Publications

Is Your Advertising Contract Worth the Paper It's Written On?

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During the 2017 Interactive Advertising Bureau's (IAB) Annual Leadership Meeting, Marc S. Pritchard, Chief Brand Officer of P&G, one of the world's largest advertisers, issued a clarion call to P&G's fellow U.S. marketers to join him in the fight against "crappy" digital advertising. "Your participation is essential," he intoned. U.S. companies spend upwards of $200 billion annually on advertising, with $72 billion of that amount spent on digital ads. But, as Pritchard outlined in his talk, the dizzying complexity of the media supply chain and its lack of transparency leads to absence of any objective measurements of digital advertising effectiveness; advertising dollars being used by ad agencies for things other than actual media payments, secret kick-back (rebate) schemes between ad agencies and media markets; and outright fraud by hackers who use sophisticated bots to fake web traffic and thus siphon off millions in advertising spending.

Importantly, Pritchard noted, these practices, as much as they may be to blame for lackluster sales growth, are more often than not a product of **poorly written, poorly understood, and poorly scrutinized agency contracts.**

Specifically, as Pritchard outlined, ad buyers have for a number of years now simply accepted as a given the media market's lack of accountability for media placement, which is largely automated. Ad buyers have also accepted media companies' refusal to provide accurate and standardized measurements of viewability (i.e. an answer to the question how many people are actually seeing any given ad) as status quo. While the digital advertising world is still relatively young, its major players – Facebook, Instagram, Twitter, Snapchat, Pinterest, Pandora, YouTube, etc. – all have different viewability metrics. These companies still largely self-report on the effectiveness of such measurements. However, the attention that P&G and other advertisers are beginning to pay to this lack of consistent across-the-platforms viewability data is slowly changing the landscape. Recently, Facebook, a long-time holdout against demands for third-party verification of ad viewability on its platforms, entered into talks with the Media Rating Council (MRC) about auditing its measurement methods. As far as P&G goes, it will contractually mandate that its agencies, media suppliers, and vendors implement the MRC measurement verification and will no longer accept self-reporting. Those who are not up for this challenge will not be doing business with P&G. And, if the entire market dynamics are to change as Pritchard advocates, it behooves other advertisers to push for similar accountability in their own contracts as they renew or seek out new agency/medial supplier relationships.

Also, advertisers recently discovered that some agencies have used advertising dollars as float to pay for expenses other than actual advertising costs. According to conversations Pritchard had with his ad agencies, the fees P&G paid the agencies did not "cover [all agency] expenses." While P&G was initially incensed at this news, it was ultimately humbled when its advertiser pointed out that P&G's own contracts allowed for this practice to exist. The contracts contained no provisions preventing agencies from making money on the float. P&G is now in the process of, with the help out outside counsel, combing through its advertising contracts to eliminate any ambiguity and include terms requiring advertising funds to be used for media payment only. To its credit, P&G is also assessing whether the rates it pays its agencies should be reconsidered to make sure they are not losing money on its contracts.

Further, in 2016, the Association of National Advertisers (ANA) published the results of its investigation, conducted in partnership with K2 Intelligence, of transparency issues in the U.S. advertising industry. Among the key findings were opaque business practices across all media –from digital, to print, to out-of-home, and television – that may ultimately greatly diminish quality and effectiveness of advertising campaigns, such as:

- Cash rebates from media companies provided to agencies with payments based on the amount spent on media. Advertisers employing the agencies receiving these kick-backs were entirely unaware of any rebates being returned and saw no part of these payments themselves;
- Rebates structured as "service agreements" in which media suppliers paid agencies for research or consulting initiatives that were of minimal utility or not provided at all, but payment for which were often tied to the volume of agency spend;
- Undisclosed markups of 30 percent to 90 percent on media ad agencies sold to advertisers through "principal" transactions (i.e. when and agency holding company buys media on its own behalf and then reselling it at markup through its agencies to advertisers). In these transactions, ANA found that agency holding companies at times pressured or incentivized their agencies to direct client spend to this media, regardless of whether such purchases were in the clients' best interests.

And again, such practices can be thwarted with solid contracts that include terms requiring all advertising funds to be used for media payment only, all rebates to be disclosed and returned, and all transactions to be subject to audit. P&G's current advertising agreements review is aimed at achieving these goals, and it is critical that others follow suit.

Finally, while most understand that types of click fraud have been a part of the digital advertising ecosystem since its inception, advertisers must remain vigilant. A December 2016 report from White Ops revealed the largest such scam to date, the Methbot operation set up by (surprise!) Russian hackers. This very sophisticated bot-net fraud was built to counterfeit premium publisher's web pages (such as vogue.com, economist.com, espn.com, etc.). It would then request video ads from media networks using one of Methbot's identifiers that would allow it to get credit for the ad viewership and proceed to produce millions of fake views and clicks on the ads. The sophistication of this process made the activity seem legitimate (as if actual humans were accessing the videos). According to White Ops, the combined financial impact of the Methbot scheme was anywhere from $3 million to $5 million per day in revenue. Billions of dollars are lost annually because of similar fraudulent clicks, fake traffic, and other scams. For companies like P&G, this type of widespread fraud is a part of the reason why a third to a half of all of its internet ads is likely never even seen by humans. The solution? P&G will not allow any entity to touch its digital media unless that entity is certified by the Trustworthy Accountability Group (TAG), an advertising industry initiative that was started to fight criminal activity in the digital advertising supply chain.

What's the takeaway from all of this? Some commentators stress the simple truth that fraud and lack of basic transparency can be avoided if advertisers make their media buys directly from each platform and content provider, avoiding both the automated robot-enabled ad placement and the complicated arbitrage characteristic of today's media markets. In fact, an out-of-home company that provides ad space on billboards, bus shelters etc. is currently cleverly "trolling" Mr. Pritchard with billboards placed around P&G's Cincinnati headquarters that say "Hey Marc, This Ad Is Real."

However, as the digital world will only continue to grow it its complexity and degree of intrusion into our daily existence, the real takeaway is that advertisers' individual relationships with this world can be effectively managed by: ***first*** setting clear expectations regarding measurements of effectiveness and fraud prevention, and ***second*** crafting contracts that will ensure transparency and accountability in the short term, and, hopefully, an ultimate positive shift in the entire digital marketing ecosystem in the long term.

Your Vorys team stands ready to assist you with any advertising contract negotiation, drafting, or review and otherwise to advise you on your digital media strategies.