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Broadcasters' Desktop Resource

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Ask the Lawyer

Understanding the New Contest Rules

By Cary S. Tepper

[November 2015] In September, the FCC adopted new rules for contests run on broadcast stations. Notice has been in the Federal Register and after a comment period, is likely to go into effect before the end of the year. While some parts of the rules are easy to understand, others could cause problems.

This step-by-step analysis by Cary Tepper should be circulated to all staff involved in contests and promotions.

It is a fact of life that broadcast promotions usually generate additional operational revenue and valuable publicity.

However, if your promotions are not conducted properly, your audience may sue you and the FCC may fine you. It is important to know that when broadcast stations conduct contests, they are subject to both federal law and FCC regulations that govern the design and administration of the contests. These provisions are meant to ensure that contests are conducted properly – that is, that they are not deceptive or unfair.

CONTEST DEFINED

Contests are defined by the FCC as schemes which award prizes based upon chance, diligence, knowledge, or skill to members of the public.

Section 508 of the Communications Act provides that contests cannot be "rigged" – no one can give some of the contestants' answers beforehand or persuade them to act in a certain way so as to determine the outcome of the contest. Section 508 defines this crime as an affirmative action – a violation arises only by an *intentional* act (or a conspiracy to act) to predetermine the winner of a contest. Violation of Section 508 is a crime punishable by a fine of up to \$10,000 and a prison term up to a year.

Section 508 is codified, in part, by §73.1216 of the FCC Rules, which requires that contests be conducted fairly and that all "material terms" be adequately disclosed. *In September 2015 the FCC adopted changes to modernize the broadcast contest rules to allow broadcasters the option of disclosing their contest rules on-line instead of on-air but there still must be a complete disclosure of all material contest rules whichever disclosure method is chosen.*¹

¹ See, Report and Order FCC 15-118 (September 17, 2015)

The sanctions for a §73.1216 violation can range from a base fine of \$6,250 (which may be reduced or increased by any extenuating or mitigating behavior of the licensee) to revocation of the station's FCC broadcast license.

BASIC ELEMENTS OF COMPLIANCE

Stations can operate their contests in confidence if they take the necessary steps to ensure regulatory compliance sufficient to preclude any legal liability. The rules are fairly straightforward and, with a little diligence, can be easily followed.

Compliance requires three things:

- full and accurate **disclosure** of the material terms of the contest either *on-air or on-line*
- administration of the contest substantially **as announced** or advertised
- use of contest descriptions which are **not false, misleading, or deceptive** with respect to any **material term**.

PLAN AHEAD TO COMPLY WITH THE LAW

The first shield of protection from liability is careful *planning* of all aspects of the contest, followed by a *written* list of all contest terms. The terms should include all aspects of how the contest will be conducted, as well as how any reasonably foreseeable problems will be handled.

As a Rule of Thumb, *think defensively!* Write the list of contest terms with the expectation that some contestant will challenge each and every term. Prevent as many problems as possible by making the terms clear and fair. Ask your staff and friends to read the contest list. Find out if anything is ambiguous or unfair before you actually finalize the terms.

However, once you are finished drafting the contest rules, they must be broadcast on-air or posted on a publicly accessible Internet website prior to the commencement of the contest. During the duration of the contest period you should either broadcast the contest rules on-air several times each day, or refer your audience to the website address several times each day.

Out of an abundance of caution you should also keep the contest rules posted in your broadcast studios during the contest period. (As far as the FCC is concerned, you can never have too much disclosure of the contest rules.)

DEFINING CONTEST TERMS

The FCC Rules and Policy in this area encourage all broadcasters to define the material terms of a contest, and to include factors which define the contest's operation and participation. It is a violation of FCC Rules and Policy to give misleading information on any of the following aspects.

Entry procedures:

Examples:

- Failing to announce at the beginning of, and during, the contest that multiple entries will not be accepted – especially where contestants are encouraged to enter as often as they like, and they were

allowed to offer duplicate entries in prior similar contests: such acts make a duplicate entry exclusion a material term of the contest. *KIRO, Inc.*, 68 RR.2d 1078 (M. Med. Bur., 1990)

- A station substantially altered material terms of a contest. The station ran a contest entitled “Treasure Vault” in which the eighth caller who could guess a four-digit code would be awarded \$275. Although the Complainant used multiple phone lines from the same location, the rules contained no restrictions on the use of multiple phone lines by contest participants.

The station proceeded to tell the Complainant that he was still the seventh caller and that he would not be eligible for the prize. The station was wrong. *Access 1 New Jersey License Company, LLC*, DA 07-962 (March 2, 2007).

- A station held an on-air raffle that failed to make clear that consideration was not required to participate in the contest and otherwise refrained from airing the contest’s rules. This is in direct violation of the licensee-conducted contest rule. *Isothermal Community College Licensee of WNCW(FM)*, DA 03-3638 (November 13, 2003).

Eligibility restrictions

Examples:

- Avoid the appearance of impropriety: A good rule for any contest or promotion is to deny eligibility to station employees, advertisers, and their respective families. (If the contest prize is a car, an age restriction is probably a necessary contest term.)
- A station failed to announce the material terms of a contest, and neglected to conduct the contest in accordance with its material terms. The station failed to conduct a competitive eating contest entitled “Wing Off” in accordance with the Contest’s advertised material. Winning this would ensure a spot in a popular eating competition, “Wing Bowl 13.” The station revoked the prize awarded to the Complainant due to contest conditions that the Station neither announced nor advertised. *CBS Radio Inc. of Philadelphia*, DA 07-960 (March 2, 2007).

Entry deadline dates

Be specific. Do not say “get your entry in by Friday morning” if you mean “get your entry in by 10 AM on Friday the 23rd.”

Whether prizes can be won

Example:

- A station engaged in a broadcast that deceived the audience was contrary to the public interest, and unfair to competitors. The hosts of the morning show urged listeners to call either of two telephone numbers – failing to disclose that those telephone numbers belonged to rival Orlando Spanish-language Station WNUE-FM – and that the 100th listener would win a cash prize in the amount of \$1,000. *Clear Channel Broadcasting Licenses, Inc.*, DA 06-1286 (June 16, 2006).

The extent, nature, and value of prizes

Examples:

- Not informing contestants that a prize of resort hotel accommodations does not include transportation from the listening area, if the announcement reasonably gives that impression by calling the prize a "vacation" and the travel cost is substantial. *Randy Jay Broadcasting Co.*, 39 RR.2d 937 (1977)
- Giving the impression that prizes are all cash when they consist mostly of non-cash prizes. *Musical Heights, Inc.*, 40 RR.2d 1016 (1977)
- Use of a misleading contest name which substantially exaggerates the value of a contest prize. *Stoner Broadcasting System, Inc.*, 71 RR.2d 27 (M. Med. Bur., 1992)
- Not disclosing that movie prize passes did not guarantee admission to the theater. *ABC, Inc.*, DA 03-3887 (Adopted December 5, 2003).
- Not disclosing the fact that a contest prize was 1,000,000 Turkish lire and not \$1,000,000 U.S. dollars. *Citicasters Co.*, DA 00-1016 (Adopted May 5, 2000).
- Not disclosing a material term of the contest. The contest conducted was called "So You Want to Win \$10,000" yet failed to mention that the prize money would be awarded in Italian lira. *Clear Channel Broadcasting Licenses, Inc.*, DA 00-238 [2000].
- Conducting and broadcasting a contest over the station and apparently awarding a prize package valued significantly less than the value publicized by the station and stated in the contest rules. *Capstar TX Limited Partnership*, DA 05-1633 (June 21, 2005).

Time and means of selection of winners

Examples:

- Advertisements for a contest promising "\$100 Every Thirty Minutes" are misleading if they fail to indicate that the contest may "start and stop" at any time during the day and that prizes will only be awarded while the contest is in progress. *Headliner Radio, Inc.*, 71 RR.2d 1044 (M. Med. Bur., 1992)
- Not broadcasting the restriction that contestants could only participate in the contest once every ten business days, notwithstanding the fact that the contest rules were posted at the station and on the station's web site. *AK Media Group, Inc.*, DA 00-883 (Adopted April 17, 2000).
- In a station's broadcast contests, it awarded prizes to callers who did not satisfy its pre-announced contest rule parameters. The station's call volume fell short of the announced designated numbered callers and consequently, prizes had been awarded to the next eligible callers even where the announced contest rules specified that the ninety-ninth caller would win the applicable prize. *New Northwest Broadcasters, L.L.C.*, DA 04-1471 (May 24, 2004).

- The station made a significant change to the rules governing the station’s promotional contest for a concert during “Bike Week 2004.” The station launched a contest in which a customized motorcycle would be awarded to the person who drew the one key capable of starting it. The station stated that it would periodically air a specific sound effect and after the effect aired a certain number caller would receive a free ticket to the concert and a key certificate would be traded in for an ignition key. The complainant received handwritten instructions to arrive at the concert location on or before 7:00 pm to exchange the key certificate for an actual key. When the complainant arrived at the concert, he learned that the drawing had already taken place. *NM Licensing LLC*, DA 06-1459 (July 19, 2006).

PROPER DISCLOSURE OF THE CONTEST RULES

Until September 2015 the FCC required broadcasters to disclose all of the material contest rules on-air even if those rules were also posted at the broadcast studios or posted on-line on an Internet website.

Now, in an effort to modernize the rules to reflect changes in the way many people receive information, broadcasters no longer need to broadcast the contest rules on-air. Broadcasters can simply disclose the contest rules on their own Internet website or on another website so long as the following criteria are met:

- The website must be publicly accessible and free to use.
- The homepage of the website must have a conspicuous link or tab to the contest rules.
- All contest information posted on the website must remain there for at least 30 days after the contest has concluded.
- You should frequently broadcast on-air the fact that the contest rules can be found on-line, and announce the web address. The more complete and specific information you provide, the better.

The FCC recognizes that, in some rare circumstances beyond the broadcaster’s control, you may need to make certain changes to the contest rules during the contest period. Should that happen, you need to revise your on-air and/or on-line version of the contest rules within 24 hours, and provide immediate on-air announcements that the contest rules have changed. The FCC warns broadcasters never to change contest rules unfairly or deceptively.

Consistency required. The FCC requires that any on-air disclosure of contest terms be materially consistent with the contest rules that are disclosed on-line. Any ambiguity will be a cause for concern and could lead to an FCC inquiry and fine.

AVOID LEGAL LIABILITY – PLAN CAREFULLY

Stations are subject to liability not only for violation of the law or regulations but also for any negligence which causes personal or economic damage to contestants or others.

Examples:

- While the sponsorship of a contest promoted and conducted by a broadcast station is not necessarily a "material term" because it does not define the operation of the contest or affect participation in the contest, failing to deliver all promised prizes can subject the station to liability, even if some of the prizes are actually sponsored by, and under the control of, unrelated dealers,

if all contest announcements identify the contest as sponsored by the licensee and where part of the prizes are actually furnished by the licensee. *See, WLAV-FM, 63 RR 2d 1421 (1987); First Media of Monterey, Inc., 70 RR 2d 509 (M. Med. Bur., 1991).*

- Failing to ensure annual payments of a prize annuity can cause liability, even though the licensee's contract with the third party named the third party as responsible for the payments, if both the promotional material and the written contest rules indicate that the contest is sponsored by the station. Either the failure to award the prize or the failure to identify the contest sponsor is a violation. *See, Mississippi Valley Broadcasting, Inc., 71 RR 2d 323 (M. Med. Bur., 1992).*
- Furthermore, even public notice of joint sponsorship of a contest will not excuse liability if either joint sponsor does not conduct the contest according to reasonable expectations as to its terms (for example, collection of entries), particularly if the station personnel promise to personally ensure collection, and then rely, even if reasonable to do so, on the co-sponsor to collect the entries. *See, Jacor Broadcasting of Colorado, Inc., DA 93-745 (released June 3, 1993).*

Other types of improper conduct include:

- Giving false clues.
- Arranging for a fictitious person to win a prize contest. *See, Eastern Broadcasting Corp., 10 RR 2d 393 (1967)*
- Conducting "treasure hunts" with misleading clues or which cause trespass to private property or with sites near heavily-traveled thoroughfares which cause substantial traffic congestion. *See, Honeyradio, Inc., 44 RR 2d 415 (1978)*
- Retaining awards long after the contest date (especially if no winner's name is available) or arbitrarily giving them to designated parties in a manner inconsistent with the stated prize selection criteria. *See, Catoctin Broadcasting Corp. of New York, 62 RR 2d 1132 (Rev. Bd., 1987), aff'd 66 RR.2d 131 (1989)*
- Making misleading announcements about the number of cash prize winners, and failing to maintain lists of winners of all prizes. *See, KWEL, Inc., 69 RR 2d 846 (M. Med. Bur., 1991)*

WHAT IS A BROADCAST LOTTERY?

A topic closely related to contests is **lotteries**. It is important to know the technical difference because, unlike **contests**, which may be advertised and conducted on the air if they are **fair** and **not deceptive**, on-air **promotion** of specific, particular **lotteries** is **prohibited** by federal law. *18 U.S.C. §1304.*

Lotteries are defined as games constituting the elements of **prize, chance, and consideration**. *Federal Communications Comm'n v. American Broadcasting Co., 347 U.S. 284 (1954).* **Prizes** are any type of award. **Chance** is selection based on random pick rather than skill. **Consideration**, the vital difference between a contest and a lottery, is any payment of "money or thing of value" by the contestants for the opportunity to win.

One major deciding factor is whether the contest sponsors (or the advertiser) receive any direct benefit from the would-be contestants. Thus, if announcements clearly state that no purchase is necessary to enter the contest, it is not a lottery. Any requirement that contestants travel to a designated place or perform some simple act is not considered "payment" of "consideration." The use of free entry forms or

"bingo" cards is not prohibited, even if contestants must travel to the co-sponsor's business establishment to obtain the forms.

Please Note: advertisements and announcements about state-run lotteries are exempted from the prohibition. *See, 18 U.S.C. §1306.* Also, announcements of lotteries sponsored by non-profit groups are allowed, as well as occasional raffles by companies – if they are not part of the company's primary business.

TAX ISSUES

Broadcast stations are responsible for reporting to the IRS the names and addresses of contest winners, and the aggregate amount of payments (or fair market value of in-kind prizes) distributed to them for each winner who receives at least \$600 in one year.

This information is currently filed on IRS Form W-9, and a copy must be sent to contest winners by January 31st of the year after the prizes are delivered or made available to the winners.

A BRIEF SUMMARY OF CONTEST STRATEGIES

If the contest involves physical participation by the contestants, insist that *each* contestant sign a full liability release before being allowed to participate. In fact, all contests should have conspicuous disclaimers and statements that participation is at the contestants' own risk. Tickets to station-sponsored events should contain adequate disclaimers of station liability and notice that parties assume any risk inherent in the event.

Full disclosure of all contest co-sponsors should be announced, as well as their respective responsibilities. It should be clear that any defect in any product or service provided by a co-sponsor is the responsibility of that co-sponsor, not of the station. Product liability releases should be signed by all winners.

Adequate notice should be given that failure to properly utilize the prize (e.g., taking a trip within a set time) may result in forfeiture of the prize and relieve the station (or co-sponsors) of further obligation.

Contest terms should conspicuously state any prize substitution options, including whether redemption in cash is available in lieu of prizes in kind.

Have available all sponsorship agreements, prize lists, winners lists, recordings of on-air announcements and contest calls, written promotional materials, signed liability releases, and internal station memoranda regarding the contest.

Please note that any questions about the potential liability of a particular planned announcement can be submitted to the FCC for a declaratory ruling.



SOME USEFUL INFORMATION

In Appendix A you will find the entire new section of rules – Sections 508 and 73.1216

In Appendix B you will find a sample set of contest rules that can use adapted for your use.

We hope that this article has been helpful in explaining the FCC's rules and policies regarding contests. If you have any questions concerning contests, or encounter a specific problem with preparing or implementing a contest, please call us.

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APPENDIX A

Section 508 of the Communications Act, 47 U.S.C. §508

§508. *Prohibited practices in contests of knowledge, skill, or chance.*

(a) It shall be unlawful for any person with intent to deceive the listening or viewing public –

(1) To supply to any contestant in a purportedly bona fide contest of intellectual knowledge or intellectual skill any special and secret assistance whereby the outcome of such contest will be in whole or in part prearranged or predetermined.

(2) By means of persuasion, bribery, intimidation, or otherwise, to induce or cause any contestant in a purportedly bona fide contest of intellectual knowledge or intellectual skill to refrain in any manner from using or displaying his knowledge or skill in such contest, whereby the outcome thereof will be in whole or in part prearranged or predetermined.

(3) To engage in any artifice or scheme for the purpose of prearranging or predetermining in whole or in part the outcome of a purportedly bona fide contest of intellectual knowledge, intellectual skill, or chance.

(4) To produce or participate in the production for broadcasting of, to broadcast or participate in the broadcasting of, to offer to a licensee for broadcasting, or to sponsor, any radio program, knowing or having reasonable ground for believing that, in connection with a purportedly bona fide contest of intellectual knowledge, intellectual skill, or chance constituting any part of such program, any person has done or is going to do any act or thing referred to in paragraph (1), (2), or (3) of this subsection.

(5) To conspire with any other person or persons to do any act or thing prohibited by paragraph (1), (2), (3), or (4) of this subsection, if one or more of such persons do any act to effect the object of such conspiracy.

(b) For the purpose of this section --

(1) The term "contest" means any contest broadcast by a radio station in connection with which any money or any other thing of value is offered as a prize or prizes to be paid or presented by the program sponsor or by any other person or persons, as announced in the course of the broadcast.

(2) The term "the listening or viewing public" means those members of the public who, with the aid of radio receiving sets, listen to or view programs broadcast by radio stations.

(c) Whoever violates subsection (a) shall be fined not more than \$10,000 or imprisoned not more than one year, or both.

§73.1216 Licensee-conducted contests.

A licensee that broadcasts or advertises information about a contest it conducts shall fully and accurately disclose the material terms of the contest, and shall conduct the contest substantially as announced or advertised. No contest description can be false, misleading or deceptive with respect to any material term.

NOTE 1: For the purposes of this Rule:

(a) A contest is a scheme in which a prize is offered or awarded, based upon chance, diligence, knowledge or skill, to members of the public.

(b) Material terms include those factors which define the operation of the contest and which affect participation therein. Although the material terms may vary widely depending upon the exact nature of the contest, they will generally include: how to enter or participate; eligibility restrictions; entry deadline dates; whether prizes can be won; when prizes can be won; the extent, nature and value of prizes; basis for valuation of prizes; time and means of selection of winners; and/or tie-breaking procedures.

NOTE 2: In general, the time and manner of disclosure of the material terms of a contest are within the licensee's discretion. However, the obligation to disclose the material terms arises at the time the audience is first told how to enter or participate and continues thereafter. The material terms should be disclosed periodically by announcements broadcast on the station conducting the contest, but need not be enumerated each time an announcement promoting the contest is broadcast. Disclosure of material terms in a reasonable number of announcements is sufficient. In addition to the required broadcast announcements, disclosure of the material terms may be made in a non-broadcast manner.

NOTE 3: This rule is not applicable to licensee-conducted contests not broadcast or advertised to the general public or to a substantial segment thereof, to contests in which the general public is not requested or permitted to participate, to the commercial advertisement of non-licensee-conducted contests, or to a contest conducted by a non-broadcast division of the licensee or by a non-broadcast company related to the licensee.

APPENDIX B

SAMPLE CONTEST RULES

PRIZES

- 1) The [NAME OF CONTEST] begins on [DATE] and ends at [TIME] on [DATE].
- 2) The Grand Prize includes: [NAME OF PRIZE, FULL DESCRIPTION OF PRIZE, AND ANY LIMITATIONS ON USE OF THE PRIZE].
- 3) The estimated value of the Grand Prize is [NUMBER OF DOLLARS].

HOW TO ENTER

- 1) No purchase is necessary to enter.
- 2) To enter, [DESCRIBE ENTRY REQUIREMENTS, INCLUDING ANY FORMS TO BE USED AND METHOD OF DEPOSIT].
- 3) Entry must be received by KXXX no later than [TIME] on [DATE]. KXXX is not responsible for failure to receive any entries due to mail or telephone disruption or any other reason whatsoever.
- 4) Copies of the entry form [ARE/ARE NOT] acceptable. Multiple entries [ARE/ARE NOT] permitted.
- 5) Winners will be selected by a panel of judges appointed by KXXX. All decisions will be final.
- 6) Weekly winners will be selected by Friday of each week during the contest. Winners will be notified on air by the following Monday at [TIME]. Prizes will be sent to the weekly winners by U.S. mail. The Grand Prize winner will be selected [BY RANDOM DRAWING [FROM AMONG ALL CONTESTANTS OR WEEKLY WINNERS] OR BY THE PANEL OF

JUDGES BASED ON [LIST THE CRITERIA] and announced on air at [TIME] on [DATE].

- 7) KXXX reserves the right to change these rules at any time.

RESTRICTIONS AND OTHER INFORMATION

- 1) The WEEKLY PRIZE is subject to, and must be used in accordance with, the following restrictions: [LIST RESTRICTIONS].

- 2) The Grand Prize is subject to, and must be used in accordance with, the following restrictions: [LIST RESTRICTIONS].

- 3) The [WEEKLY PRIZE OR GRAND PRIZE] has been furnished by [NAME OF SPONSOR], who is solely responsible for its provision, maintenance, and liabilities.

- 4) **DISCLAIMER OF WARRANTIES.** KXXX makes no warranty concerning fitness or merchantability of any goods given as prizes.

- 5) As a condition to acceptance, all prize winners must release KXXX, its owners, officers, directors, managers, employees, and agents from any and all liabilities arising directly or indirectly from the prize. Failure to sign a waiver constitutes forfeiture of any prize.

- 6) Eligibility: Entrants must be at least 18 years of age to qualify. No employee, director, or officer of KXXX or this contest's sponsors, or members of their immediate families, is eligible to participate in this contest.

7) No substitutions or transfers of prizes are allowed. Failure to collect the prize within a reasonable time will constitute forfeiture. KXXX is not liable for the failure of any participating sponsors to furnish their portion of the prize.

8) Participation in this contest constitutes the entrant's permission for KXXX to use the participant's entry, name, voice, or likeness

and the fact that he/she participated in or won the contest.

9) Winners shall be responsible for any taxes imposed on receipt of the prize.

10) Failure to comply with all contest rules will result in disqualification and forfeiture of any prize.