JANUARY 2025

DEVOTED TO LEADERS IN THE INTELLECTUAL PROPERTY AND ENTERTAINMENT COMMUNITY

THE Licensing Journal®

Edited by Gregory J. Battersby and Charles W. Grimes

Wolters Kluwer

The Licensing Journal (ISSN 1040-4023) is published monthly, except bimonthly for June/July and November/December by Wolters Kluwer, 28 Liberty Street, New York, NY 10005, (212) 771-0600. This material may not be used, published, broadcast, rewritten, copied, redistributed or used to create any derivative works without prior written permission from the publisher. Printed in U.S.A.

The Licensing Journal is sold with the understanding that it is not engaged in rendering legal counseling or other professional service. If legal counseling or other professional assistance is required, the services of a competent practitioner in the relevant area should be sought.

Permission requests: For information on how to obtain permission to reproduce content, please go to the Wolters Kluwer Web site at *www.WoltersKluwerLR.com/policies/permissions-reprints-and-licensing*. **Purchasing reprints:** For customized article reprints, please contact *Wright's Media* at 1-877-652-5295 or go to the *Wright's Media* Web site at *www.wrightsmedia.com*.

Editorial Offices: To speak with the editor; to ask questions or comment on newsletter content call **(203) 733-7653.**

Articles, comments or ideas for themes: The editors welcome the submission of articles, as well as questions and comments on matters published and suggestions for future themes, which should be addressed to: Gregory Battersby, Executive Editor, *The Licensing Journal*, 25 Poplar Plain Road, Westport, CT 06880, (203) 454-9646.

The Licensing Journal, Brand Licensing, (Jan. 1, 2025)

By Craig Carpenter, Sarah La Voi and Bethany Lukitsch

Craig Carpenter is a partner on BakerHostetler's Privacy Governance and Technology Transactions team and the Leader of the Dallas office's Digital Assets and Data Management team. He advises clients on intellectual property and data issues in M&A and other commercial transactions, intellectual property licensing and development, data collection and privacy, service agreements (SaaS, HaaS), entertainment, media and online marketing and branding.

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.

Bethany Lukitsch is a partner in BakerHostetler's Los Angeles office and co-leads the firm's Class Action Defense team. She has over two decades of experience litigating class actions and complex litigation, including the defense of consumer class actions, antitrust cases, data privacy matters, mass tort and product liability claims and commercial disputes. Bethany also has first-chair and liaison experience in multidistrict and class litigation for global and Fortune 500 companies and product manufacturers.

Getting the Most out of Brand Partnerships with Artists . . . Lawfully

In today's dynamic market, brand partnerships with artists and musicians have become a powerful strategy for companies looking to enhance their visibility and connect with active and aligned audiences. These campaigns can also benefit artists looking to better understand their audience and drive engagement. Done properly, such campaigns can provide invaluable data and insights for both partners. These brand + artist collaborations can take many forms, from more traditional endorsements and sponsorships to co-branded products and exclusive content creation. However, navigating the commercial and legal intricacies of such partnerships is crucial to ensure a successful and compliant collaboration. This post will explore the key considerations involved in brand partnerships with artists and musicians.

1. Vetting and Authenticity

The first step to any brand-artist partnership is for each party to vet the other and ensure that the collaboration makes sense, from both a legal and an image standpoint. Brands and artists should look for authentic collaborations or risk alienating their fans and customers. Fans can sense a forced partnership, and engagement will suffer. Similarly, each party should make sure they are comfortable with the other from a reputation perspective to avoid any unwelcome negative PR. The parties should also identify early whether any portion of the engagement will be subject to guild terms, such as the SAG-AFTRA Commercials Contract, and account for those related costs.

2. Contract Terms

In addition to a genuine connection, the foundation of any brand partnership is a well-drafted contract. The agreement should outline the rights and obligations of both parties, ensuring clarity and (hopefully) preventing disputes. Key elements to include in the contract are:

> **Scope of Work:** Clearly define the deliverables expected from the artist or musician, such as performances, appearances, social media posts and product endorsements. Be clear on how

schedules will be managed and how to manage artist availability. Artists are often on tour, and the parties to the contract need a plan and open communication to make sure service days are practical.

Compensation: Specify the payment terms, including any upfront fees, royalties or performance-based incentives. Brands should take into account incentives for performance and may want to withhold a significant portion of fees until certain key services are performed.

Duration and Termination: Outline the length of the partnership and the conditions under which either party can terminate the agreement.

Exclusivity: Determine whether the artist or musician is restricted from partnering with competing brands during the contract period and potentially for a buffer period or "exclusivity tail" after termination or expiration. Beyond prohibiting a formal sponsorship with competitors, the parties should be clear on expectations for the artist's use and public interactions with competing brands. For example, if an artist and an auto brand partner up, it's highly likely the contract will include a stipulation that the artist will drive only the brand's auto during the term.

3. Intellectual Property Rights

Intellectual property (IP) is a critical aspect of brand partnerships. Both parties must address the ownership and usage rights of any IP created or used during the collaboration, up front. Important considerations include:

Copyrights: Ensure that the contract specifies who owns the copyrights to any content produced, such as music, videos or artwork.

Trademarks: Address the use of trademarks, including the brand's logo and the artist's name, image, or likeness, in promotional materials.

Licensing: If the brand intends to use the artist's existing work, such as songs or images, a licensing agreement must be in place to outline the terms of use. The brand should be careful to ensure that license rights are obtained from the proper parties — having an agreement with the artist to use their name/image/likeness does not necessarily mean you have all rights to use that artist's works.

4. Morals Clauses

Morals clauses, also known as morality or conduct clauses, are provisions that traditionally allow a brand to terminate the partnership if the artist or musician engages in behavior that could negatively impact the brand's reputation. These clauses are particularly important in the age of social media, where public perception can change rapidly. Some artists now request bilateral morals clauses, allowing the artist to terminate the contract in response to certain company conduct as well. The contract should clearly define what constitutes a breach of the morals clause and the consequences of such a breach, including certainty on how fees paid or owing are treated at the time of the termination.

5. Compliance with Advertising Regulations

When artists and musicians endorse products or services, they must comply with advertising regulations to avoid misleading consumers. In the United States, the Federal Trade Commission (FTC) requires that endorsements be truthful and not deceptive. This point ties back to the concept of authenticity. The best partnerships are built on genuine mutual admiration between an artist and a brand. Key points to consider include:

Disclosure: Artists and musicians must disclose any material connections to the brand, such as receiving payment or free products, in their endorsements. It has to be clear to consumers that the artist and the brand are working together.

Accuracy: Endorsements must reflect the honest opinions and experiences of the artist or musician.

Substantiation: Any claims made in the endorsement must be substantiated by evidence. Endorsers cannot make claims about a brand's goods and services that the brand couldn't make in its own traditional advertising.

6. Data Privacy and Protection

In partnerships involving digital content and social media, data privacy and protection are paramount. Since access to additional consumer data is often a significant driver for these partnerships, each party should ensure that they have the rights and permissions they expect with respect to the campaign data. Each party should ensure that their data collection practices comply with applicable state and federal data protection laws, including giving consumers notice and applicable rights/choices, and obtaining consent where necessary. The parties should clearly define which party or parties are owners or controllers of the data. On a practical note, brands should build in time to vet the privacy practices used by artists, because rarely will an artist have a well-defined privacy policy. This may mean that for privacy and security reasons, the brand takes the lead on data collection via a trusted third party.

7. Hope for the Best, Plan for the Worst

Despite careful planning, disputes can arise in brand partnerships — either between the partners or with consumers and regulators. Prudent planning can help the parties anticipate these issues and put them in the best position to respond and mitigate liability. Key risk areas include:

Breach of Contract: Common risk areas include breach of covenants/requirements, morals clauses, exclusivity and usage rights.

Data Issues: Risks include privacy claims related to tracking technologies, data use, compliance with privacy notices and rogue communications.

FTC Compliance: Again, these sponsorships and endorsements are subject to Section 5 of the FTC Act due to their commercial nature as advertising. The FTC Endorsement Guides, while not law, helpfully outline best practices.

Conclusion

Brand partnerships with artists and musicians offer exciting opportunities for both parties to reach new audiences, build credibility and trust, create memorable campaigns, and get closer to their fans/customers. However, these collaborations come with commercial legal complexities that must be carefully managed.
By addressing key legal considerations such as contractual agreements, intellectual property rights, morals clauses, advertising regulations, data privacy and dispute mitigation, brands and artists can build successful and compliant partnerships that benefit both sides.

Wolters Kluwer
The Licensing Journal
Distribution Center
7201 McKinney Circle
Frederick, MD 21704

November/December/10041449-0800