How to Protect Your Brand When Your Spokesperson is Behaving Badly: Morals Clauses in Spokesperson Agreements

You smile contentedly as you pour yourself a bowl of Super Sugar Puffs, your company’s top-selling breakfast cereal and your account. Who cares if it’s a kids’ cereal—each sweet corn puff makes you feel like a teenager again. As you tilt the box back upright your smile grows, and you congratulate yourself, again, for signing Cindy Celeb, America’s sweetheart and latest teen sensation, as spokesperson for Super Sugar Puffs. The boxes with her photo on the front hit the store shelves yesterday. Her contract includes several appearances at grocery stores across the country. Miss Celeb is the perfect representative of the wholesome and sweet image you have created for your brand.

You open the newspaper, and you’re ready to fully enjoy your breakfast, and you stop mid-crunch as you read the headline in bold-faced type. “Cindy Celeb Arrested for Drunk Driving: What Will Become of Her Good Girl Image?” You scan the article and, as you suspected, the reporter jibes “Perhaps Celeb isn’t quite as sweet and wholesome as those Super Sugar Puffs she recently started endorsing.” Breakfast forgotten, you dial the attorney who drafted the agreement with Miss Celeb. “Have you seen the papers?” you shout. “Can you get me out of this deal? Our grocery store appearances are scheduled to start next month!”

“Not to worry,” responds the attorney, “we included a morals clause in our endorsement agreement with Miss Celeb.”

Teaming up with a celebrity spokesperson can be a great benefit to a brand because the endorsement can set the brand apart from other brands of similar products. The hope is that the public will become comfortable with the product because they are comfortable with the celebrity spokesperson. However, this transference of public perception from the celebrity to the product works both ways. When the celebrity starts behaving in a way that is likely to offend the purchasing public, the negative public perception may also be transferred to the product. For this reason, celebrity endorsement agreements generally include “morals clauses,” which allow the brand owner a way out of the contract in the event that the celebrity starts behaving badly. Here is an example of a typical morals clause:

The spokesperson agrees to conduct herself with due regard to public conventions and morals, and agrees that she will not do or commit any act or thing that will tend to degrade her in society or bring her into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the brand owner in general. Brand owner shall have the right to terminate this Agreement if spokesperson breaches the foregoing.

Although the typical morals clause includes broad language, such clauses have long been held enforceable. The celebrity may push for a narrower clause—for instance, one that requires a criminal conviction of a felony or public reporting of an illegal offense that includes moral turpitude. Negotiations between the brand owner and the celebrity may result in the following compromise:

[Spokesperson] (i) has not been accused of or convicted of any crime (other than minor traffic violations), including, without limitation, any felony, crime of moral turpitude, morals offense or drug charge; (ii) is not now and has never been a user of illegal drugs or an abuser of alcoholic beverages and has never received treatment for drug or alcohol abuse; (iii) will not during the Term engage in any practice or acts which are likely to cause [Brand Owner] embarrassment or which could be considered offensive or shocking to [Brand Owner]’s customers or the general public; and (iv) has disclosed to [Brand Owner] any situation, event, legal or personal matter which if made public might cause a public relations issue. [Brand Owner] shall have the right to terminate this Agreement if [Spokesperson] breaches the foregoing warranties and representations.

Fortunately for the Super Sugar Puffs brand, Cindy Celeb’s spokesperson agreement included a broad morals clause. Her arrest and possible conviction trigger the brand owner’s right to terminate the agreement. In addition, a court has held that the brand...
owner can take a reasonable amount of time to determine if the morals clause has been implemented. Although it seems unlikely that time will change the result in Miss Celeb’s case, the brand owner does have time to determine the public’s perception of the incident and decide if it wants to terminate the endorsement arrangement.

Celebrity endorsements are a risky business for brand owners. There are still hundreds of thousands of boxes of Super Sugar Puffs boxes bearing Cindy Celeb’s picture on the market, so there is some potential for damage to Super Sugar Puffs associated with the agreement with Cindy Celeb. However, you can minimize the damage by canceling the grocery store appearances under the morals clause and not printing any more cereal boxes that have her picture on the front. While you are glad your attorney included the morals clause in the agreement as a way to minimize your damage, you are starting to understand how Snap, Crackle, and Pop have been able to keep their endorsement gig since the 1930s. TFL

Sarah Osborn Hill is a registered patent attorney and a member of the Intellectual Property and Technology Licensing Group of Wyatt, Tarrant, & Combs LLP, where she counsels clients and litigates in patent, trademark, copyright, unfair competition, trade secret, and advertising matters. She is based in the firm’s Louisville office and can be reached at shill@wyattfirm.com.

Endnotes
2 Adapted from Loew’s Inc v. Cole, 185 F.2d 641, 645 (9th Cir. 1950).
3 See Loew’s, 185 F.2d at 641, Twentieth Century Fox Film Corp. v. Lardner, 216 F.2d 844 (9th Cir. 1954); RKO Pictures Inc. v. Jarrico, 274 P.2d 928 (Cal. App. 1954); Scott v. RKO Radio Pictures Inc., 240 F.2d 87 (1957); Nader v. ABC Television Inc., 150 Fed. Appx. 54, 2005 WL 2404546 (Sept. 30, 2005).
4 With apologies to Mr. Shakespeare’s Hamlet.
5 This is a specific example that Jim Richardson, a former president of the FBA, and I got from the dean of a law school in Washington, D.C., who thought that students would find it beneficial to hear what someone from the ethics review board of a state bar has to say.
6 Dylan Thomas, “Do Not Go Gentle Into That Good Night.” (1951)

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joining their bar.” As with the Rashomon Effect, it’s all in the perspective.

So, by any means necessary, do something for the greater good with some of your retirement time. As Dylan Thomas wrote,

Do not go gentle into that good night,
Old age should burn and rave at close of day;
Rage, rage against the dying of the light.5

Of course, you could also run for president of your bar association. But above all else, do not go gentle into that good retirement. TFL

Endnotes
1The National Native American Bar Association does not have a section or a division devoted to senior lawyers.
2Adapted from “Twelfth Night,” Act 2, Scene 5: “Be not afraid of greatness: some are born great, some achieve greatness and some have greatness thrust upon them.”
3With apologies to Dylan Thomas.

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disabling your display of HTML content. Unfortunately, you won’t be able to see any other images that are embedded in the body of received e-mail messages. (Image files sent as e-mail attachments will still get through, however.)

PC World points out that, for people who use Outlook (versions 2000 through 2003) and don’t want to turn off HTML in their mail messages, former Netscape programmer Mike Belshe has created a free program called “NoSpyMail” (belshe.com/nospymail) that can detect and block Web bug elements in messages coming through sources like Msgtag and DidTheyReadIt without requiring you to turn off HTML in your e-mail software.

Conclusion
It is an interesting world out there in Cyberia. It is important to know what’s going on and to take necessary steps to protect your interests. In using any software that tracks e-mail messages, it is crucially important for lawyers to consider all ethical implications, including—but not limited to—the implications of using any source that could arguably compromise the attorney-client privilege. TFL

Michael J. Tonsing practices law in San Francisco. He is a member of the FBA editorial board and has served on the Executive Committee of Law Practice Management and Technology Section of the State Bar of California. He also mentors less-experienced litigators by serving as a “second chair” to their trials (www.Your-Second-Chair.com). He can be reached at mtonsing@lawyer.com.