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He's Been in Starkfield Too Many Winters

By: Jim Astrachan

A friend of mine runs an advertising agency with offices in New Jersey and NYC. He has about 60 employees, owns all the stock and is involved in every decision of consequence. In fact, very little happens that he does not approve, and any employee who bucks this unwritten policy doesn't last long.

For a small agency he has some really good clients and his people work on some very important and interesting matters. Recently, we met at his Manhattan office to catch up on a few things that needed attention. I asked him what was new and he became really animated as he discussed his firm's latest project, undertaken on behalf of an international consumer company, some of whose advertising his agency creates.

It involved a producer who hired a screen writer to dramatize a fairly famous novel. I asked if this was by permission and with a license. "Not likely," my client responded. My surprise caused my client to quickly add that the screen writer had been instructed by the producer to come close, but not infringe the original work by making the screenplay a derivative work based on the original work. I wondered to myself how the writer would know the difference, but asked by friend to continue.

"Our client, the advertiser," he replied, "has been approached by a TV network to sponsor the broadcast of this dramatization. The advertiser's ads will be the only ones shown during the two hour broadcast. My agency will create ads to help promote the TV broadcast; you know, create the ads that will cause the viewers to turn on their sets but we'll do it for our client, not the network. We will also produce the ads that will be shown during the broadcast. It's a lot of work and it will earn our agency enormous fees. Enough, even, to pay your bills," he quipped.

"Look," I said brushing by his attempt at humor, "if the screen writer screws up and ends up writing an infringing dramatization that is broadcast with the sponsorship

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of your client and the ads you created, your agency could be liable for copyright infringement. There's a case decided in the mid-sixties that is right on point. DuPont, the BBDO Agency, David Suskind, the producer, and a cast of other infringing characters were all involved."

"In that case, the works that were produced were found to infringe Edith Wharton's novel Ethan Frome. Despite the finding of infringement, broadcast sponsor DuPont and its agency, BBDO, argued that the record did not support finding them guilty of copyright infringement, and frankly, there was scant authority to assist the court in deciding whether the sponsor and its ad agency should be held liable for copyright infringement inasmuch as neither wrote anything."

My friend nodded his head. "I really don't see what DuPont and BBDO did to participate in the infringing activity. DuPont merely paid money to the network to be associated with the broadcast, and BBDO created the ads that promoted DuPont and its products during the broadcast. What's wrong with that? They did nothing wrong."

"At least that was their position," I replied.

The earlier case had wonderful dicta that can be quoted to clients over and over again to illustrate just how difficult a copyright case may be to call:

> "…the court is again faced with a picture all too familiar in copyright litigation: a legal problem vexing in its difficulty, a dearth of squarely applicable precedents, a business setting so common that the dearth of precedents seems inexplicable, and an almost complete absence of guidance from the terms of the copyright act."

The question presented in the DuPont/BBDO case is under what circumstances will an ad agency, and its client, be held liable for the broadcast of an infringing work sponsored by the client when the broadcast contains ads created by the agency for the broadcast?

"Well," I told my friend, "it's a real dicey question. On one hand, the agency is doing its job; on the other hand it is benefiting from the broadcast. When the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of a copyrighted work – even if the agency is not aware that a copyrighted work in being infringed – the copyright laws will insist that liability be imposed on those who benefit from the infringement. And that can be your agency," I added.

If the agency and its advertiser have some power to supervise the activities of those persons – the writers and producers – who are on the first line of copyright infringement, and if they fail to exercise that supervising power to prevent infringement

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and if the infringement results in financial benefit to them, they should also hang for infringement alongside the writers and producers.

"So," I said, "did your advertising client have the power to review content and consent to the broadcast? Did you read the screenplay and approve it at various stages on behalf of your client? Clearly, your client was not merely an advertiser buying time on some show that ran an infringing program. The advertiser had a duty to exercise its final authority to prevent infringement, and it did not."

"And you?" I questioned. "Doesn't your agency – and you – have a financial interest in the increased sales of your client's goods that result from the ads for your client's products that you created that ran on a show whose content infringed another's copyright? Frankly, your agency, and maybe even you personally, could also be held liable because of your participation and direct financial involvement.

"Do you have an indemnification clause in your client-agency contract?" I asked. "Is your E&O insurance up to date?"

James B. Astrachan is the author of The Law of Advertising, published by Matthew Bender-Lexis/Nexis.

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