

Sports Litigation Alert

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March Madness On Demand: Legal Considerations when Structuring a Successful New Media Sports Promotion

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The 2009 NCAA March Madness on Demand event was the most successful multi-platform, integrated sports event offered to date with an estimated 7.52 million unique visitors, a 58% increase over the 2008 event. It also illustrates some of the legal issues sports organizations and promoters need to keep in mind when planning an event that includes new and emerging media such as mobile marketing, interactive contests, online sweepstakes, and social networking.

Although March Madness on Demand has been providing streaming of NCAA Division I Championship tournament basketball games for several years, the 2009 NCAA March Madness on Demand package contained some new features. For the first time, the 2009 package streamed every tournament game from the first round to the Final Four games online for free. From 2003 to 2005, CBS charged \$15 to watch online; in 2005, 20,000 users bought the package. In 2006, when free coverage began, 1.3 million users registered to watch. This year, all games were available (in 2007, games after Round 16 were not available online), blackout restrictions were lifted allowing viewers to watch online the same games broadcast in individual markets, and viewers did not have to register.

The 2009 MMOD also offered several innovative and very popular interactive features such as the Boss Button, an iPhone application that allowed users to watch the streaming videos on their cell phones, multiple-viewing channels (such as Facebook and MySpace), branded widgets (mini-applications that can be added to a blog or web page), RSS feeds and podcasts, interactive contests, and online sweepstakes. The Boss Button application, sponsored for the first time by Comcast, replaced streaming video on viewers' desktops with a spreadsheet (so the boss wouldn't catch a viewer watching the games while at work). According to Nielsen, the Boss Button received 2.77 million clicks (up from 2.5 million in 2008).



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Mobile marketing – in addition to providing an iPhone application, MMOD also sent messages to viewers on their mobile devices. The regulatory landscape for marketing to mobile devices is best described as “fluid” – it’s still the wild west in terms of regulation but this is likely to change. Federal telemarketing and commercial email laws can apply to some kinds of mobile marketing, depending on how messages are sent. In addition, the Mobile Marketing Association guidelines are widely followed and have become baseline standards in the absence of laws in this area. The guidelines stress an opt-in approach (i.e., getting consent to send mobile marketing messages), disclosures and privacy standards. The Wireless Association has issued guidelines for location based services provided to wireless customers. The voluntary guidelines stress notice, consent and safeguarding location based data. Wireless service providers also may impose some restrictions on mobile marketing; for example, providers may prohibit profanity or sexually explicit images or language, defamatory material, and anything that facilitates an illegal activity. Another concern for mobile marketers are child protection registries. Two states – Utah and Michigan – have established child protection registries: individuals and schools can register telephone numbers, fax numbers, email addresses and instant message addresses that belong to or can be accessed by a child. Marketers are prohibited from sending messages or making calls that contain or advertise certain content such as pornography, alcohol, firearms, and tobacco products to any number on the registry.



Interactive contests. MMOD included a Coke sponsored Famous Fans contest in which fans were invited to submit videos and the fan video selected would appear in a commercial during the NCAA finals. Interactive contests in which

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viewers can provide content such as videos, music, and photographs can potentially lead to liability for copyright and trademark infringement. Web site terms of use and/or contest rules should spell out what kind of content is allowed and when an entrant needs to get permission to use trademarks or material copyrighted by third parties, and contest sponsors should reserve the right to reject or remove submissions for any reason. There is a federal law that provides a safe harbor from liability for online copyright infringement, but web site operators have to take certain steps to qualify for the safe harbor status, such as registering with the U.S. Copyright Office and establishing and following a take-down procedure for complaints of copyright infringement. Blogs and contests that invite submissions of essays may create liability for defamation and the violation of the right of publicity (the right to control the commercial exploitation of someone's name and likeness) and the right to privacy (the right to keep certain information private). Web site terms of use and/or contest rules can instruct entrants about these laws and the importance of not making defamatory statements or posting pictures of celebrities. Another federal law provides some immunity from these types of liability when a web site operator is acting like a publisher.

Contests and sweepstakes. The MMOD package also offered a Men's and Women's Bracket Challenge and an online sweepstakes. Contests and sweepstakes, whether conducted online or offline, are heavily regulated by the states. To avoid being considered an illegal lottery, sweepstakes should provide at least one method of entry that is free (and not too time-consuming) and should not require any considerable effort to enter. Contests require that skill be an element in determining the winner and, in most states, an entry fee can be charged. In contests, a tie should also be determined by skill (rather than by chance). Online sweepstakes and contests pose additional concerns such as being vulnerable to hackers and/or automated entries and being accessible to Internet users around the world and thus potentially subject to international laws. Also, for all types of promotions, it's important that entrants have access to the Official Rules prior to entering.

Social networking. Partnering with social networking sites such as Facebook broadens the exposure of a new media sports event considerably, but sports organizations should be sure to comply with the terms of use and policies of social networking sites. Some social networking sites limit commercial activity, including using the site to send messages. Sports organizations should also be familiar with a marketing program before participating to avoid embarrassing developments. One social networking site launched a feature with partnering web sites in which transactions on the partners' web sites were publicized on the personal web pages of the social networking site. Users of the social networking site protested because this seemed like free advertising for the partnering web sites and because opting out was not easy; the social networking site soon changed the feature to require an opt-in before publishing such information. Sports organizations should also take steps to protect their own intellectual property when creating a presence on social networking sites. For example, Facebook recently launched personalized Facebook URLs (www.facebook.com/yourname) for Facebook members, including companies and organizations that are members. Facebook is allowing trademark owners to stake a claim to certain personalized URLs and has a procedure in place for trademark owners to complain if someone else registers a personalized URL containing a trademark.

Conclusion

Using mobile marketing, contests, sweepstakes and social networking sites can be an effective way to promote a sporting event, athletes and leagues. But each feature raises legal issues that should be considered and that may determine how a new media promotion is structured or advertised. Nonetheless, as shown by the success of MMOD 2009, integrating these features can generate buzz and revenues.

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