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OPINION 2012-005

REQUIREMENTS FOR PROOF OF BROADCAST ADVERTISING IN SUPPORT OF PAYMENT

This opinion represents the views of the Office of the Ulster County Comptroller at the time they were rendered, based upon facts and records as presented to this office by the persons or departments making the inquiry or contacted in order to render this opinion. This opinion may no longer represent those views if, among other things, facts provided are determined to be inaccurate, or there have been subsequent court cases or statutory amendments that bear on the issues discussed in this opinion.

INTRODUCTION

This Opinion is rendered in connection with a query as to whether to pay for broadcast advertising where the broadcaster will not notarize invoices, by which they affirm under oath that the air-time invoiced in the advertisement contract was actually fulfilled.

STATEMENT OF ISSUES

The County of Ulster Tourism Office contracts with an advertising agency to provide print and air media advertisement throughout the year. In the instant matter, our advertising contractor has contracted with WABC for the airing of certain media advertisement at certain times. Historically, broadcast media outlets have submitted with their invoices notarized statements (reflecting an oath of truthfulness made under penalty of perjury) affirming that the advertisements ran as promised at the times for which they were contracted.

Our advertising contractor has contacted the Tourism Department, indicating that it is apparently WABC's policy that no such notarized statements will be made, and that instead, that on their invoices, they "warrant" that they have reviewed the "program logs" to confirm that the spots ran as contracted.

Research by this office reveals that this "warranty" practice, as an alternative to "notarization" is, apparently, a reflection of a general trend in the industry. The trend away from notarization is a

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reflection on the change in the modern broadcast industry in which no one person is really able to truthfully “swear” an oath to the fact that ads ran at a particular time, or ran at all. We are sensitive to the realities of this situation, but feel the present warranty may not be sufficient to ensure contract fulfilment.

The issue, from our perspective, breaks down two independent paths. The first is: what is required to justify payment to our advertising contractor by virtue of our contract? The second is: whether any method of verification may be settled upon which is realistic to impose within the industry, while still passing muster in terms of our obligation to confirm we are receiving the services for which we pay. This second issue is important, since it seems that WABC is likely not the only entity with whom we may encounter this issue in the future, and, it may alter how we write our future contracts for media advertising.

AS TO PAYMENT OF THE ADVERTISING CONTRACT

A. Discussion: It is worth noting that our contract with the media consultant does not require notarization of the invoices by the broadcast entities. Our contract with the advertising contractor sets forth the advertising time to be obtained and requires the vendor (not the broadcast entity) to provide certification of their invoices. The important implication of this detail is that, in a sense, we need not concern ourselves with the representations (whether by notarization or warranty) made by the broadcast company itself, but rather, the onus is on our vendor to obtain sufficient information to certify the truth of the services rendered. If they do so, they are entitled to payment. If they do not do so, they are not entitled to payment, even if the reason they will not do so is because the broadcast company refuses to notarize its invoices. And, we note that if our own audit, should one be conducted, revealed that the time paid for was not aired, we would be entitled to refuse or recoup payment.

B. Determination: As to this particular billing issue, we must insist on certification of the accuracy of the invoices by our contractor as a pre-requisite for payment of any invoice. We therefore find that the invoices may be paid, so long as the certification is in attached to the invoice. How our vendor becomes comfortable with such certification, if at all, is a matter of their own concern and due diligence. Should the County determine that the air time certified was not in fact provided, the vendor would be accountable under the certification.

AS TO THE ISSUE OF WARRANTY OVER NOTARIZATION GENERALLY

A. Discussion: There is some merit to the notion that “notarization” of a statement under oath as to the accuracy of invoices for advertising within broadcast media is outdated and, perhaps even that it invites fraud or perjury. This is the case because in a digital programming age, there likely is not a single person, who is familiar enough with the entire broadcast day of a media outlet to verify, upon personal knowledge, that a particular advertisement ran at a certain time. Compliance with such a requirement (for those entities which still comply) probably only results in a person reviewing program logs of digitally scheduled advertising and confirming that the advertisement appears on the program log as having been aired. Since personal knowledge is what is actually required for a notarized oath to be effective, many such oaths are probably taken without personal knowledge, a problem in and of itself. Indeed, it may result in nullifying the oath entirely, meaning that, in reality, requiring notarization could be argued to result in

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something *less* valuable than a warranty. That it may also subject the oath-taker to penalties of perjury is no consolation to the payor, who only cares whether their ad was run as contracted.

Nevertheless, ABC's practice of "warranting" that the *program log* indicates the ad ran, is not only indirect proof of fulfillment at best (since it is based on review of a business record and not actual knowledge), but it provides the recipient with no real knowledge or understanding of the documentary proof upon which it is based.

Recommendation: As to whether the vendor should accept a warranty in lieu of a notarization, we suggest that warranty could be sufficient if the means by which the program log is generated is set forth, and the program log is *attached* to the invoice to reflect the basis for the warranty.

We ask that the County Attorney's office consider these issues in future amendments and contracts involving broadcast media. Since notarization may simply not be achievable in the present marketplace, and since warranty by the broadcast entities themselves is of suspect merit without supporting documentation, requiring them as part of our contract with media relations consultants may simply be inviting impasse. Our present contractual language, by which we require certification by our contractor, makes the most sense – in other words, their efforts to confirm the fulfillment of the contract must be their own. But we may want to strengthen that language to make clear that expectation. We are advised that an advertising RFP may be close at hand. This may be an opportunity. Including new language in the RFP will allow us to elicit a response from several industry vendors, and provide us insight into this commercial practice generally.

Elliott Auerbach, Comptroller

Dated: September 11, 2012