

BEFORE)
THE PRODUCER--SCREEN ACTORS GUILD)
SOLE NEUTRAL ARBITRATOR)

In the Matter of Arbitration)

between)

SCREEN ACTORS GUILD, INC)
a non-profit corporation, on behalf of)
Affected Performers, 20 Doe Performers,)
and the Producer-Screen Actors Guild)
Pension and Health Plans,)

Complainant,)

and)

McCANN-ERICKSON, INC ,)

Respondent.)

before)

Edgar A. Jones, Jr.)

Neutral Arbitrator)

OPINION

and

AWARD

October 8, 1999

(Relating to "Powerade")

PARTIES.

Screen Actors Guild
Pamela Conley Ulich, Esq.
Screen Actors Guild
5757 Wilshire Boulevard
Los Angeles, CA 90036-3600

McCann-Erickson, Inc.
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Re: Peggy Odira - SAG Commercial Contracts Arbitration

I
Findings of Fact¹

A. The Issues

The parties executed the following stipulated statement of the issue to be resolved in this proceeding

[1] Is claimant Peggy Odita identifiable in accordance with Paragraph 6.C of said Commercials Contract?

[2] If yes, then what remedies are appropriate?

B. Stipulation of Facts

The parties have stipulated to certain facts as follows (Jr. Ex. 3):

1. The commercial and all of its video depiction and audio recording which is the subject of this arbitration is covered by the terms and conditions of the Screen Actors Guild Commercials Contract of 1997.

2. The determination as to whether the claimant is entitled to be considered a principal performer in that commercial is covered under Paragraph 6.C of said Commercials Contract.

3. Respondent stipulates that claimant's image is in the foreground and the such performance illustrates the on camera commercial message.

¹ During the course of the hearing in this matter both parties were afforded a full and complete opportunity to present evidence, to cross-examine witnesses and to develop argument, including the submission of post-hearing briefs. All witnesses appearing were duly sworn. No official record of the proceeding was made.

C. The Commercials Contract

Paragraph I.1.A, "Principal Performers," provides in material part as follows:

Compensation to principal performers in commercials is based both on the services which the principal performer renders in the production of such commercials and on the use which is made of the finished commercial in which the principal performer has rendered services. This dual basis of compensation springs from the unique nature of the services rendered by principal performers in commercials . . . [A] principal performer rendering services in a commercial performs, to a great extent, the duties of a demonstrator or salesperson of a particular product or service and as such, tends to be identified with that particular product or service.

Paragraph 6, PERSONS COVERED - PRINCIPAL PERFORMERS, provides in material part as follows:²

The following classifications of persons are included in the term "principal performer" and are covered by this Contract.

* * *

C Anyone whose face appears silent and is identifiable and whose foreground performance demonstrates or illustrates a product or service or

² Paragraph III.C of the 1958 Commercials Contract (Jr. Ex. 4) defined a "principal performer" as, "Anyone whose face appears silent and whose foreground performance illustrates or reacts to the off-camera narration or to the commercial message being given." In the 1960 Commercials Contract the 1958 language was amended in Paragraph 3 C to read "Anyone whose face appears silent and is identifiable and whose foreground " (emphasis added)

illustrates or reacts to the on or off-camera narration or commercial message . . . (emphasis added)

D. Notwithstanding any of the provisions of subsections A, B or C hereof, anyone who is the subject of a closeup and who is identifiable shall be deemed a "principal performer". A "closeup" is defined as that term is understood in motion picture photography,

...

Paragraph 56.F provides:

Nothing herein contained shall be deemed to give the arbitrator(s) the authority, power or right to alter, amend, change, modify, add to or subtract from any of the provisions of this Contract.

D. The Circumstances

On May 11, 1996, Claimant, Peggy Odita was filmed during a hurdling competition at the Modesto Relays Track and Field Meet. She is ranked ninth in the U.S. for the heptathlon event.

On May 20, 1997, in consideration of the payment to her of \$1,000, she executed a "Talent Release" to Action Sports Adventure, Inc., relative to Job #4719, "Job Name: McCANN, DK POWERADE, "to use up to :02 seconds of the motion picture film or broadcast footage, more particularly described as yourself hurdling in the commercial for Powerade to be aired nationally in the US only for the life the commercial campaign."

Respondent undertook on behalf of its client, The Coca-Cola Company, to produce a commercial motion picture for the drink, Powerade. As produced, it consisted of a series of vignettes of athletes engaged in various strenuous sports actions. In an effort to avoid having Ms.

Odira contractually classifiable as a "principal performer," and thus entitled to residuals, the producer blurred her facial features by reversing the footage into a negative image, thereby altering the colors in the sequence. The effect was significantly to lighten her skin from dark black to a light grayish tint. The result, according to Respondent, was that, "The Hurdler's image has been reversed into a 'Negative' photo image making her unrecognizable. (She is an African-American woman running in the daytime, but the footage makes her look like a Caucasian woman with Blonde hair running at night.)" (U. Ex. 4) That altered image of her is on screen for about a half second as she is launching full tilt over the hurdle. (A television commercial is broadcast at 24 frames per second. Claimant's hurdling image was on screen for 14 to 16 frames.)

Claimant has appeared in other commercials (e.g., AT&T, Gladiators 2000). She testified that she believes she was recognizable because she was wearing her usual ponytail hairdo, her own atypical "color outfit" without any sponsor-identifying label on it, and with her plainly visible number "22" on her bib. At other meets across the country, she testified, kids remarked to her that they had seen and recognized her in the Powerade commercial.

E. Positions of the Parties

1. Claimant Guild

To the Guild, the 1960 addition to the 1958 version of present Paragraph 6.C of the phrase, "and is identifiable," broadened the focus for a performer being classifiable as a "principal performer" from being limited to the appearance of a silent face to the performer's general identifiability in context, inclusive of clothing and bodily features other than the face, such as: stance, proportion, shape, uniform, specific attributes and skin color. Based on those factors,

the Guild concludes that, "the Performer is identifiable in the Commercial as the same person complaining today." (Guild Brief, 9)

The Guild argues that a decision sanctioning the distortion of Claimant's face by reversing the negative would lead to a deplorable situation: "A decision by the arbitrator which holds that her face is not identifiable would allow employers to use any individual's image and change the color without having to compensate the individual in accordance with the Commercials Contract. This result would be inequitable and offensive to justice (Guild Reply Brief, 10)

The Guild referred to and discussed certain statutes and court cases involving the criteria to be applied by courts in tort actions for invasion of privacy or wrongful appropriation of personal images, seeking application of those criteria as supportive of its arguments in this case. In particular, it relies upon the definition in Cal. Civil Code §3344(b)(1) which provides:

A person shall be deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine that the person depicted in the photograph is the same person who is complaining today.

(See also *Newcombe v. Adolph Coors*, 157 F.3d 686 (9th Cir. 1998).)

The Guild urges the arbitrator to take into consideration Claimant's physical appearance at the hearing, as well as in both the freeze-frame and still photograph images of her in proceeding to assess her identifiability in the broadcast commercial at issue in this proceeding.

2. Respondent McCann Erickson

To Respondent, the 1960 addition of the crucial phrase, "and is identifiable," in what is now Paragraph 6.C merely added a second phrase within one of two "whose" clauses and modifies the subject, 'face,' within the first "whose" clause, so it means what it says, no less, no more.

Respondent also points to Paragraph 6.1) in which the word "identifiable" is present but the word "face" is absent. From that contrast between Paragraphs 6.C and 6.1), it concludes that, "The drafters of the Contract clearly understood what they meant. In 6.1), 'face' is not mentioned and may or may not be an element of identifiability. The performer could be identifiable through some particular characteristic or even disguise. The fact that the word 'face' is specifically used in 6.C indicates again that the parties intended that it is the performer's face that must be identifiable and not just the performer." (Resp. Brief, 7)

Respondent reasons that the Arbitrator should look at the broadcast segment "in the way that an ordinary viewer must look at it. That is, it should be viewed on a television screen, at normal speed and in the context of the commercial itself. Freeze framing can be used only to identify what scenes to look at and what persons appearing in those scenes are the subject of the arbitration. To allow a freeze frame or a photographic print as evidence of identifiability is to ignore both common sense and the whole meaning of the compensation scheme of the Commercials Contract." (Resp Reply Brief, 10)

II

Analysis and Conclusion³

³ In the interests of avoiding the cumulative and concentrating on the determinative, in writing this Opinion there has been no effort to summarize all of the evidence nor to discuss each contention pressed by the Parties and considered by the Arbitrator.

The dual structure of the two "whose" clauses of Paragraph 6.C unambiguously segregates the first "whose face" clause from the second "whose foreground performance" clause. Within the first "whose" clause, the word "face" has two conjoined ("and") modifiers: "silent" and "identifiable."

There is no necessity in this case to psyche out the undisclosed intent of an ambiguously structured provision drafted as their best effort by the negotiators in the early hours of a final bargaining session. To the contrary, the conclusion is inescapable that the clause is solely focused on the face and its manifest characteristics. The body and its configurations, together with any of its adornments, are of no relevance to the contractually required focus.

The standard to be applied here differs from that which is applicable in tort cases for the invasion of privacy or wrongful appropriation of personal image. It is whether one may realistically conclude that Claimant's face can reasonably be said to be identifiable when seen by an ordinary viewer at the actual speed of the aired segment, but not by comparing it to her image on a freeze-frame nor in a still photograph of her, as is done in tort cases resolving issues of invasion of privacy or wrongful appropriation or exploitation of personal pictorial images. The rationale expressed in Paragraph I 1 A is to protect the performer's employability in other commercials which would be jeopardized if the face is identifiable and associated with the product being advertised; the solace is afforded by residual payments as a "principal performer."

Actually, however, *comparing* the freeze-frame of her reversed negative image taking the hurdle, as is shown on the clip (U. Ex. 2A), along with an identical but unaltered color still

photograph of her taking the hurdle (U. Ex. 2B), *with* the half-second run of her on-screen segment, merely reinforces the conclusion of the lack of a reasonable identifiability of her face as seen in the blurred reverse negative image on screen. The face of a vibrant, intense competitor in the positive image has been distorted into a chalky caricature in the negative reversal that cannot reasonably be concluded to be identifiable as the Peggy Odita portrayed in the positive images

In the context of this contractual arbitration, whether the airing of such a distortion of a performer's facial features should be deemed to be "inequitable and offensive to justice" raises an issue of tort public policy that may be resolvable in a judicial forum or by the legislature, but not in this contract-based arbitral forum founded in the mutual obligations of the parties. Of course, future Guild negotiators could address and might resolve it in the context of proffering a new contractual provision restricting the alteration of a performer's facial image.

III.

Award

A. This matter was heard in Los Angeles, California, on July 14, 1999, testimony being taken under oath, exhibits being received, post-hearing briefs being filed by September 1, 1999, and reply briefs being dated September 28, 1999. No official record was made of the proceeding.

B. The Award is as follows:

1. The clause, "whose face appears silent and is identifiable," appearing in Paragraph 6 C of the SAG Commercials Contract refers solely to the performer's face.

2 Claimant Peggy Odita's face was too obscured and distorted by the image-reversal process to be reasonably identifiable by viewing the broadcast commercial without reference to any other non-facial attributes from which her presence on screen might be deduced

Edgar A. Jones, Jr.