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Guidelines for Negotiating Online Advertising Arrangements

Businesses with advertising needs have long looked to advertising agencies or other outside service providers to assist with their marketing and promotion efforts. This outsourcing model has not changed with the emergence of online, social media, or mobile advertising. Agencies are not only assisting with development of digital creative materials, but also with advertisement placement, serving, and delivery. With respect to these online initiatives, advertisers should acknowledge and address the legal risks and issues associated with these new online or mobile delivery arrangements. The best defense available to advertisers against these potential pitfalls has been and remains their agreements with the agencies. Do not rely on a general or outdated contract form. Below is a list of suggested concepts that should be addressed and incorporated, as applicable, into advertising agreements. Consideration also should be made of the constantly evolving legal framework governing the following.

- **Retaining Content Ownership.** Specify that the advertiser owns and retains all intellectual property and proprietary

rights associated with its content or data, which is compiled, modified, derived, developed, created, or otherwise used by the agency on the advertiser's behalf during the term of the agreement. Advertisers should require, at a minimum, that agencies receive only a tailored license grant to use such content or associated rights.

- **Confidentiality.** Establish that the advertiser's confidential business information, including, without limitation, any marketing or sales plans or pricing initiatives, shall be retained by the advertiser and may be accessed and used by the agency only as necessary for the sole purpose of fulfilling the obligations set out in the agreement.
- **Third-Party Intellectual Property.** Require the agency to obtain the advertiser's prior written consent or, at a minimum, undertake and perform any necessary rights clearance, before using in any advertising campaign any intellectual property or data owned or held by a third party.
- **Search Engine Optimization.** Legal uncertainty surrounds certain search engine optimization practices and may be outright prohibited, particularly in connection with metatag usage or keyword triggering. Consequently, an

advertiser should require an agency to abide by applicable laws and otherwise remain solely liable and responsible with respect to the utilization of such techniques.

- **Data Collection.** The agency should be bound by applicable laws and industry or agency guidelines as well as any other parameters suggested by the advertiser with respect to the permissible data, especially personally identifiable or location-based data, that can be collected from advertisements.
- **Data Usage.** Any further use of data collected in an authorized fashion by the agency, especially for purposes unrelated to the original campaign, should be resolved and determined by the agency and the advertiser.
- **Distribution.** Absent prior written consent or subject to express parameters, restrict the agency's ability to place advertisements, particularly in contextual-based environments or environments that do not contain general audience content.
- **Deception and Substantiation.** Prohibit the agency from making any additional statements about an advertiser's products or services without prior and express consent.
- **Comparative Advertising or Endorsements.** To the extent comparative advertising or endorsements will be implemented as a part of a campaign, maintain controls over and otherwise allow for validation of any declarations in order to avoid and otherwise preclude deceptive, confusing, or disparaging practices.
- **Industry-Specific Rules.** Require the agency to comply with any specialized industry rules generally applicable to the planned advertising

tactics or the particular industry in which the advertiser operates or competes.

- **Email Marketing.** To the extent the campaign incorporates email communication, require any related email advertisements to include the required notices and mechanisms to comply with applicable laws.
- **Intent-Based Advertising.** Require any agency that uses intent-based techniques or technologies to comply with any disclosure, consent, or data handling or collection obligations both as prescribed by law as well as by generally recognized industry or agency guidelines or self-regulatory rules.
- **Children.** Be especially cautious of allowing an agency

to facilitate and market to children under the age of 13 and always require compliance with applicable laws and generally recognized industry or agency guidelines or self-regulatory rules.

- **Network Connections.** Require the agency to ensure that any access to an advertiser's systems or networks uses software or other processes to prevent unauthorized access or harmful programming code.
- **Termination.** Require the agency to return or destroy all proprietary content.
- **Agency Relationship.** Require the agency to acknowledge its role as an independent contractor permitted to act only in accordance with particular parameters and the advertiser's directives. Require the

agency to accept and assume sole responsibility for all other actions or undertakings.

- **Indemnification.** Require indemnification for third-party claims.
- **Subcontractors.** Require that agency contracts with media companies or other subcontractors contain, as applicable, and as tailored to the subcontractor's activities, provisions that incorporate or account for the concepts mentioned above.

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