relationship is soured and difficult to repair. Once your secrets are out in the open, then it's very difficult (if not impossible) to stop the secret from spreading and becoming common knowledge.

When companies treat private information like a rare and precious diamond, then they would be foolish to give it away (or even sell it) for short-term gains. In the long run, the companies that succeed will hold on to the precious information that they are given by their customers and will find ways to use the information without abusing trust. That's the key to successful privacy management.

In essence, a customer's private information is a competitive advantage. What many companies don't realize is that if the information is shared, it becomes common knowledge and is of much less value to the few companies with whom it was shared in the first place. It seems only logical that a company would do its best not to share private information about its customers, but the financial temptations to do otherwise are great.

One temptation is to provide customers' private information to partner companies in a related field (that often copromote their products and services) to increase sales. This level of information sharing can have negative results if your customers are not first made aware of what you want to do and grant you permission to do so. It is wrong to share your customers' private information with your partners and expect that your customers will be comfortable with this practice. Those who did not want their private information shared will be upset and, at the very least, discouraged from providing any further information to your company—not the place you want to be for a long-term relationship. If consumers are angry enough, they may write to the FTC or commercial privacy organizations that will, in turn, investigate claims against your company. This could result in a loss of time and money during the investigation, and could even result in a lawsuit, causing your company financial losses and negative publicity as well.

Because information is valuable, it is tempting to sell information to companies outside your business model and even data warehouses. Here again, there are certainly short-term profits to be made by selling private information, but the practice usually ends up backfiring in the long run. Besides upsetting consumers who will distance themselves from your company, there is the danger of your customers' private information falling into the hands of your competition. Even though you didn't intend for this to happen, by selling information, you lose control over it and it is now up for the highest bidder.

The bottom line: Your customers' information is extremely valuable, but only if you keep it in strictest confidence and use the information they have provided you only within your company. If you absolutely must share some information about your customers to your partners, you can generally do so without breaking your customers' trust by providing information in the aggregate (that is, general information about *all* your customers). If your partners want to leverage the information you have accumulated, it should *only* be with the express

permission of your customers. Only after presenting your customers with this option will you and they remain in control of their personal information and continue to trust your company with that information.

FTC: Self-Regulation and Privacy Online

Before jumping into what the Federal Trade Commission (FTC) has to say about privacy online, I want to point out that the law firm Loeb & Loeb has produced a comprehensive white paper on how the United States and the European Union deal with privacy issues online. If you'd like to learn more, send an email to Ken Florin at kflorin@loeb.com.

To see what the FTC thinks about online privacy, you can download a report from the FTC Web site at www.ftc.gov/reports/privacy3. The latest report provides a summary of what the FTC is currently faced with and how they are dealing with privacy issues online. According to the July 1999 report, the FTC's conclusion was the following:

The self-regulatory initiatives described above, including the guidelines adopted by the OPA and seal programs, reflect the industry leaders' substantial effort and commitment to fair information practices. They should be commended for these efforts. [Emphasis added]. Enforcement mechanisms that go beyond self-assessment are also gradually being implemented by the seal programs. Only a small minority of commercial Web sites, however, have joined these programs to date. Similarly, although the results of GIPPS and OPA studies show that many online companies now understand the business case for protecting consumer privacy, they also show that the implementations of fair information practices is not widespread among commercial Web sites.

Based on these facts, the Commission believes that legislation to address online privacy is not appropriate at this time. [Emphasis added]. We also believe that industry faces some substantial challenges. Specifically, the present challenge is to educate those companies which still do not understand the importance of consumer privacy and to create incentives for further progress towards effective, widespread implementation.

In essence, the FTC has decided to take a "wait-and-see" attitude toward online privacy. The FTC recognizes that this is a huge issue and that the online industry itself is, at least for now, in the best position to develop its own practices, policies, and procedures for addressing online privacy. Over time, the FTC will watch the development of online privacy initiatives and will ultimately decide if governmental legislation and regulation are necessary.

This is great news for marketers that adhere to best practices of information gathering and sharing. If you're not sure what best practices your company should take, the FTC recommends TRUSTe (www.truste.org), BBBOnline (www.bbbonline.org), CPA WebTrust (www.webtrust.org), and industry-specific organizations such as the Interactive Digital Software Association (IDSA) and the Entertainment Software Rating Board (ESRB). TRUSTe is credited as being the first online privacy seal program. It launched on June 10, 1997, and is an independent, nonprofit organization founded by the CommerceNet Consortium and the Electronic Frontier Foundation. Among other things, TRUSTe is a third-party monitoring service that requires its members to write an official privacy statement, and then audits its members for compliance with its own statement. TRUSTe will, for example, check to make sure that your company honors its promise to remove members from databases and email lists. TRUSTe also acts as a consumer advocacy group to whom consumers can submit complaints and concerns.

BBBOnline is an online subsidiary of the Better Business Bureau, which launched its privacy program on March 17, 1999. BBBOnline requires that its seal recipients comply with BBBOnline's own information practice principles as well as agree to participate in a consumer dispute resolution system and third-party monitoring by BBBOnline. By taking the BBBOnline's "Compliance Assessment Questionnaire," you identify your privacy practices, which will allow BBBOnline to assess if your practices are in line with their seal requirements. Similar to TRUSTe, BBBOnline acts as an advocacy group where consumers can submit complaints and concerns, and BBBOnline will investigate and work with corporate seal recipients to resolve disputes and complaints.

The third group, the CPA WebTrust, was created by the American Institute of Certified Public Accountants and the Canadian Institute of Chartered Accountants in September 1997. The CPA WebTrust consists of certified public accountants who conduct quarterly audits to confirm that seal recipients stick to stated business practices, including the adherence to transaction security and privacy controls. In essence, the CPA WebTrust tells consumers that the Web site they're on has taken precautions not only to protect consumer information but also to protect credit card information and transactions as well.

And finally, there are industry-specific organizations, of which the earliest is the Interactive Digital Software Association (IDSA), which was launched in October 1998. The IDSA established the Entertainment Software Rating Board (ESRB) on June 1, 1999, to focus on a ratings system for entertainment software and interactive games. To find organizations specific to your industry, you can do an online search, check out your competitors' Web sites, contact any of the previously mentioned organizations or the FTC directly. As the FTC mentioned in its report, there are several industry-specific organizations that have been developed or are currently under development. Chances are, there's a specific organization that can help you create your ideal privacy statement and help you practice what you preach.

Children's Online Privacy Protection Act (COPPA)

While there continues to be industry self-regulation and ongoing debates about how best to require companies to protect the private information that they collect from their consumers, the first step has been made with respect to children under the age of 13. In October 1999, the Children's Online Privacy Protection Act was passed and in April 2000, COPPA's legislation became active. COPPA is the first act in the United States specifically targeted to protect children's private information. COPPA focuses on consumers that the government and several advocacy groups feel are most likely to be in need of protection: children under the age of 13.

Even if you don't specifically target children under the age of 13, you should be aware of COPPA if your company collects, manages, or maintains information from (or about) the people who visit your Web site. If you don't collect any information about your customers online, then COPPA does not apply to you—although I will say that you probably have bigger issues to worry about like, “Why do you have a Web site in the first place?” For everyone else, COPPA is specifically targeting the collection and management of information about children under the age of 13. Conservative companies are using the COPPA regulation as a guideline to address data collection for *anyone* under the age of 18, although children between 13 and 18 years of age are not covered by COPPA.

At the Promotional Marketing Association's Law Conference in November 1999, Ronald Plesser and James Halpert of Piper & Marbury, LLP, wrote an extremely informative document called, “Internet Legislation in the 105th Congress,” which specifically addresses the Children's Online Privacy Protection Act. In this document, they provided:

1. A clear scope of the COPPA act
2. The regulation of collection and use practices
3. Safe Harbors (that is, specific protection and exceptions from COPPA), along with several other sections pertaining to COPPA.

For a full disclosure of the act, request this document via email at lawfirm@pipermar.com.

In this section, I will provide a top-line summary of COPPA, taking excerpts from the Piper & Marbury document and address what companies and agencies are doing to protect themselves during these early formative years as COPPA is regulated and enforced.

Scope of the Act

The scope of the act applies to any Web site that targets children under the age of 13 that collects personally identifiable information (Name, Address, Email, or Phone, for example) or allows a child under the age of 13 to post such information (through a bulletin board, chat, or creation of a home page). Targeting is determined by the nature of the Web site content and if the site has actual knowledge that it has collected information from a child under 13. Information that is collected in the aggregate (that is, not personally identifiable) is not covered under the scope of COPPA.

Ronald Plessner and James Halpert specifically write:

[COPPA] applies to the “collection, use and disclosure” of information collected online from a child under 13 years of age. §§ 1303 (b) (1)(A)(ii), 1303 (a) (1). The term “disclosure” is defined to include both: (1) releasing information to others (not providing internal support for the same company), and (2) providing a forum in which children may post individually identifiable information (such as an Internet home page, pen pal, e-mail, bulletin board, or chatroom service). § 1302 (4). The Act applies only to communications in interstate or foreign commerce, and does not apply to non-profit organizations that are otherwise exempt from the Federal Trade Commission Act (“FTCA”), 5 U.S.C. § 45. §§ 1302 (2) (A) & (B).

The Act applies to individually identifiable information collected online from a child, including both a first and a last name, address including street and city/town, email address, phone number, social security number, or any other identifier that the FTC determines permits the physical or online contacting of an individual. It also covers other information that a web site collects online from a child and combines with one of these identifiers. § 1302 (8). Information in aggregate form is not covered.

The Act covers a commercial website or online service, or any portion of a commercial website or online service, that is targeted to children. §§ 1302 (10) (A) & 1303(a) (1). Whether a site is targeted to children is determined in light of its subject matter, visual content, age of models, language, offline advertising for the site, and other features of the site. Bryan Statement at S11657. The Act also applies where a site or service has actual knowledge that it is collecting information from a child under 13. § 1303 (a) (1). However, the Act does not apply to sites merely because they refer or link users to different sites that are directed to children. § 1302 (10) (B).

As stated earlier, more conservative companies are also using the COPPA regulations as a guideline for all children under the age of 18, although this is outside the scope of COPPA at this time. While this section identifies who COPPA is targeting, the next section speaks to the specific responsibilities of companies who are targeting children under the age of 13.

COPPA Regulation

The FTC created clear-cut guidelines to avoid misunderstandings as to the regulation corresponding to COPPA. Included in the FTC’s regulation guidelines are terms like, “available technology” and “reasonable efforts,” which the FTC will define further over time. The FTC clearly demonstrates its understanding of how quickly technology evolves, and has made an honest effort to set forth legislation that can adapt to an evolving environment. As things like digital signatures become more prevalent online, so too will the definition of “available technology.”

There are five parts to FTC regulation of COPPA:

1. Notification
2. Parental consent
3. Parental disclosure
4. Limitation of enticements

5. Security

Notification

The first part of FTC regulation comes in the form of notification. In order to be in compliance with the FTC, you must declare what information is being collected from children under 13 and how that information is being used. This declaration must be clear and cannot be a bunch of gibberish meant to confuse someone who is attempting to determine what information is being collected. The notification must also be prominently displayed so that a parent could easily find the notification without spending a lot of time searching for it.

So if you are targeting children under the age of 13, it's important to explain—up front—what information you are attempting to collect and for what purpose. The FTC mandates that you must make “reasonable efforts” to present these disclosures using “available technology.” The point here is that you don't need to spend a fortune to build a complex notification system using leading edge technology to comply with this mandate. The FTC uses the term *reasonable efforts* to allow interpretation of its mandate. So while you can't simply bury your notification so that it's difficult to find, you don't need to make your notification the most technically advanced part of your online promotion either. Within the next few years, the FTC will more clearly define what “reasonable efforts” covers and will be more specific about what “available technology” is preferred.

Parental Consent

Beyond posting clear notification of what information you're collecting from children under 13 and for what purpose, you are also mandated to get *verifiable parental consent* through “reasonable efforts” using “available technology.” That is, it's not enough to simply post notification, but you must go to the next step and get permission from the child's parent (or legal guardian) to collect and use information about the child under the age of 13. Here again, “reasonable efforts” is loosely defined, but it is clear that the FTC is looking for *verifiable parental consent*.

Many will argue that the only way to satisfy this requirement is to get the parent's signature either through the U.S. mail or via fax machine. While some companies are experimenting with digital signatures and pens that will allow parents to send their digital signatures, these newer technologies are not yet readily available to the average parent. Some companies have interpreted this mandate to mean email confirmation. That is, when a child is asked to provide information about him- or herself, he or she must first provide a parent's email address. In this case, the company can send an email to the parent requesting permission to collect data on the child under the age of 13 and stating for what purpose. Opponents of this approach argue that the child could avoid parental consent by simply providing a fake email account such as a free email address from Yahoo! or Hotmail. Proponents counter this argument saying that the child could easily do the same thing in writing. Most agree, however, that the confirming email approach should only be used when you're collecting only the most basic information from the child (for example, email address) and have no plans to disclose that information to any third party.

According to the *Privacy White Paper*, published by the law firm Loeb & Loeb, there are five generally accepted practices for getting verifiable parental consent. They are:

1. Getting a signed form from the parent via postal mail or fax machine
2. Accepting and verifying a credit card number
3. Taking calls from parents through a toll-free telephone number staffed by trained personnel
4. Receiving an email accompanied by a digital signature

5. Receiving an email accompanied by a PIN or password obtained through one of the other four verification methods

At this juncture, the FTC has not yet weighed in on what “available technology” is acceptable and what would be defined as “reasonable efforts.” There is also no clear definition of verifiable parental consent. If you’re unsure about what makes the most sense for your upcoming promotion, I urge you to seek out a promotion agency or law firm that can provide you with the most current rulings and accepted practices. Regardless, you must make “reasonable efforts” using “available technology” to get parental consent allowing you to collect, use, and disclose the child’s information.

Parental Disclosure

The next regulation comes into play when the parent contacts your company directly for further information. Obviously, you must first verify that the person contacting you is, in fact, the parent of the child in question. Once you have received suitable identification, there are three things that you must do:

1. Explain the specific types of information that you have collected from the child online.
2. Give the parent the chance to opt-out their child from any further collection of personal information, use of existing information, or maintenance of existing information (note that some practitioners prefer requiring parents to opt-in their child).
3. Supply a reasonable means for the parent to find out about the personal information that has been collected from his or her child (and delete that information if requested to do so by the parent).

In other words, if a parent wants to find out what information you have collected on his or her child under the age of 13, you should have a reasonable means of disclosing what information has been collected and allow the parent to opt-out the child from any further use of the information that has been collected. Furthermore, if a parent decides to opt-out his or her child from your marketing efforts, this decision overrides any previous consent given. Parents, in other words, have a right to change their minds and should not have to live with a previous decision to allow their child to participate in your program.

It is extremely important that permission be as easily revoked as it is given. If permission is abused, then it will most certainly be reversed, and this is no different for a parent of a child than it is for customers over the age of 18. That said, a parent opting-out his or her child from one program does not prevent you from seeking permission in the future if a new request is received from the same child. The parent does not have to grant permission, but if the child makes an additional request to participate, a parent’s previous decision to opt-out the child doesn’t necessarily mean that he or she will choose to opt-out the child in your new program. Perhaps you have learned from the previous program and have made additions that specifically address the parent’s concerns. As long as you respect the wishes of parents and provide them with the information and ability to make the decision that is best for their children, you will demonstrate to the FTC that you have made reasonable efforts to comply with their disclosure regulation.

Limitation of Enticements

The fourth regulation states that you may not lure a child into providing more personal information than is reasonably necessary to participate in a promotion, win a prize, or participate in another activity. You may want to know everything under the sun about your customers, but when you’re getting your information from a child under the age of 13, you must stick to the requirements of the program—nothing more. In a sweepstakes, for example, you may need the child’s home address for the sole purpose of delivering a prize. You may want additional information such as “Do you have any brothers or sisters?”, but this request for information is not vital to the sweepstakes and would therefore be deemed an enticement to capture more information than is necessary.

If detailed information is desired about the family, then it's best to communicate with the parent. Let the child provide only the information that is absolutely necessary to participate in the promotion. Beyond that, contact the child's *parent* to request additional information and allow the parent to decide if he or she feels that providing you with additional information is "worth it" (based on the direct benefit of providing the information).

Security

This should go without saying, but the FTC requires that you take reasonable steps to ensure the confidentiality, security, and integrity of personal information collected online from children. Without this regulation, what good would the first four regulations be if the personal data collected from the child could easily fall into the wrong hands (for example, deceptive marketers)? Without taking the proper precautions to ensure that information collected is secure against unauthorized use, all the other FTC regulations become less meaningful. This final regulation in the Children's Online Privacy Protection Act makes a lot of sense.

Again, the FTC uses the word *reasonable*, which means that you must be able to demonstrate what steps you took to ensure the confidentiality, security, and integrity of your data collection. If you do not have an Information Technology (IT) department at your disposal, my recommendation is that you speak with your Internet Service Provider (ISP) about what security measures make the most sense for your program. In most cases, your ISP has already taken preliminary precautions to protect the integrity of their Web servers. If you explain to your ISP what you are doing with your promotion and that you need to ensure the security of the data you collect, the ISP can recommend a solution that makes sense.

While your ISP and/or IT staff will recommend a *technology* solution that may include things like a firewall, encrypted File Transfer Protocol (FTP) access, and other security measures, it is equally important that you create a *people* solution as well. By people solution, I mean a list of authorized personnel who will be accessing the data collected. This is important because each person on your list must be fully aware of the sensitive nature of the data you are collecting. If the database administrator (DBA) is unaware of the sensitive nature of the data, he or she may not use the necessary precautions to ensure the highest level of security. Firewalls and encrypted FTP access are a good start to a technology solution, but without alerting and keeping track of the people using the system, you can leave holes in your security strategy. I will speak further about creating a secure environment later on in this chapter.

COPPA Exceptions

As with any regulation, there are exceptions to the rule. Specifically, nonprofit organizations, and other companies that are otherwise exempt from the Federal Trade Commission Act, are likewise exempt from COPPA legislation. Even if your company does not fall into this category, there are other event-specific exceptions that do not require parental consent such as the following.

Single-Use Requests

The first event-specific exception comes into play if a child's information is in response to a specific request. That is, if you are not maintaining the child's information, but are simply collecting information on a one-time basis (for example, to deliver a premium item), then you are not required to receive parental consent to fulfill the child's request, although you should *attempt* to get parental consent.

You should still use caution when collecting information from a child under the age of 13 so that your one-time data collection is carefully destroyed after its one-time use. For example, if you start out with a request for information for the sole purpose of delivering a premium item, but the data collected is stored at your fulfillment house, then what started out as a single-use request has the potential to be used a second time and would therefore require parental consent.

It's okay to collect the parent's name and online contact information from a child under the age of 13 for the sole purpose of seeking parental consent. If, however, the parent does not respond to your request for permission in a "reasonable" time, the parental information must be destroyed. If no permission was granted, then it's not okay to

maintain the parent's contact information and/or use it for any purpose other than for seeking parental consent and it's not okay to collect information from that parent's child.

Responding to a Specific Request

You are not required to get parental consent if you are responding more than once to a specific request from the child as long as the child's information is not used for any other purpose beyond the specific request. An example of this would be an email newsletter. If a child under the age of 13 subscribes to a weekly, biweekly, or monthly newsletter delivered via email, you are not required to get parental consent to deliver that email as long as the child's information is not used for any other purpose. It is recommended, however, that you obtain the parent's consent prior to sending that first (and certainly the second) newsletter.

Note that you *would* need parental consent if you collected information on the child that was used to target the child for special offers within that newsletter. So while it's okay to ask for the child's email address to deliver the newsletter, you would need parental consent to target the child with special offers.

Child Safety

If the only reason that you are collecting information on the child under 13 is for the child's own protection, then you are not required to get parental consent as long as the information collected is not disclosed. An example of this would be if a child is participating in a chat group and your Web site flagged children under 13 to identify them and help protect them against strangers who attempt to arrange meetings with them. In that case, you would not need parental consent to protect children on your Web site. The purpose of COPPA is to protect children under 13. If the reason you are collecting any information about children under 13 is to help protect them, then the FTC does not require that you get parental consent to do this.

When in Doubt, Ask

When in doubt, it's always better to ask for parental consent than to be accused of deceitful marketing practices to children. These exceptions were made so that companies with good intentions would not be penalized by COPPA legislation. But it's still a good idea to get parental consent whenever possible. Marketing to children under the age of 13 is challenging, but if this is your core business, then it would make sense to speak with a law firm or promotions agency to ensure that you are staying within the bounds of COPPA legislation.

European Union Data Protection Directive

The Internet is global, so shouldn't your promotions be? No, unless you know the rules internationally and it's worth the money to keep abreast of the changes in international privacy laws. Similar to the FTC, the European Union (EU) published a directive on October 25, 1998, on the protection of personal information. The text of the directive is available at http://europa.eu.int/eur-lex/en/lif/dat/1995/en_395L0046.html. This directive was created to regulate the collection of personal information and how that personal information is used within the European Union.

While the scope of this directive goes beyond the scope of this chapter, I mention it as an example of some of the international legislation that your online promotions are subject to if you intend to go international. Usually, when a company wants to go international, it's because they have offices in other countries that would like to take part in the online promotion. If this is the case, then the best thing to do would be to clear the promotion with legal counsel residing in the countries outside the United States. I will talk about international promotions online later in this chapter.

Tell-a-Friend Emails

Are tell-a-friend emails information or are they spam? (Okay, I'm sure you know what spam means, but for those of you who are new to the Internet, let me explain that *spam* is slang for unsolicited email. The term comes from an old Monte Python spoof.)

The success of tell-a-friend emails is amazing. By simply allowing consumers to email their friends about an online promotion, online marketers have discovered a way to capitalize on word-of-mouth advertising and actually help spread viral marketing—isn't the Internet the greatest medium? But because of the success, government agencies are beginning to take a closer look at what constitutes spam versus "information." Using a literal definition of "anything that wasn't asked for is spam," it's clear that tell-a-friend emails are just as much unsolicited email as the "Follow me to financial freedom" email that I get about three times daily. But the key difference is that someone you know actually thought you might want to receive the tell-a-friend email, and so email marketers are arguing that tell-a-friend emails are *not* spam. While I'm not aware of any specific antis spam legislation that has passed, a number of states are currently considering such legislation.

So, to protect your company from pending antis spam legislation, the following sections discuss four consideration points to help keep you on the straight and narrow when adding a tell-a-friend email component to your online promotion.

One-time Mailing

If a consumer submits his or her friend's email address for notification to your online promotion, this should be a one-time mailing to the friend. Since the email address was not provided by the owner of the email address, it should not be used for any purpose other than to send notification of the online promotion. At the top or bottom of the email, there should be a clear notice to the effect that this is a one-time mailing and that no further emails will be sent.

It's common "netiquette" to include opt-out information at the bottom of email newsletters and other ongoing emails. This is of particular importance if the tell-a-friend email somehow signs up the referred friend to an ongoing email list. While intentionally having a friend sign up another friend for an on-going email subscription is clearly not wise, accidents do happen and data collected from one program sometimes ends up being used for purposes that were never intended. To minimize damage from accidental email subscriptions, it is critical that your email lists clearly define how a consumer can opt-out of the subscription.

Follow Your Own Privacy Policy

Your tell-a-friend email campaign should *not* in any way violate your existing privacy policy. This should be obvious, but some marketers believe that their privacy policy only applies to membership or sales data collected on their Web site when, in fact, it should apply to any information collected or disbursed. The tell-a-friend program should be carefully reviewed to confirm that it stays within the boundaries of the existing privacy policies, and should not be treated as an exception.

Full Disclosure

This is a bit trickier. You have two options with tell-a-friend emails: Make the email appear as if it's coming from your company or make the email appear as if it's coming from your friend. The technology exists so that the "From" line of the email can be made to appear as if the email was sent directly from the friend's own email program, when, in fact, it wasn't. If you've ever experimented with these two options in tell-a-friend emails, you know that if the email appears to be coming directly from the friend, the response rates will generally be higher.

The problem lies in what could be construed as a deceptive practice. When something appears one way but, in fact, it isn't, it can be considered deceptive by government authorities. Right now, there is no clear-cut legislation on this issue, but most law firms are pushing for full disclosure from whom the email was sent. Specifically, if the email was sent from a company, then it should look like it was sent from that company and not from the friend who provided the email address. This is not just a legal issue, but is sound business practice. Your tell-a-friend emails should not have to disguise themselves as coming from the referrer—even if the act of doing so provides a higher response rate.

Higher response rates are one good reason why the direct-mail sweepstakes companies have been involved in numerous class action lawsuits claiming unfair and deceptive marketing practices. "Congratulations,

you've just won a million dollars" had a much better response rate than "Enter for a chance to win a million dollars," even though the former statement wasn't true.

Limit Additional Entries for Referrals

This one will cut right to the heart of the tell-a-friend email component. The very reason that most consumers are compelled to refer their friends and family members is for the increased chance of winning. This is fine as long as there is a write-in method or "free" method of entry that allows consumers not referring friends an equal number of entries into the sweepstakes. The argument here is that a friend's email address has value, and it could be argued that it constitutes consideration if the act of giving the friend's email address allows additional entries that could not be received elsewhere in the promotion. Going back to Chapter 1, "Promotional Marketing Basics," if the sweepstakes has all three elements of prize, chance, and consideration, then it is not a sweepstakes, but an illegal lottery.

To avoid this problem, give a limited amount of additional entries for referrals, but be sure to include a write-in method of entry or alternate online method of entry where consumers who do not provide their friends' email addresses can receive an equal number of "extra" sweepstakes entries. As long as all the methods of entry are equal, referring a friend will not give consumers an advantage, and you should stay within the confines of the law as currently interpreted.

As I stated previously, there has been no legislation that specifically and solely deals with tell-a-friend emails to my knowledge, so this information is proactive and attempts to steer you clear of perceived risk. As I tell all my clients, I take the conservative route when it comes to legal matters because I never want either my client or my agency to be part of the "test case" that helps *define* current legislation. Along these same lines, the larger your company is, the more likely it is to appear on the radar screen of legislators. If you're a small company that is willing to take risks, you should seek legal counsel to clearly define what those risks are (for your specific requirements) and decide if they are worth the potential benefits.

Security: Creating a Safe Environment

One hundred percent security is an illusion. While many will strive for perfection, the fact that a human hand touches the system makes the system less than perfect. People make mistakes. Besides that, the only way to guarantee that your information is secure against unauthorized use is to not let anyone else have access to your information, and this simply isn't practical.

In February 1995, my friend Chan Suh, cofounder of Agency.com, taught me a valuable lesson about security. He was working with me on a project for one of my client's Web sites. I was having trouble with some HTML code and I asked for his assistance. He called me back and asked me to check out the page that I had been working on. He had fixed the problem. At first I was extremely thankful that he had been able to fix the HTML problem, but then it dawned on me—I hadn't given him access to the site. How did he upload the HTML page?

I asked him about it and he told me it was an old programmer's secret and he'd have to kill me if he told me. After much prodding, he finally explained that he had simply used a WHOIS search to determine the hosting facility and then he called the tech support line of the hosting facility, explained who he was and that he had a deadline to fix a problem, and just like that, they gave him access to the server. The security of the Web server had been compromised not by finding a coding error but by finding a weak link in the people chain. There was no harm done, but from that point on I was much more aware of the security measures of my hosting facility as well as my internal team. What good is a firewall or encryption program if a simple phone call could usurp the whole security system.

I seriously doubt that you could accomplish the same trick with the standards of today's hosting facilities, but most Management Information Systems (MIS) managers will tell you that many breaches in security happen when the wrong person is trusted with sensitive information. Security begins internally at your company. Before designing a comprehensive technology plan, it may behoove you to create a simple flowchart of who has access to

what information. By identifying who has access to what, it will become easier to recognize the potential weak links in the security system.

Ethical Hacking

What? That's what I said when I first heard this term at one of Penton Media's Internet World shows a few years ago. Just about everyone has heard of hackers. The media plays them up to be evil programmers who lurk around every company's Web server room waiting to steal access codes so they can take down your Web site. When a major Web site gets hacked, all the newspapers and magazines do a story on the latest security issues on the Internet.

But in the same way that the *The Wizard of Oz* had both "good" witches and "bad" witches, there are both *good* hackers and *bad* hackers on the Internet. The unfortunate thing is that only the bad hackers appear to get any media coverage. The main difference between good and bad hackers is ethics. Just about all the same techniques are used, but the main difference is to what end. A bad hacker's objective is some form of personal gain from the disruption of service or theft of information or passwords. A good hacker's objective is professional gain through identifying the most common tricks of a malicious hacker, and plugging the security holes as well as possible.

For example, an ethical hacker might use the same software program built to gain unlawful access to a Web server, but with the express purpose of *fixing* the security holes for the company who has retained his or her services. So while a malicious hacker might use a software program to break into a Web server or database, an ethical hacker will use the same program to stop a malicious hacker. The important difference is that ethical hackers get a company's consent before hacking away.

Think of ethical hackers as security experts who have been trained in the art of hacking, but have chosen to put their knowledge to good use—to help companies *identify* their security problems before they become security nightmares.

Choosing the Best Technology Solution

Go to ethicalhacking.com and you'll get a company called EVINCI, whose entire business is built around Internet security. They are not alone. The International Computer Security Association (ICSA) (www.icsa.net) boasts 2,785 members in its Alliance for Internet Security (AIS) alone, representing 7,391,590 "nonaggressive" systems. B2Bnow (www.b2bnow.com) and AllBusiness (www.allbusiness.com)—not to mention all the search engines—provide listings of Internet security companies that can help you determine what security measures are best for your company.

As Figure 4.1 illustrates, there are five components of any technology solution:

Consultation: When you hire an Internet security specialist, he or she will evaluate your existing security from both an internal and external vantage point.

Planning: Together, you will develop a plan with your security specialist that will balance ideal security measures with the realistic needs of your company. Security risks will be identified and recommendations will be made.

Implementation: After a security plan has been created (and approved), your Internet security specialist will help you implement the plan, adding additional technology and people processes to your existing corporate infrastructure.

Training: Along with implementation, education and training will be required for key personnel as well as documentation for any employee that is identified as a link in the security chain.

Ongoing Maintenance: Once your technology and procedures have been implemented, there should be ongoing maintenance of your new technology solution so that both your technology and people resources stay current and aware of new security threats and overall risk management.

Figure 4.1 Technology solution.

While every company's ideal security solution will vary depending on key factors such as the kind of business, type of network, and number of employees, there are some basic precautions that any company should take.

AntiVirus Software

Computer viruses are, unfortunately, one of the most common and damaging pitfalls that companies fall into. Deadly computer virus like "Melissa" and the "I Love You" viruses can wreak havoc not only on your computer but on the computers of your friends and coworkers. Viruses can attach themselves to your files, delete critical operating files from your computer, and cause a tremendous financial loss because of the destruction of your documents and the time necessary to disinfect your computer. I am truly surprised at how little progress has been made over the years at knocking out a virus's ability to wreak havoc on a person's computer. While we have made tremendous strides at advancing technology on the Internet, we have made only minor progress when it comes to stopping viruses from penetrating basic computer defense systems.

To avoid common viruses sent via email attachments, corrupted files, and downloads from the Internet, each computer in your company should have antivirus software from companies such as Symantec (Norton AntiVirus) and Network Associates (McAfee VirusScan). There are antivirus programs for servers as well as desktop personal computers, and it is equally important that this antivirus software be installed on the network as well as individual computers.

Beyond initial software installations, it is important to keep your antivirus software programs current. New viruses are developed all the time, so it is important that your antivirus software have the ability to incorporate new virus definitions and fixes into its software so that you are protected. Most of today's antivirus programs provide these updates from their Web sites, whereby your software can be automated to download patches and updates on a regular basis. While antivirus software will not protect your system 100 percent of the time, it will provide you with the bare minimum of protection against common viruses.

Backups

What if every file on your computer was damaged beyond repair? I shudder to think what a loss that would be for most of us, but if you haven't experienced this hardship, you are lucky! Depending on what's wrong with your computer, it is possible to spend large amounts of time and money to repair your system, but there are some problems that simply can't be fixed. In either event, your hardships would be significantly reduced if you had a tape drive or writeable compact disk backup with all your important files.

With the cost of writeable CD-ROM drives going down, along with the decreasing cost of tape drives, there is no reason not to have an automated back-up procedure in place. With a network, this can be as simple as having your employees leave their computers on overnight so that the server can back up critical files and important information on a daily, weekly, or biweekly basis. If you are a sole proprietor just starting your new company and only have one computer, consider buying a machine with a writeable CD-ROM drive that will automatically back up your files.

Even if you don't have the right hardware to do automated backups, manual backups are worth the time spent when you consider the importance of your electronic files. Also, you should be sure to test the backups from time to time to ensure that there are no problems with the system. You could be doing everything right but if your back-up system fails, you may be more vulnerable than you think.

Firewalls

Think of a firewall as a virtual gatekeeper for your computer network. The firewall acts much like customs officials for international flights, checking to see who is attempting to access your network and whether they are authorized to do so. This happens before you ever receive a login page where you would normally enter your username and password. Using the customs official analogy, let's say you want to use your Automated Teller Machine (ATM) bankcard in a foreign country. While your bankcard may work in another country, if you don't have a passport, you are not allowed into the country. It doesn't matter if you have an ATM bankcard and a pin number; if you don't have a passport, you will never reach the ATM machine to withdraw funds from your bank account.

In general, firewalls are used to permit and deny different kinds of traffic to get in and out of a company's network. That is, even if you are sitting at your desk at work and logged onto the network, if a Web site has been deemed unsafe or inappropriate for a work environment, you will be denied access to that Web site. Conversely, if your competitors are attempting to access your company's Intranet (your internal Web site), they will be denied.

Contrary to popular belief, firewalls are not ideal for every company. Your company may not require firewall security, and you should check with an Internet security professional before you invest in firewall protection.

Encryption

Encryption is used to scramble private information (credit card numbers, for example) that is being passed through "unsecured" networks, such as the Internet, or while it is being stored in a database (and is not being accessed). Encryption allows you to use codes or algorithms that essentially turn numbers and text into gibberish until the same code or algorithm is used to decrypt the gibberish back into meaningful information.

For example, I could set up a formula so that when I sent the number "123456" over the Internet, it would appear as "QEMPE432DKPE6859ANE23." If a hacker intercepted my transmission, the information would be useless without the formula to decode the string of alphanumeric text back into the numbers "123456."

There are many forms of encryption software, including PGPfreeware, which is free encryption software for your email. If memory serves, PGP stands for "Pretty Good Privacy," which made me chuckle when I first heard it. The point is, even encryption is not 100 percent secure, but it's *pretty good*. For a comprehensive list of encryption software, I recommend going to CNET's Web site, Download.com (www.download.com). There you will find roughly 350 different kinds of encryption programs—some free, some shareware, and others that are 30-day evaluation copies. After evaluation, you can purchase the full version.

Additional Security

We are now stepping outside the bounds of the intended scope of this book (it's supposed to be about online promotions, after all), but if you're hanging on to my every word about security, you really should check out the International Computer Security Association Web site (www.icsa.net) to learn more about things like:

- *Intrusion Detection Systems*, which alert security administrators of suspicious activity on their networks and computer systems *in real time!*
- *IPSec*, which is comprised of the latest in Internet Protocol (IP) security and specifically designed for electronic communications over the Internet.
- *Internet Service Providers Security Consortium*, which is an organization created specifically for the support of the growing security demands of ISPs.
- *Public Key Infrastructure*, which helps companies take advantage of a secure infrastructure so that there is confirmation that the person (or company) with whom they are communicating on a network is who he/she says he/she is.

There are some additional precautions that you can take in addition to the software you buy and the network that you set up within your company. These precautions include:

Passwords: The use of password protection is not enough. The passwords themselves should not be obvious such as the person's name, phone number, date of birth, or a common word from the dictionary. Alphanumeric passwords (including text and numbers) are the best. Even with an alphanumeric password, passwords should be changed from time to time to ensure maximum security.

Server access: Nowadays, hosting facilities come standard with required sign-in authorization and identity checking. Take heed of their attention to the physical security of their Web servers. A firewall is no good if it can be turned off and the Web server accessed directly. Your own network should likewise be stored in a locked room to avoid unauthorized access. Only people who really need to use the server should have access (physical or virtual). You will maximize security if you go the next step and keep track of who is accessing the server and deleting user names that are no longer being used.

Network administrators: Even if you don't have one, make sure someone is completing the tasks of a network administrator. This includes standard maintenance of the server (making up dates for peak performance); downloading and installing software patches for the operating system, database, and other software programs; checking log files for suspicious activity; and analysis and removal of unused programs such as sendmail, gopher, NFS, finger, PERL, and other standard Web server programs that could provide a backdoor for unauthorized users.

All this information on security is meant to alert you, not to scare you. Fifty percent or more of this material may not be necessary for your business—especially if your company would not be an obvious target for a hacker. But knowing what's out there is important as your business grows and you begin to do more and more of your business online. Knowledge of a particular subject should not frighten you. If you suddenly feel unprotected, then consult with a professional and find out if your concerns are unfounded or realistic.

Overview of the Legal Aspects of Online Promotions

Now I'd like to get into the heart of the legal aspects of online promotions. You hear those disclaimers during the very last few seconds of a radio commercial, "No purchase necessary. Must be 18 years of age or older. Void where prohibited. Blah Blah Blah!" You know you need those disclaimers, but the legal aspects of online promotions are usually the very last thing online marketers think about when preparing a sweepstakes, contest, or game. Unfortunately, the legal aspects will make or break your promotion (be it online or traditional).

In the next chapter, I will talk about when to call a promotional marketing agency versus when it's okay to run online promotions in house. Specifically, I will go into how best to determine if your in-house legal counsel is sufficient to protect you and your company when conducting online promotions. The purpose of this chapter, however, is to provide you with a basic understanding of the legal aspects of online promotions so *you* can better protect yourself and your company.

To begin, the legal aspects of online promotions are similar to that of traditional promotions. A sweepstakes by any other name is still a sweepstakes. While there are additional laws, such as the ones discussed earlier in this chapter, that specifically apply to the Internet, basic sweepstakes and lottery laws that were created for traditional promotions are essentially the same laws that must be adhered to online. In other words, traditional sweepstakes laws still serve as the basic foundation for online promotions. To date, very little legislation has been passed that focuses specifically on online promotions. Instead, the governmental bodies have applied current legislation to activities on the Internet. Interpretation of existing laws via court findings and actions by regulators create legal precedent, which in turn is incorporated into the verbiage of an online promotion's official rules and legal disclaimers.

There are three basic principles to keep you and your company out of trouble:

1. Know the laws.
2. Stay within the laws.
3. Expect the unexpected.

In this chapter, I will attempt to help you better familiarize yourself with the laws that pertain to promotions—online and off. Please note that this will be a summary of the basic foundation of the laws and is not intended to prepare you for the bar exam.

Knowing the laws is truly half the battle. Staying within the laws is only possible if you have a clear understanding of where the boundaries lie. Once you know what can and cannot be done, it's much easier to stay within the confines of what's legal. Most companies are not willing to take major risks when it comes to breaking the law. So if you come to a point where you recognize that what is desired from an online promotion is not legal, your explanation of the law will usually help put the promotion back on track. Other people within the company may want to confirm your opinion with outside legal counsel, perhaps, but they will certainly not ignore your concerns.

Finally, expecting the unexpected means taking the time to think about what could possibly go wrong. It's much easier to "put out fires" when something goes wrong with your online promotion if you've already thought about the potential problems and have a good idea of how you would react. What if a state legislator asks you to explain how you selected the grand prize winner? What if the printer mistakenly prints the "Congratulations, You're an Instant Winner" message on all the packaging instead of the "Sorry, Please Try Again" message? What if a hacker takes down your server? What if your database is compromised? For every question listed here, there are probably five more that would directly apply to your next online promotion. The more time you spend up front thinking about worst-case scenarios, the less chaos you will face when your worst nightmare becomes a reality. (I'm not usually a pessimist, but I've seen enough online promotions disasters to think through as many potential problems as I can fathom.)

Illegal Lotteries

In Chapter 1, "Promotional Marketing Basics," I described in detail the differences between sweepstakes, contests, and other forms of promotions. The big legal issue that was discussed was that of *consideration*. If your sweepstakes has all three elements of prize, chance, and consideration, it is not a sweepstakes, but an illegal lottery. Illegal lotteries are a criminal offense in most jurisdictions. The act of running an illegal lottery is punishable by fines and, in rare but possible circumstances, jail time. That's right. If you knowingly conduct an illegal lottery, you could go to jail. Gambling is illegal and addictive. The state and federal governments will do everything in their power to ensure that illegal lotteries do not happen.

Consideration

As stated in the first chapter, the topic of *consideration* is a much-debated issue. Consideration is not just about money, it's about value. Time can be construed as consideration. Detailed personal information can be construed as consideration. And even requiring access to the Internet has been debated as a possible means of consideration.

When putting your online promotion together, you should be mindful of common consideration pitfalls:

1. *Television, radio, print, direct mail, outdoor, and/or other forms of traditional media are used to drive traffic to an online promotion.* Although most regulators have not weighed in on the subject, requiring Internet access could potentially be construed as consideration. There are several ways to address this potential problem to reduce your risk:

- State in the eligibility requirements of the official rules that consumers are required to have had Internet access *prior* to the start date of the promotion. By clearly stating this as an eligibility requirement, no argument can be made that consumers were induced to purchase Internet access for the sole purpose of participating in the online promotion.
 - Provide an alternate “free” method of entry via mail. Even though the cost of postage is usually more than the time a consumer would spend online, legal precedent has shown that using a mail-in method of entry (requiring one stamp) is not construed as *consideration*. It is not necessary to require that consumers have Internet access prior to the launch of the online promotion if an alternate “free” method of entry exists.
 - Provide an alternate “free” method of entry via toll-free phone number. While the costs associated with a toll-free number may or may not make sense for your online promotion, it is certainly a viable alternative.
2. *You want to require that consumers complete a detailed survey or lengthy membership form in order to enter your online promotion.* The potential problem is that detailed surveys or membership forms require a time commitment from your consumers. It could be argued that the consumers’ time to complete the survey or membership application and the information they provide could be consideration. The best ways to avoid this problem are:
- Provide an alternate “free” method of entry via mail. In the mail-in method of entry, do not require that consumers complete the membership application or survey. In this way, even if the time or information is deemed to be a consideration, there is still a “free” method of entry available.
 - Offer a sweepstakes-only entry form. If you do not wish to offer a mail-in method of entry, you can provide an alternate online method of entry that does not require the consumer to complete the survey or membership information.
 - Make the survey or membership questions optional. If you don’t require the survey or membership information, then it cannot be deemed consideration. Those who wish to complete the information will do so and those who do not can simply enter the sweepstakes.
3. *You want to provide additional entries for consumers who provide the email addresses of their friends and family members.* The problem with giving additional entries for email referrals is that an advantage is given to those who provide the information. If the only way to get more entries is to provide email addresses of friends and family members, you may have a consideration issue. Here’s how to avoid this problem:
- Cap the number of additional entries that can be received for referring friends and family members. If the number of additional entries is limited, then it is possible to provide additional entries to those who enter via mail or online without referral. As long as there is a way to receive the same number of maximum entries without referring friends and family members, you can sidestep the whole consideration issue.
 - Provide the total number of additional entries that a consumer would get for referrals via an alternate “free” mail-in method of entry. If, for example, you could get a maximum of six entries per day online (one for the daily entry and five more for up to five email referrals), then provide the same six entries for a single write-in entry.
 - Allow the consumer to enter the maximum times online without referring friends, so they will receive as many entries as they would for the referrals. Again, using the example of six entries per day, you would

allow a consumer to enter up to six times per day from the online entry form without referring friends or family members' email addresses.

4. *You want to reward consumers for downloading your software program by entering them into an exclusive sweepstakes.* The problem is that if the file is large and it takes a long time to download, the time spent downloading the program could be construed as consideration. To avoid consideration issues:
 - Allow sweepstakes entry without the download. By allowing consumers to enter into the sweepstakes without downloading the software program, you can avoid the consideration issue altogether.
 - Offer an alternate "free" method of entry via mail. In this case, the mail-in entry would not require the software download and there would be no consideration issue.
5. *You want to offer an automatic entry into the sweepstakes when consumers buy something from your online store.* If the only way to enter the promotion is to purchase a product, then this is by far the most clear-cut issue of consideration. Any payment to participate is a clear issue of consideration. Avoiding consideration with automatic entries is simple (and should sound familiar by now):
 - Provide the standard "free" method of entry via mail. In this case, consumers who purchase online will receive an automatic entry into the sweepstakes, but without purchasing they can decide to write in for an entry form. Here again, the entry process cannot favor purchase. Write-in entries must receive the same amount of entries that a sale would receive.
 - Offer an online method of entry without purchase. As long as consumers do not have to purchase your product to enter into the sweepstakes, you will avoid the issue of consideration. [Keep in mind that this is only possible if you're not advertising (or not greatly advertising) offline and you're not an Internet Service Provider.]
6. *You want to give out 50-percent-off discounts as a "prize" in your sweepstakes.* This is perhaps the least obvious of the bunch, as there are postconsideration issues associated with discounts or coupons as prizes. The issue here is that to take advantage of your offer, consumers must make a purchase. That is, to claim their "prize," they must make a purchase (therefore, consideration). To avoid consideration:
 - Don't do it. Providing a discount or coupon as a prize in your sweepstakes or instant win game is something you should typically try to avoid. At the very least, it should not be your only prize offered (and even then you'll have some risk).
 - Provide everyone who enters with the same discount or coupon just for entering. That way, your coupon or discount is not a prize but simply an added bonus just for participating. If you can't offer the same discount or coupon to everyone, then either come up with an offer that can be universally distributed or remove the sweepstakes altogether.

With these few examples, I have covered some of the more common consideration issues that come up with online promotions. But as I tell my clients, "When in doubt, check it out." If you're not sure if your promotion could run into some consideration (or postconsideration) issues, ask a professional. In the case of online promotions it definitely is *not* easier to apologize than ask for permission.

Sweepstakes Registration

If the *total* prize package in your sweepstakes is over \$5,000, you must register with the states of New York and Florida if you want your promotion to be open to residents of these states. Some people mistakenly think that a

single prize must be \$5,000 or greater, but this is incorrect. If *all* of your prizes added up together come out to exactly \$5,001, you must register the promotion if you want to run the promotion in New York and Florida. At \$5,000 you do not have to register, but at \$5,001 you do. (Hey, the line had to be drawn somewhere.)

You must also provide surety bonds or a trust account for the total prize structure for each registration. If your total prize package is \$250,000, then you must provide a surety bond or trust account for the same amount for each state in which you are registering. Bonds can be obtained from your promotion agency or insurance brokers. In either case, you are required to pay a small nonrefundable fee, which is usually between 1.5 and 3 percent of the total prize package for each bond. (Discounts are given on larger prize packages.) Trust accounts are essentially certificates of deposit that are specifically designated for the promotion. In other words, if your company is cash rich, you can legally designate funds to cover the total prize package in lieu of a bond.

New York and Florida require these bonds or trust accounts because of an old scam where a company would promise to give away \$1 million, collect as many sales as possible, and then declare bankruptcy and therefore be unable to award the \$1 million prize. By requiring surety bonds or trust accounts, if the company goes out of business before the promotion has ended, all prizes will still be awarded. This means that the surety bond or trust account will be used to cover the prizes that were promised in the promotion.

New York requires that you register your promotion *at least 30 days* prior to its launch. While this is the law, New York is not known for enforcing this 30-day requirement. I'm not saying that you should deliberately ignore the 30-day requirement, I'm just saying that if you find yourself closer to the promotional launch date than the required 30 days, you may choose to register rather than voiding New York residents from participating in the promotion. I can tell you that in the four years that I have been creating and managing online promotions, there have been several promotions that did not make the 30-day window, and no fines have been imposed from the state of New York. Your results may vary.

Florida, on the other hand, will fine you without thinking twice about it. The state of Florida requires that you register your promotion *at least 7 days* prior to the launch of the promotion. If you fall one day short, be prepared for a fine of around \$2,000 *per incident* (although the fine could be higher). In other words, if your registration is late and your bond forms are late, then you could be fined \$4,000 or more. Thankfully, there is FedEx and UPS overnight delivery. If it comes down to the wire, you're better off delaying the launch date or voiding the residents of Florida from participating in the promotion. If you're late, there's a pretty good chance Florida will fine you. If you choose to run the promotion without registration in Florida or New York (and without voiding these residents), you are risking serious fines. They don't catch every promotion, but yours could be the one. Better to play it safe than sorry.

Also, if you're offering a sweepstakes through retail establishment and the total prize value is in excess of \$500, registration in Rhode Island will be required (although that state does not have a bonding requirement).

Contest Registration

Remember that a sweepstakes is *not* a contest. If you're running a skill promotion where official judges will be scoring every entry, then you do *not* have to register with the states of New York and Florida (even if your prize package is \$5,000 or more). Instead, you may need to register with the state of Arizona if you wish to include Arizona residents. Arizona does not require surety bonds or trust accounts for the prize package, but does require that you complete their official registration form and submit it along with the official rules of the promotion.

1099 Filings

Any prize winner who has won a prize valued at \$600 or more must be issued a 1099 tax form at the end of the year. This form is used to track "income" that has not already been taxed and alerts the government of the prize value that has been awarded and to whom. The prizewinner is responsible for including a copy of this 1099 in his or her tax return and for paying the applicable tax based on the gross income of the household.

Disclaimer

Please note before you read any further that I am not a certified public accountant (CPA) and this discussion should only be taken in the context of a 1099 filing—not as my rendering tax advice. If your Chief Financial Officer disagrees with any of this, do yourself a favor and follow his or her advice.

For cash prizes, the amount that is included on the 1099 is obvious—whatever cash was awarded must be declared. For prizes other than cash, the amount can be a bit trickier. Take a car, for example. If your company has purchased a new car as a prize in the promotion, then the amount that was used to purchase the car should be the actual value of the prize and what is included on the 1099 form (even if the car is “worth” more than your company actually paid). But what if the car was provided by another prize sponsor (in exchange for the car company’s logo on all the promotional advertising, for example)? Usually, the company providing the car can provide you with the cost of the automobile, but, if not, you should use the average retail value (ARV) of the car or blue book value if one is available. Generally, I recommend providing the ARV as the taxable sum.

The same goes for computers and electronics equipment. If you bought the equipment from a retailer or wholesaler, the 1099 should be for the amount that was paid for the equipment. If the equipment was provided, you must use the average retail value for the prizes (if the company providing the equipment cannot provide you with the cost).

This becomes a bigger issue when winners don’t agree with the value placed on the prize they won. Because they are required to pay taxes on the value of the prize (whether it is cash or not), they may choose not to accept the prize because of the tax implications. Let’s take the extreme case of giving away a Ferrari. The value of the car may be \$175,000 (or more). If the winner is in a high-income tax bracket and must pay 33 percent on his or her income, that \$57,750 must come out of pocket at the end of the year. Suddenly when reality strikes, this fabulous prize isn’t that attractive.. When the winner weighs the cost of insurance on top of the tax that must be paid at the end of the year, the first thing he or she will ask you is can they take a cash alternative instead. This is why the awarding of the prize must be crystal clear in the official rules of the promotion. If there is no cash alternative, then the rules must state this (along with the fact that the consumer is responsible for all taxes related to the prize won).

Let’s say that you recognize this hardship, but still want to give away the Ferrari. You could throw in \$60,000 in cash to help cover the taxes. But now the prize is no longer valued at \$175,000 because the cash bumps it up to a grand total of \$235,000 and the taxes will now be \$77,550 (assuming a 33 percent tax bracket). There’s no question that the addition of the \$60,000 helps, but the winner will still be responsible for an additional \$17,550 out of his or her own pocket. As you can see, your company can never truly take care of the tax burden unless a significant portion of the prize is cash.

This becomes even more of an issue with obscure prizes. I came across a British company that wanted to give away predominantly British prizes in a promotion in the United States. One of the prizes was an original British Telecom phone booth worth roughly \$10,000. It sounded great initially, until winners realized that they would have to pay a few thousand dollars in taxes for this phone booth. Then they began to ask themselves, “What would I do with it anyway?” For over a year, this company disqualified potential winners who declined the prize because of not wanting to pay the taxes. I believe the only way they could ever resolve the issue was to offer a cash alternative to the prize (or perhaps they are still attempting to award the prize to this day).

If you want to promote a bunch of funky obscure prizes, I recommend that you do *not* buy those prizes until after you have selected your potential winners and determined if they can and will pay the taxes. Cash alternatives to the obscure prizes are your best bet. And, of course, if the prizes are under \$600, then you need not worry about issuing a 1099. Consumers are on their honor to identify the prizes they won and claim them on their next tax returns.

Official Winners List

Because you are promoting that you are giving away prizes in your sweepstakes and contests, you are required to have an official winners' list at the conclusion of the promotion. This official winners list is your declaration of who won the prizes in your promotion. Consumers wishing to inquire about the winners in your promotion should be able to send you a self-addressed, stamped envelope and get a list of the prize winners.

For privacy and protection of your winners, you are only required to provide the first initial, last name, city, and state of the winners along with the prize won. If I had been fortunate enough to win the grand prize of a trip to Hawaii in your promotion, my listing would look like this:

[Your Company's] "Hawaii Getaway Sweepstakes" Official Winners List

Winner	Prize Won
B. Carmody, Santa Rosa, CA	Grand Prize Trip to Hawaii

Your official winners' list should be available via mail. Many companies will choose to post the official winners' list on their Web site in an effort to promote the fact that, "Yes, people really do win in our promotions." While this is a good habit to get into and will help increase the participation levels in your online promotion, it will not satisfy the legal requirement to have an official winners list available via mail. Even if your promotion is an online-only promotion (that is, not advertised via traditional mediums such as TV, radio, print, outdoor, or direct mail) you still must have a Post Office box or business address where consumers can write to receive the official winners list. New York has recently rejected registrations that do not include this Post Office box or mail-in address.

Ending the Promotion

Your sweepstakes isn't over until the prizes are awarded and, if the entire prize package was over \$5,000, the official winners list has been sent to New York and Florida to release the bonds (or trust accounts). Awarding all the prizes can be tricky with online promotions—especially if you've only collected an email address as the consumer's sweepstakes registration. The problem with using email as the only contact information is that most consumers don't believe their official prize notification emails. They are inclined to think they are bogus emails and delete them—even though they registered for your promotion.

If the potential winners that you have selected and contacted fail to respond to your official winner notifications, then they must be given a final notice and disqualified. New potential winners must be notified and the whole process repeated until all prizes over \$25 have been awarded. At this point, it should be noted that many sponsors have taken the position not to award unclaimed prizes with lesser values.

Once this is done, you must make a different version of your official winners list that is sent to New York and Florida. The main difference is that for official notification to state governments, you must include complete name and contact information along with the value of the prize and the date won. Also, this official winners list must be *notarized*. Using the earlier example of winning the Grand Prize Trip to Hawaii, your official winners list to state governments would look like this:

[Your Company's] "Hawaii Getaway Sweepstakes" Official Winners List

Winner	Prize Won	Value	Date Won
Bill Carmody 543 Lewrosa Way Santa Rosa, CA 95404	Grand Prize Trip to Hawaii	\$5,000	September 3, 2000

This additional information helps New York and Florida determine if the prizes you declared in your official rules match those that were awarded and when they were won. If any consumers complain about the promotion or suspect fraud, this detailed information will help the states determine if the winners declared in your

official winners list actually won the prizes they are listed for, or if further investigations are required. Since the states typically correspond via mail, they require that you provide the complete addresses of your winners.

Once New York and Florida have received your notarized official winners list, they will release the bonds or trust accounts used to secure the prizes for your promotion. When you receive the official letter from New York and Florida that the bonds have been released, then the promotion is officially over (until December 31 when you issue all the 1099s to the winners).

Preparing the Official Rules

In this section, I will review the importance of the official rules and why they are one of the most critical aspects of your promotion—online or off—and the issues associated with changing official rules after the promotion has launched. I will provide a checklist for especially important areas that must be considered when preparing official rules. If writing rules is not your idea of a good time, I will provide resources for some professional help. And, finally, I will discuss some of the basic requirements for disclaimers and abbreviated official rules.

As stated previously, this information should be used only as a guide because every online promotion is different and has its own requirements when it comes to the official rules. Even if your online promotion remains constant from month to month, new laws will continue to be passed that will affect the legal aspects of your online promotions. This said, if you understand the basics, the changes in the laws should be fairly easy to apply and with each new online promotion you will gain experience and knowledge that can be applied to your next promotion.

Why Are Official Rules Important?

The official rules of your sweepstakes or contest act as the contract that you are bound by and by which your consumers are bound through participation in the promotion. The official rules spell out every aspect of the promotion and the requirements of someone who wants to participate. The official rules will protect your company if a hacker penetrates your online promotion and jeopardizes the integrity of the promotion. The official rules will ensure that only eligible consumers who abide by the rules will win the prizes set forth in the promotion.

Your official rules tell consumers what prizes are available, the value of the prizes, when and how winners will be selected, the start and end dates of the promotion, and a host of valuable information to protect your company against mistakes or foreseeable problems that can occur. Without the official rules, there would be no guidelines as to how the promotion should be conducted or restrictions on who may participate. Disputes regarding prizes or winners would be much more difficult (not to mention costly) to resolve without these clearly established rules and regulations.

If your promotion is ever investigated by a governmental agency, you wouldn't have any defense without having official rules. Unhappy consumers would have a much easier time bringing lawsuits and creating negative publicity against the "unfair and deceptive practices" claims against your company if there were no official rules that clearly state the quantity and value of the prizes in the promotion and the odds of winning a prize.

Without official rules for your promotions, you are entering unexplored territory where, in all probability, there are new ways to destroy your company financially as well as its image and reputation that have yet to be examined or documented. Even with official rules, legal problems can occur, but you will be much better off if you have already declared the rules and regulations of your online promotion.

Can Changes Be Made to Official Rules?

No. Under no circumstances should your official rules be changed after the promotion has been launched. That's like trying to unilaterally change a signed agreement. It can also be deemed false advertising, among other things. In other words, if you change your official rules after the promotion has started, you could be in serious trouble.

This is especially true when you have a promotion with a total prize package of \$5,000 or more and you have registered with the states of New York and Florida. All that a consumer needs to do is send a copy of your “revised” official rules to a New York or Florida regulator and the investigation will begin. Changes in prizes, eligibility, method of entry, and completion dates are especially problematic.

Instead of changing your official rules, find some other way to deal with the problem. If a prize that was originally offered is no longer available, you can offer the winner a cash alternative. Just make sure you’ve allowed yourself this option in the official rules. If your promotion was so successful that you want it to continue for another month, then launch a second promotion that builds off the first promotion and has its own prize package. If you’re finding too many consumers that are not in your target area entering your promotion, learn from this and apply it to your next promotion.

The challenge with online promotions is that your ability to make changes “on the fly” tends to encourage you to make changes in real time. While this is fine when it comes to the creative execution or technical demands (increasing the hosting requirements, for example), it is not okay when it comes to the official rules. Note your desired changes and save them for the next online promotion. If you take the risk and make changes, they will usually come back to haunt you.

Checklist for Chance Promotions

You should use care when drafting the official rules. Avoid any misrepresentation by using clear language in both your official rules and any copy or verbiage that references the promotion (this is particularly true if minors are eligible). If your ads speak to the promotion, be sure that what they say is consistent with your official rules. By supplying clear and adequate instructions for your consumers, you can steer clear of any consumer confusion or frustration in a consumer’s desire for participation.

Now let’s move into the details. While this checklist will provide some of the more important aspects required in preparing the official rules, there will always be project-specific requirements that should be addressed. If your promotion in any way involves alcohol, for example, or another regulated industry, there are industry-specific rules and regulations that will be applicable. In some states it may be flat out *illegal*, while others have specific requirements such as registration. This checklist will provide you with the foundation for your official rules, but is not industry-specific. If you suspect you need more help, I strongly recommend seeking professional help (which I will cover in the next section).

1. Start and End Dates

Every promotion must have an official start date and end date. This defines the promotional period by which all entries must be received. Once the promotion has begun and the official rules have been published—either online or via traditional media—these official start and end dates cannot be changed. If the promotion is doing extremely well, a second promotion should be added that plays off the first promotion. Regardless, the promotion *must end* when it was originally scheduled to end.

2. No Purchase Necessary

If your promotion is a sweepstakes, there must not be a purchase requirement. If the sweepstakes requires a purchase to enter, then it is not a sweepstakes, but an illegal lottery (having all three elements of prize, chance, and consideration). This “no purchase necessary” statement is extremely important to your official rules as it declares that this is a legal sweepstakes and that you may enter it without purchase. It should be clearly stated how a consumer can enter the promotion without purchase (through a Post Office box address or online at a specific URL).

If your promotion is a contest, you may (except for a few states) need a purchase requirement if there is no chance element within your promotion. If you have an essay contest, for example, you may require a purchase because all essays will be judged using a predetermined skill-based requirement.

3. Number of Entries and Facsimile Entries

There should be a statement about the number of entries that are allowed in the promotion. If you are allowing consumers to enter once per day, then your official rules should reflect this requirement. By limiting the number of entries per person, you can void additional entries by the same person over that limit. This is important if a person sends you 300 entries in a single day. If you combined all those entries with everyone else's, then he or she would have greater odds of winning. By limiting the number of entries per person, you can ensure that everyone who enters has an equal chance at winning.

You should also have a statement about entries that are copied. In general, if you are allowing write-in entries into the promotion, you do not want someone to reproduce mass quantities of these entries and send them in. You can state that facsimile entries (photocopied entries) will not be accepted. If someone decides to mass-produce a bunch of write-in entries, you can simply disqualify them.

In the online world, this is especially important if a consumer finds a way around your automated duplicate checking program. If you are checking for duplicates via email addresses and the consumer enters with multiple email addresses, then this verbiage will protect you against multiple entries by the same individual.

4. Random Drawing or Judging of Entries

You must declare how winners will be determined. If the promotion is a sweepstakes, you will make a statement that winners will be selected randomly from among all eligible entries received. The official rules will outline when the official drawing dates are scheduled to occur. This may be only once at the end of the promotion or may be daily or weekly, depending on the number of prizes and frequency of winners desired.

If the promotion is a skill-based contest, all entries must be judged in accordance with objective criteria. This judging requirement must be detailed and explain the criteria that will be judged. For example, in an essay contest, there are usually points assigned to a few different categories such as Originality, Clarity of Expression, Appropriateness to Brand Image, and Humor. The official rules must detail how many points are available for each category so that entrants know how their entries will be judged. If the contest is ever audited, you must be able to show that your entries were judged according to the official rules (and were not a random drawing as in a sweepstakes). You should also have a way of breaking any ties (a different criteria or an additional judge for example).

5. Geographic Coverage

The geographic coverage verbiage protects you by keeping the promotion within the geographic boundaries of the laws by which you are abiding. If you do not declare the geographic boundaries of the promotion, then you are declaring that the promotion is open to everyone worldwide and that you are liable to every country's international regulations of promotions. This is not recommended.

In general, your promotion should be open only to legal residents of the United States unless you have cleared your official rules with lawyers in the countries you also wish to include. While you would like your online promotion to attract as many people as possible, you must weigh the benefit of international participation with the risks associated with running your promotion in foreign countries where you are not aware of the legal implications. I will speak more to the international issues later in this chapter.

If your grand prize is a travel prize, some companies choose to void Hawaii and Alaska to avoid the increased cost of airfare. If your total prize package is worth \$5,000 or more and you were not able to register in New York and Florida within their respective 30-day and 7-day requirements, you may want to void these states to avoid fines and other potential liabilities.

6. Odds of Winning

The number of entries received and the number of prizes available determine the odds of winning in a random drawing. In an instant win game, however, you must predetermine a set universe (number) of game pieces from which all your prizes will be seeded. In this way, you can show that if there are a million game pieces and only one grand prize trip, then the odds of winning that trip are 1:1,000,000. If there are other prizes besides the grand prize, then you must calculate the odds of winning the other prizes based on the total number of game pieces *and* the total number of prizes. For example, if your prize package also had 10,000 T-shirts, your odds of winning a T-shirt would be 1:100. If you had a total of 100,000 prizes in all that you were giving away, you could state that the odds of winning any prize would be 1:10.

There are no odds in skill-based contests as all entries must be judged.

7. Prizes

Your official rules must list the total quantity of each prize along with a description of each prize its estimated retail value. It's a good idea to include any part numbers on merchandise and version numbers on any software prizes. The more you detail your prizes, the less likely that there will be any confusion from consumers who win the prize.

I once had a client who had 20 Palm Pilots as prizes, but neglected to include the model number. During the promotion, a new version of the Palm Pilot was released. When the time came to award the prizes, a few consumers complained that they were receiving an older model. You wouldn't think that a winner would "look a gift horse in the mouth," but it happens more often than not. This problem could have been avoided altogether if the model number was included in the official rules.

When your prize descriptions are not detailed, you leave yourself open to liability. You must say exactly what you are giving away and what you are not responsible for. Travel prizes, for example, should detail everything from transportation to and from the airport, to rental cars, hotels, meals, and spending money. If all you are giving away is the flight and the hotel, you must state that the winner is responsible for travel to and from the airport, all meals, associated taxes, and other expenses not expressly identified. There can then be no confusion or argument of misrepresentation when it comes time to award the prize. For travel prizes, it is also important to require that the winner (and guest) not only sign an affidavit of eligibility but also a travel release form so that you and your company are not liable if a tragedy should strike and the plane crashes or the winner is involved in an accident.

8. Affidavit of Eligibility and Travel Release

The affidavit of eligibility confirms that the potential winner of a given prize has complied with the official rules and is eligible to win. Winners of prizes valued at \$600 or more are required to sign an affidavit of eligibility to ensure that they are in compliance with the eligibility requirements of the promotion. It is a good idea to require affidavits from all major prize winners so that there is no question that the potential winners in the promotion are eligible to win the specified prize. For prizes under \$25, it is usually not worth the time to get an affidavit signed by each winner (especially when there are hundreds or thousands of winners), but having the requirement in the official rules gives you the option if you ever suspect that a potential winner is not eligible to win the prize.

By requiring that winners of travel prizes complete and sign a travel release form, you are limiting your liability if anything should happen to the winner during the travel portion of the prize. If a potential winner refuses to sign the travel release form, then you can disqualify him or her in accordance with your official rules. This protects you on both fronts. If the potential winner signs the release and accepts the prize, your liability is limited if anything should happen. If he or she refuses to sign the release, you can disqualify him or her and find an alternate winner who will comply with the release requirement in your official rules.

9. Notification of Winners

Your official rules should state how winners will be notified. If you have only collected their email address as part of their sweepstakes registration process, then you should state that winners will be contacted via email. You

should also provide a time requirement for response. That is, if you send out multiple email notifications to the winner with no response, then you should be able to disqualify him or her and select an alternate winner. By stating that potential winners have 5 or 10 days to reply to your notification, there will be fewer problems if no reply is given and the winner is disqualified.

This becomes critical if the grand prize is something like a trip to the Grammy Awards where the date is fixed and the prize must be awarded. While there may be many people who want to go to the Grammys, as the date gets closer, it becomes more difficult to award the prize as people make other plans and don't respond to your official notification right away.

Whenever possible, it is best to get physical mail addresses from your sweepstakes entrants. Awarding prizes via email is a difficult task as very few consumers actually believe that the email notification is real. Even with multiple notifications, the consumers tend to think the email is spam and that there must be a catch. Awarding prizes via overnight delivery such as FedEx or UPS provides urgency and gives the impression that the notification is much more official and realistic.

10. Minors as Winners

Not all promotions target adults 18 years of age or older. Children are an important market to many companies. While it's okay to have promotions in which the winner can be under the age of 18, there are special considerations when marketing online promotions to children. First of all, the minor's parent or legal guardian must cosign the affidavit of eligibility and other legal documents such as travel release forms. A child under the age of 18 does not have legally binding signing authority and therefore requires the participation of a parent or legal guardian in order to award prizes. It is important to have this language included in the official rules if the age requirement is under 18.

There are other considerations that need to be reviewed such as COPPA, which was discussed earlier in this chapter. Marketing to children is similar to alcohol promotions in that there are different laws that will affect the online promotion depending on the objective and how the promotion is being advertised. It's best to review any promotions targeting children with a promotional law firm or promotions agency that will indemnify you against potential risk.

11. Disqualifications

The official rules should cover the different ways that a consumer could be disqualified. The more obvious disqualifications include:

- Not meeting the specific eligibility requirements
- Not responding to official winner notifications
- Not completing the required affidavits of eligibility or travel release forms

Other disqualifications should include:

- Any deliberate attempts to damage or spoof the entry process
- Inaccurate, mutilated, or illegible entries
- Mass-produced entries or reproduction
- Sponsor-related entries

Employees and immediate family members of your company or your promotion agency and those living in their households should not be eligible to enter the promotion.

12. Free Entries

If the main point of entry is via a purchase, online registration, survey, or other entry process that could be construed as consideration, there must be a “free” alternate means of entry. This is usually accomplished via the U.S. mail. If the promotion is an instant win game, free game pieces must be made available either at the point of sale (without purchase) or via U.S. mail. These free entries must be limited to the same number of entries that a person can make with purchase or via online registration or survey. If it’s one entry per person for the entire promotion, this should be clearly stated. If consumers can enter once per day per person, then this too should be clearly stated. If instant win game pieces are being requested, the request should include a self-addressed, stamped envelope in which one free game piece is provided per envelope per person per day. Also, free entries should be available for the same period of time as the other method(s) of entering.

Regardless of how you structure your “free” alternate method of entry, it should be clearly stated and provide detailed information as to where to send the entry (or request) and how often this can be done.

13. Tax Liability

A statement should be made in the official rules that all taxes related to the prizes awarded are the sole responsibility of the winner. In this way, you cannot be held liable for paying the taxes for the prizes that you award to your winners.

14. Separate Addresses

In your official rules, you should have separate addresses for your alternate “free” write-in entries, winners’ list requests, and official rules requests (if applicable). While this is not a legal requirement, it is important that each of these three functions be kept separate and unless you want to sort through all the mail and separate out entries from winners’ list requests and requests for official rules, it’s more efficient to have three separate Post Office boxes to handle the different kinds of requests.

These addresses should not be the same address as where you receive your orders or sales. Again, this is not a legal requirement, more a matter of logistics. If your promotion receives a large volume of mail, you may have a difficult time sorting out orders from promotions elements—each having its own time-sensitive requirements.

15. Reservation of Publicity Rights

If you plan on releasing the winners’ names on your Web site or via a press release, it’s a good idea to include a reservation of publicity rights in your official rules. In other words, by entering, a consumer agrees to allow the sponsor to use his or her name and likeness in advertising and publicity without additional compensation. This should also be in the affidavit of eligibility, but you have a stronger case if you also include this in your official rules in case a consumer refuses to go along with this and has to be disqualified. If the statement was not in the official rules, then a consumer can argue that he or she did not agree to this when entering the promotion and therefore cannot be disqualified by refusing to agree to this in the affidavit of eligibility. Remember, your official rules act as your contract with your consumers. The more you protect yourself up front, the fewer headaches you’ll have at the conclusion of the promotion.

16. Deadline for the Receipt of Entries

Your promotion must have a deadline for the receipt of all entries *in addition to* the end date of the promotion. In the case of online entries, this is usually midnight (either Eastern Standard Time or your local time zone). But when you’re dealing with the mail, you must provide a few extra days (usually five) for the mail to arrive. In other words, if the promotion ends on Friday, the 15th, an entry mailed on that day will not arrive until the following week. By setting a deadline for the receipt of entries, you remove your liability for problems with the

mail. With a deadline for the receipt of entries, you are not responsible for lost, misdirected, or late entries (also covered in the next section, Disclaimer of Sponsor's Liability). It's up to the consumers to get their entries in on time.

17. Disclaimer of Sponsor's Liability

Disclaimers are where you really attempt to cover yourself for all the potential problems that you can foresee with the promotion. As stated in the previous section, this will include things like not being responsible for lost, misdirected, or late entries due to problems with the mail. But you can also cover yourself for things like a Web server going down, the Internet backbone dropping its connection, the destruction of a database, hackers destroying entries, phone lines being disconnected, and a host of potential technical problems.

If you are running an instant win game, you can protect yourself against printing errors such as the printer mistakenly prints millions of "Congratulations, You're a Winner" messages instead of the "Sorry, Please Try Again" message.

The disclaimer of sponsor's liability is where you include every conceivable problem that could possibly go wrong with the promotion so that you will not be held liable if any such disasters occur. Remember, the liability issue does not mean the problems go away or that consumers will like your company any better if mistakes are made; it simply means you limit your liability from a legal perspective. Public relations and smart marketing are a whole other ball game.

18. Void Where Prohibited

Ah, yes, the real "catch phrase" in promotions. In other words, if this promotion is prohibited for some reason that we may or may not be aware of, then it is void according to the official rules. Not only is this an important part of the official rules, but it is a critical element to the abbreviated rules and disclaimers that are featured in all advertising and promotional-related copy on the Web site.

19. Tampering with Online Promotions

If someone hacks your online promotion, you not only want to void his or her entries, you also want to take legal action--so say that in your official rules. Put contestants on alert that if they mess with your online promotion, you will pursue legal action to the fullest extent. Not that this will stop someone who is determined to hack your online promotion, but you have provided a warning as part of your contract with consumers. Once you have identified who has tampered with your online promotion, you can then take legal action against them.

More important to the promotion itself, however, is your ability to take action once you have determined that someone has interfered with the integrity or fairness of the promotion. If you don't say what you can or will do at this point you are again sailing into uncharted waters. By identifying up front your intentions to suspend, modify, terminate, and/or cancel the promotion if the integrity of the promotion has been breached, you are within the boundaries of your own contract to take action if online tampering is suspected or has, in fact, occurred.

20. Dispute of an Email Address

What happens if two or more people use the same email address to enter your promotion? This could be problematic when attempting to award the prize *if you don't deal with this in your official rules*. One way to avoid this potential problem is to define in your official rules who will be deemed the legitimate owner of the email address and awarded the prize. The language usually used is "authorized account holder" and is defined as the person who is assigned the email address by an Internet Access Provider or other organization such as a business or school. You can further require proof of the status of the account holder at the time of entry.

Again, the more potential problems you can think of ahead of time, the better off you will be by covering them in your official rules.

Disclaimers and Abbreviated Rules

From your official rules, you will need to develop disclaimers for your television and radio spots. Disclaimers are the “short” version of the legal verbiage that is required when publicizing the promotion. While it would be unreasonable to expect that the entire commercial be made up of an announcer reading the full official rules on a radio spot, or showing the full official rules in a television ad, you are required to provide the bare minimum information so that interested consumers will know where to find the complete version of the official rules (and whether or not to bother doing so in the event that they are ineligible to enter).

While the specific language will change from promotion to promotion (and all disclaimers should be reviewed by legal counsel or your promotion agency), here is the basic foundation from which all disclaimers are built:

No purchase necessary: If the promotion is a sweepstakes, you must include the fact that no purchase is required—even if you are advertising entry with purchase. For example, “Look inside specially marked packages of XYZ product” can be the main message, but you must include the fact that no purchase is required to participate in the promotion.

Void where prohibited: You must make your audience aware that the promotion is not valid anywhere that it might be illegal. With broadcast, you don’t always have the luxury of pinpointing your audience’s location and must make this broad statement to protect yourself in the unlikely event that your promotion is prohibited for some reason. Also, if you are voiding any particular states (such as New York or Florida), this must be identified as well as any U.S. territories (such as Puerto Rico).

Eligibility requirements: Any eligibility requirements must be made clear. If a contestant must be 18 years of age or older to enter, then say so. If he or she must have Internet access prior to a specific date, then this must be identified. Anything that would prohibit someone from entering (or to be disqualified for entering) must be declared in the commercial.

Start and end dates: You must provide the time period for the promotion. In this way, you are not asking someone to participate in a promotion that has ended or hasn’t started yet. This is especially important, as commercials don’t always air when they are scheduled to do so. By having these dates in the disclaimers there is less chance that a consumer will mistakenly attempt to participate in a promotion that has ended or has not yet begun.

Subject to official rules: You need to alert consumers that there are more legal requirements than those being broadcast. Moreover, you must tell consumers where they can go to get a copy of the complete official rules. This is usually in the form of a Post Office box, but can sometimes be a URL link to the promotional Web page or (even better) the official rules Web page. When telling consumers to write in for official rules, be sure to provide the last date by which you will send them a copy of the official rules (usually a week prior to the end date).

Total prize value: You should also include the approximate value of your total prize package.

Usually, for print ads, you can include similar disclaimers, but most law firms and promotions agencies would recommend that you include abbreviated rules (unless your promotion includes Florida residents, in which case they’ll insist on full rules). The difference between disclaimers and abbreviated rules is that abbreviated rules provide just a bit more information than disclaimers would. How much more? It depends on who you’re talking to. In general, you would include all the information from the disclaimers above as well as the following:

How to enter: Usually with abbreviated rules you will provide the points of entry. This is usually part of the commercial itself, but in the fine print you include all methods of entry (write-in, online, in-store, for example). This would also include a statement about entry limit (such as one per person per day).

Odds of winning: This is usually a statement such as “odds of winning will depend on the number of entries received” unless the promotion is an instant win game where the actual odds of winning are known prior to the launch of the promotion.

Description of prizes: Again, with more room, you want to cover a bit more. Rather than just the total prize value, you would provide a brief description of the prize(s).

Winner selection and notification: This includes a statement about how winners will be selected and notified and the approximate dates when this will occur. This is also a good place to add the fact that winners must complete an affidavit and publicity release (and in what time frame) as well as limits of liability.

Official winners lists: Tell consumers when the list of official winners will be made available and how to get a copy (usually sending a self-addressed, stamped envelope to a separate Post Office box).

As I said, the exact language for each promotion will vary depending on the specifics of the promotion. If your promotion includes alcohol, there will be additional disclaimers to satisfy the legal requirements of alcohol promotions. If you are giving away a car or travel vacation as a prize, there are sometimes additional limits of liability statements that lawyers prefer to include.

Getting Professional Help

The information in this chapter should save you some time (and money), but I do not recommend using your own recipe for writing official rules or disclaimers without consulting a professional. Laws change and are constantly being reinterpreted based on decisions from court cases.

Don't be alarmed if all this is a bit overwhelming. The official rules and other legal verbiage are extremely important aspects of the promotion and should not be taken lightly. A common mistake that marketers make is to attempt to create or use a template for official rules and/or disclaimers. This is a big mistake, as each set of rules and legal copy requires its own verbiage that is tailored to the specific promotion. While there will be similarities between promotions, new legislation beyond your control may require that new language is added or old language be modified to work within existing legislation or recent rulings.

In the next chapter, I will help you determine if your in-house resources are sufficient or if you should seek outside resources and for what specific areas. I will also make recommendations on the best resources to use for getting professional help. This book is meant to help you better understand the different aspects of online promotion, *not replace* your law firm or promotions agency.

Cautions for Legal Compliance

In addition to the official rules and legal disclaimers, there are general principles and practices that should be noted to protect yourself and your company online. This section will cover these specific areas that are not necessarily associated with the official rules of a promotion, but which can have a significant legal impact. When you combine these principles and practices with a good set of official rules, you will be well on your way to protecting yourself and your company when conducting online promotions.

Avoid Deception

This should be obvious, but deception is still a huge complaint by regulators and consumers with respect to promotions (online or off). States are cracking down on companies that put out false or misleading statements and have started to legislate very specific requirements for the kinds of things that can be said—especially in the world of direct mail. It's sad that government bodies have had to put into legislation things like you can't tell someone he or she is a winner if he or she is not a winner. That would seem to be common sense, but Publishers Clearing House and American Family Publishers have been accused of (and have been sued for damages over) sending misleading direct mail to consumers.

You can't use words like "Official Sweepstakes Notification" if it isn't. You can't say things like "Congratulations, Bill Carmody, You've Won \$10 Million" in 48-point type and then in 8-point type say, "That's what we'll say if you return your sweepstakes entry and it has the grand prize-winning number." This is deceptive and misleading, and you shouldn't do it. If you do, not only will you get into trouble with the

government but you will also experience a ton of negative publicity and/or negative word-of-mouth discussions from your consumers who are duped into believing they've won something when they really haven't.

Sweepstakes are a powerful marketing tool, but when you abuse the tool, government regulators and consumer advocacy groups will come down hard and make you regret, retract, and pay for any misleading statements you made. Deception may help short-term profits, but will destroy your long-term credibility as a respectable company (not to mention your long-term profitability).

Use of the Word *Free*

When you use the word *free* in conjunction with your promotion, you subject yourself to special regulations. Specifically, you must disclose the exact terms by which a consumer will get something for free in immediate proximity to the word *free* and in the same prominence and no less than half the size. Very few people still believe in the concept of a free lunch, and those few remaining do not include state regulators. When you say something's free, there is almost always a catch such as "Buy one, get one free," or "Sign up for a year's worth of service, and get something free." These catches must be crystal clear or you will be in violation of many states' statutes regarding the use of the word *free*.

If there are limitations on the frequency or duration of the free item or offer, these limitations and time limits must also be disclosed. There are many other restrictions applicable to using words like "free" so be sure to consult your legal counsel or promotions agency when embarking on a "free" offer promotion.

Equitable Means of Entry

Your methods of entry must be equitable. That is, there can be no discrimination between people who purchase your product, become members of your site, fill out the survey, and so on, and those who simply write in and take advantage of the "free" method of entry. If consumers can purchase unlimited products, then there can be an unlimited amount of write-in entries. Most companies want to limit the number of entries per consumer, so this limit must be across all methods of entry. The point is that consumers must not feel that they will have better odds of winning if they purchase a product or jump through a bunch of hoops. More than the perception, the reality of equitable means of entry must be true. If the people who purchase your products have a better chance of winning because there is an element of consideration in your promotion, then it quickly becomes an illegal lottery rather than a chance promotion. By providing equitable means of entry, there is no discrimination between the methods of entry and therefore, the "no purchase necessary" requirement is upheld.

Investigation of Official Winners

For smaller prizes, an affidavit of eligibility should suffice. But if you are planning on announcing the grand prize winners with some publicity, it would behoove you to do some additional checking to make sure that your winner is not a convicted felon or someone who could embarrass the company. This can be accomplished with simple character references from friends and family members, or a more comprehensive background check can be completed by a private investigator.

Just because the person turns out not to be a desirable winner doesn't mean you can disqualify him or her. (You must adhere to your own official rules.) But, knowing up front that publicizing the winner could cause more problems than goodwill for the company can be quite advantageous. The caution here for legal compliance is not to break any privacy rules or laws when investigating the winners. There are plenty of public records that will tell the story of your winner. It's not worth an illegal investigation that will come back to haunt you.

Enforcement

Lottery laws are criminal statutes. Breaking these laws risks the penalty of both fines and imprisonment. A common mistake is to assume that a company will "get away with it" because consumers will not care enough (or know enough) to report a violation. This simply isn't true. Consumers who feel duped or misled tend to go out of

their way to correct the injustice. Life isn't fair, but when consumers feel that they have been lied to or cheated, they will do everything in their power to make it right.

Besides, even if your consumers do not report the violation, don't you think your competitors will? Think of your own marketing department. Part of its job is to check out the competition and see what they're doing. If you noticed they were doing something illegal, it would only take a phone call to tip off government regulators and make their lives much more difficult. Competition is fierce. It's not smart to assume that cutting corners will go unnoticed when it comes to online promotions. And when it comes to the legal aspects of online promotions, the risk is definitely *not* worth the potential reward of a little time or cost savings.

International Promotions and Foreign Laws

The Internet is virtually worldwide, so shouldn't your online promotions be? Not really. In the world of online promotion, it's best to stick to the old saying "When in Rome, do as the Romans do." Each country has its own government, its own laws, and its own regulatory practices that affect online promotion. In Canada, for example, sweepstakes *are illegal*—all sweepstakes, not just certain types. Contests, on the other hand, are acceptable (at least for the most part). So to legally have an online sweepstakes in Canada, a skill-based question must be asked (more as a formality than anything else) if a Canadian resident is selected as a winner. Also, did you know that if your online promotion includes Quebec residents, the entire promotion must be made available in French? Or that you must pay a fee to the Reggie de Lotteries for the province of Quebec?

I am only scratching the surface to be sure. Every country has its own rules that your online promotion must adhere to in order to be legal. Official rules written in the United States will not necessarily meet the requirements of every other country. There are tons of potential pitfalls that you can unknowingly lead your company into, and they are different for each country.

That said, there are different risks depending on the size and location of your company. If you own your own business and are running it off your laptop in the second bedroom of your house, then your liabilities are much less than a company like IBM with offices in 72 countries (approximately). While IBM must face the fact that it has offices in several different countries where the local government can literally shut them down for violations in an online promotion, a start-up company with barely an official office space risks being barred from doing business in that country (and possibly extradition if the office is significant enough). In other words, big companies with multiple locations outside the United States have much more to worry about than their smaller counterparts, but there *are* risks involved for both.

Country-Specific Guidelines

In the August 1998 issue of *PROMO Magazine*, Douglas Wood and Linda Goldstein, two partners in the New York City law firm Hall Dickler Kent Friedman & Wood published an article called, "A Lawyer's Guide to Going Global." It is by far the most useful article I have ever read in *PROMO Magazine* and I'm not just saying that because Linda Goldstein is a personal friend. I keep a copy of their fourpage chart on my wall that outlines "What's Legal and What's Not" internationally.

This chart is shown in Figure 4.2. While this chart is somewhat dated, it is the only resource that I know of that is this comprehensive in nature. This will give you an idea of just how complex international promotions can be. If international promotions are critical to your Internet strategy, I recommend seeking out country-specific legal counsel, or the support of a company like Hall Dickler Kent Friedman & Wood, to get country-specific legal counsel on your behalf.

Figure 4.2 Promoting overseas—what's legal and what's not.

Translating Your Promotions into Multiple Languages

In addition to all the legal aspects covered in the previous section, there is the practical issue that your international consumers do not all speak and read English. If you are truly attempting to attract international consumers to your online promotions, it would be a wise move to get your international promotions translated into the appropriate language most widely used in the country you are targeting. This shows that you are interested in attracting consumers living outside the United States and are willing to take the steps necessary to market to them *in their own language*.

The challenge is keeping this translation all the way through the promotion and including multiple languages in the responses to email questions and in general support. The key is to weigh the overall costs of going international with the benefits of increased participation. Translation is a big cost consideration in addition to the international legal clearance of the official rules and legal disclaimers. As these factors are weighed on a country-by-country basis, many online promotions stay inside the United States or travel outside only to key international markets.

Avoiding Cultural Blunders

The one caveat to translation is that you should make sure that you have checks and balances built into your conversion from English to other languages. Some of the most famous case studies in international cultural blunders occurred as a direct result of translation mistakes. These include the Chevy “Nova” automobile, which translates to “No Go” in Spanish. Without knowing this, Chevy marketed its car in Mexico without much success. Purdue Chicken had an advertising slogan, “It takes a tough man to make a tender chicken,” which was badly translated to “It takes a sexually erotic man to make a chicken affectionate.” The phonetic translation of Coca Cola in Japan literally meant, “Bite the wax tadpole.” We learn about these cultural blunders in our international marketing classes, but the key is not to become the next case study.

To avoid translation errors, it’s a good idea to have different companies (ideally) or at least different people write and review the translations. With more than one person or a group of people working on the translations, there is less chance of a major cultural blunder. It also helps to include some native speakers from the countries you are targeting to ensure that the language used would be the best choice for the region.

Conclusion

This chapter provided information on privacy and security issues as well as a comprehensive look at the legal aspects of online promotions. While you may not be able to pass the bar exam and get your law degree, this chapter should serve as a solid foundation from which to build your online promotions. Regardless of how well you understand the legal aspects of online promotions, it is a good idea to work with either a promotions agency or outside law firm to review the legal aspects of your online promotions. Even if you’re confident that you’ve followed all the right steps to protect yourself and your company online, it never hurts to get a second (outside) opinion.

One hundred percent security is an illusion. By the very nature of human involvement with the security aspects of an online program, security itself can never be completely foolproof. People make mistakes. The key is to find the best ways to eliminate potential human error and supplement these security policies and procedures with the right hardware and software solutions that meet your security needs. An ethical hacker is a security expert who has been trained in the art of hacking, but has chosen to put his or her knowledge to good use. Ethical hackers can help find security holes and make recommendations on the best ways to fill these holes.

There are three basic principles to keep yourself and your company out of trouble: Know the laws, stay within them, and expect the unexpected. The legal aspects of online promotions can be quite daunting at first glance, but after a few promotions have been completed with the help of a good promotions agency or outside legal partner, the legal aspects become clear (and somewhat straightforward). Sweepstakes and contests each have their own registration requirements, which must be closely followed to avoid fines and other potential problems.

Just because the Internet is international doesn't mean your online promotions should be. Each country has its own government, its own laws, and its own regulatory practices that affect online promotion. While a country-specific guideline was provided in this chapter, you are strongly urged to seek support from international promotions experts before jumping into online promotions that are open to countries outside the United States. In addition to the legal challenges, most international promotions also require translation and a solid awareness of cultural differences to be successful (and to avoid cultural blunders).

With all these requirements still fresh in your mind, we move to the next chapter, where we will review the pros and cons of outsourcing versus using your in-house resources to plan, produce, execute, and measure your online promotions. There are definite advantages and disadvantages to both, so the key is to understand what works best when.

This is a free chapter of Bill Carmody's book, Online Promotions: Winning Strategies and Tactics. If you would like to purchase the complete work, please visit <http://www.billcarmody.com> for complete information on how to purchase this book. If you would like to contact Bill Carmody, you can send him an email at bill@billcarmody.com. Thank you for reading this chapter.