Inside Counsel

March 10, 2014

BARGAINING FOR ARTIST CONSENTS TO USE PRE-EXISTING SOUND RECORDINGS AND FOOTAGE IN COMMERCIALS

The fifth in an ongoing series on the Screen Actors Guild – American Federation of Television and Radio Artists Commercials Contract

This is the fifth 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. This article will discuss Section 28 of the SAG-AFTRA Commercials Contract, which sets forth the requirement in certain instances to bargain with performers to obtain consent to use their performances in previously-produced sound recordings or footage made under the jurisdiction of the union.

When using pre-existing third-party content in advertising materials, such as a sound recording or piece of film or television footage, in addition to obtaining the necessary applicable copyright licenses, an advertiser or agency that is a signatory to the SAG-AFTRA Commercials Contract may be required to bargain with and pay union residuals to a performer whose performance is embodied in those materials. Section 28's bargaining requirement applies to sound recordings and footage "made under the jurisdiction of the Union." This has been recognized as meaning that the pre-existing sound recording or footage was made under the union contract applicable to the field in which the content was originally produced, e.g., the AFTRA Sound Recording Code for Sound Recordings, or the SAG-AFTRA Basic Film and Television Agreement.

Section 28 explicitly excludes from the bargaining requirement singers in an unidentifiable group who perform on a sound recording. Thus, for example, a signatory advertiser or agency using "I'm A Believer" in a commercial would need to negotiate compensation for the vocal performances of all members of the musical group The Monkees because they are part of an identifiable group, whereas using the Elvis Presley song "Suspicious Minds" in a commercial would not necessitate bargaining with any of the unidentifiable session singers who sang back-up vocals on that track (albeit any such session singers would still be entitled to receive the minimum, applicable union re-use payments in connection with the use of the recording.)

Regarding the use of pre-existing footage, query whether footage posted online by users that is not produced under a union contract — for example, YouTube video clips — would trigger a right of bargaining under Section 28? It does appear that a condition precedent for the application of Section 28 is that the footage was originally "made under the jurisdiction of the Union." However, SAG-AFTRA has argued in the past that a person appearing in non-union footage who otherwise meets the definition of a "principal performer" under Section 6 of the Commercials Contract is a covered performer who merits being compensated with applicable union re-use fees. SAG-AFTRA has also argued in such instances that Section 24 of the Commercials Contract (Union Standards),

prohibits a signatory advertiser or agency from acquiring a commercial or a portion of a commercial as to which any principal performer is not paid applicable union re-use fees. Though there does not appear to be any arbitration decision or case law definitively on point, it may be that both of these SAG-AFTRA arguments do not hold up.

Arguably, the definitions set forth in Section 6 regarding when someone is considered a "principal performer" apply both in the event a signatory advertiser or agency actually hired the performer to produce the footage, or when dealing with pre-existing footage which — under Section 28 — was "made under the jurisdiction of the Union." To argue otherwise, that Section 6 applies even when dealing with non-union produced footage, would appear to render the condition precedent language in Section 28 meaningless. As for Section 24, Union Standards, it seems a stretch to argue that licensing a piece of online content, such as a pre-existing YouTube clip, is tantamount to acquiring either a "commercial" or a "portion of a commercial." Nonetheless, there is not, unfortunately, a uniform consensus as to the application of Section 6 or Section 28 to pre-existing non-union content. However, it is important to note that whether or not the SAG-AFTRA Commercials Contract applies in such situations, obtaining common law permission for the use of each identifiable individual depicted (or whose voice is heard) in any such content is always necessary when featuring such performers in an identifiable manner in a commercial.

Section 28's bargaining requirements pose the risk for claims against advertisers and agencies who might fail to negotiate properly with performers in qualifying pre-existing content, including the right of a performer to seek injunctive relief and damages "as the court may fix in such action." While it is worth exploring whether particular pre-existing songs or footage being included in a commercial were in fact made under the jurisdiction of SAG-AFTRA, and thus in the first instance whether Section 28 applies, it is certainly important to get the analysis right to avoid claims that could potentially entail costly dispute resolution, payment of damages as a court may determine, and even the loss of the ability to utilize the commercial.

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

ABOUT THE AUTHOR

Howard R. Weingrad is a partner in the Advertising, Marketing & Promotions at Davis & Gilbert. Mr. Weingrad is one of the country's leading experts in matters involving the complex provisions and implications of the Screen Actors Guild and other advertising and entertainment industry collective bargaining agreements. He may be reached at 212.468.4829 or hweingrad@dglaw.com.