RIHANNA

CELEBRITY ENDORSEMENT

NAVIGATING THE MINEFIELD

Using celebrities for promotional purposes can undoubtedly create a powerful endorsement of your brand… as long as you're aware of the risks and traps to avoid, writes Sharon Givoni.

Models are used all the time in the fashion industry; that much is indisputable. However, the question I am often asked as a lawyer is: In what circumstances should I obtain formal consent, particularly if a 'famous face' is involved?

In short, the answer is: always (and, get it in writing too!).

Time and time again, I have seen legal disputes arise when agreements are loosely defined or there is no written agreement when someone's image is used to promote a clothing label.

This article examines this topic in detail, drawing on real life case studies along the way.

RIHANNA VERSUS TOPSHOP

Without a doubt, the most recent topical case in this area was the "tank top" case involving UK based high street fashion chain Topshop and R&B singer Rihanna.

The saga began back in March last year, when Topshop started selling a tank top that prominently featured an image of Rihanna, taken by an independent photographer.

The tank top sold, known as the "Rihanna Tank" was cut square and with a "muscle sleeve" featuring a blown up image of Rihanna with pouting coral lips and hair piled high.

Topshop apparently did have a licence from the photographer who took the picture but Rihanna had not consented to the retailer's use of her image on a tank top.

Upon discovering the sale of the top, she took legal action in the High Court of England and Wales (UK) and reportedly claimed five million dollars by way of compensation.

Rihanna's main argument was that the sale of the top amounted to Topshop "passing off" on her goodwill and reputation and was misleading.

Her lawyers argued that people would likely form an opinion that she had endorsed the product or was associated with it in some way and therefore, should be entitled to licencing fees.

After reviewing her evidence in the case, the judge, Mr.Justice Birss, concluded that Rihanna is considered extremely influential in Topshop's target market being females, between 13-30 years of age.

On this basis, if she is seen to approve of an item of clothing such as the Topshop tank, this could easily be understood as "an endorsement of that item in the mind of those people" especially given her status as a "style leader".

FLATTERY GETS YOU NOWHERE

On a somewhat amusing side note, there was also some debate as to whether the image on the tank top was flattering or not.

Naturally, Topshop argued that it was.

From Rihanna's standpoint, had she been given the opportunity she may have wanted the image touched up or may have chosen another image altogether.

While models may complain about the use of certain images, in this case, the real issue, said the judge, was whether people would buy the top on the assumption that Rihanna was associated with Topshop.

FRONTSHOP TOPSHOP

THE BOTTOM LINE

Ultimately, the judge concluded that Topshop had a case to answer and ruled in Rihanna's favour. He took the view that many purchasers would have believed that Rihanna had authorised the use of her image on the garments and even commented that to an extent the pop star had lost "control over her reputation in the fashion sphere."

It did not help Topshop's case that in the image used, Rihanna was wearing the same clothes as she wore in a recent video.

Moreover, there was a context to the dispute; Topshop has had a history of formally aligning itself with celebrities, including a formal collaboration with Kate Moss in 2007 and back in 2013, with American actress, Kate Bosworth.

A HARD LESSON LEARNT

No matter how many Rihanna tank tops Topshop may have sold, nothing can repair the potential damage of negative publicity.

Reported court cases, such as this one, are publically available and, as readers would know, once the media gets hold of a juicy story, it can easily go viral.

In this case, some of the more unforgiving headlines included:

- Rihanna Phucks Up Topshop in High Court, sends Haters to the Left Over Imposter T-Shirt;
- Rihanna crops Topshop;
- Rihanna beats Topshop in high court battle over unauthorised T-shirt;
- Rihanna wins lawsuit court battle against Topshop, judge rules; and
- Shut up and pay: Rihanna wins Topshop lawsuit.

OTHER CELEBRITIES

Other celebrities have taken issue with the unauthorised use of their image in the context of clothing and fashion. Past cases include:

In 2012, television personality Kim Kardashian took legal action against US clothing manufacturer and retailer *'Old Navy'* for using a lookalike of her in its advertising campaign. Apparently, the case settled out of court.

In 2007, Woody Allen took legal action against clothing manufacturer, American Apparel, when it reproduced an image of him from his 1977 movie, Annie Hall, on a billboard with a caption in Yiddish "the High Rabbi". According to media reports, the dispute was settled out of court for an undisclosed amount.

In 1989, Aussie icon Paul Hogan took legal action regarding the use of a look-alike" in a "Grosby Leatherz" shoe advertisement that was aired on television. The advertisement incorporated a parody of the famous knife scene in the movie "Crocodile Dundee". The Court held in Hogan's favour.

In 1988, Paul Hogan took legal action against two Australian clothing shops to stop them using the name 'Dundee' in conjunction with a modified Koala image. He won the case.

THE SELLING POWER OF CELEBRITIES

Endorsements and collaborations are very common in the fashion industry and the law recognises their selling power and ability to commercially exploit celebrities' image.

Some recent examples of celebrities endorsing brands are:

- *Jennifer Hawkins for Myer;*
- *Megan Gale for David Jones;*
- *Rachel Finch for Speedo;*
- *Pat Rafter for Bonds;*
- *Roger Federer for Nike;*
- *Maria Sharapova for Tag Heuer; and*
- *Elle MacPherson for Sheridan.*

As Rihanna has demonstrated, celebrities can be quick to take legal action if their image is misused or used without their permission. Therefore, you must always seek the person's written permission to use their image before you use it.

No matter how many
RIHANNA TANK TOPS TOPSHOP
may have sold, nothing can repair the potential damage of negative publicity.

WHAT ABOUT ORDINARY PEOPLE?

'Ordinary' people can also attach a value to their image, even more so when certain events take place that lead them to some form of public notoriety.

Take for example, Jessica Watson who in 2010, became well known for being the youngest person to sail around the world unassisted.

Since then she has published a book and a movie is set to be made about her.

WHAT ABOUT THE USEOF FAMOUS FICTIONAL CHARACTERS?

If you use a well-known fictional character that can catch you out as well.

Do not do it without formal written permission.

GETTING THE TERMS RIGHT

Assuming you do get that consent, it is important to have clear contracts in place so that everybody knows where they stand.

Such agreements could cover matters such as:

- The fee that they get paid
- Whether it is one-off or ongoing
- Whether the fashion label can touch up and alter the image at its own discretion
- Whether the fashion label use any words it wants in conjunction with the image
- What garments the image be used on
- In what countries the garment can be sold...
- ...and much more.

THE USE OF 'MODEL RELEASES'

Finally, a word for us mere mortals.

Basically, the need for model releases (a model release is a legal release typically signed by the subject of a photograph, granting permission to publish the photograph) arises when any person models your clothing or clothing is used to promote your brand, as the last thing you want is to be held to ransom in the absence of an agreement.

This will be the subject of a separate article on model releases in an upcoming issue of ATF.

THE DUFF BEER CASE

Some years ago, for example, two South Australian breweries released a beer called Duff Beer.

It was essentially a play on Homer Simpson's beer of choice in the animated series 'The Simpsons'.

Twentieth Century Fox Film Corporation and Matt Groening Productions Inc. took legal action in the Federal Court of Australia and were able to stop the breweries from producing the beer notwithstanding that the image on the beer cans was different in colour and appearance to the fictional Duff Beer featured in 'The Simpsons' and the breweries offered to use a disclaimer saying that it was not affiliated with the television series.

Based on the evidence, the courts took the view that people would associate the 'real' beer with the television series and be misled into thinking that there was some association between the two, when of course, there was none. It did not assist the case that 'The Simpsons' is widely viewed by children and if it was linked to beer this could be in conflict with its corporate brand.

By analogy, had a T-Shirt company used images of Duff Beer on clothing without permission in Australia, this could also attract legal liability.

Duff beer T-Shirts are currently sold online and it can be assumed that the owners of 'The Simpsons' are carefully monitoring the use of the Duff Beer image and for that matter, all components of 'The Simpsons' series as used on apparel.

FURTHER TIPS:

- *If you distort the image slightly, but the celebrity is still recognisable, legal liability can still arise.*
- *Using an obvious celebrity lookalike can still attract liability, as consumers may still be confused that the celebrity personally endorsed the use of their "likeness."*
- *If you use an illustration, cartoon or caricature of the celebrity, this will not excuse you (further, you will need copyright permission).*
- *Using the names of celebrities can also be misleading and deceptive or amount to passing off (take for example, 'Elle. M' for underwear. No doubt the real Elle would take offence).*

In short, there are no shortcuts. Get written consent or don't do it.

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