

Advertising By Numbers: What Modern Advertising Contracts Need to Say (But Never Do)

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Getting Your Advertising Technology (AdTech) Game on!

Advertising has long been a game of two players - the creative team develop the messaging and the campaign. Edgy wordsmiths liaise with visual geniuses and graphic masters to stimulate the interest of the consumer (or at the very least, the CMO). Then the media buyer takes over, planning the places where the campaign will be the most effective. Media analysts and hard-nosed planners make sure that eyeballs are attracted, that consumers are intrigued and that numbers are delivered.

But advertising technology has arrived and with it, new expectations from brands. Brands need more from their creative, more from their media buy and, more importantly, they need both to be wrapped up in a layer of flexibility and provided with a side of meaningful data. As a client, how do you ensure that you get these deliverables from your agencies? When the agency rolls out the same tired old contract, what changes do you need to add to ensure your CMO and their team get everything they need from a 2019 campaign brief, and more?

First Step: Understanding What it is... and What it Can Be

Simply put, AdTech is the generic term for software and related systems that target, deliver, and analyse the digital advertising that is being used by a brand within a campaign. AdTech comes in various guises, providing different solutions for various aspects of digital marketing.

Understanding the technology that is being used by your agency is a vital key to having the correct terms contained within your agency contract. For example, if an agency is using programmatic advertising (the tool that buys target audiences rather than buying particular media) to deliver a campaign for your brand, then the contract should include the specific demographic that is to be targeted. It seems logical, yet many standard form agency contracts in the Middle East do not include this term.

To add complexity, it will be very likely that the agency will be utilising multiple methods to communicate with consumers. Programmatic may be used but is unlikely to be the only method of distribution. Each AdTech method should be understood and analysed to ensure that the contract reflects the deliverables that the brand expects to get from the campaign, and from the relationship. AdTech may be designed to allow brands to use their advertising budgets in a more efficient manner, but there can be no certainty that this will happen if there are no clear targets or outcomes.

Data: Sharing is Caring

Even back in the days of telemarketing, clients demanded reports on the activities of the supplier and (as much as possible) feedback from the targeted consumers. Data sharing is a vital part of the agency remit and this is more important now than ever before. A brand must be able to assess the performance of the campaign, as quickly as possible, so that they can react and correct as needed. Their competitors are doing this - they need to as well. Yet standard agency agreements often come with minimal data sharing obligations - we still regularly see agency agreements with no data sharing obligation at all. There remains a gap between what the AdTech can potentially deliver and what the client is receiving. For example, if the

agency is using a data analytics platform, the client should have visibility as to the range of data it is analysing and what reports or recommendations it is producing. These programmes measure so much more than just 'clicks', and the depth of available data is valuable to clients as it tells them about the engagement which, in the end, is the very thing that brands are seeking. Fundamentally, the agency must supply all available data to the client in a form that is digestible and succinct without losing any of the underlying value of the data. The contract should note the way in which that will be done (reports are great, but what about 24/7 dashboard access?). Brands need to ask questions before they sign contracts – what data can the agency potentially supply within the boundaries of its chosen technology?

It is also important to assess the needs of other parties to the relationship. Does anyone else need to see this data from the client side (parent companies, distributors perhaps)? An important associated issue – what levels of security and privacy can the brand impose on the agency in relation to this data? The major platforms all collect their own data – this cannot be avoided. But perhaps it is possible to restrict further data collection or at least ensure it is anonymised if, by the nature of the system in place, it must be collected or shared with a third party?

KPIs, Verification and Fraud

Brands are (rightly) concerned about their key performance indicators ('KPIs'). The data received by the brand will be comprehensively analysed to see if those KPIs are met. Some brands may choose to add certain KPIs to a contract so that they can also take action if they are not met. Naturally this puts additional pressure on the agencies to reach those KPIs.

Notwithstanding the contract terms, the veracity of the data is incredibly important to a brand. It pays to be aware of the media where there is a tendency towards fraudulent behaviour; currently the highest rate of fraudulent activity in advertising is in App advertising. The data needs to be reviewed frequently. Any unexplained or exponential leap in the usual metrics should be raised between the parties immediately. It may be that the campaign has just been enormously successful, but it may also be that the campaign has an issue with fraudulent clicks, or is encountering increased bot traffic. Contractually it is possible to ensure that the agency employs a tech stack that includes solutions for detecting fraudulent activity. Naturally, the agency should be required to work positively with the brand to identify and minimise fraudulent activity. However, some things need to be managed outside of the contract itself. Practically, the best way to minimise fraudulent activity is to work closely with the agency in a proactive manner so the issue can be managed quickly and effectively – both parties need to report and react.

Retargeting

Once a brand has the data to hand then it is going to react to it. 'Reduce this' it will say to the agency, 'and increase that'. Digital campaigns lend themselves incredibly well to such a pivot, however it is important that the contract terms allow this to happen as quickly as the brand needs it to happen. A series of complex signed change orders might slow down reaction times to such an extent that the pivot becomes a glacial three-point turn.

This is an area where a contract needs to be practical as well as enforceable. Consider the different aspects of the campaign, their deliverables and their relative importance to the campaign and the brand. Some parts will require a signed change order because of, for example, the value of the change, whilst others can and should be moved on email notice from the brand manager.

On top of this, some AdTech platforms have the capacity to make suggestions as to where the desired demographic might be. Brands need to force the agencies to utilise this function and share this information. Naturally, as with all key decisions, the brand can then decide to follow that suggestion or not,

as it chooses.

Don't forget the potential issue of having to reformat or redesign the campaign content as well. Your creative agency might have to re-engage later to alter campaign elements so that a retargeted media strategy can be properly implemented. Sending the same creative to a consumer via a different outlet is often not practical or desirable. This has a cost implication for the brand and might not be an option at all times. It is great to have a contract that allows the brand to pivot; it is not however always going to be possible practically. Brands need to maintain the ability to say 'no' to a change in a media plan, but with that comes the possibility that the agency will require the brand to be responsible for any resulting reduction in consumer engagement.

Conclusion

As lawyers, we regularly have to review contracts for services that do not adequately reflect the way in which industries are actually operating in 2019. We see contracts that require deliverables to be sent on CD-Rom, or notices that have to be made by telex. Unfortunately, advertising services' contracts regularly fall into this category. Request an up—to-date contract that actually reflects the activities that both parties are undertaking, and the deliverables that are expected. Any agency that values its clients should happily supply such a contract, safe in the knowledge that a customised contract lays out a pathway to commercial co-operation and a successful relationship.

Al Tamimi & Company's [Technology, Media & Telecommunications team](#) regularly advises on advertising and content matters both on-line and in traditional media, acting for brand, producers, media agencies and publishers. For further information please contact [Fiona Robertson \(f.robertson@tamimi.com\)](mailto:f.robertson@tamimi.com).