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## Deal or No Deal

**California Text Sweepstakes  
Lawsuit Settles, Promoters  
Should Consider Risks****By Alan L. Friel  
and Jesse M. Brody**

As consumers have embraced mobile devices and communicating via text message, mobile marketing promotional campaigns have followed.

As a result, sweepstakes have become popular mobile promotional tools because the chance of a prize motivates consumers to interact with the sponsor. However, because sweepstakes and contests are heavily regulated by states, mobile sweepstakes and contests must comply not only with mobile-messaging laws and regulations, such as the federal Telephone Consumer Protection Act (47 U.S.C. §227) that requires express consent from a consumer before a marketing message can be sent via text to the consumer, but also with those regulating sweepstakes, lotteries and gambling.

### NEW MEANS, NEW QUESTIONS

Mobile sweeps also have raised legal questions regarding the sufficiency of the traditional approach to making a promotional sweepstakes legal — the free alternative method of entry (AMOE). A set of class action lawsuits consolidated in federal court in the Southern District of California that many had hoped would ultimately result in greater clarity recently has failed to do so with the announcement of

*continued on page 3*

## Undressing .XXX: Sexier Than the Name Itself

**A Brewing Revolt by Adult Entertainment Industry Brand Owners****By Eric T. Fingerhut and Shannon M. McKeon**

**F**irst proposed to the Internet Corporation for Assigned Names and Numbers (ICANN) in 2000 and quickly rejected, proposed again in 2004 and cast off by ICANN again, the Internet's red-light district — the .XXX top level domain name (TLD) — is finally a reality.

From September 7 through October 28, ICM Registry LLC (ICM), the British company approved by ICANN to operate the .XXX registry, accepted applications for .XXX domains as part of its Sunrise A and Sunrise B programs.

Sunrise A is a program that allows companies within the adult industry to register .XXX domain names corresponding to their .COM domain names as well as domain names for their registered trademarks. Sunrise B allows those outside the adult industry to reserve blocking registrations corresponding to their registered trademarks.

Historically, big corporations with multi-million dollar brands and the adult-entertainment industry have been on opposite sides of the fence over brand protection, with owners of famous brands like Nike, Starbucks and Lexus claiming any association of their marks with adult entertainment constitutes dilution by tarnishment. The adult-entertainment industry has very often met such claims as unfounded attempts to stifle its First Amendment right of free speech. Ironically, but legally predictably as far as protecting e-commerce interests, since the introduction of .XXX, both camps are united in a battle with ICANN and ICM to protect their brands from misappropriation.

Mainstream companies and porn-site operators may make strange bedfellows, but on the propriety of the .XXX Sunrise A and B periods, they seem to agree.

"It's legalized extortion," complains Jeff Dillon, director of online sales at San Francisco-based Gamelink.com, one of the world's largest streamers of adult-natured content.

But it's the way traffic flows in the e-commerce realm.

"It's yet another enforcement action brand owners have to take to protect their brands as a result of ICANN's continued expansion of the top-level domain space,"

*continued on page 2*

### In This Issue

**Undressing .XXX:  
Sexier Than the  
Name Itself .....1****Deal or No Deal:  
California Text  
Sweepstakes  
Lawsuit Settles .....1****Is Cyber Insurance  
Necessary?.....5**PRESORTED  
STANDARD  
U.S. POSTAGE  
PAID  
LANGHORNE, PA  
PERMIT 114

## Undressing .XXX

continued from page 1

laments Steve Stolfi, vice president, global sales and strategic partnerships at Corsearch, a search company that performs a variety of trademark-related clearance and protection services for brand owners, including monitoring newly registered domain names.

According to Dillon, Gamelink has spent millions of dollars building a brand and audience at its .com site.

"Forcing our company to buy GAMELINK.XXX only to redirect traffic back to our .com site is a pure money-making scheme," he says. "If Gamelink doesn't purchase GAMELINK.XXX, it's a certainty some other company will, in an attempt to trade on our reputation and traffic."

### PAIN — FOR YEARS

Mainstream brand owners have been feeling Dillon's pain for years, often acquiring ownership of infringing domain names for which they have no use simply to stop a cybersquatter or other bad actor from using them. The .XXX TLD simply adds another layer to the already complex Internet enforcement chain.

### How the Process Plays Out Initially

The mechanics of brand protection in .XXX are not all that complicated. For a brand owner to be eligible for a Sunrise B registration, it must have a registered trademark:

- Issued prior to the submission of its Sunrise application;
- In a jurisdiction where the brand owner conducts "substantial bona fide commerce" in connection with its mark; and
- Must be an exact match to the .XXX domain.

If a brand owner wishes to reserve more than one .XXX domain name, then it must file separate Sunrise applications for each.

### Proving .XXX TLD Entitlement

Sunrise A applicants from the adult-entertainment industry must

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also prove their entitlement to a .XXX TLD, either by satisfying the same trademark-ownership criteria as Sunrise B applicants or by showing that they own and operate an existing domain name that corresponds to the .XXX domain name applied for.

### When Applications Compete

If ICM receives competing applications from Sunrise A and B applicants, then ICM will notify both parties and offer the Sunrise A applicant an opportunity to withdraw its application. However, the registration of the domain name will ultimately be given to the Sunrise A adult-industry applicant if it does not voluntarily abandon its application. In this case, the non-adult-industry brand owner's only recourse is to consider other dispute-resolution options, if applicable.

### 'Land Rush' Expected

After the sunrise period ended on October 28, a brief "land rush" period was expected to commence. During the land rush, those in the adult-entertainment industry will be allowed to apply for .XXX domain names with no requirement to show trademark rights or other prior rights.

### Issuing Registrations

After the sunrise and land-rush periods close, registration in .XXX will be issued on a first-come, first-served basis, with no preemptive rights protections in place. At that point, trademark owners outside the adult-entertainment industry will be precluded from registering a .XXX domain name and will have to rely on the same enforcement options already available to resolve domain-name disputes, such as the Uniform Domain Name Dispute Resolution Policy (UDRP) and anti-cybersquatting litigation.

Additionally, ICM is offering a rapid evaluation service (RES) intended to provide a prompt remedy to address a limited class of situations in which there is objectively clear abuse of well known, distinctive registered trademarks or service marks of significant commercial value, or of personal or professional names of individuals. All complaints under the RES will be subject to a preliminary

continued on page 6

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## Deal or No Deal

continued from page 1

the settlement of the cases. The legal uncertainty is not likely to change soon, particularly given that marketers face a patchwork of 50 state laws, and some prior decisions predating mobile technology are unclear or unfavorable.

### Texting

Text messaging as a sweepstakes-entry method has brought much consumer litigation in recent years. Class-action plaintiff's lawyers purport to represent all allegedly affected consumers and thereby position themselves to extract significant fees by bringing these cases. Marketers, especially big brands with deep pockets, present a tempting target for these actions. Thus, marketers that run mobile sweeps should consider structural approaches that mitigate risks. Also, courts, attorneys general (AG) and state legislatures that eventually may clarify the rules for mobile sweeps should adopt a permissive approach that permits, rather than fetters, the mobile promotions industry.

### Lottery and Gambling Laws

To understand the legal complexities confronting mobile sweeps promoters, one must understand the history of lottery and gambling laws in the United States. Lotteries are exclusively government-run (or sanctioned), where permitted, and are prohibited outright in many states. A lottery essentially has three key determinative elements:

1. Prize;
2. Chance; and
3. Mandatory consideration.

### Lotteries Reserved for States

In short, one cannot create a lottery as part of a legal promotion and, accordingly, sponsors must remove one of the three lottery elements to conduct a legal promotion. In addition,

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tion, care also must be taken to avoid laws against gambling, generally defined as payment of consideration for a chance to win something of greater value.

### Considering Consideration and Alternative Methods of Entry

Consideration can come in forms other than cash wagers or product purchasing, such as short messaging-service (SMS) text or 900-number phone charges, service fees, collection of consumer contact information for marketing purposes or engaging in activities that require substantial time or effort. A sweepstakes is a legal promotion that awards a prize to a winner (or winners) selected by chance, but which lacks consideration.

### Flexible Participation

Most states have generally exempted promotional prize-gaming activities that have an AMOE — also known as *flexible participation* — from prohibitions, because no reason exists to be excessively protectionist if players do not have to exchange consideration for participation.

This is where the “No Purchase Necessary” condition comes from. However, some states have, at least in past years, taken a narrow approach to flexible participation, particularly when promotions are revenue-generating schemes as premium text sweepstakes are, and it is this vulnerability that is being exploited by the class-action plaintiff's bar.

### THE COUCH CASES

Indeed, on Dec. 11, 2007, the well known New York-based plaintiff's firm Milberg Weiss filed a class-action suit against NBC and others regarding an SMS-text game related to the TV show *America's Got Talent* (*Glass v. NBC Universal Inc.*, Case No. CV07-0844-JFW (C.D. Cal.)), which was consolidated with a number of similar cases involving other TV show text promotion cases (hereafter the *Couch* cases), and became lead counsel in the consolidated cases.

The promotional marketing industry was anxiously awaiting a federal appeals court decision in the *Couch* cases that had gone up to the Ninth Circuit Court of Appeals following the federal trial court's ruling that plaintiffs had stated a claim under state laws regarding SMS text sweepstakes campaigns that were offered

in connection with the *American Idol*, *Deal or No Deal*, *1 vs. 100*, and *The Apprentice* television programs.

The trial court had denied the defendant's motion to dismiss the illegal-lottery/gambling-based claims, finding: “Defendants' offers of free alternative methods of entry do not alter the basic fact that viewers who sent text messages paid only for the privilege of entering the games. They received nothing of equivalent economic value in return.” *Couch v. Telescope Inc.*, Case Nos. CV 07-3916, 3537, 3643, 3647-FMC (C.D. Cal., order filed Nov. 30, 2007). The defendants then requested, and the trial court certified, an interlocutory appeal seeking a certification to the California Supreme Court as to whether a claim had been properly stated under state law. The Ninth Circuit rejected that petition in July 2010 on technical grounds, finding that the legal standard for an appeal and certification — a substantial ground for difference of opinion resulting from conflicting judicial opinions — had not been shown. *Couch v. Telescope Inc.*, Case Nos. 08-56357, 08-56360 (9th Cir., order filed July 8, 2010).

As a result of the Ninth Circuit ruling, studio heavyweights including NBC Universal and Fox Broadcasting Co. agreed to settle the *Couch* cases, which the court approved on Sept. 19, 2011. As part of the settlement, the studios agreed to:

- Refund the premium text message fees of 99 cents paid by the millions of people who entered the “American Idol Challenge” and “Deal or No Deal Lucky Case Game” via text message and did not win a prize;
- Pay the plaintiff's attorneys' fees of more than \$5.2 million; and
- Enjoin the defendants from: “creating, sponsoring or operating any contest or sweepstakes, for which entrants are offered the possibility of winning a prize, where people who enter via premium text message do not receive something of comparable value to the premium text message charge in addition to entry.”

That thing of equivalent value might be a ringtone, wallpaper or

continued on page 4

## Deal or No Deal

continued from page 4

other digital items sold otherwise for 99 cents or more, a technique many text-to-win promoters have been using widely now for some time.

### MOBILE SWEEPS AND AMOE?

However, with the *Couch* cases settling, there remains the lingering legal uncertainty for mobile sweepstakes operators as to whether they can use an AMOE to make a mobile sweeps, especially one that uses premium charges to generate revenue, a legal venture. As one court explained the reasoning behind accepting flexible participation or AMOE in taking sweepstakes out of the prohibitions on lotteries and gambling, when a promoter expects to gain increased sales from a sweepstakes, this benefit is not consideration if consumers needn't purchase to participate (*see, Pepsi Cola Bottling Co. of Luverne, Inc. v. Coca-Cola Bottling Co., Andalusia*, 534 So. 2d 295, 297 (Ala. 1988), *but compare, Featherstone v. Indep. Serv. Stations Assn.*, 10 S.W.2d 124, 125-27 (Tex. Civ. App. 1928) (inducement of patronage is consideration and AMOE is insufficient)).

In earlier years, the courts of various states struggled with AMOE (*compare, People v. Cardas*, 137 Cal. App. Supp. 788 (1933) (movie theater "bank night" drawing not a lottery due to free method of entry) *with State v. Danz*, 140 Wash. 546 (1926) (movie theater that held "bank night" prize drawing violated lottery law despite free method of entry). The *Cardas* court specifically disapproved of the contrary decision in *Danz*. By the 1970s, only Georgia, Washington and Ohio continued to produce court decisions or AG opinions hostile to AMOE. *Tierce v. State*, 122 Ga. App. 845 (1970) (getting card punched at supermarket register qualified consumers for prize drawing). (*See also, Kroger v. Cook*, 265 N.E.2d 780 (Ohio 1970) (because majority of sweeps entries got entry with product purchase, availability of AMOE insufficient since a portion of grocery product sales proceeds funds the scheme, thus resulting in some entrants paying for a chance to win), *state ex rel. Schillberg v. Safeway Stores, Inc.*, 450 P.2d 949 (Wash.

1969) (requiring grocery store visit to get entry, even where no purchase was required, was illegal lottery), *and, Op. Wash. Att'y Gen.*, AGLO 1971 No. 51, 1971 WL 122969 (Mar. 24, 1971) (following *Schillberg*)).

AMOE has become custom and practice for the industry nationwide and for good reason — it protects consumers, does not create gambling in disguise and permits marketers to use a popular and well-established form of promotion.

### AMOE Nitty Gritty

A proper AMOE must be clearly disclosed, universally available to qualified entrants and equal in dignity to entries with consideration. This is typically done by means of the free mail-in or online entry method, with the entries going into the same drawing for the same prize pool as entrants who bought products or otherwise provided a form of consideration. Because mobile-text sweepstakes may result in some participant charge (though unlimited data plans are now common), and premium-text sweepstakes absolutely result in consumer charges and generation of promoter revenue, AMOE availability as a mechanism for a promotion's legality is crucial for the viability of these promotions.

### Pay-to-Play

As opposed to traditional product promotions, however, mobile-text sweepstakes present a unique challenge because some states have gambling or lottery statutes, AG opinions or case law prohibiting any "game for game's sake" where any entrant "pays to play." Thus, an AMOE may not make the promotion legal if the entrants who paid consideration via a text charge do not receive something of value for the payment, even in states that otherwise permit flexible participation. In the case of a sweepstakes involving traditional products, the product purchaser has received a product (*e.g.*, the hamburger or packaged good being promoted) and the AMOE entrant has paid nothing. Some courts and regulators have concluded that when the value associated with the purchase entry appears to be nothing more than a vehicle for a chance to win, that consideration is being paid for no purpose but a chance to win and

is, thus, a pure wager (*see, People v. Shira*, 133 Cal. Rptr. 94 (Cal. App. 1962) (distinguishing California cases finding no consideration where an AMOE existed for promotions where a product other than the game itself was being merchandised; court also noted that the AMOE was not available to all)).

More recently, a class action challenging a premium-text sweepstakes under Georgia law permitting the recovery of lost gambling wagers was unsuccessful, with the Georgia Supreme Court holding that because the premium-text charge was a fee that did not "hang in the balance" between two parties, it was not "gambling consideration" under the act. *See, Hardin v. NBC Universal, Inc.*, 283 Ga. 477, 660 S.E.2d 374 (Ga. 2008). However, the decision did not address potential claims that might be brought under the Georgia lottery laws.

### 1-900, PHONE-CARD,

### COUPON-SCHEME AND

### TRADING-CARD SWEEPS PROMOS

This has been addressed in the context of 1-900, phone-card, coupon-scheme and trading-card sweeps promotions. In these promotions, no product or a product of minimal value, accompanied a sweepstakes entry, and some jurisdictions concluded that an AMOE, under these circumstances, did not insulate the game from lottery or gambling laws.

For instance, the Georgia AG in 1984 and a federal court applying Georgia law in 2004 found 1-900 sweepstakes where callers were charged a premium for the call constitute an illegal lottery despite AMOE availability, based on Georgia courts' historical rejection of flexible-participation/AMOE schemes and a finding of consideration if any participant "paid consideration in part for a chance to win a prize." 1984 Op. Att'y Gen. GA 182 (1984) (finding Georgia law still rejects flexible participation). AT&T paid \$1 million in punitive damages in that case. *See, Kemp v. AT&T*, 393 F.3d 1354 (11th Cir. 2004).

The opposite result, however, was reached by a New Jersey court looking at 1-900 toll-call sweepstakes

continued on page 7

# Coverage Quandary: Is Cyber Insurance Necessary?

By Tam Harbert

It's been a wild year for cyber crimes, with allegations of phone hacking at Rupert Murdoch's media empire, and the arrest of 14 people for alleged attacks on PayPal's website in retaliation for its decision to suspend the account of upstart Web-based public-disclosure operation WikiLeaks.

On top of those incidents, the U.S. Senate, the International Monetary Fund, Lockheed Martin, Citigroup, Google, and Sony were among organizations that disclosed hacker attacks, Reuters reported.

It all may be falling far too close to home for BigLaw firms and corporate counsel, who are beginning to shop for — or who are at least beginning to ask a lot of questions about — cyber insurance. Queries include exactly what the policies cover and cost, how insurers quantify losses and whether the policies are necessary.

"There is lots of chatter," Anne Marie Davine, managing director of Marsh's U.S. law firm practice, says. "Rarely do we have a meeting with clients or potential clients where this topic doesn't come up."

Marsh's website defines cyber risk as "a wide range of internet and network exposures" that include theft or manipulation of sensitive or private information (e.g., financial or health records); viruses that can destroy data, damage hardware, cripple systems; and computer fraud. See, <http://usa.marsh.com/RiskIssues/CyberRisk.aspx>.

## NOT A NEW TOOL, EXACTLY

Cyber insurance has been around for a decade, but recent trends are prompting people who may have a need for this coverage to take a closer look at cyber insurance and at provisions that can be added to policies to cover a wide range of contingencies. Counsel, particularly

for e-commerce firms, also are recommending that their clients look into cyber insurance coverage.

The number of insurers has also increased. One interesting trend that has emerged, and that may make counsel more versed in advising e-commerce clients, is that cyber-insurance providers are starting to offer cyber insurance tailored to the needs of law firms. Davine estimates that there are about a dozen standalone policies from a range of insurers, including AXIS Insurance, Monitor Liability Managers, and CNA. Others offer coverage as part of legal professional errors and omissions coverage, such as Travelers' "network and information security offense" policies for small to mid-sized law firms. (Travelers offers separate CyberRisk coverage for large organizations, but this coverage is not legal industry-specific.)

Also, because of increased competition, as well as more nuanced understanding of cyber risks among interested parties, prices of cyber coverage have dropped substantially, Davine says. Policies that cost \$60,000 to \$65,000 last year might be available for about \$42,000 this year, she says.

## Data Breaches Are Expensive

Meanwhile, counsel are recognizing what a data breach could cost, particularly if they are in a regulated industry such as finance or health care. In August of this year, the Ponemon Institute ([www.ponemon.org](http://www.ponemon.org)) released its *Second Annual Cost of Cyber Crime Study*. The survey polled 50 companies and found that the average time to resolve a cyber attack is 18 days and that the median annualized cost is \$5.9 million/year (a 56% increase over 2010). Smaller companies take a harder hit: \$1,088 per employee, versus \$284 in larger shops. Companies surveyed in the study reported 72 successful attacks per week, a spike of 44% over 2010. The most costly cyber crimes: "malicious code, denial of service, stolen devices, and Web-based attacks."

## Look for Specifics

The Chubb Group of Insurance Companies, which started offering law firm-specific policies two years ago, has seen sales double in the last year, according to James Rhyner,

worldwide manager for lawyers' professional liability insurance.

Some firms haven't taken the dive. Fenwick & West started looking into cyber insurance about six months ago. "We haven't committed yet, but we're trying to educate ourselves," CIO Matthew Kesner says.

Andrew Rose, who spent five years as global IT risk manager at Clifford Chance, was looking into cyber insurance before he left the firm in 2010 to join Forrester Research as a principal analyst. There isn't clarity on exactly what constitutes cyber insurance, he says.

"I can't tell you exactly what's in a cyber-insurance policy," he says. "You get a different policy from every insurance company you talk to. They all seem to be talking about slightly different things."

## Third-party, First-party: Check It Out

Confusion also exists over which cyber risks may be already covered by existing policies. For example, damages to third parties — such as clients — may fall under a lawyer's professional liability policy.

Davine says that Marsh makes sure the professional-liability policies it writes for its large-firm clients contain very broad language that should cover most of that risk. Most professional liability insurers have said that they will cover a cyber claim, she says, "because the boundaries of the professional services that law firms bring to clients are so vast."

But, Davine cautions, smaller law firms' policies may not have such broad language, so it's important to read the policies carefully. It's a nascent area of risk management, and insurers may get queasy if major losses begin to be paid under professional-liability policies.

"If that were to happen, then insurers could change that and start putting exclusions in those policies," she predicts.

*continued on page 6*

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## Cyber Insurance

continued from page 5

Adds Chubb's Rhyner: "Many law firms and brokers were under the assumption that the bulk of the exposure would be covered by their lawyers' professional liability policy. For some of the exposure, they are right."

That coverage would most likely include claims that the firm did not adequately protect its clients' data, for example. It would not, however, typically cover so-called "first-party costs," which include the cost of identifying the extent of the breach, assessing the damage, notifying clients, and providing credit reports and call centers as required by state privacy regulations.

"When you explain the other costs that are associated with a breach — those first-party costs that you're going to incur even before anybody sues ... their eyes start to widen," Rhyner says. "This is a new exposure they didn't have 10 years ago and they need to address it."

### **Extortion on the Web? Oh, Yeah**

Another risk not covered by professional liability is extortion — where someone hacks into the network, copies sensitive information and then threatens to expose it unless the hacker gets a ransom.

"That's a huge exposure when you think of some of the transactions that law firms are involved with, such as mergers and acquisitions, and that wouldn't be covered under professional liability policies," he (Rhyner?) says.

### **Don't Ignore Threats to Social Media**

Social media can be risky, too, says Melissa Krasnow, a partner in the Minneapolis office of Dorsey & Whitney. One risk, she says, is "loss of control — one person's or

company's information is transmitted to a social media website of another (i.e., third-party) company." The confidentiality or privacy of that data "could be breached, even unintentionally, by submitting it to or posting it on a third-party social media website."

### **Poke Around in the Cloud**

Cloud computing also raises issues. What happens if a provider has a breach of firm data? Rose says some insurers have told him that cloud providers have a lower level of liability coverage than would be comfortable for most law firms. Other insurers don't seem up to speed on cloud technology, Kesner observes.

"We've had very different answers from different carriers regarding whether cloud services are covered, and if so, how," Kesner says. "The answers at first were blank faces, surprised that we were asking the question; then from others we've heard, 'We'll get back to you,' and at least one carrier [has] come up with a pretty good answer."

That carrier "understood that cloud was a part of many IT portfolios today and would likely play a larger role in the future. [It was] working internally to decide how to measure the additional or reduced risk that cloud brings. [Its] analysis was not stopping [it] from providing quotes based on more traditional factors but it might impact premiums in the future," Kesner explains.

### **Look at Risks**

Perhaps the best advice: Start by analyzing risks, and then determine if your current insurance covers them. Ask questions about how insurers quantify losses.

"How do I prove losses from a data breach?" Rose says. "There are so many different ways it can damage an organization."

Coverage issues are already in courts, including *Zurich American Insurance Co. vs. Sony Corp. (SNE) of America*, 651982/2011, New York State Supreme Court (Manhattan). Sony is seeking defense under Zurich policies against class-action suits for alleged damages stemming from the 2011 hacking of its PlayStation Network. Zurich claims the general liability policies it sold to Sony do not apply to the incident. (The complaint is available at <http://bit.ly/LTN1110g>.)

Sometimes the answer isn't buying more insurance. After a firm goes through the underwriting process and gets a quote, its members may ultimately decide to spend more to upgrade security rather than buy cyber insurance.

Says Rose: "It might be that that money is better spent actually reducing the risk of a breach in the first place."

### **GOOD BUY OR GOODBYE?**

Before you sign up for a cyber-risk policy, assess existing policies, particularly professional liability, to see whether and what cyber-related risks are covered or specifically excluded. Here's a mini-guide on what to look for:

- Conduct a security audit and determine where potential risk exposures exist and at what levels.
- Determine comfort level for risk.
- Investigate policies and prices on cyber coverage.
- Be as specific as possible when talking about terms of coverage and quantification of loss with insurers.
- Weigh whether the money for a cyber-insurance premium might be better spent on beefing up existing security.



## Undressing .XXX

continued from page 2

evaluation under which an evaluator may decide to suspend the operation of the domain name in the .XXX TLD, pending a final decision. This preliminary evaluation will occur within two business days, pursuant to the rules.

### **A DOUBLE STANDARD?**

While the world's top mainstream brand owners generally have no trouble meeting the legal criteria for blocking .XXX registrations and arguably can afford the \$200–\$300 fee per registered trademark to do so, the adult industry (where rules, regulations, social mores, and other costs of doing business are rampant)

is not so fortunate. This could explain why the adult-entertainment industry is among the leading critics of the new .XXX TLD. At the XBIZ EU Conference held in London on October 4, ICM's chief executive officer, Stuart Lawley, was barraged with questions, negative comments, boos and hisses — all relating to .XXX. It

continued on page 8

## Deal or No Deal

continued from page 4

with an AMOE. *See, Glick v. MTV Networks*, 796 F. Supp. 743 (S.D.N.Y. 1992) (AMOE sufficient under New Jersey law to eliminate consideration in 1-900 sweepstakes because entrants could have entered by mailing a request for a toll-free number or mailing an entry card).

In another action, the Mississippi Supreme Court found that a sales scheme in which participants paid \$2 to purchase a three-minute pre-paid phone card and receive a scratch-and-win game piece was not an illegal gambling operation because, in part, the operator of the promotion itself had paid nearly \$2 to purchase the same phone cards that it was selling to participants for \$2 and an AMOE was offered. *See, Mississippi Gaming Com'n v. Treasured Arts, Inc.*, 699 So. 2d 936, 940 (Miss. 1997). Other state courts have reached similar results. The fact that participants did not overpay for the phone cards to acquire a game card led the court to conclude that no illegal gambling had occurred. *Id.*

Accordingly, there is support in prior cases in contexts outside of mobile that premium text sweepstakes promoters can minimize their risk by providing real products or services that are sold for a verifiable fair market value to entrants who enter a sweeps by text, in addition to providing an online or mail in AMOE for those who do not elect to buy that product via premium text charge. For instance, ringtones or wallpapers could be sold and delivered via text in exchange for the premium text charge. These digital products should be otherwise available and marketed for purchase for at least as much as the premium text charge to counter claims that the product is a ruse for a disguised gambling scheme. Note, however, that the settlement of the *Couch* cases does not provide any legal certainty that giving the premium text entrants a digital item will preclude liability. However, since the court approved the settlement, this interpretation finds some support insofar as a court should not be approving prospective promotion terms that are clearly illegal. Nonetheless,

approval of the settlement certainly does not create binding precedent on the issue.

### Trivia and Other Types of Contests

An alternative pay-to-enter text game would be a trivia or other contest. An example of a trivia-based mobile text promotion is T-Mobile's 4G PayDay trivia game (*see, www.t-mobile4g.payday.com*). While a sweepstakes awards prizes based on chance, a contest awards a prize but replaces the element of chance by selecting the winner based on skill or intellect. Some (but not all) states may permit consideration, such as payment of money to be paid by entrants in order to participate. But nothing that would be outcome determinative can be left to chance. For example, a random drawing cannot be used to break a tie in a skill-based contest without potentially converting the promotion into a lottery.

States take a range of approaches with respect to how contests treat the element of chance, including the following tests:

- "Pure chance";
- "Predominant element";
- "Material element"; and
- "Any chance."

These four tests can be viewed as falling along a continuum of most permissive to least permissive, with the "pure chance" approach the most permissive and the "any chance" approach the least permissive. For example, a jurisdiction applying the "pure chance" doctrine views the exercise of any skill by a participant in the promotion as enough to remove the promotion from within the definition of a lottery and, thus, is viewed as a game of skill.

On the other side of the continuum would be the "any chance" test, and jurisdictions applying this test have examined the element of chance by determining whether a particular game contains "any chance" affecting the outcome of the game, in which case the game would be viewed as a sweepstakes.

Application of the approaches on what constitutes skill versus chance is jurisdiction-specific, and courts and authorities within the same jurisdiction have been known to take

inconsistent approaches even within a relatively short period of time, so legal counsel should be consulted when an element of consideration (such as a premium text charge) exists, before offering a mobile text contest.

### Premium Text Sweepstakes

Until courts apply the law to this new technology, operating a text sweepstakes or contest, particularly when premium charges occur, carries a risk. Premium text sweepstakes should be avoided unless the premium change is for an otherwise available legitimate product, such as a digital item, sold at fair market value.

A proper AMOE should also be included and promoters should consider excluding states that have poor records on accepting flexible participation. Premium text contests need to avoid elements of chance and certain states will need to be excluded. Various regulatory requirements, which vary from state to state, will need to be met. Also, beware that every state is free to interpret its lottery and gambling laws differently, so it is unlikely that national certainty will ever be possible.

### CONCLUSION

In approximately the last 30 years, we've moved at rocket speed from the first practical desktop workplace and at-home personal computers to laptops and notebooks to cells phones and, now, smartphones and tablets that are as usable and powerful as the first computers we installed on our desktops.

And the increased use and ease of use of this technology, and of the devices with which individuals and firms engage these has brought ever-growing business and legal demands.

With that use, mobile marketing has burgeoned. The complex, evolving legal issues connected to mobile sweepstakes, contests and marketing efforts, marketers who use mobile media must work closely with their counsel to design and execute mobile-marketing campaigns to bring from the outset a minimum of legal risks inherently associated with these promotions.



## Undressing .XXX

continued from page 6

was clear from the commentary that many adult industry companies consider .XXX names something they have to have, not because .XXX adds any real value to their business, but because if they do not register in .XXX, someone else will grab their brands there first.

Shut your eyes and you might think the comments from the adult industry were coming from general counsels of big business. In a comical scene at the XBIZ EU Conference, a long-haired hippy-looking character from the People for the Ethical Treatment of Animals (PETA) aligned himself with Pepsi and other well known trademarks, arguing that ICM should block established brands in .XXX for no charge. ICM's Lawley was quick to point out that running a clearinghouse takes time and money and that it could not be done for free. What he didn't say, and what remains the prevailing position in the adult industry, is that .XXX is an unnecessary Internet land grant to a single company composed of a few domain-name industry insiders who stand to profit immensely without providing any tangible value to the industry beyond what exists in the current TLDs.

It's easy to understand why players in the adult-entertainment industry feel this way. At the going rate for a .XXX domain name, the costs to block or reregister a portfolio in .XXX can add up quickly. In what may be a first, the adult industry may be feeling the same type of brand protection and enforcement cost pain brand owners outside the adult industry have been feeling for years with ICANN's introduction of new TLDs, not to mention what it is about to experience as ICANN rolls out vanity TLDs such as .CARS and .IBM next year.

### NOT SO FAST!

Of course, ICM takes the opposite view. Having spent 10 long and expensive years lobbying ICANN to award it the right to dole out .XXX domain names, it claims the real value

in .XXX is that it will bridge the gap between the mainstream audience and the adult industry. ICM argues there is real money to be made from a public hungry for safe, reputable adult entertainment. Armed with \$20 million it claims to be spending to promote .XXX in mainstream publications such as *Time*, *The Los Angeles Times* and *The Financial Times*, ICM asserts that the real opportunity for the adult industry is not so much in transferring existing portfolios, but in building newly branded .XXX websites. ICM cited the example of CASTING.XXX, assigned during a test period and the first .XXX site to go live, as an example of a successful .XXX website that has a completely different meaning in .XXX than it would in other TLDs, such as CASTING.COM, a website focused on metal casting. According to Lawley, CASTING.XXX generated \$70,000 in member sign-up fees during its first month alone.

A minority in the adult-entertainment industry may be buying into ICM's advertising and promotion. On October 5, Corbin Fisher, a huge player in the gay porn sector, announced it purchased GAY.XXX for \$500,000, the highest price ever paid for a domain name in any extension pre-launch period. According to Jason Gibson, Corbin Fisher's CEO, it has "some innovative plans for making this the one-stop Web destination for all things related to gay adult entertainment." The GAY.XXX site is not yet developed, but a provocative homepage already is in place. ICM claims it has sold nine premium .XXX domains for \$100,000 or more during the launch and indicates that .XXX registrations have already vastly exceeded sales expectations. So, some in the adult-entertainment business are seeing the value in building a brand in the .XXX space.

### A CONTENT CORRAL?

But most big players continue to worry that .XXX will "ghettoize" the Internet, forcing online adult content to a confined space. This, in turn, could make it much easier for governments to restrict the domain's use. The ultimate fear is that gov-

ernment censorship of pornography and other expressive content on the Internet will eventually follow. Lawley, however, points to the fact that no government had, by late October, blocked .XXX domains. Lawley also states that ICM will vehemently defend any governmental attacks on expression or content in the .XXX space. To this end, ICM is donating \$10 per registration fee to the International Foundation for Online Responsibility (IFFOR), which is tasked with serving the needs of the global online adult-entertainment community. Lawley also says ICM will make additional contributions to fund legal defenses for operators in the .XXX space.

Lawley may eventually need to fund his own defense, as some brand owners have already threatened to file suit against ICM if it allows registrations of their marks in the .XXX space. Last July, Hustler President Michael Klein took a firm stand, declaring that ICM is "prohibited from registering or selling to a third party any .XXX domain names that contain the famous HUSTLER trademark or other HUSTLER-related trademarks." Klein also stated that "it appears the .XXX TLD will do nothing but drive up costs to the adult community and force us to fight infringement on yet another front." He claims that Hustler is prepared to take whatever legal action is necessary to prevent ICM from allowing third parties to buy Hustler domains in the .XXX space, but no suits had been filed as of late October.

### CONCLUSION

The real battles in the .XXX space are yet to be fought and much uncertainty remains, but one thing is abundantly clear — mainstream companies and adult-entertainment companies are, for the most part, on the same side of the anti-.XXX fence. Strange bedfellows indeed.



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