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TV or advertisements are audiovisual productions like films, TV programmes or videos –moving pictures with sound that can be viewed with the assistance of equipment. Their nature is unique though, since they are made to promote a trade marked product or service. In any event, TV ads are works of authorship, audiovisual works, that are copyrightable subject matter under the Copyright Law of Mexico, based on Berne Convention standards.

The Copyright Law confers to the producer all patrimonial rights over an advertisement. The producer is free to assign those rights to third parties, in whole or part, or to license them for broadcasting, public exhibition or any other form by which the ad can be communicated. The question is, who produces of the ad and thus holds the rights? The reason is that in a typical TV advertisement production relationship, there is generally a client, an agency and an executive producer. The client is the party that takes the initiative, paying for and sponsoring the production. The client then hires an agency that undertakes to coordinate the production. The advertising agency and the executive producer are in charge of bringing in the talent. The executive producer assists the agency by providing studio facilities and all resources needed for to the shooting and post production of the ad. Under the Copyright Law, the producer of an audiovisual work is “the natural or legal person who has the initiative, coordination and responsibility in the realization of a work, or who sponsors it”. In keeping with this, the producer of TV advertisements could be the client, as the project’s sponsor or the agency, as the entity in charge of the coordination or having the ultimate responsibility over the production.

Since copyright on the advertisement production can be vested in the client or the agency, determination of the final owner of the rights is a contractual issue. Accordingly, it is advisable that companies that engage in a TV advertising project secure the rights from their agency, while making clear that the agency will bear all liabilities arising from the production. Clients pay for audiovisual products that they own; that is free of contingencies. So the first step for

companies is to enter into written agreements with their agencies that ensure that they own the right, as producers or otherwise. Work-for-hire agreements can certainly represent a valid alternative. The Copyright Law allows that works, including audiovisual works, can be entrusted and commissioned to firms or other legal persons and the resulting rights belong *ab initio* to the party that performs as the commissioner. Assignment of rights might work as well. In that case the agency would be recognized as the initial owner of copyright, which would be transferred to the client. However, the transfer could imply legal restrictions, especially in connection regarding the scope and term of the agreement.

Pursuant to the contingency issue, agencies can be reluctant to accept their liability over the production. They may wish to transfer their burdens onto the client. A trend in Mexico is that agencies consider themselves as mere representatives of their clients and that the clients face the liability deriving from labour or other contractual contingencies. Agencies have even asked their clients to sign so-called representation or mandate agreements instead of a conventional service agreements. However, that could misrepresent the spirit of advertisement production agreements and the role and that each party should take in the relationship, especially if the agency would be recognized as the producer and copyright owner of the production. In any event, companies should be careful not to enter into representation agreements with their agencies, since such agreements could signify that they take responsibility for the contingencies the service providers should bear.

WHO OWNS THE ART?

The Copyright Law describes the director, writer(s), composer(s), photographer(s) and cartoonist(s) as authors of the works that the producer utilizes in connection with a film or audiovisual production. Likewise, they are authors of the audiovisual works as such, and are entitled to patrimonial copyright rights, subject to restrictions. As mentioned above, producers are the legitimate owners of patrimonial rights and it is they exclusively who can exploit the audiovisual works. An important provision stipulates, that once authors have “consented” to “contribute” to the work they cannot oppose its

exploitation. In other words, once they have consented to the incorporation of their contribution (authorized by any form available in the laws) authors cannot authorize or prohibit the exploitation of the work. Likewise, in 2003, Congress approved a public performance remuneration right that would coincidentally strengthen the Contribution Rule of the Copyright Law. The bill of amendment has produced intense litigation at Supreme Court level. The remuneration system can be deemed compatible with the contribution limitation, as they both allow authors to collect monetary compensation from the public performance of works linked to audiovisual works.

If the audiovisual work is based on a novel or other type of literary works, a producer can obtain from the writer the right to adapt it to audiovisual form, and can, in general, negotiate the rights to publicly perform the literary work as adapted, by means of public exhibition, broadcasting, digital transmission technologies or by reproducing the audiovisual work for distribution by sale or rental. The same is true as of other creative contributions, like the direction that is required for the production. The contract can be a general license or assignment, a work-for-hire agreement or an audiovisual agreement, typified in the Copyright Law. In the particular case of advertisements, the Copyright Law also offers a particular alternative, stating: “Advertising contracts are those whose goal is the utilization of literary or artistic works in commercials or advertising by any means of communication”. These provisions are not necessarily the best solution for producers to adopt regarding assignment, work-for-hire or license agreements, since they are vague and imprecise. It is not advisable for producers to rely on typified forms to secure all the author’s rights on the audiovisual productions. The jingles required to produce advertisements can be commissioned from a composer and the rights consequently belong *ab initio* to the producer. If the composer or a music publisher owns the copyright of a song that is desired for the ad, it can be the subject of a synchronization license.

THE ROLE OF MODELS

Performing artists –screen actors and musicians- are protected under related rights. They are subject to a different legal regime from authors. In principle, they are entitled to Rome- type rights to oppose the fixation of their performances, the reproduction of their performances as fixed in tangible

media, and the public communication of the performances. Performers hold additional remuneration rights for all forms of exploitation of their interpretations. Accordingly, apart from labour or service clauses, performer agreements require non-opposition provisions ensuring that producers are entitled to incorporate the performances into audiovisual productions and to use the same in all media. The question remains whether models that do not really have an artistic role in ads can be the subject of these related rights. In keeping with this, the legal definition of "performing artist" would have to be extended to the kind of activities performed by models.

The Copyright Law provides an *ad hoc* regime for advertisement productions that varies the system applicable to other audiovisual works. The rule dictates: Ads may be communicated for up to a maximum term of six months from the first communication. After this term, an amount at least equal to that original sum must be paid for communication for each additional six-month period, even if the communication occurs for only fractions of that period. Three years after its production, the communication shall require the authorization of the authors and artists participating in the work utilized.

The provision imposes a detailed remuneration system that benefits authors and artists who contribute to ads. Authors and artists have this right regardless of whether they assigned their original copyright right or worked for hire. A relevant question is, which party is obliged to remunerate them? It could be company, the agency or the communication medium that disseminates the ad. The Copyright Law is silent on this subject. In practice the companies make the payment. However, the producer/copyright holder, as the party owning the rights on the ad, should bear the obligation. Naturally, that implies that agencies should assume the obligation, when they have been designated the producer of the ad and possess the correlative rights.