ADVERTISING . MARKETING . ENTERTAINMENT

COMPLIANCE REVIEW

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Party Time

Now's the Season to be Careful

BY BRIAN GEACH

It's the end of a stressful yet fruitful year in your workplace. Sales targets have been met, KPI's attained, crises overcome and disagreements patched over. Time now for all staff to kick back, let their hair down and celebrate at the very generous Christmas party you have organised by way of thanks for their efforts over the year. Its party time. What could go wrong?

Well quite a lot as it happens if sensible and considered measures are not put in place by employers hosting the end of year knees up. A potentially lethal combination of informality, excitement and alcohol often produces ramifications for the employer that extend far beyond a dull hangover the next day. A duty of care still exists even at out of hours social events which are employer sponsored or sanctioned. Ignoring this duty of care is a recipe for disaster.

Most of us have been to myriad work social functions over the years and it would be unusual for any of us not to have at least one horror story to recount. Tales of drunkenness, sexual harassment, fights, accidents and injury, abuse and other inappropriate behaviour abound.

Whilst there may be an element of shadenfraude in observing a drunken and erstwhile pompous senior manager acting inappropriately toward other staff members, it is no laughing matter for the recipient of that behaviour, particularly if

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How Technology is Changing the Talent Landscape

BY DARREN WOOLLEY

DARREN WOOLLEY
Managing Director - TrinityP3 Pty Ltd

Darren is called a Pitch Doctor, Negotiator, Problem Solver, Founder & Global CEO of TrinityP3 - Strategic Marketing Management Consultants and a founding member of the Marketing FIRST Forum. He is also an Ex-scientist, Ex-Creative Director and a father of three. And in his spare time he sleeps.

I am sitting on a plane watching in-flight advertising, while next to me a guy is watching a television show he's downloaded onto his tablet with ads he can skip through. On my smartphone I can watch ads on YouTube and in the boarding lounge there are ads running on the big television screen.

An article in USA Today proclaims that television networks in the USA have hit the tipping point where viewing of the content they produce is so fragmented due to technology, that they need to look for new sales models for advertisers.

Interestingly though, despite this rapid shift in the media environment, advertisers are still paying the talent that appear in the ads in the same way they have for more than 20 years.

It seems that while technology is driving change and providing more and more ways to view content including advertising, than ever before, the commercial arrangements behind the advertising have not changed in response to this new environment.

In many cases, and in most countries, there is a very traditional view of the media landscape underpinning the way actors are paid for appearing in commercials.

Now this is not about paying actors less money. Not all actors appearing in television commercials live in Beverley Hill's mansions or appear on the cover of glossy gossip magazines. But it is about simplifying the process of determining and then managing the fees paid to actors for their talent, ability and exposure.

For clarity, I am talking about actors and not celebrities. I know the two are not mutually exclusive. When I use the term actor, I mean someone engaged to perform a role or part, selected for their abilities to deliver the required performance and not because of the

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Party Time

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there is an element of sexual harassment involved. Similarly a drunken dispute that escalates to physical violence may ultimately result in the dismissal of the employees involved.

These and similar instances are often complicated by the inappropriate use of social media; the appearance of Facebook posts the next day highlighting two members of staff in a compromising position could be regarded by those thus highlighted as being bullying and may expose the employer to litigation and Workers' Compensation claims.

There is also an overriding obligation to ensure that the actual location in which the function is to be held is safe and that all potential hazards are identified. The owner of a premises used as an out of hours work related party venue has been found liable under the NSW Workers' Compensation legislation, after an employee fell from a flight of stairs to a landing below, sustaining serious head and brain injuries. In another case, an employee organised harbour cruise resulted in a worker being pushed overboard and subsequently being struck by the boat's propellor. The employer was found liable for the injury.

It is clear then that an employer's responsibility in these matters extends far beyond the provision of venue, alcohol and party pies. The prudent employer will select a venue that's appropriate, identifying hazards and exposures. Prior to the function, staff need to be reminded of appropriate behaviour and the consequences of ignoring those strictures. The number of guests attending the party need to be finalized prior to the date. This information may affect the way the function is managed. A strict alcohol policy needs to be in place, identifying the times alcohol will be served and providing alternative beverages and food. Employers are also responsible for monitoring the consumption of alcohol by employees and further ensuring that employees have safe alternative modes of transport home at the cessation of the function. Protocols making provision for alcohol related illnesses, dehydration, diabetic episodes or cardiac arrests also need to be put in place.

If this all sounds like the ultimate party pooper it need not be. Prudent and sensible provisions put in place prior to and during the function could save a world of hurt both figuratively and literally, ensuring your end of year shindig is a success and does not result in a prolonged and messy legal hangover for all concerned.

From the Editor

Welcome to this year's final edition of Compliance Review. We may be biased, but here at Compliance Review, we think this is our best edition yet.

This is of course due in no small part to our diligent and generous contributors who give of their time and effort, providing Compliance Review with thought provoking and stimulating articles.

True to form, Darren Woolley from TrinityP3 has once again raised some very relevent issues in his article which deals with the ramifications of the new media on talent remuneration.

Andrew Dawson from Brett Oaten Solicitors, another of our regular contributors, writes of the pitfalls in hiring high profile brand spokespersons or ambassadors whilst Anisimoff Legal's Leanne Montibeler, canvasses the use and validity of pre contractual talent agreements.

We also welcome a first time contribution from Roisin Beard, the National Recorded Media Industrial Officer from the MEAA. In her article Roisin sets out a cogent argument against the use of sham contractors in the entertainment and advertising industries, describing a disturbing increase in the use of illegal contractors in recent years.

In 'Trial by Twitter', the ongoing fallout from the BBC's inept handling of the Lord McAlpine Twitter affair stands as a salutary warning of the perils of social media use.

And finally in 'Party Time' the pitfalls of staging that end of year knees up, the company Christmas party, are examined.

Speaking of Christmas, now seems about the right time to thank all of you who've had a hand in the production of Compliance Review over the year. We literally couldn't do without you.

And last but not least, thankyou to all our loyal readers and contributers. May you and your families have a wonderful festive season and New Year.

See you all in 2013.

Brian Geach

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The Brand Ambassador

How to Safeguard Your High Profile Investment

BY ANDREW DAWSON

The value of celebrity and athlete endorsements for products and services is well known. In recent years, scandals involving high profile brand ambassadors have highlighted some of the risks associated with having endorsement arrangements in place. Two well known sporting scandals are those involving Tiger Woods' personal life and Lance Armstrong's alleged doping. Both involved world famous athletes, huge brands and multi-million dollar endorsement deals. In each case, the brands involved reacted to the scandals in different ways. In Lance Armstrong's case, some brands moved to distance themselves, whilst in Tiger Woods' case, some brands stood firmly behind him. So, what can a brand do to protect itself when things go wrong in the lives of the individuals endorsing them?

Clearly, specific termination rights in the event of "immoral conduct", "cheating" or any other activity that brings the brand into dispute are ideal. However, few high profile celebrities or athletes will readily agree to extremely broad termination rights without some definition around what amounts to conduct that gives the brand owner the right to terminate. The brand ambassador's concern is likely to be that relatively minor conduct could give rise to termination in circumstances in which the parties' relationship is strained for other reasons. For instance, does a breakdown of a personal relationship with allegations of infidelity amount to "immoral conduct"? Does an arrest for drink driving bring a brand associated with the person into disrepute? What about an off-the-cuff offensive tweet? A brand owner may take the opportunity to argue that such conduct gives rise to the right to terminate under broad termination provisions if sales have been slow and overheads need to be cut or if there has been conflict between the brand ambassador and the brand owner.

Often, careful negotiation and drafting is needed to find a compromise position that protects the brand and satisfies the celebrity or athlete. This may include specific carve-outs to address existing or pending matters such as divorce proceedings. It may also include careful definition of the type of conduct that is unacceptable.

Linked to the termination provisions may be provisions allowing a brand owner to "claw back" payments. A brand owner may specifically address this issue with contractual provisions providing for repayment. Such provisions are likely to make recovery of amounts paid easier in the context of legal action. There has been significant press coverage in relation to US insurers seeking to recover bonus payments to Lance Armstrong. Clearly, recovering those payments is likely to be more straight forward for the insurer if the contract expressly provides for repayment. There are other important issues to consider in the context of endorsement deals that are not specifically linked to termination for the brand ambassador's conduct

Three key issues are:

Exclusivity – This is very important for both the brand owner and brand ambassador. Clearly, the brand owner will require exclusivity to protect their investment. The brand ambassador will need to consider other opportunities foregone. Sometimes, a narrow exclusivity to a "product category" will still exclude other brands outside that category. For instance, large electronics manufacturers compete over a wide range of producers. So, association with one brand regardless of the scope of the exclusivity provisions, may exclude all other competing brands regardless of product category.

Loss of other Deals – Often, a brand owner is interested in appointing a brand ambassador because of their other endorsements or media profile. For instance, if a brand ambassador is no longer on radio or television, should the brand owner have the right to terminate?

Scope of Rights – There is often significant negotiation around the scope of the rights a brand owner has in relation to a brand owner's image. For instance, promotion may be limited to specific channels (i.e. print only and no TVCs). The duration and runs permitted for campaigns may be limited. The competing interests of a brand ambassador concerned about over exposure and a brand owner wanting to get value for money can lead to complicated drafting.

Endorsement deals involve many other considerations many of which are specific to particular brand owners and individual brand ambassadors. These may include standards of accommodation and travel, provision of hair and wardrobe, approval of promotional shots and management of filming and shoot schedules given other commitments. These points and the issues mentioned above need to be carefully considered and carefully drafted to protect both the brand owner and the brand ambassador.

ANDREW DAWSON -
Entertainment Lawyer, Brett Oaten Solicitors

Andrew is an entertainment lawyer with Brett Oaten Solicitors with over 10 year of experience. Brett Oaten Solicitors is one of Australia's foremost music and entertainment law firms representing major Australian artists, creative agencies, film and television producers, broadcasters, venue operators and major talent.

Sham Contracting

Not Worth the Risk

BY ROISIN BEARD

In recent years the Media, Entertainment and Arts Alliance has seen a rise in the number of producers seeking to engage crew members and performers in the entertainment and advertising industries, as independent contractors.

While engaging workers, particularly short term workers, as independent contractors rather than employees may seem advantageous from an administrative level, businesses need to ensure that they look at the true nature of the relationship with workers. Not to do so runs the risk of falling foul of federal laws dealing with superannuation, sham contracting and unfair contracts.

A common misconception held by many industry professionals is that if a worker has an ABN or invoices for payment, they are automatically an independent contractor. This is not the case. Calling someone an independent contractor or having a worker sign a contract saying they're an independent contractor also does not necessarily change the nature of a relationship between a worker and a business or from an employer and employee relationship to a principal and contractor relationship.

Where a worker is engaged primarily for the provision of labour and the contracting business exhibits a significant amount of control over how and when the work is performed, there would be a strong argument that the worker is an employee rather than an independent contractor, despite what any contract between the worker and the business may say.

The test as to whether a worker is an employee or an independent contractor is a common law test that looks at the actual nature of the relationship. There is not necessarily one thing that shows that a person is a contractor or employee and business must look at the nature of the relationship as a whole.

Some of the factors that will generally be indicative of an employment relationship are:

- *The worker is directed by the employer as to their hours of work;*
- *The worker is entitled to receive superannuation from their employer;*
- *The manner in which the work is performed is controlled by the employer;*
- *The worker bears no financial risk in the enterprise;*
- *The worker has an entitlement to paid leave and minimum wages; and*
- *The employer makes income tax deductions on the workers behalf.*

Factors that will generally be indicative of a relationship of contractor and principal are:

- *The contractor pays their own superannuation and tax and arranges their own insurance;*
- *The contractor exhibits a significant degree over the manner in which the work is performed including hours of work;*
- *The contractor has the ability to engage others to assist with work; and*
- *The contractor issues and is paid via an invoice for the work performed.*

Australian courts have on many occasions been prepared to look behind contracts and at the nature of the relationship between parties to find that an alleged contractor was in fact an employee of a business.

Employers in the entertainment and advertising industries need to be particularly mindful of the nature of the relationship when engaging actors or crew. Often actors or crew members have little control over when or the manner in which work is performed, do not hold their own insurance and bear little financial risk in the work.

Superannuation and contractors

Businesses also need to be aware that if a worker is engaged as a contractor under an ABN, an engaging entity may still be required to make superannuation contributions on behalf of the contractor.

Under the terms of the Superannuation Guarantee (Administration) Act 1992, a person will be deemed an employee for superannuation purposes where a person is engaged under a contract that is wholly or principally for labour.

A contract will be principally for labour if more than half the value of the contract is for labour. Labour may include:

– *Physical labour;*
– *Mental effort; or*
– *Artistic effort.*

In the entertainment and advertising industry performers and many crew will be engaged solely or principally for labour and will therefore be deemed employees for superannuation purposes, even if they are engaged as contractors under an ABN.

Unfair contracts and sham contracting

Under the Independent Contractors Act 2006 a relevant court may order the terms of a contract between a contractor or a principal to be re-written and set aside or order that specific terms have no effect, if a court determines that a contract is unfair or harsh. In determining whether a contract is harsh or unfair a court may consider:

– *The strength of the bargaining position between the parties;*
– *Whether any undue or unfair tactics were used; or*
– *Whether the contract provides total remuneration that is less than for an employee performing similar work; and*
– *Any other matter that the court thinks relevant.*

Performers and crew employed in the entertainment and advertising industry will generally be covered by the provisions of the Broadcasting and Recorded Enter-

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tainment Act 2010. Engaging entities should ensure that contractors' entitlements would not be less than if they were engaged as an employee so as not to risk a possible challenge against the contract being unfair under the Independent Contractors Act 2006.

Independent contractor agreements that allow for remuneration by way of profit share only are common, particularly in the low budget film area. Before engaging performers or crew under such contracts, producers should seek advice on these contracts.

The Federal Fair Work Act 2009 also poses a risk for businesses who do not obtain proper advice before engaging workers as independent contractors. The Fair Work Act allows for civil penalties of up to $33,000 to be imposed where a business has engaged in sham contracting.

Sham contracting refers to when an employer deliberately disguises an employment relationship as an independent contracting arrangement instead of paying the worker as an employee.

An employer must not misrepresent an employment relationship as an independent contracting arrangement. An employer must also not dismiss or threaten to dismiss an employee with the purpose of rehiring the employee to perform the same work as an independent contractor or knowingly make a false statement to a current or former employee to persuade that person to do much the same work.

ROISIN BEARD - ***the Recorded Media Industrial Officer for the Actors Equity Division of the Media, Entertainment and Arts Alliance.***

Prior to joining the MEAA Roisin worked as a lawyer with the Office of the Fair Work Ombudsman and an Associate in the Australian Industrial Relations Commission.

Trial by Twitter

BY BRIAN GEACH

In what is calculated to send shivers up the spines of many Facebook users, the British peer Lord McAlpine has resolved to track down those Facebook users who have falsely accused the 70 year old peer of child sex abuse.

This follows allegations aired on the BBC program 'Newsnight' by a victim of child abuse who, after being shown a photograph of Lord McAlpine, later admitted he had been wrong and that it was a case of mistaken identity. In a pre program tweet, the managing editor of the Bureau of Investigative Journalism, co producers of Newsnight with the BBC, stirred up speculation as to the identity of the 'senior political figure'. This was taken up by Twitter users who quickly named the peer as the alleged child sex abuser.

In the ructions that followed and in response to what can only be described as shoddy journalism, the BBC Director General resigned as did the editor of the Bureau of Investigative Journalism. Other staff involved stepped aside or have been reassigned.

But the real story here is the role of Twitter in this saga. Although the BBC had put in place measures to protect the identity of the falsely accused peer, once the story had reached the Twitter-sphere, all bets were off. Amazingly, most who tweeted took no steps to protect their identity and have left themselves open to defamation proceedings after what Lord McAlpine has described as a "trial by Twitter'.

The BBC has settled a claim by Lord McAlpine for approximately £185,000 plus costs. However in regard to the Twitter users, his lawyer has ominously stated "we know who you are" and has urged those involved to come forward to negotiate a settlement.

This may come as a huge shock to those who regard social media as an informal chat room, unaware that not only could they be held liable for their own defamatory statements promulgated through Twitter, but also for those defamatory statements that are passed on by users.

With an effusive apology from The Guardian's columnist George Monbiot on the table, the naming of the comedian and actor Alan Davies and of the wife of The Speaker in The House of Commons Sally Bercow as some of the Twitter disseminators, this story undoubtedly still has a long way to run.

LETTERS & EMAILS

This space is intentionally blank. We look forward to filling it in the next edition with your letters and emails.

Please address all letters to:

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PO Box 1182
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or email us at:
editor@compliancereview.com.au

THE LOCAL EYE

News from Australia the world

◆ Complaints to the ASB were received concerning two Carnival Cruises TVC's which allgend a father figure was portrayed in a discriminatory and mocking manner. The complaint was dismissed as the ASB considered the advertisement to be gently mocking and that 'most members of the community would..... view the situation as humorous and light hearted'.

◆ Whilst admitting that the objective behind a TVC for the National Stroke Foundation was to communicate an important community health message, the ASB upheld complaints of violence made against the commercial. The TVC concerned depicted a menacing man in black who is shown as a silent killer, ultimately smashing a brain with a hammer. Although the actual impact of the hammer on the brain is not depicted, the board viewed the TVC as confronting and felt that it was 'likely to cause alarm and distress to viewers' and that the underlying message behind the commercial was unclear and in particular, lacked 'a call to action'.

◆ A Facebook campaign urging young women to post photographs of themselves and their friends in lingerie has fallen foul of the ASB. Bendon's campaign offered prizes to women who posted the images, but after complaints were received by the ASB, the Board found that the campaign may have encouraged or condoned young people to post inappropriate images.

Term Sheets, Heads of Agreement, Deal Memos, Letters of Intent, Memorandums of Understanding

Are they Worth the Paper they're Written on?

BY LEANNE MONTIBELER

You are in the process of negotiating with a celebrity to appear in your advertising campaign. The negotiations have been ongoing for months and you are finally getting somewhere. You have agreed on some of the important details, such as the talent fee and the media. But there are still some unresolved issues. You wonder if there's a way to lock down the points that have been agreed so far. You approach your lawyer and ask the question – 'Is there such a thing as a preliminary agreement?'

The short answer is yes. These agreements are generally known as a 'Memorandum of Understanding', 'Letter of Intent', 'a Deal Memo' or 'Heads of Agreement'. Some advertising agencies might recognise this as a 'Term Sheet' and this article will use the phrase 'Term Sheet' to refer to these types of documents generally. Essentially, a Term Sheet documents what has been agreed from negotiations, generally with a view to formalising a final, more comprehensive agreement or contract at a later stage.

However, there are some urban myths and prevailing misconceptions about Term Sheets, particularly around whether or not they are legally binding. Although this will always depend on the unique circumstances of each case, set out below is some general guidance to consider.

Are Term Sheets Legally Binding?

An agreement requires certain essential elements to ensure it is legally binding and enforceable. Relevantly, amongst other things, there must be:

1. Consideration (i.e. a price or payment; 'something for something').
2. Intention to create a binding agreement (this can be presumed or the agreement can expressly say the parties intend to be bound).
3. Certainty of language and completeness of terms (i.e. the Term Sheet must be sufficiently clear and certain to actually be binding in practice)

In many cases 1) and 2) above can be easily satisfied. Where a Term Sheet often comes unstuck is in relation to 3).

As a Term Sheet is drafted and signed at a preliminary stage, it is common for it to include vague phrases such as 'to be agreed', 'on the usual terms', 'when necessary', 'when practical, 'at a fair price' or 'subject to contract' because the parties haven't fully contemplated all the details yet.

Such language is however problematic from a legal perspective, as it could signal that the agreement

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is incomplete or is too vague to be enforceable. If on an objective read of the Term Sheet it is not clear what the parties' obligations actually are, then there is unlikely to be a valid or binding agreement.

This is also the case where the Term Sheet leaves out key, essential terms (for example, the fee), to be decided at a later date. If this occurs, then not only is the agreement uncertain and incomplete, it could also signal a lack of intention of the parties to be bound. The Courts have in the past been unlikely to conclude that parties intended to be bound by agreements if there are numerous and significant areas which the parties have failed to reach agreement.

The result is that although you have a written agreement, you might not be able to rely on it if a dispute arises, such as if the other party refuses to follow its terms or wants to re-consider it. Sometimes, this may suit you commercially as it means you also have an 'out' if circumstances change. But what if you want to make it binding?

Unfortunately, without completeness and certainty of language, you could run into problems. If you use a Term Sheet, be aware that great care needs to be taken to fully and properly record the parties' intentions if you want to rely on the agreement and have the parties bound by it. If in doubt, obtain advice to draft the Term Sheet clearly and precisely.

If some elements of the deal are uncertain, it might be appropriate to have a mechanism in the Term Sheet to deal with such elements if the parties are unable to agree. For example it may be prudent to include a binding dispute resolution clause which sets out the process you will follow if there is a dispute, or a clause which makes it an obligation for the parties to negotiate in good faith.

Generally speaking, the obligation of good faith requires the parties to cooperate in a reasonable way to achieve the contract objectives. This doesn't mean that the parties need to compromise their own commercial interests but overall they should negotiate honestly and sincerely and give genuine consideration to proposals that are made and received, rather than engage in improper or unfair tactics. Offers and counter-offers should also respect the material terms already agreed in the Term Sheet.

Despite the legal uncertainty that can arise, there are still practical and commercial benefits for having a Term Sheet. For example, it is a good way to get down on paper what has been agreed thus far and can help set parameters within which to base further negotiations. It can also give comfort to all parties as there is an impression that the parties are committed to concluding the negotiations. It can assist the later drafting process of a formal agreement as the major terms are neatly contained in one document rather than in a series of email chains.

If you are concerned about ensuring your agreement is binding, then it is preferable to finalise all terms into a full and final agreement as soon as possible.

LEANNE MONTIBELER
Solicitor - Anisimoff Legal

Leanne advises on all aspects of advertising, marketing and media law including advertising clearance, consumer law compliance, intellectual property, advertising agreements and packaging.

THE GLOBAL EYE

News from around the world

- A promotional campaign for the Bundeswehr, Germany's armed forces, has been criticised for violating children's rights. The video to attract young recruits, stresses mountain climbing, white sandy beaches, flying in a real army plane and water sports all conducted under the guise of adventure camps. The childrens' aid organisation 'Terre des Hommes' characterised the campaign as 'absolutely unacceptable.'

- The BBC has abandoned plans to point a radio telescope at a new planet during its show, 'Stargazing Life' as the producers were unable to satisfy OH&S requirements should a signal from alien life be discovered.

- A crew member on the set of The Lone Ranger starring Johnny Depp was found to have drowned in a water tank being prepped for future shooting. It appears there is some doubt as to whether the crew member, a diver, suffered a cardiac arrest whilst submerged.

Its Time to Rethink Talent Fees

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celebrity or reputation they bring to the role. Celebrity endorsement is a very different and distinctive value proposition. *(see page 8.ED.)*

There are a number of common factors currently used in determining an actors' fee for commercials:

1. ***The Role; lead featured support, non-speaking or extras.***
2. ***The Number and Duration of the Performance(s).***
3. ***The Channels on which the finished product will appear; free to air television, subscription television, cinema, internet, etc.***
4. ***The Exposure; including number of showings and the timeframe.***
5. ***The Geography; one market, multiple markets or global.***

There are also two further components to be considered when discussing actors' fees, and although they are often rolled into one, it is worth highlighting them as the performance and the rights to that performance.

These are the two parts of the value chain for the actor's performance. There is the 'work' that they bring to the performance and deliver on the day and then there is the 'performance rights' that they effectively licence to use the performance that they delivered.

Lets look at the relevancy of each of these factors in the current marketplace and the possibility they hold in achieving a simpler and more manageable system for talent fees.

1. The Roles

Of all of these factors this is the only one still relevant. The idea of an actor being required to carry the whole performance in the lead or supporting other actors in the performance or in fact providing a performance without a speaking part or as an extra is a reasonable categorisation of a performance.

2. The Number and Duration of Performance/s

Most talent agreements look to the number and length of the "commercials" and here is the issue. The idea of 15-second, 30-second, 60-second performance is very television centric and paid media based. In the digital world the duration is largely irrelevant, with longer forms commonplace and multiple edits and versions increasingly popular.

Linking the amount paid to the actor based on the length of the execution and the number of executions was a way of trying to get a measure of the exposure that actor's performance would garner. But in the world of DVRs, downloads and online viewing, the number of executions and the frequency of viewing is no longer related to the number of spots or the length of the spots. In actual fact, the performance work is more directly related to the time taken to capture the performance in the first place. The performance work is an important factor and can be directly correlated with the performance time. Think of the time it takes to shoot a simple talking head delivering a single line to camera, compared to performing either a long form monologue or performing for a complex CGI integrated spot. The time and effort expended in delivering the performance is an important consideration in the value the actor brings to the value equation.

3. The Channels

This is where technology has had a huge impact on exposure. There are increasingly more channels and more devices to view content, including advertising, than ever before. Beyond television there are computers, tablets, smartphones, gaming devices, point of sale screens, cinemas, venue screens, out-of-home sites and the list continues to grow. And at the same time the audience grows on one channel, it is falling on another. Additional screens do deliver some additional opportunities to view, but that does not guarantee larger audiences. All of these options are screens, opportunities for the audience to view, but without the delivery of a larger audience there is no additional value for the marketer. Perhaps a better and simpler approach would be to consider screens and not platforms, as the distinction is becoming increasingly irrelevant.

4. The Exposure

The approach of linking actors' fees to the size of media budget or the number of spots planned is definitely based in the broadcast world. Online, the audience chooses to watch the content. If an ad is served to them through online display advertising they click to activate or click to close if they do not want to view it. Likewise if it is embedded in the site, like YouTube or a company site, then they click to view. The audience and not the advertiser determine the number of views. The reason for these views is one of any number of things including performance, but it is rarely performance alone that determines views.

5. The Geography

This is a tough one, because while the advertiser may want to promote their brand in a particular geographic area to a particular audience or a particular size, the internet makes it next to impossible to guarantee the delivery. Some mechanisms are in place with digital downloads and ad-serving and the like for copyright reasons. Of course broadcasting did not have this problem, but within reason, the marketer (and their agencies), can limit the exposure where they have the control and mechanisms to do so.

However, I do find it ironic that actors and their agents will threaten prosecution because someone put the ad on the internet outside of their current contractual arrangement, therefore turning a blind eye to agencies and production companies doing the same thing for self promotion and award shows. In fact the content of award shows has become a popular channel in its own right with many websites earning income using actors performances in commercials as the content.

The Need for Change

Technology is changing the media landscape radically and the actor's fee calculation has not kept pace, making the process complex, time consuming and difficult for all involved.

We must simplify the process and the ideal starting point is identifying where actors deliver the value in the process. There are two clear parts, the first being the delivery of the performance required and the second being the rights to use that performance for an agreed period or time and geography across multiple screens.

Without some sort of simplification, marketers and their agencies will increasingly look for alternative ways to achieve their needs including using non-union actors or turn to markets where the requirements are less restrictive and cumbersome.