Monday Memo

A commentary on liability for payment of advertising time by Thomas J. Hogan and George Stella, Communications Credit & Recovery Corporation, Garden City, New York.

Updating the basic rules of advertiser/agency liability

"Some other dude did it," or "soddi" as it is playfully referred to by the Criminal Defense Bar, is a means to obtain a dismissal of a crime with which a client has been charged. What is simply being said is that someone else is responsible for the act, but not the client.

An analogy is the situation that has been known to arise in the media in the event of non-payment for an advertising schedule, although here the statement might be more appropriately changed to "I ordered it, but the other dude is liable for it." Fortunately for the media, the finger pointing that occurs on delinquent accounts represents an insignificant percentage of overall advertising billed. However, while the percentages are insignificant the cumulative dollars are not. In this article we will again examine and attempt to update some guidelines concerning liability issues for application to situations that confront media credit personnel daily.

To begin, it is helpful to review principal-agent law: A principal may give its authorization to an agent to act on its behalf. That agent has the power to bind the principal for obligations made to third parties, as long as it acts within the scope of its authority. In binding the principal, the agent is not liable for the obligation.

Having restated the common law principle, it must be noted that its application to everyday situations that arise in the media requires an examination of the factual patterns that exist, in order to answer the question of where liability rests.

If an advertiser is exercising complete discretionary control over the placement of advertising, with the agency producing no creative input and simply making buys as directed by its principal-client, then in the event of non-payment of the advertising schedule, absent any acknowledgement of liability by the agency, liability rests with the advertiser directly.

While this is a simple description, it hardly illustrates events typical of the routine media buy. More often, the agency is supplying creative input and is making specific recommendations as to how the advertiser can best reach its target market. As the agency increases its level and extent of judgment and control, it takes on a new role, that of the independent contractor. In this role, the agency, while still acting on behalf of the client advertiser, is performing its function in a discretionary manner.

In assuming the role of independent contractor, the advertising agency is taking on a significant amount of responsibility in the advertising campaign, and lacking any other clearly stated definition of its role, a commensurate liability to media for advertising buys made, even though those buys are ultimately made on behalf of a client.

The dilemma faced by the media credit grantor is to determine what scenario, or degree thereof, applies to the potential order with which it has been

presented. But how can this question be answered?

Asking the credit department of the potential media credit grantor to determine what roles are being played by advertiser and agency is at best a difficult task. This is particularly so since they are not privy to the contractual relationship between the two. Nonetheless, clarification of this issue is a must in the event of a future delinquency.

The key, of course, is defining to whom credit is being extended. For years, the industry standard had been sole liability for payment by the advertising agency. With the financial failure of certain substantial ad agencies, an effort was made by the media to extend the liability point beyond the agency to include the advertiser as well. After all, the theory went, it is the advertiser that is really receiving the benefit of this advertising, and they should also be liable. (Essentially, this is a restatement of the "unjust enrichment" concept.)

The "dual liability" theory, which has a solid basis in substantive legal precedent, has encountered numerous problems in practical application to the media. *CBS vs. Stokely Van Camp*, in which the Federal District Court of New York ruled that, lacking an overriding contractual statement of liability, the advertiser did not have a direct obligation to the media, makes clear the court's unwillingness to find liability on the part of the advertiser when the facts indicate that the agency was not serving as an agent in the common law sense. The assumption that the agency is automatically in a position to bind the advertiser, or that the advertiser is bound after being notified of an agreement between station/publisher and agency but without formal ratification of that agreement, is erroneous.

To avoid uncertainty, it becomes incumbent upon the media to make clear its position in dealing with an agency and, through that agency, an advertiser. In the first instance, agency recognition forms should be identified as credit forms, and a statement for the position with respect to agency liability should be made clear, and should be restated on any order acknowledgments or confirmations. Since this is a practice already implemented by many media credit grantors, it is the next step that bears more extensive discussion.

In order to establish a link in support of a claim of liability on the part of the advertiser, we recommend the following:

- Have the advertiser pre-sign all orders for time or space.
- If the order is signed by the agency only, send a letter to the advertiser before the schedule runs or the ad is published acknowledging receipt of the order, with a copy requesting the advertiser to sign the dual liability provision, indicating its consent and acknowledging liability.
- A letter of continuing guarantee executed by the advertiser, where there is a long-term relationship with frequent buys to be made; or
- As a last resort, a more general letter might be requested form the advertiser, stating that the ad agency is its agent for placement of all advertising.

The means to avoid a cloud of uncertainty or strengthen a potentially week position should a default in payment occur is clearly contained in the

written form. If it is not forthcoming with the initial order, the further discussion should be considered as part of the overall credit approval process.

Of course, whether or not a station or publisher may choose to insist upon any acknowledgment from an advertiser will properly depend upon its relationship with the agency involved as well as its reading of the agency's financial position. Should media believe that the circumstances do warrant such action, they by obtaining one of the recommended confirmations the creditor will have solidified its position for future use should its evaluation of a potential payment problem with the agency become a reality.