

## **Loss Prevention for Ad Agencies:**

### **Tips and Advice on How to Keep You and Your Client out of Hot Water**

#### Consents and Releases:

- To avoid claims of misappropriation, obtain necessary consents and releases from any individual whose name or likeness is to appear in your ads.
- Such releases should be in writing and signed and dated by the individual appearing, with the original copy being retained by the agency.
- Be sure that your releases are written broadly and specifically enough to cover all contemplated uses and distributions of the material.
- Be careful of making comments to the individual providing consent that can be later construed to contradict and limit the scope of the intended uses and distributions.
- Minors and incapacitated individuals lack the ability under the law to provide binding consent, so obtain releases from their parents or guardians.
- Remember that a release can also be challenged if obtained from someone under the influence of alcohol or drugs or in some other temporarily impaired state.

#### Celebrities and Look-a-likes:

- Celebrities are very protective of their rights of publicity, so exercise special care when including them in advertising to be sure that all necessary consents and releases have been obtained.
- At death, rights to publicity pass to one's estate and those of some celebrities, such as Elvis Presley's, have been especially vigilant in enforcing their rights. When using the name, likeness or persona of decedents, be sure to obtain permission from their estates.
- Uses of celebrity look-a-likes in advertising have generated substantial misappropriation claims, so be sure clear such advertising legal counsel.
- If a celebrity declines to perform for an ad, avoid copying the celebrity's style of performance as this practice has led to severe claims of misappropriation.

#### Using Creative Material of Others:

- To avoid intellectual property claims, be sure that all necessary clearances and licenses have been obtained when using artwork, photos, film footage, music, writings and other materials created by those outside your agency.
- When using works of others that display a copyright notice, obtain proper permission.
- Permission should also be obtained on outside works that do not display a notice, as copyright protection attaches at the time the work is created and registration is not a prerequisite.
- Avoid over reliance on "fair use" when using copyrighted material. This doctrine allows uses of small portions of another's work without permission for

criticism, parody, editorial or educational purposes, but this defense is applied more narrowly by courts than commonly thought. When in doubt, consult legal counsel.

- Remember that copyrights in works created by independent contractors belong to them, not to the ad agency or company that commissioned the work, absent a specific written agreement to the contrary.
- Keep in mind that non traditional works, such as distinctive furniture or creative arrangements of every day items can be copyrighted as sculptures or other works of art.
- Watch out for photographs that show artwork or other copyrightable material as permissions from multiple rights owners may be required.
- Music often requires several licenses for the permissible use of a single work. Be sure you have all necessary licenses.
- Be wary of trademarks. Use of distinctive names or logos may well require permission from the owner.

#### Political Ads:

- During election season, be careful of advertisements that you develop for political candidates or interest groups, as unflattering and false statements of fact about opponents can lead to libel and slander claims.
- Remember that as the ad agency involved, you can be named as a co-defendant for producing such ads.
- If an allegation appears damaging, check out the facts. Public records are the best source of support as they don't change their stories.

#### Product Disparagement:

- False and disparaging statements of fact about a competing product can lead to claims for product disparagement.
- These claims can be especially severe as loss of sales or market share can lead to substantial damage awards.
- This exposure is especially high in comparative advertising.
- Look for documentation that supports disparaging statements about a competing product.

#### Intrusive Advertising Techniques:

- Advertising techniques that employ the Internet or new cyber technology in gathering information from or disseminating information to consumers may expose your agency to claims of invasion privacy.
- Such advertising activities done on a mass basis have lead to severe class action claims.
- Be aware of state and federal statutes designed to protect consumers from unwanted commercial intrusions, such as anti-spam laws and the Telephone Consumer Protection Act.
- Before using a new advertising technique consult legal counsel knowledgeable in such laws.

## Other Loss Prevention Basics:

- Be sure to have written contracts with your agency's clients that specify the services that you are to provide.
- Such agreements should also contain cross indemnity provisions requiring the agency and client to defend and hold harmless one another for claims arising from the material they develop and contribute to the ad.
- Written agreements containing indemnity provisions should also be used with photo houses, model agencies, independent contractors and others who supply material or talent for ads.
- Any indemnity agreement should be backed by insurance. When in doubt, request evidence of insurance.
- Maintain a document retention system for releases, clearances, licenses, contracts and other documents related to the development of advertising. Failure to find such materials when a claim comes up can be more than embarrassing.
- Be careful of emails, memorandums and other internal documents written during the development process. Statements about copying the style of a popular person or item have become damaging evidence in lawsuits against ad agencies.
- Develop a relationship with an attorney knowledgeable in advertising law who can be consulted regularly during the development process.
- Conduct periodic loss prevention training on advertising liability issues for your staff in order to create and maintain awareness this area.

## In the Event of a Claim ...

- Notify your media liability insurer immediately of any litigation, demand letters, or threatened claims.
- Consult your insurer before retaining counsel to respond to such complaints
- Obtain proper authorization from your insurer before making settlement offers or entering into settlement agreements, especially if they will involve the policy.
- Remember there is no charge for keeping your insurer advised and consulted on claims issues and that failure to do so may limit or prejudice the coverage available.
- Seek to partner with your insurer to work toward a favorable claim resolution. Remember that the claimant is the adversary.