



Retail Reconsidered

#Ad

**KL Stores: A case study series
exploring innovation in retail**

Retail reconsidered

Part 4: #Ad

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When you spend money to market your business you want to make sure that it is money well spent. In the February 2020 CMO Survey marketing budgets were expected to grow by 7.6% over the next year with the marketing budget expecting to account for 11.3% of a company's budget. The survey also shows that growth in digital marketing is outpacing growth in traditional marketing spend.

With in-store shopping down, retailers are looking at how to leverage their online presence and the importance of digital marketing in driving sales. There are a variety of ways retailers use their marketing budgets to reach customers and potential customers online, including through paid search, paid social and e-commerce adverts. Each of these has their own pros and cons and the return on investment can vary. Having a marketing team who really understands how to harness the power of digital marketing is important and, according to the CMO Survey, the retail industry is the industry spending the biggest share of its marketing budget on training and development currently.

In this article, we return to our KL Stores case study and a meeting between Andrew (the CEO) and Gemma (the Chief Marketing Officer) to discuss what new ways KL Stores could be spending its marketing budget.

And back to the meeting room...

Andrew – Now that our Chief Creative Officer has convinced me it's time to set up a company Instagram account, I think it's time we did more online. Can you tell me more about the options for digital advertising?

Gemma - Digital advertising is simply marketing that exists online and includes using channels such as email, social media, a company's website or search engines. One of the benefits of digital marketing is that it is easier to track the success of a marketing campaign, for example, tools such as Google Analytics allow you to see what is and isn't working which means it is easier to manage the marketing budget. Digital marketing also creates more user engagement, it is easier for customers to interact with adverts by liking or sharing them on social media, for example, which helps the advert to reach a wider audience. It is also easier to keep digital advertising up to date, for example it's much easier (and cheaper) to post pictures of new products to a social media page than to reprint and distribute a new flyer when new product lines are added. This all helps with developing a brand and hopefully creates more potential customers for KL Stores.

Andrew – I've heard of a concept of "programmatic advertising", what's that and how does it change the way we currently think about placing adverts?

Gemma - Definitely, we can use data to help us target our advertisements better. We may be able to create target audiences, groups of people with characteristics that we know would be receptive to our adverts, and then when we are bidding in the online auction for space to display our adverts we can only bid on or pay more for users that fall within our target audience to view our adverts. There are lots of ways to create

target audiences, for example we can use data collected through loyalty programmes that we run or through the use of cookies. We must make sure we have the right cookie consents in place though if we're using cookies and may need to update our cookie notice. Target audiences could be made of groups of people that we know are our customers or groups of people that have characteristics similar to our customers. We always need to be mindful of our GDPR obligations and make sure that we are using any personal data we might have collected lawfully. We should also keep in mind that the whole AdTech sector is under scrutiny by the UK data protection authority.

In 2019 the UK data protection authority (the ICO) published a Real Time Bidding and Adtech Update Report. Following a period of industry engagement, the regulator found many of the practices to be disproportionate, intrusive and unfair making them in contravention of European data protection rules. Their specific concerns include:

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| 1. Poor understanding of data protection rules (e.g. the use of legitimate interests for cookie placement) | 5. Poor compliance with DPIA requirements leading to unmitigated risks |
| 2. Insufficient consent collection for the data sharing, 'cookie' technologies and special category data | 6. Disproportionate data sharing , and use of data profiles |
| 3. Poorly established legitimate interests and associated safeguards | 7. An excessive use of personal data |
| 4. Invisible processing and lack of transparency | 8. Overreliance on contractual limitations |
| | 9. No guarantee for individual rights and the safeguarding of their personal data |

At the time the ICO was clear, real time bidding was an industry problem, and it was for industry to come up with a solution if it wanted to avoid external sanctions from regulators. Following the publication of the report, the ICO engaged in a six month period of engagement and additional fact finding, working with industry bodies attempting to come up with solutions to the regulators concerns.

The AdTech industry had been engaging with the ICO but the investigation has been paused as a result of the COVID-19 pandemic but the ICO did make a number of interim observations that were particularly critical of how personal data is being processed across the industry.

Andrew – It sometimes feels like my phone is listening to me when I get such tailored adverts and I'd like some of our marketing efforts to be a bit more subtle. Can we get bloggers and influencers who we know have a strong following to write really positive reviews for our products and post it on their pages?

Gemma - If we have control over the content and we've made payment to the blogger or influencer then the post becomes an advertorial and is subject to the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (the CAP Code). That payment doesn't have to take the form of cash but might be the gift of a product or even just if we loan the product for them to test.

This means that we are responsible for compliance with the CAP Code and the post will need to make it clear that it is a marketing communication. The advertisement must not materially mislead customers and so we will need to make sure that any positive reviews don't overstate the benefits associated with our products.

We should also keep in mind that influencer marketing is likely to be subject to consumer protection law which makes it illegal to use editorial content to promote a product where we've paid for the promotion without making it clear in the content that this is marketing. We may also break the law by falsely claiming or giving the impression that an individual is acting outside of their business purposes or falsely representing themselves as a consumer.

Andrew – Ok, so what about if they just post pictures of themselves using the products but we don't tell them what to write?

Gemma- If we give a blogger or an influencer a product then any post they make which promotes or endorses the product becomes subject to consumer protection law, even if we don't have control over the content of the post. We should make sure that any bloggers or influencers we provide products to use a really clear label in their posts (such as “#Ad”) to make it clear that the post is an advert.

Who enforces the rules around influencer marketing and what are the consequences of getting this wrong?

The Advertising Standards Authority (the ASA), the UK's advertising regulator enforces the CAP Code and can take action when a brand paid someone and has some form of editorial control over the content (including just final approval). As mentioned above, gifting or loaning a product can amount to payment and so this is a low threshold. Whether or not a brand has control will usually depend on the agreement between the brand and the blogger or influencer. If the blogger or influencer is completely free to do and say whatever they want (including not to make any posts) then there is unlikely to be editorial 'control'. If you breach the CAP Code the ASA may make a ruling and one of the most persuasive sanctions the ASA can impose is bad publicity, a brand's reputation can be badly damaged if it is seen to be ignoring the rules. The ASA also has the option to refer brands to Trading Standards or Ofcom.

Remember that, even where there is no control over the content of the post, the Competition Markets Authority (the CMA) can still enforce competition and consumer law and has the power to carry out investigations into entire markets. Recent breaches have resulted in CMA investigations and contractual commitments from the bloggers and influencers involved to change their ways, but further non-compliance could result in litigation, a CMA fine or even a prison sentence.

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