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CONFRONTING CONTINUING AMBIGUITY IN THE DEFINITION OF INTERNET "COMMERCIALS"

The key inquiries are whether the advertiser's video content constitutes an advertising message and whether it could run on television as a commercial in its current form

By Howard R. Weingrad

This is the second in a series of six articles examining recent developments and ongoing issues related to the Screen Actors Guild – American Federation of Television and Radio Artists (SAG-AFTRA) Commercials Contract (Part 1 - the use of "real people" in digital commercial products). Since the 2003 Commercials Contract was negotiated, defining what a "commercial" intended for use on the Internet is, advertisers and agencies have grappled with how to classify the online video content they produce. The definition of an Internet commercial was not updated when the industry and the union renegotiated the Commercials Contract in 2013, which leaves advertisers and agencies — as well as SAG-AFTRA — with continued ambiguity regarding what type of video content triggers the payment of applicable SAG-AFTRA rates to talent. This article discusses some parameters as to what constitutes a commercial made for use on the Internet and contemplates whether the advertising industry is really better off lacking clarity on this issue coming out of the 2013 negotiations.

As a threshold matter, the SAG-AFTRA Commercials Contract defines "commercials" as "short advertising or commercial messages" that "depict or mention an advertiser's name, product, or service." The Internet-specific provision of that section deems such "advertising messages" to be commercials intended for use on the Internet, so long as they "would be treated as commercials if broadcast on television and . . . are capable of being used on television in the same form as on the Internet."

The key inquiries are whether the advertiser's video content produced for the Internet constitutes an advertising message and whether, in any event, it could run on television as a commercial in its current form. Some indicators include the presence of sponsor identification, a title card or a call to action to consumers. In addition to these basic criteria, there are many factors to consider which tend to influence an evaluation of whether online content is a commercial. For integrated or branded content, the primary purpose of the video may be considered: Does the content exist primarily to sell a product or to entertain? This is not a litmus test, but a potential jumping-off point to help determine if the video constitutes an advertising message. Certain types of music can influence a video's classification as a commercial. The length of a video does not make a difference in this determination, as any video that is three minutes or shorter could qualify as a commercial if it meets the above criteria, and one longer than three minutes is subject to separate negotiations between the producer and the union. And finally, if there is a unique interactive experience that the video presents, it probably could not be run on television in its current form — at this point in time — and may not be considered a commercial under the SAG-AFTRA Commercials Contract.

Since 2003, one major development that affected how Internet content is classified was that minimum scale rates went into effect for Internet commercials as of April 2011. With the stakes higher, SAG-AFTRA became more aggressive in bringing claims over advertisers' branded "webisodes," "viral videos," "case studies," and the like, seeking to have them classified as "commercials." As the Memorandum of Agreement was negotiated for 2013, the parties could have, but did not, re-work the definition of "commercials" made for the Internet, so as to provide better clarity. As a result, the ongoing ambiguity in the SAG-AFTRA Commercials Contract over this difficult definition may hurt more than it helps.

The concept of whether branded content constitutes an "advertising message" or even if such content is capable of running on television is increasingly nebulous, given the development of new forms of interactive advertisements, mobile marketing and other new media content. Advertisers and agencies may benefit more from structured parameters for what makes digital content a "commercial," at least in terms of being able to accurately project production budgets without fearing costly claims that could be brought by SAG-AFTRA later. For now, and until the next round of SAG-AFTRA Commercials Contract negotiations, an advertiser or agency faced with a claim from the union that an Internet video should have been classified as a commercial may be well-served to bring that dispute before the Industry-Union Standing Committee for potential resolution — if only to clarify and learn more about how SAG-AFTRA defines whether a piece of digital branded content is, in fact, deemed a commercial intended for showing over the Internet.

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

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