

## PROMOTING YOUR AGENCY OR PROMOTING TROUBLE: FACTORS TO CONSIDER WHEN USING MATERIAL FOR SELF-PROMOTION

By Leanne Montibeler, Solicitor

Can an agency use TVCs they have created for self-promotional purposes? This is a question we are often asked by agencies who naturally wish to showcase and publicise their creative efforts on their website, via YouTube or industry awards.

From a legal perspective, this is one of those unfortunate 'grey areas' and providing a simple 'yes or no' answer is not possible. This article sets out some factors to consider from a talent and copyright perspective.

### Talent considerations

Whether an agency can freely use talent featured in campaigns for self-promotional purposes is an untested area in Australia. As a first port of call, you will need to refer to the talent agreement in each individual case to check whether there is a clause that allows the agency to use the campaign material for self-promotional purposes. If you have this clause, you are usually 'good to go'.

The issue however is that many standard talent agreements are silent on this and do not expressly provide that the agency has the right to use the material for self-promotional purposes. There is also no general 'news' or 'editorial' exception at law to use talent for this purpose that you can rely on. Furthermore, even if you attempt to add a self promotion right for the agency into the talent agreement the agent will often use that request to justify an increase in the talent fee.

### *What happens next?*

Broadly speaking, this area has not been tested in the courts and there is no 'black and white' answer, whether in terms of contract (if the contract is silent on this use), industry code or law. It is therefore open to be dealt with in accordance with industry practice, commercial considerations, and individual circumstances.

From what we know at an industry level, if the talent contract does not provide for this agency use, the Media Entertainment & Arts Alliance (MEAA) will most likely require the agency to seek permission from the talent directly to use the material for its self-promotional purposes. Naturally, this could invite some agents or talent to negotiate for some additional payment as a condition of their approval for what they may argue amounts to extended usage. If the agency is happy to bear this cost, then it may confidently use the material for self-promotional purposes with certainty that the talent approves of this use.

If no agreement with the talent can be reached (e.g. if the talent is demanding an exorbitant fee), and the agency uses this material anyway, then this could invite trouble as the talent has been put on notice of the agency's intention and will most likely complain and demand payment upon finding out about the use. It is open to the talent to make a claim if they are used without consent and the MEAA would generally stand by them in such a claim if they were asked.

In some cases the agency may wish to commercially proceed and then deal with complaints from talent if they arise, particularly if the talent cannot be located, such as for very old ads. This use may go undetected, however the risk profile will change depending on where the materials are broadcast and on the reputation of the talent. If it is just on the agency website and can be taken down relatively easily then the risk may be lower than if it were promoted more widely. It will depend on the facts in each case. Regardless, if usage is discovered, it could expose the agency to a complaint and demand for payment.

### *What are my options?*

The safest course if the contract is silent on agency usage would be to obtain consent from the talent and negotiate this commercially if the talent contract does not give you express permission to use the material for self-promotional purposes. The other option is to take the risk; however if the talent becomes aware of this, they may demand payment or approach the MEAA, and this could escalate into a legal dispute around the argument that there was an implied term of the talent contract that the talent would only be used for the purpose and for the period set out in the contract.

We recommend generally that you ensure there is a provision in your talent contracts for usage for agency self-promotional purposes particularly for large, creative or unique campaigns that you will want to publicise. Having this in the contract from the outset could avoid a dispute down the line.

### **Copyright considerations**

A separate consideration to talent usage arises in relation to the copyright that, in many occasions, exists in your client material. Whether you need to seek copyright clearance from your client in respect of the use of advertising material created is also a grey and untested area in Australian law.

Copyright relates to the material itself, such as:

- literary works (e.g. text, articles and song lyrics);
- artworks (e.g. photos, logos and other images);
- music;
- dramatic works (e.g. screenplays and choreography);
- sound recordings (e.g. recorded music and speeches);
- cinematograph films (e.g. video clips and animations); and
- broadcasts (e.g. TV and radio material).

One item may contain multiple types of copyright-protected material. For example, a television commercial will be protected by copyright as a type of film, but may also contain sound recordings (such as music) and dramatic works (like the script the actors are performing) and these would be separately protected in addition to the film.

### *Who owns copyright?*

The main consideration as to who owns copyright will be found in the contract (if any) between the agency and the client in relation to material use and ownership, and the terms of any licenses e.g. a license to use a song or image. Generally, most client agency agreements will provide that the copyright in advertising materials created by the agency is owned by the client. Some, but not all, agency agreements provide that the agency reserves the right to use the material for self-promotional purposes however this is usually subject to the consent of the client. This is obviously going to vary from client to client.

If copyright is owned by the client but there is nothing stated in the contract about agency self promotion the situation is murky. We recommend going forward that wherever possible you seek the client's consent or include a provision for self-promotional usage in your agency contracts (if you do not have this already). If an agency uses a TVC to self promote where copyright is owned by the client, such usage is technically a copyright infringement.

If however the contract is silent on the question of copyright ownership, then the copyright in the material will be owned by the agency and not the client. The client however is granted an implied licence to use the material in accordance with the brief to the agency. While it is uncommon these days for agencies to retain copyright ownership in a TVC, this is the default position in the absence of a specific copyright assignment clause in the contract or elsewhere in writing. If the agency does own the copyright, then it does not need client consent to use the material for its own self promotion, unless there is a specific prohibition on this in the contract.

### *Is there a Copyright Act exemption?*

The *Copyright Act* does provide that copyright material may be used for the purposes of 'reporting of news', and 'criticism and review'. So if the material was truly to be used for these purposes, then you may be able to use the material without consent of the client. This is a very difficult question of degree and case law in Australia in this area is notoriously confused and ambiguous.

This is not a question we can answer definitively 'across board' as it is something that needs to be determined on a 'case by case' basis, considering the unique facts of the situation. Even if the use of the material were to fall under one of these exceptions, it would normally be subject to the requirement to sufficiently acknowledge the copyright owner.

If the commercials themselves were subject to discussion as to their impact in the market, or their creative success or otherwise, or in some other way critiqued, then this could be considered 'criticism and review'. However, where an agency is using the material for self-promotion, there is a commercial element to the use which means that it is most likely not for 'criticism and review' and so this exemption cannot be relied on.

Generally speaking, whether or not a client would pursue you for breach of copyright in their advertisement is another issue. This would depend on the approach of the client in relation to their reputation and intellectual property. In order to avoid the prospect of a dispute, it would therefore be prudent to seek consent of the client in relation to copyright in the material before proceeding unless the agency owns copyright. In the case of pitch materials or unused concepts for example, depending on the terms of the agreement, the agency may retain copyright and could use that material to self promote.

A separate consideration is whether there is any 'third party' material in the TVC, such as music or artwork created by a third party and not assigned to the agency or client. For example, if the TVC contained a music track then this is also subject to copyright and there may be different copyright owners for the music, lyrics and sound recording. Use of music without authorisation is a copyright infringement and the risk associated with this is high. You will not be able to rely upon a fair dealing exemption for this use, as it does not fall within any of the available exemptions. You will therefore need to obtain a license to use the song, if you do not have this already, which allows for your use to avoid an infringement.

### **Summary**

In a competitive marketplace, agencies need to promote themselves as much as they need to promote their clients, and what better way than to showcase their work. As raised above, the main concerns are in relation to obtaining talent consent and consent from your client, as well as a licence to use any third party works featured (such as music).

Ideally, consent should be obtained from all sources that you use to create your TVCs. As we understand, quite a few agencies do this and may be simply taking the risk in this area, which is also a matter for you to consider. In taking the risk, you should be prepared and willing to remove offending material if a complaint arises, and prepared for a copyright owner to approach you demanding some sort of payment for your use.

In relation to talent and client consent, the take home message is to ensure a general provision is included within your talent and agency / client contracts that extends usage rights for self-promotional purposes in perpetuity for your agency, as well as in any music license agreements that you enter. In this 'grey' legal area, that bit of certainty could save a lot of stress and hassle down the line.

**Contact us**

If you would like further information on how it impacts on you or your business, please contact one of our experts below. We can provide tailored legal and practical advice to assist you with reviewing, drafting/reviewing Terms and Conditions, or clearing advertising material.

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