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BLOCKCHAIN IS HERE, BUT LEGAL AND PRACTICAL ISSUES ABOUND

by Vejay G. Lalla

Blockchain technology took off in 2017 across a wide array of industries and may start to more significantly impact digital advertising this year.

Blockchain is fundamentally a decentralized, immutable and mutually verifiable digital ledger, with inherent attributes of transparency, security and trustworthiness. It is therefore no surprise that some say blockchain has the potential to address many of the digital ad industry's current concerns, including bot traffic, viewability and brand safety.

But despite blockchain's potential, there are hurdles that must be resolved for blockchain to impact the digital advertising industry. Some hurdles could potentially block effective implementation or wind up being decided by regulators or the courts.

PRACTICAL CONSIDERATIONS

A blockchain network requires a consensus mechanism to allow relevant parties to verify that transactions are correct.

Mutual verification increases the validity and trustworthiness of transactions. And while no one will deny there is value in ensuring an ad buy is "verified" – that is, viewed by a real person and not adjacent to harmful content – it is unclear what "verification" would actually look like across the digital ad ecosystem and whether parties can reach a consensus.

LEGAL CONCERNS

There are also certain legal implications of blockchain, including data privacy and confidentiality concerns. Portions of the information stored in the blockchain over time may be subject to data privacy laws in jurisdictions that are not always consistent in their laws or application.

For example, in the US there is no federal privacy law, so the transactions may be governed by state regulations and foreign regulations, such as the European Union's soon-to-be-implemented General Data Protection Regulation. Data security and confidentiality obligations are also implicated as parties will have to consider how to implement blockchain without disclosing confidential information or even trade secrets or methods.

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Although these issues will need to be reconciled, the decentralization aspect of blockchain should also be viewed positively from a privacy standpoint because there may be less risk of a central server attack on data that could compromise companies or consumers at a large scale.

There are also a variety of intellectual property concerns. The parties will need to consider who actually owns the information or data in the blockchain. If all relevant parties can view and independently verify the history of transactions in the chain, how do they contractually define and police each party's respective rights to use, repurpose and distribute the underlying data?

And what if data contained in the blockchain infringes on third-party rights? The ledger's immutability means that the data cannot be scrubbed or removed, obviating potential remedies while also increasing the risk of a potential claim between the parties or with third parties.

This further raises the issue of jurisdiction as there may be more than one location or country where the transaction takes place. Unless these issues are very clearly agreed upon via smart contract or offline agreement, courts may have to address what laws apply in a dispute, and parties will have to consider what exposure they have to legal compliance in various jurisdictions.

As parties enter the digital ad space with blockchain solutions, patent issues will also come up, given that blockchain applications are on the rise at the patent office. The risk of patent claims may discourage parties from making the innovations necessary to fully adapt this technology to the digital ad industry, and there is no telling whether patent trolls may make this their next revenue focus.

While there remain many uncertainties with blockchain, two things remain clear: It does not appear to be losing traction as a technology that will disrupt the digital advertising and other industries, and companies, courts and regulators must catch up quickly. Blockchain will be a part of the solution – but not the entire solution – to the issues marketers grapple with today. Marketers should tread carefully and stay abreast of blockchain's business and legal implications.

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