There were significant changes in almost every aspect of the law relating to advertising, marketing and promotions in 2013. Here, our lawyers explain and discuss what happened, and offer suggestions for advertisers and agencies to think about and address in 2014.
During 2013, as in recent years, the advertising industry explored new tactics and tools, and there was an exponential increase in the complexity and variety of technologies being used and the issues they present. In particular, discussion last year focused on the expansion of the digital advertising ecosystem and new relationships between advertising modes, technologies and platforms.

Programmatic advertising, including real time bidding and other algorithm-based buying or selling, presented new issues in connection with both specific mechanics (e.g., pixel placement) and general operation (e.g., building in appropriate safety valves to address excess buying and to better ensure buys meet advertiser specifications and requirements). Connections between programmatic ads and “big data” also introduced further complexities, as new technologies collect and transmit consumer data through previously unexplored pathways.

Intersections between content and ads and between digital and real realms also brought increased attention to native advertising and the “Internet of Things.” No concerted action has been taken yet with respect to the “Internet of Things,” but tactics such as the collection of geo-located data through linked devices have begun to implicate privacy laws and issues addressed in 2013 by new guidance documents including the Digital Advertising Alliance’s Application of Self-Regulatory Principles to the Mobile Environment (the “Mobile Principles”).

As mobile devices and software have evolved, a variety of new advertising units and sophisticated advertising opportunities on mobile devices have become available. Many of these opportunities raise privacy and data collection issues similar to those discussed above, and also may be covered by the new Mobile Principles.

Key issues and themes likely will include:

- New buying and selling modes that will require in-depth legal assessment to prevent contractual and regulatory issues.
- New methods of gathering data will raise novel privacy issues.
- The Mobile Principles, which thus far have been in an “implementation phase,” will move into an enforcement phase.
- The mobile environment, including more diverse, sophisticated and integrated advertising activities, will continue to develop and expand, along with new kinds of tools, data and targeting mechanisms.
LOOKING AHEAD TO 2014

Children’s Advertising >> Allison Fitzpatrick

COPPA, CARU AND CFBAI: NOT CHILD’S PLAY

Children’s advertising faced a number of challenges in 2013, but the most daunting was complying with the Federal Trade Commission’s amendments to the Children’s Online Privacy Protection Rule (COPPA), which went into effect on July 1st and made operators of child-directed sites and apps strictly liable for the collection of personal information (including in connection with behavioral targeting) through their services. Third parties, such as ad networks and plug-ins, can also be held liable under the revised COPPA if they have actual knowledge they are collecting personal information from child-directed services.

The Children’s Advertising Review Unit (CARU), the self-regulatory arm of children’s advertising, updated its Self-Regulatory Program for Children’s Advertising (the CARU Guidelines) to reflect the revised COPPA. While online privacy protection continued to be an important priority for CARU, CARU also brought several actions against advertisements which featured products that posed safety risks to children, failed to make material disclosures in language that children could understand (particularly when disclosing what is not included in the initial purchase), misled children about a product’s performance (e.g., depicting toy movement) and urged children to buy products (including in connection with in-app purchases).

Food advertising to children also remained a top priority in 2013, with the Children’s Food and Beverage Advertising Initiative (CFBAI), a self-regulatory organization representing the majority of children’s food advertisers, implementing a uniform nutrition criteria (in contrast to company specific nutrition criteria) for the types of products that may be advertised to children.

Children’s advertisers and agencies will need to:

- Review privacy practices to ensure compliance with the revised COPPA. In particular, advertisers should ensure that any ad networks or other third parties on their sites or apps are not behaviorally targeting children and should implement agreements with these third parties to that effect.
- Review the CARU Guidelines to ensure compliance prior to advertising to children. In particular, advertisers should make sure that their disclosures are understandable to the child-directed audience, the products featured are appropriate for children and their advertisement does not pressure children to purchase products or mislead children about a product’s performance.

Anyone who represents a member of the CFBAI should check to see whether the member’s products are even allowed to be marketed to children under the CFBAI’s updated uniform nutrition criteria.
TECHNOLOGY, DRIVING CHANGES IN AUDIENCE HABITS, REQUIRES ADAPTATION BY ADVERTISERS AND AGENCIES

The year in entertainment was marked by fundamental changes in audience habits driven by technological innovation.

The television industry dealt with challenges seemingly on every front. With “House of Cards,” Netflix showed it could produce award-winning programming as sophisticated and compelling as anything on HBO or any broadcast network. Perhaps more significantly, Netflix’s practice of releasing an entire season’s worth of programming at once accelerated a sea change in viewing habits, encouraging binge viewing and altering the very notion of “season.”

On the distribution front, networks continued to fight an uphill battle against technological changes that are reshaping how television programming is delivered to consumers. The networks unsuccessfully sought to enjoin DISH from offering its Hopper service, which enables users to mass record primetime programming, remove the commercials with a simple push of a button and then watch that programming on any device. Similarly, broadcasters so far have been unsuccessful in halting the launch of Barry Diller’s Aereo service, which uses miniature antennas to pull free over-the-air broadcast signals without authorization and transmit them to its subscribers’ connected devices; the dispute now is before the U.S. Supreme Court. Together, these developments threaten to erode both the advertising and the affiliate fee revenue streams of programmers, fundamentally altering the business model for delivering video programming to viewers.

The music industry, finally stabilizing after years of upheaval caused by illegal file sharing, saw its paid digital music business begin to falter. In 2013, for the first time since the introduction of the iTunes Store back in 2003, digital music sales dropped. The decline no doubt is a result of the maturation of music streaming services such as Pandora and the entry into the streaming marketplace by Apple itself, with iTunes Radio. As Netflix has done with video, these services have altered how music content is consumed.

Advertisers and agencies will need to adapt to these changing habits by:

- Creating marketing opportunities within subscription video services that take advantage of their unique relationship to subscribers.
- Capitalizing on sports and live event programming to communicate messages in traditional channels, while identifying new ways to connect with consumers in an on-demand DVR world.
- Leveraging the shift from music sales to music streaming, where more significant advertising opportunities are available, taking advantage of user location, taste and preference data inherent in music streaming services.
Environmental marketing made a significant comeback in 2013. After years of diminished standing during the Great Recession, green issues were again on the minds of consumers, advertisers and regulators. Factors such as an improving economy and a seemingly endless series of “once-in-a-lifetime” weather events, as well as the release by the Federal Trade Commission (FTC) of its updated Green Guides in October 2012, all contributed to environmental impact being an increasing focus of marketing.

Regulators used the first full year of the new Green Guides to send a message to the marketplace that green marketing practices were very much on their radar. The FTC alone settled 14 separate enforcement actions based on what it considered to be misleading or deceptive environmental marketing claims. Green claims also were the focus of many state attorney general general investigations, private litigations and industry self-regulatory actions over the last year.

Interestingly, although the updated Green Guides contain a lot of guidance about environmental issues never before covered, much of last year’s regulatory scrutiny involved more “traditional” green claims – such as degradability – for which guidance long had been provided by the FTC and that also had been the subject of many previous enforcement actions. In other words, regulators used 2013 to enforce long established principles of green marketing, meaning that 2014 likely will be the year regulatory scrutiny turns to “new” concerns, such as the FTC’s new “de facto” ban on unqualified general environmental marketing claims.

Advertisers and agencies will need to:

Expect regulatory scrutiny and be especially cautious when making marketing claims about “new” environmental issues, including reductions in carbon emissions or the use of renewable energies; be specific and work closely with counsel early to ascertain how different claims might have to be qualified.

Understand that with green marketing, it is critical to consider the overall net impression of the ad so as to ensure it is not making claims – including through its visuals, use of third party seals or use of “green” trade names – that cannot be supported (e.g., an unqualified general environmental benefit claim).

Keep in mind that green claims often require a lot of qualifying and explanatory information to be properly understood, and merely referencing a website with details about the environmental claim is not acceptable to the FTC. Therefore, it is important to carefully consider the intended media and its limitations (e.g., social media, mobile marketing) when determining how, or even if, a certain environmental claim should be made.
INCREASINGLY CONSERVATIVE FDA POSES CHALLENGES FOR PHARMACEUTICAL COMPANIES AND AGENCIES

The increasingly conservative stance of the Food and Drug Administration (FDA) against pharmaceutical companies continues to impact public relations and advertising agencies servicing this sector. Actions over the past year relating to adverse event reporting, social media and media statements highlight this changing approach.

Janssen Pharmaceuticals and Johnson & Johnson were hit with multimillion and billion dollar fines, respectively, in connection with the promotion of Risperdal, an anti-psychotic drug, for off-label uses. Janssen had received repeated warnings over what the FDA contended were misleading marketing messages targeting physicians. These actions recall the DOJ’s settlement on behalf of the FDA with GlaxoSmithKline for $3 billion for violations that, the government alleged, included unlawfully promoting certain drugs and failing to report adverse event data.

The FDA also cracked down on the distribution of pharmaceuticals marketed for off-label uses. Late last year, the CEO of Aegerion Pharmaceuticals appeared on “Fast Money” and promoted Juxtapid for unapproved off-label uses. In a warning letter, the FDA determined that the statements caused the drug to be misbranded and made the distribution of the drug a violation of the Food, Drug, and Cosmetic Act. This action echoes the FDA’s enforcement action against Cornerstone Therapeutics for allegedly failing to include risk information in a pitch letter, even though the press release accompanying the pitch letter included the risk information.

Over the past year, the FDA even expanded its enforcement presence to social media sites and search engines. In a Warning Letter to AMARC Enterprises, the FDA determined that when a company “Likes” a consumer’s statement, it’s the same as adopting that statement. In AMARC’s case, the consumer said that AMARC’s dietary supplement “enabled me to keep cancer at bay without the use of chemo and radiation.” The FDA found that AMARC’s “Like” impermissibly promoted its dietary supplement for conditions that caused the product to be a drug.

Adapting to the FDA’s increasingly conservative stance will require:

- Working in conjunction with pharmaceutical companies to ensure all promotional materials, speeches and marketing materials promote drugs for approved uses and do not inadvertently promote drugs for off-label uses.

- Managing pharmaceutical companies’ social media presence and drafting social media policies to ensure that they do not “like” posts that may invite FDA enforcement actions.

- Carefully reviewing agreements with pharmaceutical companies. If an advertiser or agency is required to report adverse events under the agency-client agreement, then the agency should have policies and procedures in place to ensure that adverse events are reported appropriately.
In 2013, state and federal courts around the country made significant rulings in three areas relating to commercial speech:

- invalidating laws that restricted non-misleading advertising;
- upholding laws that compelled commercial speech of a purely factual and non-ideological nature; and
- giving speech that intertwines commercial and non-commercial elements the heightened protections of non-commercial speech.

For example, in the area of legal restrictions on non-misleading advertising, the Fourth Circuit Court of Appeals invalidated a Virginia regulation that, with the aim of reducing underage and binge drinking by students, banned alcohol advertisements in college student publications. The court ruled that the regulation was overbroad as to the plaintiff newspapers because it prohibited their readers, the majority of whom were over age 21, from receiving truthful information about products they were allowed to consume under the law.

In the area of compelled commercial speech, the Washington, D.C. District Court preliminarily upheld a U.S. Department of Agriculture (USDA) regulation requiring meat to be labeled with detailed information on its geographic origin. The court held that the regulation compelled disclosure of factual and uncontroversial information only, and was reasonably related to the USDA’s interest in preventing consumer deception, and, therefore, did not violate the meat producers’ free speech rights. By the same token, the California Supreme Court upheld a California law requiring prescription benefits managers to report pharmacy pricing information to their insurer clients. The court held that the law compelled disclosure of purely factual information only, and was reasonably related to the state’s interest in promoting informed rate-setting by insurers, and, therefore, comported with the First Amendment.

With respect to hybrid commercial/non-commercial speech, a California District Court gave heightened First Amendment protection to promotional materials that were “inextricably intertwined” with books by Lance Armstrong. By contrast, the Virginia Supreme Court refused to grant heightened First Amendment protection to a lawyer’s blog that consisted predominantly of self-promotional posts about cases the lawyer had won and that only superficially and sporadically included the lawyer’s political statements on legal issues.
FCC’S “PRIOR EXPRESS WRITTEN CONSENT” RULES TAKE CENTER STAGE

The biggest news in mobile for 2013 was the revisions by the Federal Communications Commission (FCC) to its rules under the Telephone Consumer Protection Act (TCPA) to require “prior express written consent” in order to send a commercial SMS or MMS text to any wireless number using an autodialer (essentially any computer). Specifically, the consent must be in writing, signed and sufficient to show that:

- the consumer received “clear and conspicuous disclosure” of the consequences of providing the requested consent, i.e., that the consumer will receive future text messages by or on behalf of a specific seller;
- the consumer who received this information agreed unambiguously to receive these calls at a telephone number the consumer designated; and
- there was no requirement to sign it as a condition – directly or indirectly – of purchasing any good or service.

While a simple opt-in was all that was previously required to send commercial text messages to consumers (e.g., “Text ‘coupon’ to 12345 to receive a coupon good for 50% off your next purchase at ABC Store and to periodically receive information on future offers”), marketers now will need to obtain the prior express written (and signed) consent outlined above. Therefore, even where a consumer responds to an off-line offer or opts-in by sending a text, the marketer will need to send a separate text message, including the above disclosures, to obtain the consumer’s consent.

Of critical importance is the fact that the TCPA permits private lawsuits against telemarketers – with the potential of significant damages awards of up to $1,500 per violation. There already has been a number of class actions under the prior TCPA consent requirements.

Some things to consider:

Expect to see a number of class action lawsuits in early 2014 against marketers who failed to obtain appropriate consent.

Given the risk of the potential class action, strict compliance with the revised rule is critical. Advertisers that have not done so already (the new rule went into effect in October 2013) should review the steps they and their marketing agencies are taking to obtain consent and revise immediately if not in compliance. Do not be a test case.
MUCH TO DO IN 2014 TO RESPOND TO THE NAD’S 2013 RULINGS

2013 proved to be another busy year for the National Advertising Division of the Council of Better Business Bureaus (the NAD). Seventy-one competitor challenges were filed with the NAD last year, the same number that were filed in 2012. As in prior years, challenges involving dietary supplements and cosmetics and beauty products were the most common.

Cosmetics advertisements came under increased scrutiny last year, as evidenced by a pair of NAD decisions issued in September 2013. As part of its routine monitoring program, the NAD examined two mascara advertisements in which models used lash inserts to artificially enhance the performance of the advertised mascara. In each case, the NAD determined that the photograph of the model wearing lash inserts was literally false because it was not an accurate depiction of the volume that could be achieved by applying the mascara alone. Additionally, in each of these cases, the NAD concluded that the use of the disclosure “lashes styled with lash inserts” was insufficient because it contradicted the message conveyed by the advertisement that the photograph was a demonstration of the performance claims in the advertisement. Thus, the NAD recommended that both advertisers either discontinue the use of artificial lash enhancements or, in the alternative, reference the use of lash inserts in the main message of the advertisements.

Several NAD cases from 2013 also addressed the issue of native advertising. For instance, in December 2013, the NAD reviewed an article in Shape magazine that promoted the benefits of certain Shape-branded water flavoring products. The publisher argued that the relationship between Shape magazine and the Shape-branded products was obvious to consumers and that there was no need to characterize the article as an advertisement. The NAD disagreed, noting that consumers may attach different weight or significance to recommendations made in an editorial context than to recommendations made in an advertising context. Accordingly, the NAD recommended that the publisher clearly and conspicuously designate content as advertising when promoting products within its publication.
Native Advertising >> Vejay G. Lalla and Anne DiGiovanni

IP, DISCLOSURES AND CONSUMER EXPECTATIONS: TOP NATIVE ADVERTISING ISSUES

Native advertising has been around for decades in various forms, but in 2013, digital native content became a hot topic, as well as the subject of industry and regulatory discussion around how traditional advertising law principles apply to native advertising. The President of the Online Publishers Association recently stated that nearly ninety percent of its members are providing native solutions.

In early 2013, The Atlantic published an article sponsored by the Church of Scientology that, although properly disclosed as sponsored, created an outcry from readers because the Church’s message seemed to run counter to the magazine’s journalistic values. The incident has served as a cautionary tale to advertisers and publishers that native advertising needs to be mindful of both applicable laws and consumer expectations of the brand or publication. Since this time, the American Society of Magazine Editors and the Interactive Advertising Bureau both have issued guidelines on the use of native advertising.

The Federal Trade Commission (FTC) has begun to focus on native advertising as well. The FTC sent letters to the major search engines stating that they should delineate between search results that are paid placements and search results that are organic through the use of clear and conspicuous disclosures. In December, the FTC held a workshop on native advertising that facilitated industry, academic and government experts in a discussion over what level of disclosure the FTC should demand from advertisers and publishers that engage in native advertising practices. Although the FTC may issue further guidance, it likely also will continue to monitor native advertising through enforcement of Section 5 of the FTC Act for any unfair or deceptive acts or practices in or affecting commerce.

Issues likely to dominate include:

Agencies and advertisers typically bear the burden of responsibility for ensuring any content (including native advertising content) does not infringe third party intellectual property or other rights, so campaigns should be reviewed closely.

Agencies and advertisers should ensure that any native advertising includes proper disclosures in accordance with current FTC regulations and its history of enforcement, including by placing a disclosure obligation in contracts with publishers and media.

Media companies and publishers should tread carefully when taking on native advertising to make sure content is consistent with what the audience expects and consistent with their or their advertisers’ core brand messaging.
EU REGULATIONS, STATE LEGISLATION AND INCREASED LITIGATION ARE 2014’S BIG PRIVACY ISSUES

Privacy and data security issues did not need any help in 2013 garnering attention from decision makers. Nonetheless, these issues skyrocketed with the revelations in the Edward Snowden affair. The collection and use of data is on the minds of every business, government and citizen in the world. The matter cast a negative light on the marketing and communications industry, where extensive data collection and use long have been a part of the industry, albeit for much more benign purposes.

2013 saw key developments in privacy through legislation, litigation and self-regulation. California enacted a pair of groundbreaking privacy laws, one dealing with the right of minors to “erase” content they have posted to social media sites and another requiring a website to disclose how it responds to “do not track” (DNT) signals transmitted by web browsers.

Wyndham Hotels continued with its lawsuit with the Federal Trade Commission (FTC), arguing that the FTC does not have the authority to establish data security standards. Should Wyndham prevail, this would significantly undercut the FTC’s current privacy and security enforcement activities, but may spur Congress to enact new legislation.

Self-regulatory efforts in interactive advertising had successes and failures. The Digital Advertising Alliance released its Application of Self-Regulatory Principles to the Mobile Environment, while the World Wide Web Consortium failed to achieve any consensus in its DNT efforts.

Some key issues to follow:

- New regulations from the European Union (EU), which could have a significant impact on U.S. companies operating in the EU.
- More privacy legislation at the state level.
- Increased litigation involving modern technologies and decades-old privacy/technology laws, which may further push Congress to update many of these laws.
- Increased sensitivity to issues involving the collection, use and distribution of “big data.”
DISCLOSURES AND PRIVACY POLICIES HEAD THE NEW YEAR’S TO-DO LIST

The Federal Trade Commission (FTC) made a number of changes to its regulations and guidelines in 2013. Specifically, the FTC updated its “.com Disclosures” guide to provide advertisers with more specific instructions for complying with the FTC’s Guides Concerning the Use of Endorsements and Testimonials in various forms of new media. Moreover, the updated guide emphasized that disclosures must be clear and conspicuous on all devices and platforms where consumers may encounter advertisements and clarified methods by which advertisers can implement effective disclosures. The FTC also announced new mobile privacy guidelines designed to improve the disclosures that appear on mobile platforms and that are used by application developers.

On the privacy side, dozens of state and territory attorneys general filed comments with the FTC addressing consumer complaints about “mobile cramming” – a practice involving the placement of unauthorized charges on consumer mobile bills for unwanted services as well as the inadequate disclosure of these third party charges. The comments also expressed concerns about the limited mechanisms available to consumers to effectively block or dispute such charges.

A 2013 FTC ruling against juice company POM Wonderful clarified the FTC’s standard for determining whether an advertising claim is misleading. Specifically, the FTC found that, based on the overall “net impression” of the POM advertising campaign, at least a “significant minority” of reasonable consumers would believe that drinking POM juice would prevent heart disease and/or that there was clinical proof of these claims. Applying this “significant minority” standard, the FTC concluded that the challenged claims were misleading despite the fact that most reasonable consumers would not interpret the advertising to mean that POM’s juice actually prevented heart disease.
SAG: Commercials Contract

>> Howard R. Weingrad and Anne DiGiovanni

RENEGOTIATED COMMERCIALS CONTRACT HAS STRINGENT NOTICE REQUIREMENT, AND QUESTIONS REMAIN ABOUT INTERNET/NEW MEDIA “COMMERCIALS”

The SAG-AFTRA Commercials Contract, which governs wages and benefits for talent appearing in commercial advertising productions, was renegotiated in April 2013, resulting in a Memorandum of Agreement (MoA) that will be operative for three years.

Key among the updates was a side letter for an Experimental Coverage Waiver for Made for Internet and Made for New Media Commercials under which signatory advertisers and agencies now can film the activities of people in public without them being covered under the Commercials Contract, as long as those people are neither scripted to speak any dialogue nor “cast” for the commercial. When an advertiser or agency employs this waiver, the SAG-AFTRA Commercials Contract can become inapplicable to live events not staged for purposes of producing a commercial, “man-on-the-street” segments and hidden camera footage. It is a material condition that the advertiser or agency notify the union that it is applying the waiver and provide the union with a copy of the produced commercial within sixty days of first use.

Notably, the MoA did not provide clarification on the definition of an Internet/new media “Commercial,” leaving intact the current ambiguity in how advertisers and agencies may interpret what types of productions are covered by the Commercials Contract. Although it may seem useful to have flexibility in considering what a “Commercial” on the Internet is, having clearly-defined parameters may be more useful for planning production budgets, as receiving a claim from SAG-AFTRA that scale wages are owed for each principal performer appearing in an online video that the advertiser was not considering a “Commercial” can be an unwelcome surprise.

**LOOKING AHEAD TO 2014**

**Issues of note include:**

The notice requirement to avoid owing scale payments for productions that use real consumers should not be taken lightly, as SAG-AFTRA will aggressively pursue advertisers and agencies to enforce scale payments to all individuals appearing in a commercial in the event notice of the waiver and the produced commercial have not been submitted to the union.

When conducting a promotion in which consumers submit user-generated videos or other content, advertisers now can post the user-generated submissions online – but during the promotion period only – without having that content be subject to the Commercials Contract.

Advertisers and agencies should consider whether online advertising content has the primary purpose of selling a product versus entertaining, whether it contains a call to action to purchase or engage with the brand, whether there is a title card or other sponsor identification in the video and whether in its current format it could run on television as a commercial, among other factors, when evaluating whether content is an Internet “Commercial” that is subject to the Commercials Contract.
Social Media >> Joseph J. Lewczak, Gary A. Kibel, Allison Fitzpatrick, Vejay G. Lalla, and Rohini C. Gokhale

AVOIDING MISSTEPS ON SOCIAL MEDIA PLATFORMS

Last year proved to be an enlightening year for companies navigating social media. As use of social platforms expanded to engage in storytelling, native advertising, and blogger and consumer endorsements, certain companies faced state and civil actions for their conduct.

In a notable state action, the NY Attorney General concluded an investigation into fake reviews on consumer-review websites, determining that companies used advanced IP spoofing techniques to hide their identities and set up hundreds of false online profiles to post phony reviews. The year-long investigation resulted in settlements with 19 companies and over $350,000 in penalties. Consumer-review websites such as Yelp also demonstrated their willingness to take action against fake reviews by suing several companies that had posted or solicited fake reviews.

Social media platforms themselves were not immune to challenges in 2013. For example, Facebook settled a class action lawsuit for $20 million alleging that the site used users’ profiles in its “Sponsored Stories” advertisements without consent.

One lawsuit in particular highlighted the dangers of using social media content without authorization, when a judge ruled that Getty and Agence France Presse had infringed on Daniel Morel’s copyright by distributing his photos without permission. Morel was awarded $1.2 million in damages. Remember, just because it is available online doesn’t mean it can be used for any purpose.

Acknowledging the challenges that companies face in maintaining a social media presence while complying with regulatory guidelines, the Federal Trade Commission (FTC) published an updated “.com Disclosures” guide to provide guidance on how to make appropriate disclosures online and in mobile.

Advertisers utilizing social media should take the following steps:

Develop or update written social media policies for bloggers, spokespeople and other endorsers and make sure endorsers are making the appropriate disclosures on social media platforms. Disclosures should be clear and prominent, not buried in hyperlinks or behind buttons. Consider requiring endorsers to have posts pre-approved to verify that required disclosures appear.

Review and update social media policies for recent advertising and employment law developments, including ensuring social media policies only allow “authorized” representatives to post on behalf of the company.

Respect the rights of third parties when posting or otherwise using consumer content via social media platforms or hashtags.

Recognize that commercial uses of social media services and content differ significantly from personal uses.
2013 was the year the reins on gambling began to loosen even more. New Jersey became the third state in the United States to permit Internet gambling, following Nevada and Delaware. Of course, it is limited to licensed casinos in the state, with most of the back-end operational aspects being provided by already established Internet gambling companies located offshore. Although not necessarily impacting the promotions industry per se, it is highly likely that more states will follow in the future.

On the promotional front, Vermont joined the majority of states in permitting sponsors of skill-based contests to require an entry fee or other consideration for entry into skill games. Accordingly, businesses that are structuring a contest that requires a fee or purchase no longer will be required to void Vermont.

In addition, Facebook updated its Page terms to make it easier for businesses to create and administer promotions on Facebook. Facebook hopes that these changes will enable more businesses to launch sweepstakes, contests and other promotions on its platform. Given the changes, companies now can:

- collect entries by having users post on their Page or comment or like a Page post;
- collect entries by having users message their Page; and
- utilize likes as a voting mechanism.

Despite these changes, businesses still are not permitted to ask people to take part in a promotion by liking, sharing or posting something on their personal timelines. Facebook stated that it is keeping this guideline to ensure that people continue to post authentic, high quality content to their Facebook timelines.

On the flip side, the states continued their pursuit of Internet sweepstakes cafés, with states such as California, Mississippi, New York and Ohio passing new laws prohibiting or restricting the activity, and Florida, Georgia and New Jersey pursuing enforcement actions against operators. Keep in mind that the laws prohibiting Internet sweepstakes cafés frequently are drafted broadly and may suck in other more legitimate activities.

Consider the following:

Although the perceived evil of gambling seems to be crumbling somewhat, that does not mean that law enforcement officials will not continue to pursue illegal gambling activities on all fronts, and the aiding and abetting of those activities. Some unlicensed Internet gambling providers may use this as an opportunity to try to sneak back into the states. If what they are doing is unlicensed by the state, it still is illegal.

Before running a promotion on any social media platform, be sure to check the site’s terms and conditions. They are updated frequently, and what may be permissible one day, may not be on another.

The Internet sweepstakes café legislation and enforcement actions should be a reminder that if all three elements of prize, chance and consideration are present, it is an illegal lottery and/or illegal gambling. Be sure to carefully analyze any proposed business model/promotion to ensure it complies with the law.