

PROMO

QUIZNOS/SUBWAY SETTLEMENT POSES LEGAL THREAT TO FUTURE UGC PROMOS

Quiznos and Subway recently settled their longstanding dispute involving the Quiznos vs. Subway TV Ad Challenge user generated content promotion and other advertising created by Quiznos for its Double Meat campaign.

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THE SETTLEMENT CAME QUICKLY after the court in the matter issued a decision denying Quiznos' motion for summary judgment. The negative decision for Quiznos could have far reaching consequences for future UGC promotions, and sponsors should now carefully consider what type of content they ask users to submit.

The Quiznos campaign itself involved various claims comparing the quantity of meat in Quiznos' sandwiches to Subway's sandwiches, and the Ad Challenge invited consumers to create their own advertising along those lines. The lawsuit, filed by Subway in late 2006, asserted claims for false and misleading advertising in violation of state and federal law, including with respect to the content submitted in connection with the Ad Challenge.

Quiznos asked the court to dismiss the suit for various reasons, including (with respect to the user generated content portion) claimed immunity under the Communications Decency Act (CDA). Under the CDA, a provider of an interactive computer service cannot be treated as the publisher or speaker of any information provided by a third party, and is therefore not liable for objectionable content posted by such third party on their Web site.

The court found that Quiznos was a provider of an interactive computer service (which is good news for UGC sponsors), but declined to decide whether the information at issue (the user generated videos) was "provided" by Quiznos or, as the statute requires for immunity, by a third party. The court stated that it was necessary to

explore the extent of Quiznos' active involvement in the creation of the content. "[T]he critical inquiry with respect to CDA immunity[,]” the court stated, “is whether [Quiznos] merely published information provided by third parties or instead were actively responsible for the creation and development of disparaging representations about Subway contained in the contestant videos.”

What's troubling about the court's decision is that it implies that a sponsor of a UGC promotion could be held liable for claims made by consumers if the sponsor was “actively responsible” for the creation of the content. Exactly what “actively responsible” means is not yet clear. However, in relying on an older case, the court indicated that a sponsor who “actively encourage[s], instruct[s], and participate[s]” in the materials being submitted would not be able to take advantage of immunity under the CDA.

The court in the Quiznos case indicated that it was a question of fact as to whether Quiznos was actively involved, and those facts would be determined at trial. However, the court went out of its way to list all the various ways Quiznos was involved with the content submitted by consumers including: asking consumers to submit videos comparing Subway and Quiznos and demonstrating “why you think Quiznos is better;” using a domain name (“meatnomeat.com”) that implied that the Subway sandwich has “no meat;” and posting sample videos that were arguably misleading due to their depiction of a Subway sandwich having no meat or less meat than a Quiznos sandwich.

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Clearly the litany of things that Quiznos was doing to encourage users to submit the type of content that was in keeping with the campaign is not atypical of the requests any sponsor would ask of consumers for a UGC campaign of a similar type. After all, one of the points of a UGC campaign is to receive content that is within your marketing brief and that can be used to further the goals of the overall campaign. The Quiznos decision therefore exposes sponsors to greater potential liability for false or misleading advertising if, for example, statements made by consumers about the sponsor's products or services are untrue or if a consumer's endorsement of or testimonial for a sponsor's products or services is false.

So, what can be done to minimize that liability? First and foremost, consider carefully the content you are asking consumers to submit. It's best not to allow consumers to create content that includes claims about your competitors, or about the attributes or performance of your products or services. It's also unwise to encourage consumers to provide a testimonial for your products, as any testimonial is necessarily tainted by the prospective promise of a prize. Limit the subject matter to more innocuous content such as a video of a person performing a song or about a topic that is not directly related to the product (the Progressive "Help Flo" Video Contest is a good example of this).

Second, allow the consumers to determine the content and message of the materials they post. The more involved a sponsor is with dictating content, the higher

is the likelihood that CDA immunity will not apply. Third, screen the submissions – or not. Screening can be a double-edged sword. On the one hand, screening will give you the opportunity to catch and reject any problematic submission. On the other hand, screening implies more involvement with the submission process, so perhaps a higher degree of risk that there will be no CDA immunity. On balance, screening is better than not screening, so long as you do it, and do it correctly. Screening will allow you to deal with any issues up front, including negative pr issues, intellectual property infringement, or potential false advertising claims. Finally, make sure you comply with your rules. For example, if your rules state that submissions that disparage your competitors will not be eligible, be sure those are omitted from the competition.

The Quiznos decision could be a turning point in UGC promotions, but its better to think of it as a teaching point. UGC promotions can still be an effective piece of the marketing mix, but Quiznos demonstrates there are limits. If you use your common sense, and treat your promotion like you would any content that you create, your risks should be minimal.

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