

# Augmented, Native and Interactive

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## The New World of Digital & Mobil Advertising

It All Adds Up!



Presented by

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Partner, **Rimon**, P.C.

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## Our Agenda

- Basic Principles of Advertising Law
- Native Advertising
- Advertising & Online/Mobile Gaming
- Celebrity Endorsements, Bloggers, Experts & Consumers
- Augmented Reality & Advertising in Virtual Worlds
- Programmatic Buying
- Advertiser-Agency Relationships

## What is an “Advertisement” Anyway?

Any communication of information intended to promote the sale or use of commercial products or services by informing or influencing people

Distinctions between advertising, information and entertainment are blurring:

- Advertisers and consumers are content creators
- Media and entertainment companies are ad supported revenue engines
- Technology and search companies are network publishers
- Telecommunications and gaming companies are distribution platforms.

Social media and gaming, through globally networked technology embedded in interactive platforms has given rise to fundamental changes in the ability to create use, distribute and control information and content (and who has the ability to do so) also blurring the distinction between consumers, content creators, employees, individuals and brands.

# Federal Trade Commission Act: Section 5



Unfair methods of competition in or affecting commerce,  
and **unfair** or **deceptive** acts or practices in or affecting commerce, are  
hereby declared unlawful.

Advertising law is designed to protect the consumer, not the advertiser

# What is Unfair?

Advertising is unfair if:

- It injures consumers
- It violates established public policy
- Is unethical or unscrupulous

Examples:

- Forcing consumers to buy unwanted goods
- Selling consumers defective goods on an “as is” basis
- Locking consumers in expensive, long-term contracts

# What is Deceptive?

Advertising is deceptive if it contains any representation, omission, act or practice (“claim”) that:

- Is likely to mislead (in light of the totality of circumstances and targeted audience);
- Would be deceptive to a reasonable consumer; and
- Is material (*i.e.*, involves information the consumer would likely consider important as part of the decision making process)

Claims can be:

- Express
- Implied
- Created by Net Impression

Claims must be substantiated in advance. Without reasonable basis to substantiate a claim prior to dissemination, the claim will be treated as false, even if the claim is ultimately proven to be true.

# Express Claims

**Advil**  
The **EVERY** Pain Reliever™

Advil works wherever it hurts

- ✓ Headache
- ✓ Backache
- ✓ Muscle Ache
- ✓ Menstrual Pain
- ✓ Minor Arthritis Pain

Advil Tablets, 200 mg  
Non-Steroidal Anti-Inflammatory Drug (NSAID)  
Tablets

Get new warnings information

Advil, Are You An Advil, and The Every Pain Reliever are trademarks or registered trademarks of Wyeth. LIQUA-GELS is a trademark or registered trademark of Celanese Pharma Solutions. Use as directed.

**airtel** PAY & RECHARGE BUY BANK WITH US OUR NETWORK GET HELP

## Switch to Airtel

Officially The Fastest Network

KNOW MORE →

INDIA'S FASTEST MOBILE NETWORK

Icons: Mobile phone with ₹, Satellite, Mobile phone with ₹ and call icon, Globe, ₹ symbol.

NUROFEN.  
WE SEE HEADACHES DIFFERENTLY.

**NUROFEN**  
**EXPRESS**  
200mg LIQUID CAPSULES  
Ibuprofen TARGETS PAIN FAST 16 LIQUID CAPS

TARGETS THE REAL SOURCE OF MOST HEADACHES FASTER\* >>

BAA

## Central London to Heathrow in 15 minutes

London Paddington ↔ Heathrow in 15 minutes, every 15 minutes

Famous for 15 minutes

Heathrow **express**

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# Implied Claims

# Cheat death.

The antioxidant power of  
pomegranate juice:



©2011 Fruit of the Loom LLC. All rights reserved. POM Wonderful and "The antioxidant power of pomegranate juice" are trademarks of Fruit of the Loom LLC.



# Deception by Omission

Even if literally truthful, ads can be deceptive if information material to a purchase decision or to fully inform, is omitted

AS ADVERTISED



IN REALITY



# Puffery

Puffery is a 'claim' (usually in the form of an opinion, exaggeration or hyperbole) that

- Cannot reasonably be proven or disproven;  
or
- No reasonable person would believe  
(or consider material to a purchase decision)

*“You’ve tried the rest, now try the BEST!”*

*Puffery does NOT require substantiation: In essence, an advertiser’s right to blatantly lie with as much exaggeration as possible, since no reasonable (rational) person would or could believe it!*

# Overall (Net) Impression

What does the average, reasonable consumer believe or understand when receiving the message, communication and information?

**I'M NOT LYING,  
I'M ADVERTISING** 🤪

# Contract Terms Are Claims

Online & Mobile Terms are “Claims” and consequently:

- If you fail to honor your own terms and conditions, including a stated privacy policy that can be considered deceptive and misleading under Section 5 of the FTC Act (in addition to being a breach of contract); and
- The FTC construes online and mobile privacy policies as also applying to offline data collection unless the policy expressly states otherwise.

# Advertising in Digital & Mobile Formally Regulated

## Guides Concerning the Use of Endorsements and Testimonials in Advertising

[16 C.F.R. Part 255; First promulgated in 1975, previously revised in 1980 and now newly revised and effective 2009

### Bloggers and advertisers held accountable:

- Obligation to guide and correct errors\*
- Disclose payments (consideration)
- Disclose connections (material)
- Opinion must be honest and free of unsubstantiated or false claims.

Brand ambassadors & sponsored influencers must be transparent and honest and can be held personally liable for failing to disclose material connections AND advertisers are liable for the actions of those they “support.”

If a blogger portrays her or himself as an expert or having unique qualifications to make laudatory statements about the advertiser’s product or service, blogger may have independent responsibility.

\* The FTC has taken a real world approach, and understands that “[i]t’s unrealistic to expect you to be aware of every single statement made by a member of your network. But it’s up to you to make a reasonable effort to know what participants in your network are saying.”

# An Example of Failure to Disclose: FTC v Lord & Taylor

Paid 50 influencers to post Instagram pictures of themselves wearing the same dress from a new collection and use an @lordandtaylor mention and #DesignLab hashtag.



But, they failed to disclose they had given the dress and paid thousands of dollars in exchange for the endorsement.

March 2016: Settlement. No financial penalty, but consent order for 20 years.



# Promotions on Social Media Platforms

Social media platforms restrict, prohibit or have limitations, through their terms of use, on the conduct of advertising & promotions.



In addition to the laws and regulations that apply, advertisers must comply with these terms which are contractually and legally binding.

# Disclosures - Disclaimers





# Disclosures - Disclaimers

**YEAH, THESE FLIP OVER.  
THAT'S WHY  
GOD INVENTED  
LAWYERS.**



**THE NEW NISSAN XTERRA**

[xterra2.com](http://xterra2.com)

4239 OUTDOOR SYSTEMS

# Disclosures - Disclaimers

In order for a disclosure to be effective as a disclaimer, at a minimum:

- There must be a clear link between the claim and the disclosure
- The “disclosure” should explain, not contradict
- The disclosure must be readable by consumers
  - NO in mice type; \*
  - NOT buried in 80 pages of legalese, blah, blah, blah; and
  - NOT in difficult to read:
    - *Type*
    - color
    - **font**

\*Type so small only mice could possibly read it

# When Reviewing Advertising

## Four Basic Principles

- Tell the Truth
- Support All Claims
- Secure All Necessary Rights
- Are There Specific Laws, Regulations, Social, Political and/or [Fill In The Blank] Issues That Apply?



## Ask Yourself

- What is this?
- What is it trying to say?
- What is the law that applies?
- Are the claims supported?
- Do we own all this?
- Should we be more sensitive?
- How are we producing this?
- Where is this going to be seen?

## Key Issues to Watch Out For

Rights of Publicity

IP Rights: Trademark/Copyright/Music/Art

Clearances / Licenses

Celebrities / Sports Figures / Politicians

- SAG
- Endorsements
- Image/Reputation

Experts

Consumers

Special Consideration:

- Children
- Alcohol
- Firearms
- Tobacco
- Gambling
- . . . . more

# NATIVE ADVERTISING

Federal Trade Commission Enforcement Policy Statement on Deceptively Formatted Advertisements (“Policy Statement”) and the corresponding business guide entitled, ‘Native Advertising: A Guide for Businesses (“Business Guide”).

**EDAM** is auditioned before it is sold—the Dutch cheese-mongers tap each cheese and judge its quality by the echo. Admiral de Ruyter used Edam cheeses as cannon-balls. Their delicate flavor calls for Half and Half—half beer, half Guinness.

**PROVOLETTI** is one of Italy's greatest cheeses. It is smoked, and its flavor is sharpened by aging. Its resemblance to a corsetted haggis is merely superficial. Half a pound of Provoletti contains the protein equivalent of ten eggs, or a good sized steak.

**STILTON** is perhaps the greatest of the great English cheeses. They eat it with Guinness “that noble liquor—the comeliest of black malts.” Guinness Stout is now brewed here, with yeast which is descended from the yeast used in Dublin in 1759.

**CHEDDAR** is the most popular cheese in America, and it was of Cheddar—“toasted mostly”—that Ben Gunn used to dream while he was marooned on Treasure Island. Robert Louis Stevenson was an inveterate lover of Guinness Stout.

**ROMANO** comes from Southern Italy. Have you noticed that all *black* victuals are delicious—pickled walnuts, truffles, caviar, Romano, Guinness? Hold a glass of Guinness up to the light and you will see a *ruby gleam!*

# Native Advertising

**BuzzFeed**

Politics Tech Lifestyle Food Rewind Celeb Music LGBT Sp



## 10 Photos From 2012 That Should've Never Been Shared

Some things are just meant to be kept to yourself, just like the new **Taco Bell Loaded Grillers**, amazing appetizers you don't have to share.

posted about 6 days ago



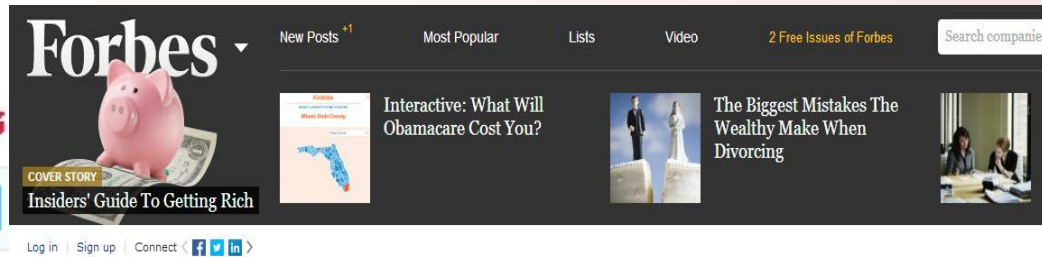
**NATIVE ADVERTISING**



**Not everything needs to be shared.**  
99¢ Loaded Grillers from Taco Bell. Appetizers for one.

LET ME SHARE THIS!

The FTC uses examples such as “Sponsored”, “Promotion” “Paid ad” or starting a post/tweet with “Ad:” or “#Ad in native advertising



Fidelity Voice

FOLLOW

Viewpoints  
full bio →



**ForbesBrandVoice** Connecting marketers to the Forbes audience. [What is this?](#)

INVESTING 4/29/2014 @ 10:27AM | 1,544 views

## Should You Accept Your Employer's Pension Buyout Offer?

Fidelity Viewpoints Team · Fidelity

Faced with mounting pension costs and greater volatility, companies are increasingly offering their current and former employees a critical choice: Take a lump sum now or hold on to their pension.

“Companies are offering these buyouts as a way to shrink the size of their pension plans, which ultimately reduces the impact of that pension plan on the company’s financials,” says John Beck, senior vice president for benefits consulting at Fidelity Investments. “From an employee’s perspective, the decision comes down to a trade-off between an income stream and a pile of money that’s made available to them today.”

# ADVERTISING & ONLINE/MOBILE GAMING

## Two Categories of Advertising Issues \*

### Advertising the Game

- Misleading Trailers
- Graphics Quality
- Advertised Features Not in Game
- Free to Play Games with In-App Purchases
- Failure to Disclose Odds

### Advertising in the Game

- Interstitial
- Incentivized Downloads
- Native Ads
- Offer Walls
- Videos
- Icon Drop
- Clearances

\* If you count using characters created or developed for gaming to advertise other products or services as a category, then there are three!

# Advertising the Game; Characters in Advertising



# In-Game Advertising

**STATIC:** In-Game billboards and loading screens that are hard-coded into a game by the developer. Comparable to product integration in television, cinema and video.



**DYNAMIC:** In-Game billboards served dynamically (based on gamer location/ IP Protocol) by 3rd party networks. Comparable to 15 second commercial spots in cable TV, genre specific print, digital billboards.

**PRODUCT PLACEMENT:** Full integration of brands and products, hard-coded into games by the developer. Comparable to product placement in films & television.

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# In-Game: Product Placement, Branded Games



# AdverGames

Bespoke mini-games created around a brand or product (usually free to play)



Comparable to traditional marketing  
loyalty programs, experiential and  
guerrilla\* marketing

\* Ambient, Ambush, Stealth, Viral and Street Marketing

# Don't Lose Sight of State Consumer Protection Laws



# Trademark Infringement: A Difficult Road



# ENDORSEMENTS & TESTIMONIALS

A verbal or visual communication that consumers, acting reasonably, would be likely to understand to be expressing the opinions, beliefs, findings, or experiences of someone other than the sponsoring advertiser

Note: The FTC and Courts now use the terms “endorsement” and “testimonial” virtually interchangeably.

# Endorsements: What You Need to Know: Part I



Endorsements are claims!

Advertisers are liable for false or unsubstantiated statements  
made through endorsements

Advertisers are liable for failing to reveal material connections to endorsers

Endorsements must reflect the honest opinions, findings, beliefs or experience of  
the endorser who may also be liable for false or unsubstantiated statements

If a blogger portrays her or himself as an expert or having unique qualifications to  
make laudatory statements about the advertiser's product or service, blogger may  
have independent responsibility

The FTC defines an expert as an individual, group, or institution possessing, as a  
result of experience, study, or training, knowledge of a particular subject, which  
knowledge is superior to what ordinary individuals generally acquire

A consumer becomes an 'endorser', when – viewed objectively – the consumer is  
being sponsored by the marketer. If the speaker is acting solely independently, there's  
no endorsement. But if the speaker is acting on behalf of an advertiser as part of an  
overall marketing campaign that will make the consumer an endorser.

# Endorsements: What You Need to Know: Part II



Endorser must be an actual user throughout.

Accurate depiction, typical of consumer's experience.

May not contain representations or statements that could not be substantiated if made by advertiser.

Individual must actually use product/service.

Previously, experts and celebrities were treated the same way. Payments did not generally trigger disclosure requirements.

Celebrities can be paid, and no disclosures are required where consumers would normally expect a celebrity endorser to be paid (talk shows, public appearances), but if a celebrity has a relationship with the sponsor or compensation is tied to performance, disclosure is required (and all the other rules still apply).

Experts can now be paid for endorsements, but they may have independent liability.

If payment to an expert is related to success or is not a flat fee, disclosure of compensation relationship may be required; and

If there is some other relationship or material connection, that must be disclosed.

Consumers can't be paid, coerced or influenced to provide an endorsement . . . So obtain their endorsement before informing them of potential use in advertising.

# Rights of Publicity – Rights of Privacy

The right of publicity refers to the right to control use of your name, image and/or likeness for commercial purposes.

**Celebrities** have a right of publicity: If a person is recognizable or one can identify distinctive characteristics or trademarks of the individual – apparel, voice, caricature, silhouette - get a release. Even using a quote from a celebrity can run afoul of the right of publicity if the quote implies an endorsement. Under many state laws, the right survives and can be protected **after death**.

**Everyone** has a right of privacy: The use of a **living individual's** name, likeness, photograph, voice, or indicia of identity for purposes of advertising or trade is prohibited without the person's written consent.

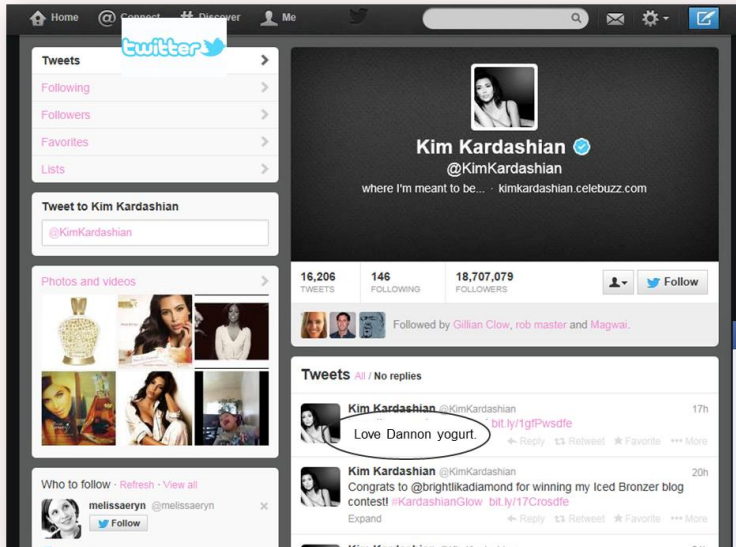
Publicity became a property right, rather than personal right [In *Factors v. Pro Arts*, 597 F.2d 215 (2d Cir. 1978), regarding an Elvis Presley poster, confirmed publicity was a property right, surviving the death of the celebrity].



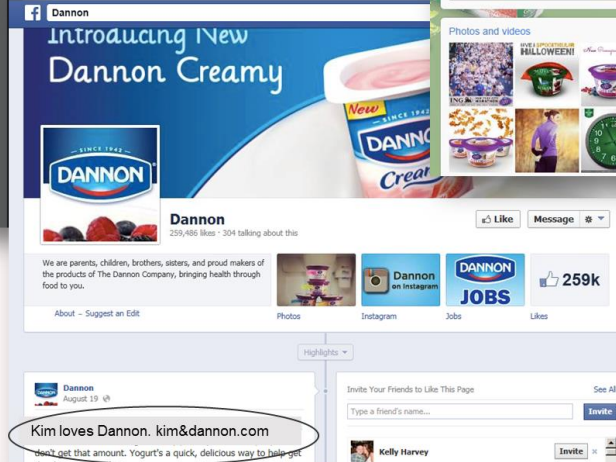
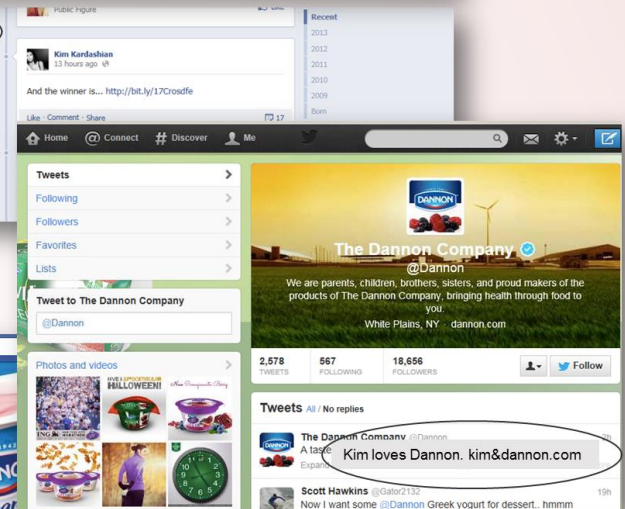
# Stealth Endorsements



facebook.



I love Dannon



Kim loves Dannon. kim&dannon.com

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# Celebrity Endorsements: The Good, the Bad & the Ugly



# A Word About Contracts & Intellectual Property

When dealing with celebrity endorsements online, mobile and on social media, contractual issues and intellectual property rights are not identical to those you may be used to in traditional print, radio and television advertising.

When dealing with celebrities, athletes or non-consumers, \* consider whether use of that individual in commercial advertising is covered by the SAG/AFTRA Commercials Contract. The producer and/or agency also must be a signatory. (and remember Global Rule One)



\* You would be surprised at how many individuals who aren't actors are actually SAG members

# UNREAL ADVERTISING

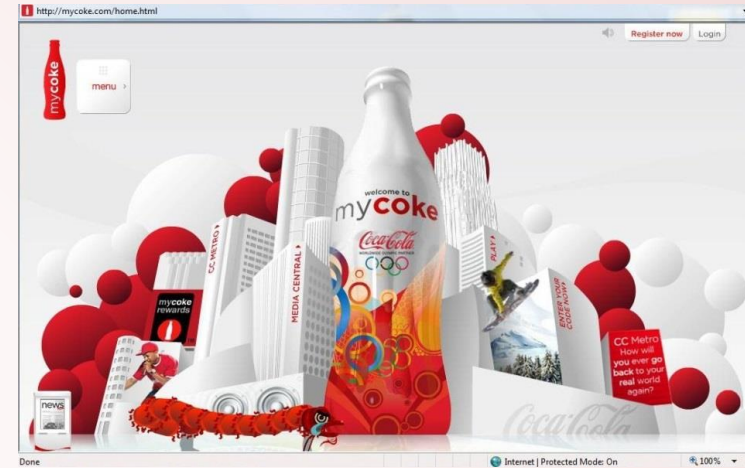
## Advertising in Virtual Worlds and Augmented Reality



# Advertising in Virtual Worlds



Barbie :  
Proprietary  
Virtual  
World



Coca-Cola : MyCoke” Web World

Johnson & Johnson: Splenda Island  
In Second Life



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H&R Block: A virtual “office” in Second Life

# Augmented Reality Creates Advertising Opportunity

Lonely Planet mobile city guide apps overlay place-of-interest information on pictures seen through travelers' cell phone cameras.



“We got three million downloads in 24 hours across the apps we gave for free, and the halo effect in to the paid apps was absolutely phenomenal—our paid downloads went through the roof.” Lonely Planet



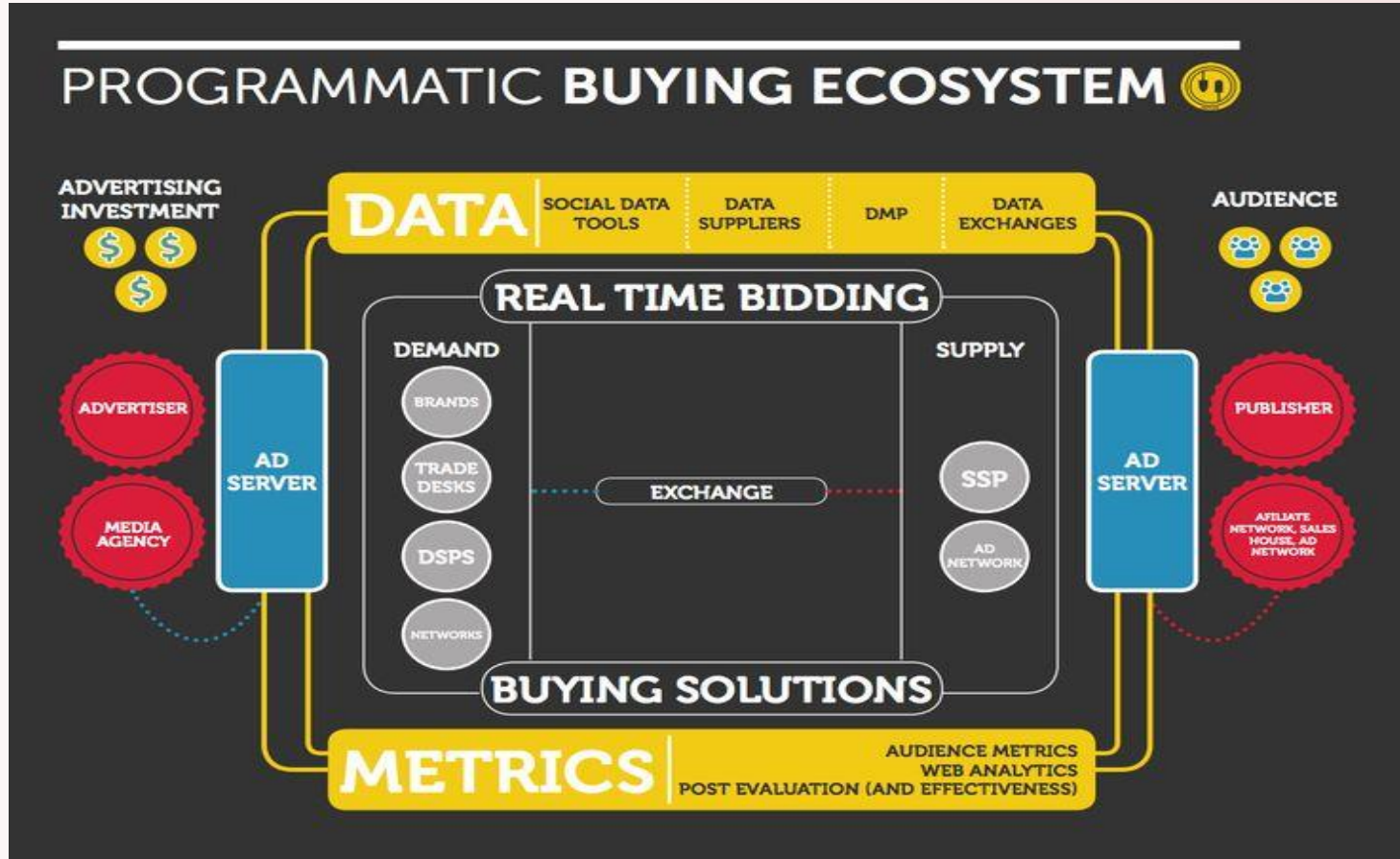
# PROGRAMMATIC BUYING

Programmatic media buying, marketing and advertising is the mathematical, calculable, algorithmic purchase and sale of advertising space in real time.

Software automates buying, context, placement and optimization of the inventory of advertising space using a bidding system, also in real time.

Automating the advertising and media buying process allows the process to be accomplished and adjusted in real time, without reliance on individuals, judgments, human price negotiation or manual insertion.

# Programmatic Buying: Rise of the Machines

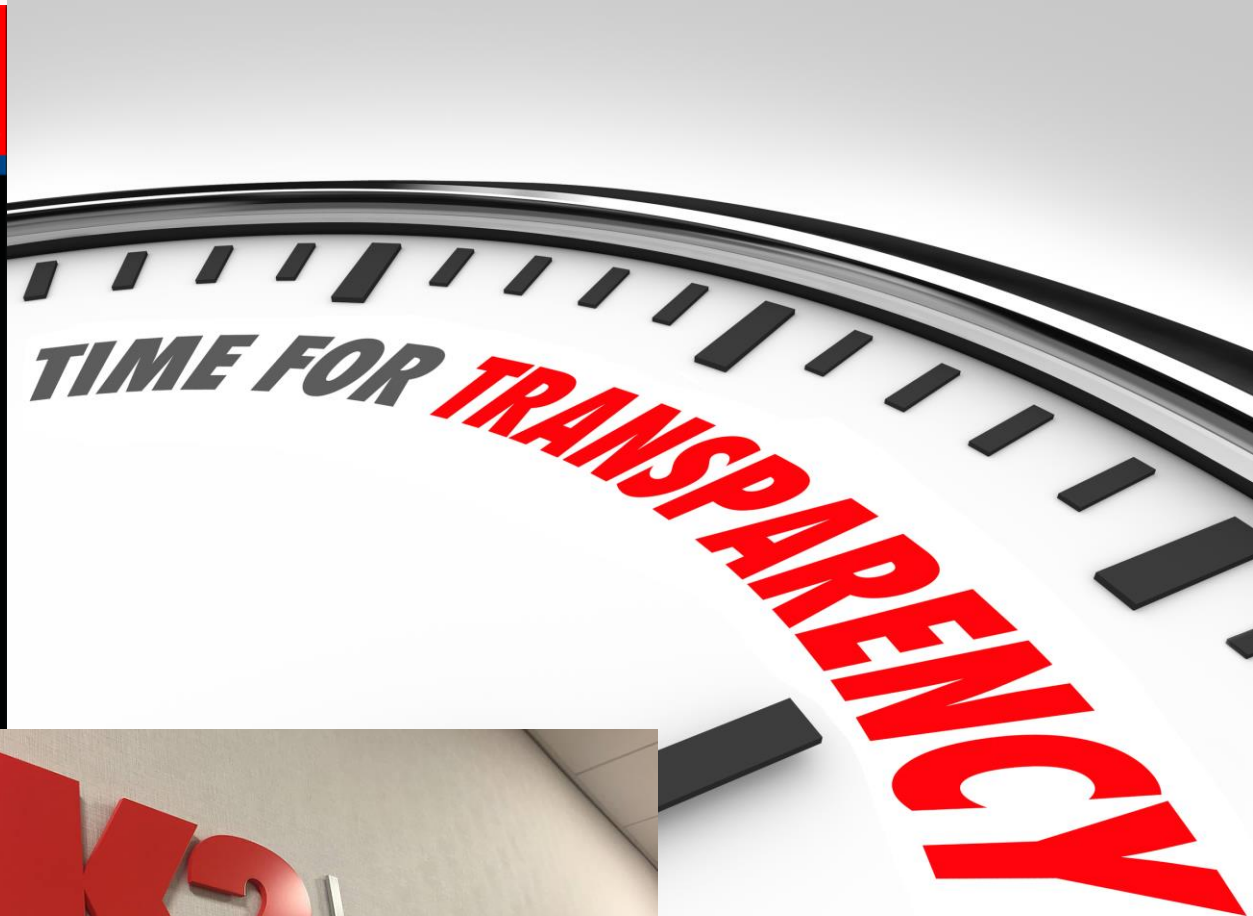


Programmatic media buying allows a brand to tailor an advertisement to the right person, at the right time in the right context – using demographic data and insight (collected, licensed or purchased) – to their target audience. It is more precise, more personalized – both the message and the medium – resulting in more effective marketing campaigns.



# ADVERTISER – AGENCY RELATIONSHIPS

Brave New World of Industry Click (Fraud), (Mis)Trust and Transparency?



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