



STANDARD ADDENDUM TO PRODUCTION AGREEMENT (WITH COMMENTS)

This Addendum dated _____, 20__ amends and supplements the production agreement dated _____, 20__ and any documents that are incorporated in the production agreement by reference (collectively the “Agreement”), between the undersigned Agency (on behalf of its Client) and supersedes anything to the contrary or seemingly to the contrary which may be contained in the Agreement. In any conflict between the terms of the Agreement and this Addendum, the terms of this Addendum shall control.

1. **Bankruptcy** (Agreement Section ___)

The references to “bankruptcy” and/or “petition” contained in this Agreement mean a “bona fide” bankruptcy and “bona fide” petition.

COMMENTS:

The bankruptcy clause in the production agreement may allow the Agency to cancel the agreement or otherwise take action with respect to the production in the event that the Producer files for bankruptcy protection. The purpose of adding the phrase “bona fide” is to prevent cancellation where the legal basis for the bankruptcy proceeding is questionable.

2. **Compliance with Union Agreements** (Agreement Section ___)

The Producer’s obligations under labor agreements means and refers solely to collective bargaining agreements to which the Producer is a signatory.

COMMENTS:

In many cases all three entities (the Producer, Agency and Advertiser) may be parties to various union contracts. In sorting out the responsibilities among these entities, the Producer should only be contractually responsible under those contracts which it has signed, including those negotiated for it through the AICP. The Producer should not be contractually responsible under a labor agreement which it has not signed.

3. Payment of Production Company Suppliers (Agreement Section ____)

The direct payment of the Producer's supplier by the Agency shall apply only where the Producer is in default paying a supplier whose contract or possessory lien rights would prevent release of the Commercial unless payment is made. Nothing contained in this provision shall permit termination of this Agreement by the Agency or Client.

COMMENTS:

The Agency's clause states that Agency may cancel the job, or pay Producer's vendor directly and deduct the sum otherwise due Producer, in the event Producer does not pay its vendor. If the vendor cannot exercise possessory lien rights that would prevent the commercial from airing, the Agency should not have the right to interfere with Producer's business. There may be circumstances in which the vendor is not entitled contractually to payment. There are situations where a vendor could complain to an Agency about non-payment which has nothing to do with the Producer's financial stability. For example, if Producer hires a caterer to serve breakfast, and the caterer does not show up on time, the Producer may be forced to hire another company to fulfill the caterer's duties. Producer should not be obligated to pay the caterer for services it did not perform and when there may be valid defenses to the vendor's claims for payment. The clause added protects the Producer and Agency, by allowing the Agency to pay Producer's vendor only in rare instances where the Agency's rights would be affected by the vendor.

**4. (a) Post-Production/Editorial and/or Special Effects Assignment
(New York State Editorial) (Agreement Section ____)**

Where Editorial and/or Special Effects are performed under the Direct Payment Assignment, the Producer is not responsible for the Editorial or Special Effects process including but not limited to quality, payment of the Editor and/or Special Effects facility, overages or security of the negative after delivery to the Editor and/or Special Effects facility. Agency shall indemnify and defend Producer from any claims by Editor and/or Special Effects facility and shall cover Producer and the editorial and/or Special Effects processes under its wrap-up insurance program or shall compensate Producer for its insurance coverage.

COMMENTS:

For New York State based Agencies, the Producer, in form if not fact, subcontracts to the Agency's selected editor and/or special effects company and signs the editorial assignment form that allows the Agency to pay the editor directly. This procedure, which was developed in New York State solely for the sales tax benefit of the Agency, should not expose the Producer to any

risk of liability to the Agency-selected post facility or to liability under other provisions of the agreement that make the Producer responsible for its subcontractors.

**(b) Post-Production Including Editorial and/or Special Effects
(Outside New York State) (Agreement Section ____)**

If the Agency requires the Producer to use a designated facility or service with whom the Agency is contracting directly as identified on the cover sheet of this Agreement and which is excluded from the Producer's bid and production fee, then the Producer is not responsible for the quality, payment to, or acts or omissions of, the facility/service or security of the negative after delivery to the facility/service. The facility/service shall be deemed the Agency's subcontractor for all purposes under this Agreement. Agency shall indemnify and defend Producer from any claims by such facility/service and shall cover Producer under its wrap-up insurance program from such claims or shall compensate Producer for coverage under Producer's insurance.

COMMENTS:

Outside of New York State, or with a facility in New York State that is not subject to the editorial subcontract process described in Paragraph 4(a) above, the Agency may designate an editor/special effects service that it intends to contract with and pay such facility directly. The designation of the Agency-selected facility in the agreement should not expose the Producer to any liability to the post facility or to the Agency under provisions of the agreement that make the Producer responsible for its contractors.

5. SAG/Talent Agreements (Agreement Section ____)

The Producer shall, on Agency's behalf, observe all applicable provisions of the talent union contracts to which the Agency is a signatory but Producer is not a party to those talent union agreements. Producer shall compensate Agency for any fines or penalties which Agency incurs under its talent union contracts caused by Producer's failure to observe such provisions.

COMMENTS:

This clause recognizes that while talent is employed by the Agency under the terms of its SAG agreement and other talent agreements, the Producer plays a role in supervising and coordinating talent with the production. This clause confirms that the Producer is not a party to the Agency's talent agreements and acknowledges the Producer's duty to avoid putting the Agency in breach of its contractual obligations.

6. **Sequential Liability** (Agreement Section ____)

The sequence of liability set forth herein shall not be deemed terms of payment or a payment schedule and shall not supersede, reduce or limit the Client's express payment obligations contained in this Agreement's payment terms and schedule.

COMMENTS:

A Sequential Liability ("SL") clause in the Agency production agreement provides that the Client – not the Agency – is the party ultimately responsible for a failure to pay under the agreement. Typically, the Agency only accepts primary financial responsibility once it has been paid by its Client.

This revision to the SL clause balances the Agency's desire to avoid liability in cases where it has not received payment from its client with the Producer's legitimate right to confirm that the SL clause does not trump or negate the agreement's payment schedule. While the Agency may not be directly liable to the Producer unless it has received payment from its Client, that does not relieve the Client from compliance with the payment schedule.

7. **Quality** (Agreement Section ____)

It is agreed that each production when completed conform to Agency's written specifications as contained in this Agreement and technically will be equal to current MPTE and ISO Standards, all subject to Agency's approval and acceptance. When any element of the production has been approved by the Agency and/or Client, such element cannot subsequently be disapproved. No warranty of the "quality" of the Commercial contained in this Agreement shall subject the Producer to any liability for consequential damages to the Agency or Client.

COMMENTS:

Because the Agency approves elements of the production throughout the process, this addendum will prevent the Agency or Client from attempting to disapprove the production or an element thereof that it has already approved.

"Consequential damages" is a legal concept meaning damages that indirectly follow from the consequences of the breach of a contract. Regardless of the assurances which the Producer may give the Agency regarding the quality of the commercial (i.e. technical or aesthetic aspects), under no circumstances should the Producer be responsible for indirect consequences, e.g., lost

profits or lost business or other consequences beyond the physical commercial itself.

8. Transfer of Rights/Ownership (Agreement Section ___)

The assignment, transfer or other grant of rights in the work(s) hereunder by Producer to the Client are subject to full performance of the payment terms/schedule contained in this Agreement by Agency and/or Client, as appropriate. In the event that Agency and/or Client fail to pay Producer in full, the Producer shall have the right to require the Agency and/or Client to assign to Producer all rights in and to the work(s).

COMMENTS:

It is unreasonable for the Client to retain the Producer's rights in the commercial when the Producer has not been paid in full. In some cases, the Commercial has been physically delivered while outstanding monies remain due and unpaid to the Producer. This clause allows the Producer to require assignment of those transferred rights to the Producer in the event that the Producer is not paid in full.

9. Changes and Variations (Agreement Section ___)

All approved overages shall be paid in accordance with the terms and conditions contained in this Agreement for final payment.

COMMENTS:

This clause reconfirms that approved overages are to be treated as required payments which must follow the terms of production agreement's payment schedule.

10. Licenses and Releases (Agreement Section ___)

Producer will attempt to secure third party licenses for works used in the production in perpetuity. However, Agency and Client acknowledge that some portions of and/or materials used in the production may be licensed for a period less than perpetuity and agree that this is standard in the industry and acceptable. In this event, Producer shall notify Agency in writing (e-mail acceptable) of such portion and/or material, provide information regarding license renewals or extensions, and therefore any Producer warranties contained in this Agreement regarding such third party licenses shall not apply.

COMMENTS:

The Licenses and Releases section of the contract states that the Producer will deliver the commercial to Client unencumbered with all rights secured. To the extent that any or all of the materials may only be licensed for a limited period of time (less than in perpetuity), Producer must notify and inform the Agency of such limited licenses renewal and extension deadlines.

11. Use of Agency/Client Name (Agreement Section ____)

Agency for itself and its Client consents to Producer's use of the Commercial in the Producer's show reel.

COMMENTS:

As a work produced by the Producer, the Producer should have the limited right to include the commercial on its show reel for purposes of soliciting future work once the Agency has accepted the commercial. Acknowledgment of this right does not in any way affect the rights of either the Agency or its Client.

12. Indemnification of Producer (Agreement Section ____)

Unless the Agreement contains reciprocal indemnification of the Producer, the Agency / Client shall indemnify, defend and hold Producer harmless together with its officers, directors, employees and agents, to the same extent, based upon the same causes and from the same claims that the Producer must indemnify the Agency / Client, and without limitation, as provided in Producer's indemnification of Agency / Client.

COMMENTS:

The production agreement has been designed by the Agency to cover indemnification of itself and its Client in a wide range of situations. The Producer has a similar right to be indemnified. This clause requires the Agency and Client to indemnify the Producer in parallel situations to those described in the production agreement. For example, if the production agreement requires that the Producer indemnify the Agency / Client for any breach of the Producer's representation or warranty, then this clause requires the Agency / Client to indemnify the Producer for any breach of an Agency / Client representation or warranty.

13. Audit Rights (Agreement Section ____)

Any audit rights contained in the production agreement shall only apply to cost plus productions or where the production is not produced on a cost plus basis then only with

respect to items which the parties have expressly agreed are to be invoiced on a cost plus basis. Any audits pursuant to the preceding sentence shall be conducted at reasonable times and places by mutual agreement between the Agency and the Producer, at the entire expense of the Agency and shall be initiated by written notice to the Producer within ____ months of the invoice containing the item(s) to which it is claimed audit rights apply.

COMMENTS:

There is no basis for any audit unless the production itself is cost plus or some component of the production is cost plus. If an audit is justifiably sought, there should be a reasonable limit to when it must be initiated, on written request to the Producer, and in all cases, should be conducted at the expense of the Agency / Client.

14. Non-Disclosure (Agreement Section ____)

Contractor is authorized to disclose confidential information to those it employs or engages as it may be necessary for Contractor to produce commercials in the usual and customary manner under this agreement.

COMMENTS:

The existing language is overly restrictive and not practical during the normal course of production. There may be times when members of the Producer's crew need access to such confidential information in order to perform their job duties, such as the director, the assistant director, members of the art department, etc.

15. Cancellation/Postponement (Agreement Section ____)

AICP guideline Cancellation and Postponement is incorporated herein by reference.

COMMENTS:

If the Producer blocks out a specific period of time with the agreement that it represents a firm commitment from the Agency/Client, then, obviously, no further efforts are made to sell that time. If the job is canceled or postponed within the Guideline time frame, it is unlikely that this time can be re-booked. It should be understood that this time represents a Producer's only source of income. The Agency/Client should also be made aware that the Guideline states that the Producer shall make all reasonable efforts to re-book the canceled/postponed time with another comparable project.



AICP Agency Contract Addendum Survey

You may either complete this form and fax to Denise Gilmartin at 323-960-4766, or email the negotiated addendum to deniseg@aicp.com.

Advertising Agency: _____

Addendum clauses accepted (please check all that apply):

- 1. Bankruptcy
- 2. Compliance with Union Agreements
- 3. Payment of Production Company Suppliers
- 4.a Post-Production/Editorial and/or Special Effects Assignment (NYS Editorial)
- 4.b Post-Production Including Editorial and/or Special Effects (Outside NYS)
- 5. SAG/Talent Agreements
- 6. Sequential Liability
- 7. Quality
- 8. Transfer of Rights/Ownership
- 9. Changes and Variations
- 10. Licenses and Releases
- 11. Use of Agency/Client Name

