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## EXAMINING THE USE OF ‘REAL PEOPLE’ APPEARING IN DIGITAL COMMERCIAL PRODUCTS

Signatory advertisers and agencies should be encouraged that SAG-AFTRA has recognized the benefit to both sides of allowing “reality” commercial content

By Howard R. Weingrad

The Screen Actors Guild–American Federation of Television and Radio Artists (SAG-AFTRA) Commercials Contract, which governs wages and benefits for talent appearing in commercial advertising productions, was renegotiated in April 2013, resulting in a Memorandum of Agreement that will be operative for three years. There are many implications of the new provisions of the Memorandum of Agreement for signatory advertising agencies and advertisers, including continuing developments in how both sides regard the use of talent in digital content productions. This series of six articles will discuss the new provisions as well as some pre-existing rules and provide advertisers and their advertising agencies with a practical perspective on dealing with these issues. Future articles will consider the definition of an Internet/new media “Commercial,” pension and health allocation issues involving multi-service endorsement contracts, the rules around the use of union vocal performances in musical works, and how advertisers and agencies can respond when they have received a claim from the union. Key among the latest developments, and the subject of this article, is how commercial producers can utilize several new exemptions for real people appearing in commercials intended for use in digital media.

Advertising content has followed one recent trend in entertainment content – featuring real people in non-staged settings, rather than scripted talent. Traditionally, advertisers and agencies were required under the SAG-AFTRA Commercials Contract to treat “real people” appearing in commercials in the same manner as talent cast and engaged by them, requiring, at a minimum, the making scale payments to those people. Now, at least for the Internet and new media, and on an experimental waiver basis, there is an exemption for real people who appear in commercials.

Under a side letter for an Experimental Coverage Waiver for Made for Internet and Made for New Media Commercials, signatory advertisers and agencies can now film the activities of people in public without them being covered under the Commercials Contract, as long as those people are not scripted to speak any dialogue nor “cast” for the commercial. When a commercial producer employs this waiver, the SAG-AFTRA Commercials Contract can become inapplicable to several types of productions. The first is any live event that is not staged for the purpose of producing a commercial and that is attended by at least twenty people who have not been hired or cast to attend the event. Such an event cannot involve an agency, advertiser, or production team giving direction to the event attendees on an individual basis, though the side letter does allow for group direction to be given.

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The other two productions that can be exempt from the SAG-AFTRA Commercials Contract under the waiver are “man-on-the-street” segments, where a spokesperson for the advertiser “interviews” people on the street, at a public venue, or at a live event, or merely interacts with people at the event to elicit responses, or reactions from them; and hidden camera footage captured by an unseen camera without direction to the person or people being filmed is also exempt. While the members of the public being filmed are considered exempt under the SAG-AFTRA Commercials Contract, the interviewer who solicits answers or reactions from those consumers is still covered.

In order to take advantage of a waiver for any of these online or new media commercial production methods, it is a material condition that the advertiser or agency notify the union that it is applying the waiver and provide the union with a copy of the produced commercial within sixty days of first use. This notice requirement should not be taken lightly, as SAG-AFTRA will aggressively pursue advertisers and agencies to enforce scale payments to all individuals appearing in a commercial in the event notice of the waiver as exercised and the produced commercial have not been submitted to the union within the proscribed time period.

The exemptions for online video production, particularly for live events, may give rise to abuse from the union’s perspective, as advertisers and agencies may be tempted to take advantage of the live events exemption as a loophole allowing them to stage so-called “live events” that are actually commercial shoots in order to avoid paying scale to the public appearing in these productions. It is important to know, however, that the event itself may be staged by the advertiser or agency, so long as the intended purpose of staging the event was not to make a commercial. As a result, in order to avoid scrutiny or a potential claim from SAG-AFTRA, advertisers and their agencies should stage any event as a true live event if it will be filmed. This means inviting the public and not an exclusive guest list or select group of individuals who could be viewed as having been “cast” in the production, as well as ensuring that the event is worthwhile as a stand-alone event.

Producers may also need to be careful about spotlighting or focusing on certain individual event attendees – if they are pulled from the crowd to be featured in the foreground of a scene or to be more prominent participants in some activity being filmed, they may be considered by the union to have been “cast” and thus owed scale payments.

It is notable that these exemptions are only available on an experimental basis, and advertisers and agencies have to exercise a waiver in order to take advantage of them. It remains to be seen whether the exemptions will remain available when the SAG-AFTRA Commercials Contract is next renegotiated. For now, signatory advertisers and agencies should be encouraged that SAG-AFTRA has recognized the benefit to both sides of allowing “reality” commercial content utilizing non-SAG-AFTRA members to be produced at a cost that will have little if any impact on SAG-AFTRA talent.

This article was written with the help of Davis & Gilbert associate Anne DiGiovanni.

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