Inside Counsel

March 24, 2014

BREACHES OF EXCLUSIVITY OBLIGATIONS CAN LEAVE ADVERTISERS WITH LITTLE RECOURSE

The 2013 Memorandum of Agreement attempted to provide a more concrete remedy, but holes remain

This, the final article in a series examining recent developments and ongoing issues related to the Screen Actors Guild – American Federation of Television and Radio Artists (SAG-AFTRA) Commercials Contract, will discuss the potential recourse advertisers and their advertising agencies have when a performer breaches the exclusivity obligation he or she has under an agreement to perform scale commercial production services.

First, it's important to note a distinction in contracting with scale performers versus overscale performers: When negotiating with scale performers, Section II(9)(B) of the SAG-AFTRA Commercials Contract stipulates that commercial producers cannot make changes, alterations, or additions to the Standard Employment Contract unless such modifications are more favorable to the performer than the Standard Employment Contract. Producers are, however, able to negotiate to include additional legal protections, such as a morals clause with a termination right and remedies for breach, and other remedies for a breach of the performer's obligations (including breach of exclusivity, which will be the focus of this article), by negotiating and paying performers on an overscale basis.

By way of illustrating the limitations of a scale agreement in the face of a breach of a performer's exclusivity, imagine that a beverage company hires an actor, at scale, to appear as the face of the brand in an upcoming television campaign. The first commercial airs, and later in the year, the same actor is seen featured in a competitor's commercial, despite her agreement not to render services to any competitor during the term of the original beverage company's use of its commercials. Now the value of its rights to use that performer have been diminished, and the beverage company should be compensated for the loss; however, the beverage company's agreement with her at scale could not have included a remedy for this situation, as the beverage company was bound to the terms of the Standard Employment Contract for a scale performer. The beverage company would naturally want to address the issue with its competitor, to try to get the other beverage company to stop running their commercial. But it would likely not be able to stop the other company from using the actor in a competing commercial with an injunction unless there were a viable tortious interference claim, whereby the other advertiser knew about the pre-existing obligation the actor was breaching by rendering services for its brand. The beverage company that hired the actor initially would likely be left without any recourse in this situation.

Historically, SAG-AFTRA's stance on performers who breach exclusivity obligations was set forth in Section 16 of the SAG-AFTRA Commercials Contract, which continues to state that any breach of exclusivity is to be considered a serious breach of the agreement that could result in substantial damages being assessed against the performer. This meant that SAG-AFTRA considered a breach of exclusivity to be a violation of a fundamental aspect of the

agreement — "one of the foundations for use fees." And Section 16 makes it the union's policy to make members aware of their responsibility to adhere to exclusivity agreements. But this provision alone had no real teeth.

The Memorandum of Agreement negotiated in 2013 addressed this issue with a step toward a concrete remedy by providing that an arbitrator can consider, as a remedy for a breach of a principal performer's exclusivity obligation, allowing the aggrieved advertiser to continue to run the commercial but withhold payment of future holding fees and residuals. The union recognized the need for a stronger provision here, setting advertisers up to be able to bring arbitration against a performer who breaches exclusivity obligations. It is left in the hands of the arbitrator to consider, among other possible remedies, loss of holding fees and residuals otherwise due to the performer for the remainder of the usage period. While no doubt a step in the right direction, the new provision regarding exclusivity breaches in the 2013 Memorandum may not be enough.

That an advertiser would need to bring an arbitration against a performer who breaches exclusivity obligations, when such breaches are usually apparent and do not give rise to much fact-finding, is problematic given the expense and time investment of arbitration. As discussed, for scale performers, advertisers cannot negotiate for a clawback or withholding of holding fees and residuals remedy at the outset of the relationship because it would violate Section II(9)(B) of the Commercials Contract as a change to the Standard Employment Contract that is less favorable to the principal performer. But advertisers should, as a default, be able to rely on damages in the form of withholding fees and residuals. Currently, this can be used as a settlement tactic at best, with the advertiser arguing that loss of future holding and use fees would likely result if the parties arbitrated, but it is not a formal course of action that the union has ratified. At the very least, SAG-AFTRA and the advertising industry should create a streamlined dispute resolution process for these claims that could mirror the one for pension and health allocation claims available through the Industry-Union Standing Committee.

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

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