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Unions and the Production of Commercials for Traditional and Non-Traditional Media

Few people are aware that the union collective bargaining agreements that govern the employment of performers and musicians in commercials in traditional and non-traditional media are collectively the largest union agreements in the entertainment business. Under these agreements, advertisers pay union performers and musicians nearly \$1 billion a year. In the collective bargaining process, the industry is represented by the ANA/AAAA Joint Policy Committee for Broadcast Talent Relations (JPC), performers are represented by the Screen Actors Guild (SAG) and the American Federation of Television and Radio Artists (AFTRA), and musicians are represented by the American Federation of Musicians (AFofM).

As we enter the New Year, the collective bargaining process is undergoing profound change and the JPC, SAG and AFTRA are working together to explore new ways to pay performers that represent fair compensation but also provide advertisers with a measureable return on their investment. This effort included a \$1.4 million study by Booz & Company and countless hours of testing and discussions. This was a monumental undertaking that will affect the costs for every advertiser and agency.

This process will all culminate when formal negotiations between the JPC and SAG and AFTRA commence in February 2009. Negotiations with the AFofM do not occur until October 2009.

While the vast majority of major advertisers and advertising agencies are signatories to the collective bargaining agreements and are represented by the JPC, this memorandum explains the process and why it's critically important that responsible advertisers and advertising agencies be a part of that process.

1. What is the ANA/AAAA Joint Policy Committee for Broadcast Talent Relations (JPC)?

The JPC is the multi-employer bargaining unit that represents the interests of the advertising industry in negotiations with the various unions that represent performers and musicians who perform commercials in traditional and non-traditional media – SAG and AFTRA and the AFofM. The JPC is comprised of thirty members – fifteen appointed by the Association of National Advertisers and fifteen appointed by the American Association of Advertising Agencies. The ANA also appoints the JPC Lead Negotiator and legal counsel. Reed Smith LLP is the JPC's legal counsel and Douglas J. Wood, a partner with Reed Smith, is the JPC's Lead Negotiator. Mr. Wood is also the ANA's General Counsel. As Lead Negotiator, Mr. Wood is the public voice for the JPC.

2. Does an advertising agency have to be a member of the AAAA and an advertiser a member of the ANA to be an authorizer to the JPC?

Yes, to authorize the JPC, an authorizer must be a member of either the AAAA or the ANA. While there are some advertising agencies and advertisers that are direct signatories to the collective bargaining agreements and are not represented by the JPC, they are very few in number and their agreements with the unions are identical to what the JPC negotiates. So there is no advantage to being a direct signatory if a company is a member of either association. Of course, if a company is not a member of either the AAAA or ANA, they must be a direct signatory.

3. Is an advertiser member of the ANA or an advertising agency member of the AAAA automatically an authorizer to the JPC and thereby a signatory to the collective bargaining agreements?

No. Authorizing the JPC to negotiate on an ANA or AAAA member's behalf is entirely voluntary and a company can be a member of the ANA or AAAA without being a signatory to the collective bargaining agreements.

4. How does an advertiser or advertising agency not a signatory to the collective bargaining agreements deal with union members in the production of commercials? Can a non-signatory advertiser or advertising agency hire union performers for a non-union commercial?

Union members are prohibited from performing in non-union productions and are subject to fines and sanctions from their union should they do so, including possible expulsion from the union. At least one company in the production must be a signatory to the applicable collective bargaining agreement.

5. Can I get a list of the authorizers to the JPC?

No. The list is confidential for a variety of reasons. If it is important to understand those reasons, please contact Douglas Wood at the address, email, or telephone number, below.

6. Why should an ANA or AAAA member be a JPC authorizer and thereby a signatory to the collective bargaining agreements with SAG, AFTRA, and the AFofM?

The answer to this question is multi-faceted:

- Solidarity breeds success. It would be nonsensical to leave the negotiations solely to either advertisers or advertising agencies. They are both partners in the business of producing commercials and share common interests in controlling costs and minimizing administrative burdens. For advertisers, it makes sense to be at the table because it is their money that is being spent. Agencies need to be there because they know how to best watch the bottom line and production costs. Without full representation and participation of the two constituencies at the table supporting the JPC's efforts, negotiations will not achieve maximum success. In that regard, the wider the representation of advertisers on the JPC, the better. The worst thing that could happen is for the JPC's advertiser or agency representation to be dominated by one "type" of company, e.g., a heavy network buyer. If that were to happen, then rates would be skewed to benefit that group of advertisers and not the community as a whole. Without question, both advertisers and agencies need to be at the bargaining table.

- It's the right thing to do. The collective bargaining process and its administration in the United States is one of the great accomplishments of this country. While union vs. management is often a tense relationship, no one can honestly disagree with the proposition that the United States has prospered in many ways by the laws that foster and protect unions and their organization of workers. It certainly hasn't killed management. And while there are those who believe some instances of non-competitive cost structures have resulted from the union movement, such examples are rare. In truth, the collective bargaining process has forced transparency in the workplace and improved the working environment for everyone. So while it may be nice to be non-union in some industries, responsible employers cannot turn their backs to the collective bargaining process and to their competitors and colleagues industries that have embraced it. It's their duty to come to the table and be an active participant in determining terms and conditions of employment. In large part, that's the reasoning offered by industry leaders and global brands when asked why they are a signatory.
- If you want the best, you have to pay for it. Without doubt, union performers are the most professional and sought after performers for commercials. They understand their craft and bring great efficiency to the workplace. It makes sense that those who pay for productions be aware of the performers' issues and be part of the team that explains, negotiates, and resolves concerns important to both sides of the bargaining table.
- It's close to home. Today, competition for most ANA and many AAAA members is global. Yet the success of most of the members is dependent upon a healthy United States economy. Allegedly, many advertisers consider off-shore production to avoid rising talent costs. Some in the industry claim as many as two out of three bids are for so-called runaway productions. When this happened in earnest in the last strike, domestic production plummeted and entertainment and production companies went out of business. Craft union members went bankrupt. Local vendors lost their nest eggs. The ripple affect is real and affects every advertiser and agency and every consumer in America. So it is important that the industry and unions find ways to live with one another in a manner that helps keep production in the United States and prevents further economic deterioration of an important industry of which every ANA and AAAA member is a participant and beneficiary.
- Back a dog into a corner and he'll bite. If the ANA and AAAA members fail to support the collective bargaining process and begin to hire performers at non-union rates or hire non-union performers to avoid union payments, there is no doubt that the acting community will rise in protest. And while the macho side of every advertiser or agency may be to belittle that possibility, there isn't an advertiser or agency today that is not sensitive to its reputation. No one should lightly regard the downside to a disgruntled Hollywood and the boycotts, adverse public relations, organization of sister unions that have contracts with advertisers, and direct picketing and attacks that a union, particularly when desperate, will resort to in order to protect its members. Stability is important. And stability is at risk. The unions have made it clear to the JPC that they will aggressively organize against those companies that are not parties to the collective bargaining agreements (as they must to preserve their position). At this point, withdrawals are not a significant problem. But if withdrawals become a trend, the end game becomes a severe problem. Should the number of authorizers to the JPC materially decline, there is nothing to prevent the unions from telling its members that they cannot work any job unless BOTH the advertising agency and the advertiser are signatories. This has been threatened in the past but not implemented because the advertiser representation on the JPC remained constant. Should

significant withdrawals occur, the situation could change. In fact, if the trickle of withdrawals were to become a torrent, the unions could claim the JPC does not represent a sufficiently large part of the industry to qualify as a multi-employer bargaining unit. The result of that would be that each individual advertiser and agency would have to bargain separately and the unions would have almost dictatorial power. The JPC, as the industry's multi-employer bargaining unit, allows us to speak with one voice and keep the playing field equal for all advertisers and agencies.

- Withdrawing is not an easy proposition. Labor law protects the union-management relationship and seeks to preserve it as public policy once an employer has become a signatory to a collective bargaining agreement. To withdraw authorization from an employer's bargaining unit, in this case the JPC, the employer remains obligated to the unions should the unions insist on direct negotiations. In this context, the agency or advertiser withdrawing authorization may have to negotiate directly with the unions should the unions demand it. And it's safe to say that the unions will not agree to a better deal than they have been able to negotiate with the JPC; to do so would prejudice the unions in future JPC negotiations. So the withdrawing agency or advertiser is probably better off allowing the JPC to continue as its representative. But if withdrawal is nonetheless the preferred option and the unions and agency or advertiser that withdrew cannot come to terms, the unions can "strike" that agency or advertiser and instruct union members not to work for them. Further, the unions will engage in whatever organizing efforts legally allowed either through public relations, boycotts, or other aggressive measures. In addition, depending on current funding levels, the unions' Pension & Health Plans may be required to charge an exit fee to any company withdrawing from the Plans. Depending upon the amount of production historically undertaken by the former signatory, that amount can be very substantial. Thus, if a company is serious about withdrawing authorization to the JPC or not remaining a direct signatory, they are well advised to consult counsel to determine their withdrawal penalties. Lastly, if an authorizer to the JPC wishes to withdraw, it must do so prior to the commencement of formal negotiations between the JPC and the unions. Once those negotiations begin, no one may withdraw. Formal negotiations are expected to begin as early as January 29, 2009 and in no event later than the second week in February.

7. What have the JPC efforts accomplished?

- The collective bargaining agreements with SAG, AFTRA, and the AFofM represent nearly \$1 billion in annual spending. They are among the largest collective bargaining agreements in the world. Within the entertainment industry, advertisers pay more into the union pension and health plans than either television producers or motion picture producers. One would be hard pressed to say that the investment to control those costs and contributions led by the JPC hasn't been well worth the return.
- The JPC, through its bargaining and arbitrations with the unions, has saved the advertising industry millions of dollars. With ANA members at the helm, ever aware of spending and budgets, costs have been contained in the last three years and the future looks brighter than ever for a fair and just compensation structure.
- The collective bargaining agreements are complex. Experts are required to interpret them and guide signatories through the process. Yet at the same time, advertising agencies are eliminating the positions that historically handled such matters, often outsourcing it to talent payroll companies. And while talent payroll companies and broadcast business affairs consultants have great capabilities, their expertise isn't broad enough to see the entire picture or understand all the intricacies of the union

agreement. If the ANA and advertisers are serious about controlling costs, the JPC is an important tool in accomplishing that goal.

- The current leadership of the JPC, appointed in 2004, created a new, transparent model of operation for the industry, providing guidance and insight that in the past was the province of a small group of people.
- The JPC has a working relationship with the union leadership. The JPC's open and transparent approach even when disagreeing with the unions has created an atmosphere of mutuality of interest rather than the historical adversarial interaction.
- The JPC provides industry members with a robust information source that includes searchable copies of the collective bargaining agreements (something never before available), a database of arbitrations and settlements with the unions (representing the beginning of the first database of precedents that industry members can use when dealing with the unions), copies of seminars and other presentations pertinent to the issues industry members face, copies of waivers received from the unions, and memoranda on dealing with contract problems. This resource continues to grow.
- In the past two and a half years, the JPC has conducted six major seminars, five of which were "aired" on the Internet. In all, more than 700 people attended.
- For the first time in its history, in 2008 the JPC brought the Screen Actors Guild to arbitration over what the JPC felt was an inequitable playing field with respect to how to determine contributions to SAG's Pension & Health Fund for covered services under the collective bargaining agreement. The arbitrator agreed with the JPC position that if there is a dispute between a signatory and SAG on the proper allocation, it must be resolved through arbitration in accordance with the collective bargaining agreement. SAG appealed to the United States District Court where all of SAG's arguments were rejected and the judge confirmed the arbitration award. These decisions prevent the SAG Pension & Health Fund auditors from unilaterally determining proper allocations, a procedure that had been in place for more than 30 years but that was clearly in violation of the collective bargaining agreement. The JPC victory in this proceeding will save the advertising industry millions in unfair and inequitable payments to the Funds and put advertisers on a level playing field in future disputes. The contributions to the Funds under the collective bargaining agreement have been more than double on a per performer hired basis than the contributions under either the television or motion picture contracts. It should come as no surprise that this suit has created some tension between the JPC and SAG. Yet the professionalism between the unions' staff and the JPC has remained unaffected. It is a maturity level not previously seen in relations with the unions.
- The JPC has reached out to every constituent of the industry – advertisers, agencies, talent payroll companies, production companies, casting directors, consultants and even performers – with a detailed survey of concerns under the collective bargaining agreements. Through this survey, the JPC has a better understanding of true issues than ever before. This will help the JPC prioritize the issues in anticipation of negotiations.

8. What does it mean and cost to be a signatory to the SAG, AFTRA, or AFofM collective bargaining agreements?

All signatories agree to pay performers minimum compensation for production days in producing commercials as well as residuals that vary based upon the ways in which the

advertiser uses the commercial. Presently, there are different rates for network, cable, local, syndication, Internet, new media, and other uses. Additional fees are incurred depending upon editing as well. While these costs are substantial on an annual industry wide basis, talent costs are actually a very small percentage of the overall spending by advertisers on advertising and marketing. In fact, union payments to performers amount to less than three percent of the total media costs paid by advertisers. It's even less if you factor in production costs. For a global advertiser, the reality is that costs associated with signatory status are not unreasonable in relation to industry costs.

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If you have any questions regarding this memorandum or the JPC, please contact Douglas J. Wood at Reed Smith LLP, 599 Lexington Avenue, New York, NY 10022, office: 212 549 0377; mobile: 201 745 7843; email: dwood@reedsmith.com.