

#MeToo and #TimesUp Movements Cause Entertainment and Advertising Industries to Re-Examine Talent Agreements

The Bottom Line

- *Studios, networks, agencies and marketers are negotiating for stronger and broader morals clauses in talent contracts in the wake of the #MeToo revelations, and following the #TimesUp movement, talent representatives are seeking inclusion riders in talent contracts that seek equal representation in staffing and casting for productions.*
- *Given the financial stakes, negotiations over morals clauses will likely become more protracted while producers and marketers will need to re-think how productions are cast and staffed to preserve flexibility while embracing the goals of diversity.*

No story had a bigger impact on the entertainment industry in 2017 than the stunning allegations of sexual assault against previously-powerful men. While the long-term ramifications of the #MeToo and #TimesUp movements are still playing out in Hollywood and Madison Avenue, they have already prompted the industry to refocus on old contractual provisions like the “morals clause” and the newer “inclusion rider.” Producers and developers of content, whether for entertainment or advertising, should give serious consideration to these provisions in future contracts for talent, recognizing the seismic industry shift resulting from these social movements.

Morals Clauses

Morals clauses have been a source of contention between producers and performers since the silent film era and their inclusion in talent contracts has ebbed and flowed over the years. Designed to protect a producer’s investment, the morals clause allows producers to terminate a performer and recoup payment from performers that engage in scandalous, offensive or criminal behavior. It is based on the premise that a film performer’s salary is based on his or her ability to deliver box office results, a television performer’s salary is based on his or her ability to deliver ratings and a product endorser’s salary is based on his or her ability to create a positive association between audiences and the brand.

This logic is undermined, if not shattered, when performers, endorsers or spokespeople engage in morally repugnant behavior that offends the very audiences that producers and marketers hope to engage. Producers, studios, brands and marketers carefully consider the public image associated with the talent they choose, as negative publicity surrounding an individual can directly and significantly impact the success of the final output and the brand behind it, whether it is a film, television show or commercial product or service.

More recently, morals clauses may have been waived in the entertainment industry (or watered down in the ad industry) or simply not strictly enforced, but in the wake of the watershed #MeToo and #TimesUp

movements, producers and marketers are now insisting on robust versions of these provisions for performers of every stature. Reports that Kevin Spacey did not have a morals clause in his contract, forcing Netflix to pay his full fee for House of Cards, even after removing him from the show's final season, illustrate the costly consequences of failing to require a morals clause. Not only does the project suffer from the public relations backlash and cost increases due to reshooting or rewriting projects midstream, but the prospect of giving full payment to the performer who caused this damage adds insult to injury.

In particular, these movements have focused attention on the events that give rise to a morals clause. If producers rely on a criminal conviction, or even an arrest, as the trigger, they could be exposed to substantial losses, since the criminal justice system can take months or years to resolve, and as demonstrated by the #MeToo movement, there are often significant barriers to obtaining an arrest or conviction even when there are multiple, credible accusations. Drafters of morals clauses will, and should continue to, renew their focus on the actions themselves, the credible reporting of those actions and their immediate impact on a production.

Inclusion Riders

These movements have also underscored how gender and ethnic imbalances can perpetuate a system that protects and empowers abusers. The movement for pay equity and related demands for greater representation of women and other diverse classes have crystallized in the "inclusion rider," which requires an emphasis on diversity in staffing cast and crew. The inclusion rider mirrors, in part, the "Rooney Rule" adopted in the National Football League (NFL), focusing initially on minimum requirements for auditions and interviews of women candidates and candidates from under-represented groups. But the model inclusion rider drafted as part of the USC Annenberg Inclusion Initiative goes beyond the Rooney Rule, requiring specific hiring and casting targets based on demographic data. It also requires the reporting of interview, audition, hiring and casting data and imposes a financial penalty for non-compliance in the form of a donation to diversity initiatives.

Frances McDormand's championing of this concept in her 2018 Academy Award acceptance speech has already resulted in increased demands for these riders by influential talent and commitments by producers to honor these demands. Production companies run by Matt Damon and Ben Affleck, Paul Feig and Michael B. Jordan announced shortly after McDormand's speech that all future projects will adopt an inclusion rider, and actress Brie Larson has publicly stated that she will demand it be included in her future contracts. Further, WME has voiced company-wide support for advocating for inclusion riders on behalf of its clients, and its content production arm, Endeavor Content, announced that it will adopt the rider for its projects. Studios, networks and marketers will likely see increased demand for such socially-minded contractual clauses. As more performers push for inclusion riders, producers and marketers will be required to engage on this issue to find workable solutions.

Related People

James Johnston

Partner

212 468 4867

jjohnston@dglaw.com

Samantha G. Rothaus

Partner

212 468 4868

srothaus@dglaw.com