

Put copyright notice in all ads you create



Few legal decisions on ownership of ads

By JEAN MANEKE
MPA Legal Consultant



(Jean Maneke, MPA's Legal Hotline attorney, can be reached at (816) 753-9000; jmaneke@manekelaw.com.)

It is not unusual for a call to come into the hotline that relates to ownership of advertisements in the newspaper. Generally, I refrain from getting into those discussions because often they involve one member newspaper in dispute with another member newspaper, and I find myself in a "conflict of interest" situation which the disciplinary folks for the bar association look upon with disfavor.

And then we have two newspapers unhappy with the association because the hotline attorney cannot help them in their matter.

In order to shed some light on these circumstances in an impartial forum, I have done some research on the subject of copyright of advertisements and am doing this piece to set out the basic principles as I understand them.

The basic issue deals with advertisements which are created by one paper at the request of an advertiser. The advertiser pays the newspaper for the cost of the space in the paper in which the ad runs.

No additional fees are paid for the creation of the ad. No written agreement exists between the newspaper and the advertiser setting out the terms for the project, other than the newspaper's rate card and the check from the advertiser paying for the space purchased.

The problem develops when the advertiser is approached by a second newspaper about purchasing advertising and either the advertiser suggests that the second newspaper pick up the ad which ran in the first paper, or the second newspaper simply offers to do this for the advertiser. Of course, the critical matter is who owns that advertisement.

As far as can be determined, there are only two cases on this subject. Because it involves copyright law, this is an issue for the federal courts. None of the decisions involve the Eighth Circuit Court of Appeals, which covers Missouri, or the U.S. Supreme Court.

The first decision, which I think is not the binding decision, is *Canfield v. Ponchatoula Times*, a 5th Circuit decision from 1985. In it, the newspaper had a copyright notice on its paper, but not within the advertisement itself. One issue the court considered in this decision was that the paper, by failing to include a notice within the ad, failed to give notice of its ownership rights to third parties, and therefore it was available for reprinting. This case holds that a newspaper must give separate notice of copyright in such advertisements to protect them.

The second case, which I believe is probably more authoritative, is *The Brunswick Beacon, Inc., v. Schock-Hopchas Publishing Co., d/b/a/ Brunswick Free Press, et al*, a 1987 decision out of the 4th Circuit. It, too, involved an advertisement created by one paper for an advertiser that had been picked up by another newspaper. However, in this situation, the ad actually contained a copyright notice within the ad.

In this case, the lower court upheld that the newspaper, not the advertiser, held the copyright to the advertisement. The appellate court upheld the lower court decision. The court noted that in this case there was a copyright notice in the ad which did give notice that they claimed copyright to the ad.

The court also commented that "nothing suggests that Beacon's employees who prepared the advertisements were employees of the advertisers working in the scope of their employment by the advertisers." And, further, "Without doubt the advertisers told the Beacon what they wanted, but there is no suggestion that they supervised Beacon employees as they developed the advertisements or directed the manner of the work's comple-

tion.”

The court discussed the Canfield decision in connection with this decision. It noted that the presence of a copyright notice on each ad would clarify the issue of notice to the advertisers. However, it also notices that the court of appeals in the Canfield case expressly declined to pass on the ownership of the copyright.

However, in conclusion, the court held as follows: “As rewritten in 1976, the Copyright Act requires the conclusion that the copyright is owned by the newspaper publisher whose employees prepared it, unless there is a written agreement signed by it and the advertiser that the work should be considered work for hire.”

I believe that is a rock-solid holding and that this case can be seen as explaining the holding in Canfield such as to make this decision the controlling case on this subject. For that reason, I believe that the present law is such that the newspaper creating the ad owns the ad under the copyright law.

I would conclude this with two recommendations. I believe that every newspaper should include in its rate card language such as the following: All advertisements created by the Publisher are not considered a “work made for hire” and the Publisher retains the copyright to all advertisements created by the Publisher for the Advertiser. The advertisement may not be reproduced without the written permission of the Publisher. This puts the advertiser on notice that the newspaper believes it owns the advertisement being created. Every advertiser must receive a copy of this rate card in order to ensure all have notice.

The second suggestion would be to include in small print in every ad created a copyright notice for the publishing company. However, I believe that, based upon the language in the Brunswick Beacon case, the current law is clear that the newspaper which creates the ad owns the ad, for copyright purposes.