

Agencies held liable for client ads, promos



By Bart
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I can't tell you how many times I've heard nonagency clients tell me that "the agency has taken care of everything," or agency clients say, "That's the client's responsibility"

when it comes to developing promotions, sweepstakes or advertising campaigns. This includes such issues as clearing promotions, sweepstakes, trademarks, advertising copy, packaging copy, Internet stuff—you name it. True, an agency or client often has had a promotion or campaign properly reviewed, although it is not always the case. The fact is, we are all in this together. Agencies and their clients need to work in concert (or each do their own work) and make sure they communi-

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cate about these important legal issues because we are all accountable.

Clients, of course, are usually primarily liable in these types of situations. Liability issues can also be handled in an agency/client agreement. Agencies, however, do not always realize that they could be on the hook for their client's violations of the law when it comes to such issues as deceptive advertising or trademark and copyright infringement on illegal promo-

Advertising claims

An ad agency can be held liable for deceptive advertising that it creates for a client. As long as an agency actively participated in the deception, and knew or had reason to know that the ad was false or deceptive, liability will follow. Courts have found that the more an agency participates in framing the representations made in an advertisement, the more likely that it is responsible or liable. The degree of participation is measured by weighing an agency's role in writing and editing the text of the ad, creating the audiovisual material, researching and analyzing public opinions and attitudes, and selecting the appropriate audience for the advertising message. These factors are weighed to conclude if the advertising company knew or should have known of the advertisement's deceptive nature.

Most interesting is that an agency cannot get out of its agency liability just because its clients have the final say and control over an advertisement. In one famous example, an advertising company was held to be an agent and liable for a deceptive ad it created that depicted clear fumes resulting from a car's exhaust when a new environmentally friendly gasoline was used, compared with a car's dirty exhaust fumes, which used normal gasoline. This advertisement was deceptive because it did not state that clear fumes are not necessarily less toxic than gray or black fumes, and because it did not disclose that the car that used normal gasoline emitting the dark fumes had an engine that produced more toxicity in its fumes than the other engine. The agency was found to be liable because it knew of these deceptions and was involved in the advertisement from the beginning in its writing, in its development, in meetings during which the ad was evaluated and decisions were made, and in its filming.

In cases in which medical or other complicated or technical data is involved, the standard of knowledge for an agency decreases somewhat because an agency can rely on the expertise of its client. Of course, even



this exception could have exceptions, for example, if it's pretty clear that the facts cannot be trusted. In the current video news release (VNR) debate regarding VNRs that look too much like real news, for example, it is theoretically possible that an agency might be independently liable for creating a deceptive VNR.

Intellectual property infringement

An agency can be held liable for copyright or trademark infringement, if the agency has knowledge of the infringement or contributed to it in some way. For example, a few years ago, an advertising agency was found liable for copyright infringement when 10 words from a competitor's television advertisement found its way into the "original" commercial it had "created." Also, an agency can be liable if it knows of the infringement but takes no action to stop it. Even willful blindness or suspecting something is wrong and deliberately not investigating could be an issue. It is unclear whether relying on a client to an unreasonable degree could be considered willful blindness.

Agencies can also be held vicariously liable for copyright infringement if the agency retains a supervisory role in developing the commercial. One agency was found liable when it failed to include proper copyright management information with artwork that was used in the commercial.

The same principles would equally apply to a situation of trademark infringement but not as many cases have been brought against agencies in these situations.

Promotions/sweepstakes

While it is rare for an agency to be charged with operating an illegal promotion, such as lottery gambling, it is possible. The definitions under some state laws include anyone who aids or assists in gaming, gambling or lotteries. Also, state promotion and sweepstakes laws speak to the operator of a sweepstakes or a person who engages in the promotion, both of which could be interpreted to include the agency as well as the client. ■

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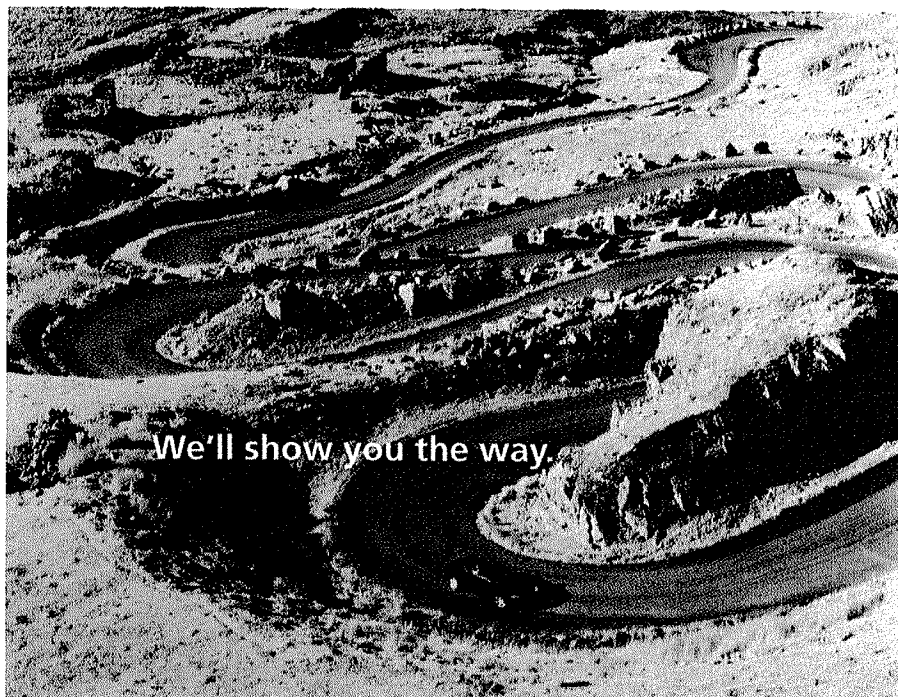
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