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Guidelines for Nonprofits when Negotiating Online Advertising Arrangements

Nonprofits have long looked to advertising and marketing agencies to assist with their marketing and promotion efforts relating to fundraising, membership development, program promotion, product and service sales, and furthering the nonprofit's general purpose and mission. This outsourcing model continues to help nonprofits reach new and existing donors, supporters, members, and other interested third parties, and 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, nonprofits should acknowledge and address the legal risks and issues associated with these new online or mobile delivery arrangements.

The best defense available to nonprofits against these potential pitfalls has been and remains their written 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 Do not rely on a general or outdated contract form.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 nonprofits' agreements with advertising and marketing agencies. Consideration should also be given to the constantly evolving legal framework governing the following:

- **Retaining Content Ownership.** Specify that the nonprofit owns and retains all intellectual property and proprietary rights associated with its content and data, which is compiled, modified, derived, developed, created, or otherwise used by the agency on the nonprofit's behalf during the term of the agreement. Nonprofits should require, at a minimum, that agencies receive only a tailored license grant to use such content or associated rights, and generally no rights upon termination of the agreement.
- **Confidentiality.** Establish that the nonprofit's confidential information, including, without limitation, any new program offerings, marketing or sales plans, or pricing initiatives, shall be retained by the nonprofit 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 nonprofit'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, a nonprofit 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 both applicable laws and industry guidelines, as well as any other parameters suggested by the nonprofit, 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 both the agency and the nonprofit.
- **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 a nonprofit'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 control 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 nonprofit operates.
- **Advertising Guidelines and Best Practices.** Agreements should incorporate, as applicable and as warranted, the best practices advocated by industry standards bodies, such as the Internet Advertising Bureau and the Association of National Advertisers, which provide governing or performance rules for advertising arrangements.
- **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.
- **Antitrust.** Members of trade and professional associations always must be careful to avoid sharing information, engaging in discussions, or undertaking other practices that could lead to violations of federal and state antitrust laws. Require the agency to represent that it will not make any agreements or otherwise undertake any actions on the nonprofit's behalf which are actually or potentially anticompetitive.
- **Intent-Based Advertising.** Require any agency that utilizes 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 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 both applicable laws and generally recognized industry guidelines or self-regulatory rules.
- **Network Connections.** Require the agency to ensure that any access to a nonprofit's systems or networks utilizes software or other processes to prevent unauthorized access or harmful programming code.
- **Termination.** Require the agency to return or destroy all proprietary content upon termination of the agreement, and to cease stating or implying any affiliation with the nonprofit post-termination.
- **Agency Relationship.** Require the agency to acknowledge its role as an independent contractor permitted to act only in accordance with particular parameters and the nonprofit's directives. Require the agency to accept and assume sole responsibility for all other actions or undertakings.
- **Indemnification.** Require indemnification of the nonprofit by the agency 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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