

Clients, Contractors and Associated Liability Issues in Media and Events

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Many years ago, a production facility was undertaking a rebuild and upgrade of a studio. They hired a contractor, who put in a subcontractor, who then got a subcontractor, who put in place a subcontractor, who hired a team of young freelancers to undertake the work. Unfortunately there was a serious accident involving one of the freelancers and suddenly the production facility was faced with many layers of contracts, none of which had been reviewed by a lawyer. What also became clear was that none of the subcontractors had contracts with each other that reflected the terms that were in place between the client and the contractor itself. The production facility ended up being held fully liable for the accident.

The media and events industry rely heavily on subcontractors to provide services to their clients. Whilst accidents are uncommon, properly passing liability down the chain (and back up again in some cases) remains important for all aspects of the contractual relationship. In this article, we will review those areas which should be carefully reviewed as well as looking at the possible legal ramifications of signing subcontractor agreements without checking them.

The Scenario

To assist in explaining the importance of contractual relationships in the media and events industry, let's consider the following, very normal, scenario.

A client, Acme Retail, is working with their advertising agency, The Agency. Acme Retail and The Agency have carefully reviewed their contract terms before they are signed at the highest level, each aware that they are in a day-to-day relationship that is very important to both. Acme Retail asks The Agency to develop, deliver and produce a short live musical event to promote its brand. They also want the event to be filmed so that it could be used in digital media, with the eventual goal of it becoming viral content. The Agency gives the task of delivering the event to an events company, Events R Us, who then subcontract the filming activities to production company, Film Inc. Film Inc subcontracted the post production to an edit house, Edit.Com.

Contractually, Acme Retail has an annual contract with The Agency to be their creative agent and oversee production of content. The Agency signs a short form agreement that is supplied by Events R Us which they use for all their live corporate events. Film Inc supplies a purchase order to Events R Us and there is no contract at all with Edit.Com.

What could go wrong?

Intellectual Property Ownership

In the media and events industry, focusing as it does on creativity and buzz, it is easy to forget that underpinning the creation of materials is the legal concept of copyright. In the UAE, as with most places globally, copyright vests in the person that creates the material. Additionally, in line with the Berne Convention, which underpins most copyrights systems globally, an assignment of copyright will not be valid unless it is in writing. In short, if there is no written contract, then the person that created the works still owns them.

It is easy to see in the above scenario that there might be a problem. It is common in agency contracts for the client to demand that all materials created under the contract are wholly owned by them so that they can be used in perpetuity globally and in all media. So The Agency must deliver all rights to Acme Retail. Unfortunately, as it has contracted with Events R Us on a standard form events contract and it is not common for events to be filmed, it contains no clauses regarding copyright. But as they have no contract at all with Film Inc, then we know that copyright in the film created of the event will remain with Film Inc. Acme Retail does not own the film.

But Acme Retail thinks it does. It moves the film on-line and it becomes a sensation, winning awards and acquiring 2 million views in a short time.

The music that was used at the event is still contained in the film – it was shot live and is an important part of the event. As there are no contracts, there is no clear line of responsibility about the clearance of the music. Record companies will definitely seek damages for the infringing use of their material and will likely seek them from the brand. Acme Retail received a notice regarding the infringing use of the music. It looks to The Agency as there is generally a very clear indemnity clause in the agency contract. With no clear contract noting the liability for clearing music between The Agency and Events R Us, The Agency will most likely end up paying the damages. All The Agency had to do was ensure that the indemnity contained within its contract with Acme Retail was mirrored in the subcontractor relationships. It should also, at every stage, ensure that all subcontractors under Events R Us sign a contract with a similar clause.

This not only protects itself against potential liability but ensures that Acme Retail does not receive legal notices. It also saves its reputation in the market place.

Talent

As we noted above, Events R Us provided its own basic event contract to The Agency which was signed without being reviewed. It contained the dates, the venue and a synopsis of the services and provided for payment.

Events R Us then hired two dozen dancers to perform at the event. Each performer signed a one page release about performing which, again, included terms about dates, venue and payment. So what happens when the performers see themselves on an on-line campaign? After all, they were only booked for a live performance.

If Events R Us did not acquire a broad range of rights from the performers, then the performers have a right to seek additional fees from Events R Us. In fact, we have seen this happen many times in the region and the result is always the same – extra money must be paid to the performers. Sometimes a performer did not consent to being filmed at all but, more commonly, performers agree to be filmed to appear in (say) a billboard campaign for six months but then see themselves two years later in a magazine.

Of course, in the contractual matter raised above, Events R Us is not in a strong position to claim the extra payments from anyone contractually. It can hardly pass liability to Film Inc, which did not arrange the performers. There is no question that both Film Inc and Edit.Com could have requested copies of the performers' agreements but, as they have no contractual liability for the clearance of rights, they might simply ignore the matter as being someone else's problem.

Acme Retail, now pushing this content across to television advertising, will likely remain oblivious to the further payments being negotiated with performers for the content.

Payment Dates

The vast majority of contractual disputes come back to payment, and the media and events industry is no exception. And in our scenario above, we do have to feel sorry for Edit.Com, who sits at the bottom of the chain and needs to be paid.

The usual response to lack of payment is to withhold the materials to be delivered. Edit.Co will probably do that. This places Film Inc in a difficult position. It has a purchase order and quite a significant number of emails agreeing to a delivery date but nothing ties delivery to payment. The fee is probably noted on the purchase order as being 'payable on delivery'. Most smaller production companies in the region do not have the cashflow to pay Edit.Com to release the materials but Edit.Com knows that if it releases the materials, it has no way of securing its payment.

Payment schedules are incredibly important in documentation. They should line up perfectly from Acme Retail across each contract and eventually to Edit.Com. Failure to do this can compromise deliverables and this can be exacerbated if any contract contains penalties for failure to deliver on key dates. These must also be passed down verbatim in order to avoid one entity being financially punished for the slow delivery of another.

Liability

It is often the case that certain terms that have been agreed in the client agreement are omitted in subcontractor agreements. For example, Acme Retail may have included a cap on liability in their contract with The Agency. This is not of course reflected anywhere else in the documents relating to the event.

This may not be relevant as, in most cases, Acme Retail will not be providing services for the event. But let's imagine that they are actually arranging a branded car to be part of the event. Events R Us obviously secure the venue under a standard venue contract - this will have no cap on liability. Then their marketing manager drives the branded car from the venue, crashing it into the DJ booth and causing severe damage to the electrical system.

Acme Retail is contractually liable (other legal obligations aside) to the value of the cap. However Events R Us, as the signatory to the contract with the Venue, are liable for the full amount of the damage. A cap on liability is never a preferred position, but if you have one then it should always be passed down to subcontractors (including, in this case, the venue) to ensure you do not end up with liability.

Conclusion

From a practical perspective, allowing a subcontractor to commence work before the terms of the supply are properly finalised means that they can assess the work and realize that they need higher fees, meaning either a late re-negotiation or the replacement of a subcontractor midway through the project (neither of which is commercially satisfactory). But this issue becomes very difficult legally when the key commercial terms are not passed down into to subcontractors.

Fundamentally, any ambiguity in a commercial relationship provides an excellent basis for misunderstandings, arguments and eventually a legal action. The situation is no different in the media and events industry. Prepare your contracts well, pass on key liabilities to the appropriate subcontractors and ensure that, if anything does go wrong, you are not the one left opening your piggy bank.

Al Tamimi & Company's Technology, Media & Telecommunications team regularly advises clients in respect of contracts in the media and events industry.

For further information, please contact Fiona Robertson, Senior Associate, Technology, Media & Telecommunications (f.robertson@tamimi.com).