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## Using Celebrities in Advertising

### Introduction

Fortunately for UK advertisers and their agencies, the laws and regulations of the UK permit the use of celebrities in advertising to a much greater extent than in many jurisdictions around the world. In the UK, there is no immediate right for a celebrity to prevent his or her image being used in a marketing campaign.

This is not the case in the US, which has various legal provisions relating to “personality rights”, or in France or Spain, for example, whose Constitutions prevent the use of an individual’s image in a commercial context, such as advertising, without their consent. Advertisers are therefore urged to proceed with caution if they are running international campaigns, or indeed if a perceived UK-only campaign is run on the internet, since this could in theory be subject to the law in the country in which the ad is accessed.

This is not to say, however, that the UK has no restrictions on the use of celebrities, nor that, conversely, anybody featured in a marketing campaign has no legal recourse to prevent such usage. There are various legal avenues which an affected person could pursue if they discover that they are featured without their consent, and advertisers need to be aware of these.

### Industry Self-Regulation

Advertising in the UK is self-regulated by a series of Codes which are specific to the media carrying the communication in question. The Committee of Advertising Practice (CAP) Code<sup>1</sup> covers non-broadcast marketing communications, that is to say those run in the press, cinemas, online in paid-for space, or outdoor. For broadcast ads, the Broadcasting Committee of Advertising Practice is responsible for the BCAP codes for Television<sup>2</sup> and Radio<sup>3</sup>. The Codes are enforced in the UK by the Advertising Standards Authority. For further information on the UK self-regulation system of the advertising industry, please see the ReACTS Ad Guide, Regulation of Advertising in the UK.

The position on using celebrities in television ads is set out in section 6.5 of the BCAP television Code:

- **With limited exceptions, living people must not be portrayed, caricatured or referred to in advertisements without their permission**

The “limited exceptions” are detailed in an accompanying Notes section. In summary, these exceptions are for advertisements for specific publications which feature the person referred to in the advertisement, in generic advertisements for news media assuming that a person would not reasonably object, and in crowd scenes where the appearance is brief and incidental.

Advertisers should note that Clearcast, the UK clearance body for broadcast ads on television, will not clear an ad for broadcast until it has been provided with written permissions from any living individuals featured or referred to in a TV ad. The advice for advertisers is to use living individuals only with permission, or perhaps rather morbidly, to use dead people instead.

However, it is less straightforward in non-broadcast advertising under the CAP Code and in the BCAP Radio Code. The CAP Code states in s.13.1 that:

- **Marketers should not unfairly portray or refer to people in an adverse or offensive way. Marketers are urged to obtain written permission before:**
  - a) referring to or portraying members of the public or their identifiable possessions; the use of crowd scenes or general public locations may be acceptable without permission

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1. <http://cap.org.uk/The-Codes/CAP-Code.aspx>  
2. <http://cap.org.uk/The-Codes/BCAP-Code/BCAP-TV-Code.aspx>  
3. <http://cap.org.uk/The-Codes/BCAP-Code/BCAP-Radio-Code.aspx>

- b) referring to people with a public profile; references that accurately reflect the contents of books, articles or films may be acceptable without permission
- c) implying any personal approval of the advertised product; marketers should recognise that those who do not wish to be associated with the product may have a legal claim.

The BCAP (Radio) Code states in s.2.14:

- **Advertising must not claim or imply an endorsement where none exists.**

Advertisers are urged to obtain written permission in advance if they portray, refer or allude to living individuals in any advertisement. Clearance given will be on the basis that it is recommended that such permission is sought.

The point therefore is that for these two Codes, permission is “urged” but not “required” as under the TV Code. The commercial interpretation of this is therefore that advertisers can use living individuals without their permission in non-broadcast ads and on the radio, provided that there is no implied endorsement of the advertiser’s product or service, and that nothing denigratory or defamatory is said or implied in the advertisement.

On two related points, note also that the CAP Code requires in s.13.3 for references to deceased individuals to be handled with care in order to avoid causing distress, and in s.13.4, that permission is required if referring to or featuring members of the Royal Family.

## Passing Off

Perhaps the most common legal avenue for a celebrity to pursue if complaining about the use of their image, likeness, voice or signature in a marketing campaign, is passing off.

Passing off is, however, a notoriously difficult legal claim to bring, as various elements need to be established, namely:

- goodwill (the individual must show that they have a reputation and value in their name)
- a misrepresentation in a commercial context which causes confusion to a consumer
- damage flowing directly from the misrepresentation.

This means that if an ad suggests that a particular individual is endorsing a product, either directly or indirectly, and sufficiently so for a consumer to be misled into believing that it is the case, then that individual potentially has a case for passing off, but only if they can also show that they have goodwill in their name and that they suffer damage as a result. If any one of these elements cannot be established, there will be no case of passing off to answer. So it is easier for celebrities to complain about the unauthorised use of their images on these grounds (because they have merchandising careers) than, say, the man on the street who cannot show his image is commercially valuable.

It should be noted that the use of lookalikes and soundalikes could also give rise to a case for passing off if a consumer were to be misled into thinking that it was a genuine endorsement by the celebrity in question.

Arguably the most famous recent case for passing off was the racing driver Eddie Irvine’s claim against TalkSport Radio. In that case, an image of Irvine holding a mobile phone was used without permission for a press ad. On the face of it, that is arguably fine, under the CAP Code permission to feature a celebrity is only “urged”. However, the image was digitally manipulated, and the phone was replaced with a handheld radio branded with a TalkSport logo. This was therefore clearly a false endorsement, suggesting that Irvine listened to TalkSport radio, which was not the case. Irvine was eventually awarded, on appeal, £25,000 in damages since he argued that such an amount would have been his standard fee for an endorsement like that, and he had been deprived of this by the advertiser. Of course, this figure also excluded the legal fees for both parties which TalkSport were required to pay in addition.

Compare this to the recent US case against American Apparel which was brought by the director Woody Allen. The clothing company used a still of Allen from his film in a billboard ad on Allen Street in New York. Allen claimed an abuse of his personality rights under US law since his image was used without permission. It was a clear-cut case and it quickly settled before court action commenced for \$5million, which leaves Irvine’s £25,000 damages win after a lengthy legal battle, rather in the shade.

## Copyright

Under the Copyright, Designs and Patents Act 1988 (the “CDPA”), copyright protection in the UK is given to artistic works, it does not extend to a person’s image, name or voice. If an advertiser were to use a photograph of a living individual, they would need to obtain permission to use the photograph, usually through a licence for the photograph itself, but copyright permission would not need to be obtained from the person featured.

Under Part II of the CDPA, however, protection is given to performers for their performances of artistic works, and this should also be noted. If an advertiser uses a recording of a performance, the rights of any performer featured should be cleared. This would also apply after the performer in question has died, since performer's rights under the CDPA last for 50 years from the end of the year in which the recording is made. Permission in such cases would need to be sought from the deceased performer's estate.

## **Trade Marks**

Advertisers should be aware that celebrities are increasingly registering their names as Trade Marks, and therefore it is necessary to check the relevant Trade Marks Registry before proceeding with a campaign which features celebrity names. This is particularly relevant for those celebrities who have accrued an amount of goodwill in their name or image, such as sportspeople who endorse various products, like David Beckham and Lewis Hamilton. It should also be noted that trade mark rights can survive beyond the death of the individual whose name is registered, if the rights are owned by a company, or indeed via an assignment in the individual's will.

## **Denigration and Defamation**

Advertisers need to be careful to avoid possible defamation actions being started against them, especially when running tactical ads based on current news stories where allegations have yet to be proven. In those situations, it is always better to hint at such issues and individuals, but legal advice should always be sought.

It is rare for advertisers to defame celebrities or individuals in their advertising (it does not usually enhance a brand to do so), but the Codes prevent references to any individual's name or image being used in a denigratory fashion, and advertisers need to be careful not to use celebrities or individuals in an offensive or detrimental way without permission.

## **Privacy**

In contrast to what the media may suggest on the subject, there is still no absolute right to privacy under UK law. Again, this is not the case in the US and many European jurisdictions, and therefore particular care should be taken with international, including online, campaigns.

In the UK, there have been various attempts at creating such a law and indeed it looks like we may be heading in the direction of legislation. As it stands, however, an individual has fairly limited legal recourse in such situations. The Human Rights Act 1998 introduced a limited right of privacy into English law with the provision under Article 8 that "everyone has the right to respect for his private and family life, his home and correspondence."

There have been several high-profile cases in which this provision has been used with some degree of success, the most famous being that brought by Michael Douglas and Catherine Zeta Jones against Hello magazine. Other high-profile individuals, such as Sara Cox and Elizabeth Hurley, have also succeeded in their claims of breach of privacy against the press, when photographed, for example, sunbathing on a private island. But such successful cases are few and far between and require such a clear invasion of privacy to have taken place. Advertisers are advised to check the sources of their photographs and to seek legal advice if unsure as to whether they can use an image of a potentially private situation.

It is possible, if a photograph is used without permission, for an affected individual to claim a misuse of their personal information and therefore a breach of the Data Protection Act 1998. However recent case law has minimised the possibility of photographs used in advertising context being deemed personal information for these purposes. Even so, advertisers should be aware of the new powers awarded to the Information Commissioner's Office, which will be available from April 2010 and will allow for fines of up to £500,000 for serious breaches of the Data Protection Act 1998.

## **Final Thoughts**

Using celebrities in advertising in the UK can be possible without their permission subject to the media and treatment in question. Advertisers must of course always be careful not to portray celebrities in a denigratory or defamatory light and, importantly, need to avoid creating any suggestion of false endorsement.

Whilst the UK seems fairly lenient on this point, it should once again be noted that this is not the case around the world. Advertisers therefore need to be very careful if running international campaigns and indeed if running online campaigns, since the laws of other jurisdictions could apply in these circumstances.

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