

## >> COVID-19 ALERT

# SAG-AFTRA and the JPC Issue Temporary Waiver Regarding Stock Footage in Commercials

### THE BOTTOM LINE

- >> Given the uncertain duration of the coronavirus pandemic, there is no expiration date for this Section 7 stock footage waiver.
- >> The Union must provide the JPC with 14 days' notice of termination in order to bring the waiver period to an end.
- >> Until then, the Union and the JPC will undoubtedly be watching the industry closely to see how well this compromise plays out in the new world of production during a pandemic.

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With a longstanding difference of opinion on the use of stock footage in commercials, the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) and the Joint Policy Committee on Broadcast Talent Union Relations (JPC) have recently reached a temporary compromise to address the challenges posed by the increased use of stock footage during the coronavirus pandemic.

### COMMERCIALS CONTRACT STIPULATION

By way of background, under Section 7 of the 2016 SAG-AFTRA Commercials Contract (Commercials Contract), among other things, “persons appearing in commercials in ... stock footage” are subject to the terms and conditions of the Commercials Contract when the stock footage is “made for any advertising purpose,” requiring the payment of applicable talent fees where the person depicted in the stock footage qualifies as a principal performer in the commercial.

### STOCK FOOTAGE LICENSED FROM THIRD PARTIES

The Union and the JPC disagree on whether certain types of stock footage licensed by a third-party stock footage company constitute footage “made for any advertising purpose.” While the re-cycled use by a stock house of footage originally made for an advertisement would qualify as footage “made for any advertising purpose,” it seems less clear that footage originally produced for editorial or other non-commercial purposes and, subsequently, licensed by a stock house for any purpose — including for use in commercials — is footage “made for any advertising purpose.”

Other footage may have been produced for no purpose other than to offer it up to a stock house for potential license and use in third-party content, be it editorial or commercial.

The JPC has taken the position that the relevant inquiry is whether the initial impetus for creating the footage was for an advertising purpose, regardless of its eventual license by a stock house for use in a commercial.

The Union, however, considers most all stock footage licensed from stock houses used in advertising to have been made for the purpose of advertising, and, thus, covered under the Commercials Contract.

# ADVERTISING, MARKETING & PROMOTIONS

## >>ALERT

### TEMPORARY WAIVER

As of April 3, 2020, the JPC and the Union agreed to temporarily shelve their difference of opinion on this issue in an effort to offer a practical solution to some of the production challenges posed by the COVID-19 pandemic. With most of the world under mandatory stay-at-home orders by various government authorities, agencies and advertisers are struggling to produce commercials live on set.

As an alternative, in addition to “selfie” production, many agencies are turning to the use of pre-existing stock footage so as to produce commercials without the need for talent or crew to leave their homes. Given the increased reliance on stock footage, the Union and the JPC agreed to a [temporary waiver](#) suspending the parties’ disagreement regarding the obligations of Section 7 of the Commercials Contract as applied to third-party licensed stock footage and the “made for any advertising purpose” inquiry, with a number of negotiated caveats intended to spread the costs more evenly between the Union and the advertisers.

Under the temporary waiver, SAG-AFTRA will refrain from actively enforcing its interpretation of Section 7 and claiming that union payments are due to individuals shown in stock footage used in commercials, subject to the following conditions:

- >> The advertiser must make pension and health contributions to the Union, based on scale session and use fees, for each

individual who appears in stock footage in a commercial used in a way that qualifies the individual as a principal performer under the Commercials Contract;

- >> The stock footage must be sourced from an independent, third-party stock footage house and must have been created on or before February 1, 2020; and
- >> The commercial in which the stock footage is being used must include a voice-over performer hired and paid SAG-AFTRA wages under the Commercials Contract.

As a final important caveat, although SAG-AFTRA has agreed not to actively seek to enforce its interpretation of Section 7 under this waiver, and will not search out or solicit claims for payment by talent, it reserves the right to pursue claims for payment on behalf of individuals who appear in the stock footage who independently approach the Union to pursue a claim for payment.

It is important to note that the new waiver is optional. Signatory agencies and/or advertisers following the JPC’s position — that the use of stock footage not initially made for an advertising purpose is exempt from the Commercial Contract — can elect not to invoke the waiver, and can continue to operate with no change to their usual practices. But others that may typically follow SAG-AFTRA’s interpretation of Section 7, or that do not want to risk a potential challenge from SAG-AFTRA, may want to take

advantage of the new waiver as a potential safe harbor (though, as noted above, the talent can still bring a claim and if so, SAG-AFTRA has reserved the right to pursue that claim on behalf of the performer, waiver or no waiver) against increased payments of talent session and usage fees as the use of stock footage increases.

### INDUSTRY FEEDBACK

The temporary waiver regarding stock footage will likely be greeted with mixed reactions from the industry. It will be viewed by some as unnecessary and perhaps even an unwelcome opportunity for SAG-AFTRA to monitor the use by signatory agencies and advertisers of stock footage. Others will view this development as a way to minimize financial risk to agencies and advertisers relying heavily on licensed stock footage to produce commercials during the coronavirus pandemic.

The waiver also ensures that SAG-AFTRA pension and health benefits continue to grow throughout the pandemic, and helps union talent maintain steady work as voice-over performers.