

OCTOBER 2024

DEVOTED TO
LEADERS IN THE
INTELLECTUAL
PROPERTY AND
ENTERTAINMENT
COMMUNITY

VOLUME 44 • NUMBER 9

THE *Licensing Journal*®

Edited by Gregory J. Battersby and Charles W. Grimes



Wolters Kluwer



Contract Corner

Sarah La Voi and Lauren Bass

A Moral Quandary: Best Practices for Negotiating Morals Clauses in Talent Contracts

It was late summer in 1921, and Roscoe Arbuckle – known familiarly to movie audiences as Fatty Arbuckle – had just signed a three-year deal with Paramount Pictures under which he would earn an unheard-of \$1 million a year. To celebrate, his friends planned a Labor Day weekend party at San Francisco’s St. Francis Hotel. Unfortunately, the party didn’t go exactly as planned, and by the end of the week, Arbuckle had been arrested and was in jail, accused of murdering one of the party’s female guests.

Although he was ultimately acquitted, Arbuckle’s arrest and the resultant trials turned public opinion against the actor and negatively impacted the studio’s films in which he had starred. Witnessing the scandal unfold in real time, and hoping to avoid similar incidents with their stars, Universal Film Company began inserting into all existing and future actor deals a protective clause, permitting the studio to terminate an actor’s contract “if they forfeit the respect of the public.”¹

Thus, the morals clause was born.²

The Morals Clause: a Traditional One-Way Street

A morals clause is a contractual provision that gives one contracting party (usually the advertiser) the unilateral right to terminate an agreement (or take remedial action) should the other party (usually the talent) engage in scandalous behavior that negatively impacts (or may negatively impact) the talent’s public image and, by association, the public image or reputation of the contracting advertiser.³

Morals clauses serve two purposes: (i) they act as a deterrent to “bad” behavior during a contractual relationship and (ii) they provide a clear mechanism by which to terminate a relationship quickly and effectively and (ideally) protect a party (and potentially its investment) in the process.

Traditionally, morals clauses have been included in agreements such as talent, endorsement, or influencer deals, at the behest of the advertiser; and such clauses have been upheld by courts. Recently, however, the tables have turned, and in the wake of corporate scandals, the #MeToo movement, and general cancel culture, we’ve seen an uptick in “bilateral” morals clauses being requested by *talent* effective against the advertiser.

The “New” Morality: A Bilateral Approach

In a bilateral morals clause, the unilateral right previously exercisable at the discretion of the advertiser alone now becomes a mutual (or reciprocal) right that may be exercised equally by either party. We’ve even seen smaller, “micro-influencers” add these provisions to draft deals.

Although the inclusion of a bilateral morals clause is a relatively new concept, advertisers should consider whether a version of this type of clause makes sense in certain limited circumstances.

Fundamentally, it is logical for an advertiser to want to impose a morals clause on talent. After all, talent provides services that are unique, personal, and often intrinsically tied to their public reputation. On the other hand, to impose those same guardrails on an advertiser’s brand makes less sense, as the overall reputation of a brand rarely hinges on the actions of just one person. As such, the risk to be mitigated by a traditional morals clause is not exactly an apples-to-apples comparison, as between talent and advertisers.

While we would generally not recommend a bilateral morals clause that contains “mirrored” terms for most talent, endorsement, or influencer deals, a bilateral clause with narrowly-drawn language that allows the talent to walk away from a partnership may be beneficial in certain circumstances. For example, some influencers build their brands around personal beliefs such as “cruelty-free” or “all-natural,” and agree to promote only those products or services that meet these critical standards. So, if an

influencer whose brand revolves around promoting “cruelty-free” products partners with a beauty brand, and it is later revealed that the brand did indeed test on animals, the influencer might understandably no longer want to promote that brand or its products.

Under the FTC’s Endorsement Guides,⁴ endorsements should be truthful, accurate, and based on personal experience. But if circumstances change, and an influencer no longer believes in the product or the brand they are touting, holding them to a contract can impact the authenticity of the endorsement and increase risk to the brand.

As such, a bilateral morals clause, if properly drafted to protect the interests and reputations of both parties, is an opportunity for advertisers and talent to find common ground.

Best Practices

When negotiating a morals clause in a contract, here are a few best practices to consider:

Choose which type of clause: unilateral or bilateral. This decision will likely depend on the type of agreement, the value thereof, and the status of the contracting parties.

Make clear what type of behavior will trigger the clause. Depending on the relationship between the parties and the value of the contract, narrow language that lists only specific actions (such as an indictment) might suffice, or a more broadly-worded clause that allows for termination based on allegations alone, or even at a party’s discretion, may be preferable.

State when and how termination will occur. While termination under a morals clause is often “immediate” upon notice to the other party of the exercise of the clause, consider whether other remedial actions should be taken prior to termination.

Include the effect of the exercise of the clause. In addition to terminating the contractual relationship, consider what amounts should be due upon termination and how to treat the existing collateral.

Sarah La Voi is a partner on BakerHostetler’s Advertising, Marketing, and Digital Media team in Chicago and co-leads the firm’s Retail industry group. She specializes in advertising FTC regulatory and self-regulatory matters as well as commercial negotiations within the advertising ecosystem. Sarah focuses on agency agreements, media buys, brand collaborations, sponsorships, digital marketing, and influencer protocols. Sarah also advises on structuring and executing compliant sweepstakes and contests. She can be reached at slavoi@bakerlaw.com.

Lauren Bass is an associate in BakerHostetler’s New York office. She currently works with the Emerging Technology, Intellectual Property, and Advertising, Marketing and Digital Media teams, counseling clients on social media, endorsement, and influencer campaigns; merchandising, sponsorship, and branding deals; sweepstakes and promotions; and other digital media, digital advertising, and digital asset matters.

1. *Morality Clause for Films*, N.Y. TIMES, Sept. 22, 1921, available at <https://timesmachine.nytimes.com/timesmachine/1921/09/22/98743776.pdf>.

2. *Id.*

3. See Fernando M. Pinguelo & Timothy D. Cedrone, *Morals? Who Cares About Morals?*

An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know, 19 SETON HALL J. SPORTS & ENT. L. 347, 351 (2009), available at https://scholarship.shu.edu/sports_entertainment/vol19/iss2/4.

4. See <https://www.federalregister.gov/documents/2023/07/26/2023-14795/guides->

[concerning-the-use-of-endorsements-and-testimonials-in-advertising](#).

Copyright © 2024 CCH Incorporated. All Rights Reserved.

Reprinted from *The Licensing Journal*, October 2024,
Volume 44, Number 9, pages 27–28, with permission from Wolters Kluwer,
New York, NY, 1-800-638-8437, www.WoltersKluwerLR.com

