

What Amazon Giveaway Means For Sweepstakes Laws

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With the launch of Amazon Giveaway this February, Amazon, having radically reshaped publishing, retail and digital content, showed its intent to do the same to sweepstakes. The e-commerce giant's latest service allows anyone to sponsor and run a sweepstakes through a relatively simple process. Sponsors need only select a prize, a Giveaway type, and a method of entry. Amazon takes care of the rest, including selecting the winners, shipping the prize and, perhaps most importantly, establishing and enforcing the rules.

The rules are notable in that they eschew many of the precautions taken by promoters of nationwide sweepstakes who are concerned with running afoul of antiquated state lottery laws. Specifically, the Giveaway rules (1) require entrants to have or register for Amazon accounts and, in some cases, [Twitter](#) accounts; (2) may require entrants to follow the sponsor on Twitter; and (3) do not otherwise offer a free alternative method of entry, such as a mail-in entry form. By crafting its rules in this way, Amazon, with the help of thousands of sweepstakes spawned by its new service, may bring perceptions of what constitutes a lawful sweepstakes out of the old-fashioned models and into the age of social media.

Sweepstakes Basics

Sweepstakes are often defined by what they are not, namely, illegal lotteries. Lotteries, which only governments may run, have three elements: (1) a prize (2) awarded by chance (3) for consideration.^[1] A giveaway promotion that eliminates any of these elements is typically deemed a sweepstakes rather than an illegal lottery. Because prize and chance are essential to any sweepstakes, promoters usually attempt to eliminate the element of consideration.

In this context, consideration refers to something of value provided by participants in exchange for the chance to take part in the prize drawing. In many states, a promotion must involve monetary consideration, such as an entry fee or the purchase of a product, to qualify

as a lottery.[2] In other states, nonmonetary consideration, such as requiring participants to expend more than minimal effort to be eligible to win, may be sufficient for an activity to be considered a lottery.[3] Examples of nonmonetary consideration that have been found sufficient to convert a promotion into a lottery include requiring participants to visit a store[4], provide personal information[5] or simply observe advertisements.[6]

Much of the case law supporting the nonmonetary view of consideration is old and has not been recently tested. For example, *State v. Reader's Digest Association Inc.*, decided in 1972, concerned a sweepstakes in which individuals entered by mailing a form indicating that "yes," they would purchase goods advertised by the sponsor or, "no," they did not want to make a purchase but still wished to be entered in the drawing.[7] The court found the scheme to be a lottery, reasoning that even those responding "no" expended "time, thought, attention and energy" in studying the advertised goods, which was both a detriment to them and a benefit to the sponsor.[8]

The analysis of nonmonetary consideration has evolved somewhat over the years in response to criticism that certain jurisdictions viewed seemingly innocuous sweepstakes as illegal lotteries. For example, some jurisdictions that permit nonmonetary consideration to meet the definition of consideration required for a lottery have enacted statutes clarifying that passive activities, such as being exposed to advertising through radio or television programs, does not in fact rise to the level of consideration.[9]

The advent of the Internet further shifted perceptions. Initially, promoters worried that requiring individuals to have Internet access to participate in an online sweepstakes would be found to be a form of nonmonetary consideration. States such as Florida suggested this was a real possibility. Those fears, however, have not been borne out. In fact, the Federal Unlawful Internet Gambling Enforcement Act of 2006 expressly excludes the cost of obtaining Internet access from the definition of consideration.[10]

Even with these developments, sponsors of sweepstakes traditionally avoided the consideration problem entirely by offering a free alternative method of entry — that is, by allowing participants to enter without participating in any activity that could be deemed non-monetary consideration. This practice is nearly universal among promoters of nationwide sweepstakes.

The most widely used free alternative method of entry is the mail-in entry form. Online

submission forms have grown in popularity as a free alternative method of entry as promoters become more comfortable with the idea that the mere fact that the entry may require a person to obtain Internet access likely does not constitute consideration in any state (particularly in light of the increasing prevalence of Internet access at home and the availability of free Internet access at libraries and other locations).

In addition to ensuring that their sweepstakes are not illegal lotteries, promoters must also comply with various state statutes regulating sweepstakes.[11] Florida, New York and Rhode Island impose the most onerous obligations. In Florida and New York, promoters operating sweepstakes in which the total value of the prizes offered exceeds \$5,000 must register with the state and obtain a surety bond guaranteeing the prizes.[12] In Rhode Island, retail stores operating promotions in which the total value of prizes exceeds \$500 must register with the state, although there is no bonding requirement.[13]

Amazon Giveaway

Amazon Giveaway allows anyone to create a sweepstakes through a simple process.[14] First, the sponsor selects a prize or prizes from a predetermined universe of Amazon products. The retail value of the prizes cannot exceed \$5,000, likely to avoid Florida and New York's registration and bonding requirements. If the prizes exceed \$500, residents of Rhode Island are not eligible to enter (apparently another attempt to avoid registration requirements).

Next, the sponsor chooses one of two Giveaway types: "Lucky Number" or "First-come, First-served." In the former, prizes are given out at set intervals, for example, to every 100th entrant. The sponsor decides the interval as well as the number of prizes. In the latter, prizes are awarded to the first entrants until all prizes are distributed.

Finally, the sponsor chooses one of two methods of entry. Under the first method of entry, participants are simply required to click on a box image to see if they are a winner. Under the second method of entry, participants are required to follow the sponsor on Twitter and then are asked to click on a box image to see if they have won. Both methods require participants to use their existing Amazon account or create one prior to entry. The second method of entry also requires entrants to have or create a Twitter account and to authorize that account to interface with Amazon. Importantly, the two methods of entry are not alternatives. A Giveaway either employs the first method or the second, but not both.

All Giveaways are subject to this identical set of rules.[15] The “sweepstakes in a box” approach may well be one of the main attractions to sponsors, as it spares them from grappling with the complex process of drafting and enforcing rules that comply with the laws of all relevant jurisdictions. But this is also where things get interesting.

Impact of Amazon Giveaway

In light of Amazon’s outsized online presence, we are likely to see thousands of sweepstakes in the near future governed by Amazon Giveaway rules. This flood of identical, nationwide sweepstakes may help modernize perceptions of what constitutes nonmonetary consideration in the age of social media. At least three developments are worth considering.

First, requiring entrants to have or register for an online account may become viewed as so slight an imposition that it will not be deemed nonmonetary consideration in any state. Amazon plainly believes this is already the case because it permits only Amazon account holders, and, in many instances, Twitter account holders, to participate in its Giveaways. Amazon may have reached this conclusion based in part on the fact that Amazon and Twitter accounts can be created easily and without providing much personal information — registrants need only disclose their email address.[16]

Second, requiring entrants to follow someone on Twitter may become viewed as an essentially passive activity that also falls short of being consideration. Again, Amazon appears to believe that we have already reached this point, because Amazon Giveaways can require that participants follow a sponsor on Twitter in order to enter. Sponsors of such Giveaways will benefit from an enhanced ability to market themselves and their businesses through Twitter, while entrants will find themselves exposed to advertising and other messages that they may not have otherwise elected to receive. Arguably, this skirts the line of what some jurisdictions have found to be non-monetary consideration.

Following someone on Twitter, though, is a relatively passive activity not unlike listening to a radio station or watching a television channel. Twitter followers are also free to “unfollow” sponsors at any time, much as a television viewer or radio listener can change the channel at will. Amazon appears to believe that such reasoning will protect Giveaways from being deemed illegal lotteries.

Third, Amazon Giveaway signals that, at least for online sweepstakes, mail-in entries are increasingly a thing of the past. Traditionally one of the primary methods of entry for sweepstakes and the preferred free alternative method of entry, mail-in forms have recently been losing ground to online methods of entry. Amazon dispenses with mail-in forms entirely for its Giveaways, apparently comfortable that it need not offer a non-Internet based method of entry. This will likely cement beliefs that requiring access to the Internet does not constitute consideration. It may in turn lead to more online sweepstakes eschewing mail-in entries, which can be logistically difficult to handle, in favor of online submission forms.

These are just a few of the potential impacts of Amazon Giveaway on the world of sweepstakes. As these promotions continue to proliferate, it will be interesting to see how courts, regulators and legislators address these new sweepstakes and adapt (or do not adapt) to this continuously evolving landscape.

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[1] See, e.g., Opinion of The Justices, 795 So. 2d 630, 635 (Ala. 2001).

[2] See, e.g., N.M. Stat. Ann. § 30-19-1; Com. v. Webb, 68 Mass. App. Ct. 167, 170, aff'd, 450 Mass. 1014 (2007).

[3] See, e.g., Wis. Stat. Ann. § 945.01; Blackburn v. Ippolito, 156 So. 2d 550, 554-55 (Fla. Dist. Ct. App. 1963).

[4] See, e.g., *Knox Indus. Corp. v. State ex rel. Scanland*, 258 P.2d 910, 914 (Okla. 1953).

[5] See, e.g., *State ex rel. Line v. Grant*, 162 Neb. 210, 212-13, 216-17 (1956).

[6] See, e.g., *State v. Reader's Digest Ass'n, Inc.*, 81 Wash. 2d 259, 268-69 (1972).

[7] *Id.* at 262.

[8] *Id.* at 268.

[9] See, e.g., Kan. Stat. Ann. § 21-6403(c).

[10] 31 U.S.C.A. § 5362(1)(E)(viii)(I).

[11] There are numerous other legal considerations facing sweepstakes promoters that are beyond the scope of this article. These include, but are not limited to, ensuring compliance with (1) state and federal statutes and regulations governing false and deceptive advertising; (2) the Deceptive Mail Prevention and Enforcement Act, 39 U.S.C. § 3001; (3) the CAN-SPAM Act, 15 U.S.C. § 7701 et seq.; and (4) the Child Online Privacy Protection Act, 16 U.S.C. § 6501 et seq.

[12] Fla. Stat. Ann. § 849.094; N.Y. Gen. Bus. Law § 369-e.

[13] R.I. Gen. Laws Ann. § 11-50-1.

[14] Amazon Giveaway, https://www.amazon.com/gp/giveaway/home/ref=aga_shrt_hm;
Amazon Giveaway: Frequently Asked Questions,
<http://www.amazon.com/gp/giveaway/faqs>.

[15] Giveaway Official Rules, <https://giveaway.amazon.com/rules/>.

[16] So You'd Like to Get an Amazon Account,
<http://www.amazon.com/gp/richpub/syltguides/fullview/RMFLJS1OOMAZV>; Signing Up With
Twitter, <https://support.twitter.com/articles/100990-signing-up-with-twitter>.