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DIGITAL ADVERTISING PLATFORMS STRUGGLE TO KEEP PACE WITH GROWING ACCEPTANCE OF MARIJUANA

by Richard S. Eisert

Marijuana legalization is heating up across the country.

As of this month, 33 states permit marijuana use for medicinal or recreational purposes, and an additional three states have decriminalized marijuana use. More states continue to eye potential legalization, with New York, New Jersey and Connecticut all currently debating expanding decriminalization beyond just medicinal use.

And, on the federal level, the 2018 Farm Bill removed “industrial hemp” from Schedule I of the Controlled Substances Act, essentially decriminalizing the use of hemp-derived cannabidiol (CBD).

Yet, while the legalization trend is undeniable and the cannabis market continues to grow, businesses are finding it hard to market their products online, due in part to the reluctance of publishers and networks to accept or run advertising for cannabis and CBD products.

There are a number of reasons for their hesitation. One is the continuing conflict between state and federal law regarding marijuana. Marijuana remains a Schedule I drug under the Controlled Substances Act. That means that, as a legal matter, the federal government could prosecute cannabis businesses or users even if they are fully compliant with applicable state laws. In turn, parties that knowingly “assist” in such illegal activity could be liable for “aiding and abetting” a crime (although the Joyce Amendment has effectively put in place an agreement that the federal government will not prosecute medicinal use for the time being).

Due to this legal gray area, publishers and networks have been slow to change their advertising policies. For example, Google’s advertising policies specifically prohibit “ads for substances that alter mental state for the purpose of recreation or otherwise induce ‘highs.’” Facebook’s policies state that “ads must not promote the sale or use of illegal, prescription or recreational drugs.”

Whether these policies would allow for the advertising of hemp-based CBD products is unclear, but they seem to be intentionally broad in scope.

By some calculations, Google and Facebook together account for almost two-thirds of online advertising spend. The inability to advertise on those platforms undoubtedly limits the ability of cannabis businesses to reach a wide market.

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Still, some advertisers are finding ways to circumvent this issue. For example, many cannabis brands are now utilizing online influencers and native advertising to promote their products. One influencer analytics company has observed double-digit increases in influencer marketing for cannabis businesses in the last year alone.

Advertisers and networks may also begin to take advantage of geotargeting to avoid the maze of conflicting state laws. While geotargeting is not 100% accurate or reliable, it can help advertisers obtain the benefit of online marketing in specific locations where marijuana products are legal.

Certain individual publishers are beginning to adapt their policies to reflect changes in the law. In response to the 2018 Farm Bill, Meredith Corp. said it would now accept advertising for industrial hemp-based products on its sites. Also, an internal Facebook presentation leaked earlier this year indicates that Facebook may reconsider allowing marijuana advertising in certain regions where it is legal.

And, among smaller publishers, there can be considerably more flexibility. Indeed, there are already several ad networks dedicated to aggregating “cannabis-friendly” inventory on those websites.

However, further adoption or acceptance of cannabis advertising will continue to be stymied as long as the conflict between state and federal laws persists. No one expects legalization of recreational marijuana use on the federal level anytime soon – but Congress could still help clear up uncertainty by passing the STATES Act, which would codify the Joyce Amendment. The STATES Act would offer protection to those engaged in medical marijuana transactions that are legal in their state. Without the fear of enforcement by the federal government, networks and publishers could adapt their policies to address state laws.

However, without action at the federal level on recreational marijuana, we will likely be dealing with a conflicting patchwork of state laws for the foreseeable future. Each state is entitled to address marijuana advertising regulations in its own way, and as of now there is no state leading the charge in developing a standard regulatory framework.

For that reason, digital platforms and networks will need to figure out a way to create policies that comply with multiple conflicting state regulatory guidelines – which may prove difficult for many. Unless geotargeting is more widely embraced, the strictest advertising regulations will likely be adopted by most publishers.

Changes to marijuana laws reflect shifting public perceptions on cannabis use. Recent polls show that most American voters favor legalization. The trend of states legalizing marijuana is expected to continue, which will only lead to further growth in the cannabis industry and a turning point for cannabis advertising on digital platforms. Eventually, the prospect of substantial advertising dollars will push one or more of the major networks or platforms to make a change.

The questions then become: How will they navigate the conflicting laws? Will geotargeting be more widely utilized? And, to what extent will state or federal regulators oversee and enforce the laws?

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