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Watch your Steps: Role of Morality Clauses in Talent and Endorsement Agreements

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ABSTRACT

“Reputations take a lifetime to build and seconds to destroy” so goes this famous aphorism. The role of celebrity endorsement exerts a pivotal role in influencing the sales of a product in the market. Everyone wishes to emulate their favourite celebrity’s lifestyle and sense of fashion. One always associates their favourite actor with the character he has played and mimics his dialogues. This is why brands and production houses wisely choose a celebrity to represent them since the celebrity extends their values. At times the conduct of the celebrity can be incongruous with society’s prevalent standards of morality, which can malign the company’s public image. This can leave long-lasting scars on companies’ and production houses’ image in the public eye.

Moral clauses deter a celebrity from doing an act morally abhorred and censured by society. These clauses are mentioned as a part of the employment agreements and broadly spell few categories of conduct that the company or production house disapproves of and indulgence of, which would lead to termination of the contract. These covenants shroud the shoulders of the celebrity with a sense of accountability to the company or production house for their conduct. This paper delves into the meaning, history and development of morality clauses in talent and endorsement agreements, travelling a trajectory from the insertion of moral clauses to the germination of reverse moral clauses, the legal feud between the company and celebrities when the latter have taken legal recourse to challenge their wrongful termination of the contract by the company, certain instances where morality clauses have cost the company a huge cost.

I. INTRODUCTION

The morality clause in entertainment contracts has been defined as. *“A contractual provision that gives one contracting party (usually a company) the unilateral right to terminate the agreement, or take punitive action against the other party (usually an individual whose endorsement or image is sought) in the event that such other party engages in reprehensible behaviour or conduct that may negatively impact his or her public image and, by association, the public image of the contracting company.”*² These clauses are mentioned in the employment

¹ Author is a Student at NMIMS School of Law, Mumbai, India.

² Fernando M. Pinguelo and Timothy D. Cedrone, *‘Morals? Who cares about morals? An Examination Of Morals*

contract, and the celebrity consents to them before entering a contract. These enable brands to ensure that the celebrity acts in conformity with society's standards of morality. Celebrities, at times, engage in certain nefarious activities brushing off their social conscience, which can land them in deep trouble. Even if they emerge with clean hands in the end, they get associated to that wrongful act which takes years to faint from public memory.

*"A morals clause generally seeks to cover conduct that: a) goes against social conventions and public morals or decency, b) shocks or offends the community or c) places an employer, financier, advertiser, studio, or distributor in a bad light due to the association."*³ *"In short, the motive of these clauses seeks to protect the contracting employer from the immoral or reckless behaviour of talent that has become so commonly associated with the celebrity lifestyle"*⁴

Usually, termination of the contract is a natural consequence ensuing a violation of these clauses, but in some cases, the celebrity can be sanctioned with a fine or repayment of past money.

*"In the early 1920s, it was hypothesised that film ticket sales had declined because of the perception that "stars" were leading "sinful" off-screen lives."*⁵ This led to the dawn of morality clauses in film and television agreements. Under New York and California law, violation of the moral clause leads to termination of the contract. Movie companies have become very cautious of their image and make diligent efforts to ensure their actors are not wrapped up in legal complications. Companies choose to sever ties with the celebrity even if the celebrity has played a minuscule role in the movie since they believe that their personal life will reflect in the character they play.

A vexed question posed in front of us is, 'what exactly is moral?' The ambiguity surrounding the word enables brands to have great discretion. These clauses are often drafted vaguely to negate the celebrity's acts and conduct that they consider 'immoral'.

II. EMERGENCE AND EVOLUTION OF MORAL CLAUSES

The dawn of moral clauses was seen in 1920 with the famous comedian Rosco Arbuckle who had signed a three years contract of three million dollars with Paramount Pictures. However, a female designer, Virginia Rappe, was found in Arbuckle's room with deep injuries. *"Rappe died from peritonitis, caused by a ruptured bladder. Arbuckle was charged with first-degree murder,*

Clauses in Talent Contracts and what Talent Needs to know, *Seton Hall Journal of Sports & Entertainment Law*, Forthcoming page 5, (2012).

³ Stephen M. Gallagher, 'Who's Really "Winning"?: The Tension of Morals Clauses in Film and Television', 16 VA. Sports & Entertainment. Law.Journal, page 97n56, (2016).

⁴ Ibid, 88 page 90n11, (2016)

⁵ Ibid, page 93n26.

eventually reduced to manslaughter.”⁶ Though in 1922, he was acquitted of all charges against him, this incident vilified his personality as an affable character, and he lost public trust. This incident triggered Universal Studios to insert a moral clause in its agreements with various celebrities. A statement made by the Attorney of Universal Studio said, “*As a direct result of the Arbuckle case in San Francisco, Stanchfield & Levy, attorneys for the Universal Film Manufacturing Company, have drawn up a protective clause . . . to [be] inserted in all existing and future actors’, actresses’, and directors’ contracts with the company.*”⁷ “*Despite having nothing to do with the Arbuckle case, nor having any clients with similar issues at that time, Universal Studios nonetheless saw a need to include the clauses in its talent contracts to “reassure the public” and “protect the company in an investment.”*”⁸

In the 1940s and 1950’s these clauses were viewed from the political lens as well. In 1947, the House of Unamerican Activities could smell the swell of Communism in Hollywood and issued notices to various writers, directors and actors for portraying domination of screens by Communists, which was considered bothersome in the prevailing political climate of the country at that time. They were asked to present themselves for a hearing in Los Angeles and Washington. The Committee felt that the testimony from ten of the forty-seven was ‘unfriendly’. They were charged with contempt of Congress for refusing to answer certain questions and non-cooperation during the probe. Film producers invoked a moral clause and issued a statement by which they would not employ any of the ‘Popular Ten’ unless one were declared under oath that he was not a Communist.

As cautious companies and production houses are of their image, talent to wants to protect themselves from the company’s wrongdoings and choose to disassociate themselves if the company says or does something against the moral climate or celebrity’s moral ethos. “*A reverse-morals clause as a reciprocal contractual warranty to a traditional morals clause’ intended to protect the reputation of talent’ from the negative, unethical, immoral, and criminal behaviour of the endorsee-company or purchaser of talent’s endorsement.*”⁹ This happens when the sound of their moral conscience rings their ears or when celebrities want to avoid the blot of stigma on their sleeve due to their association with the company.

The first instance of a reverse moral clause germinated in 1968 by singer and actor Pat Boone.

⁶ Jude Sheerin, BBC News, ‘*Fatty’ Arbuckle and Hollywood’s first scandal*’, (4th September, 2011), <https://www.bbc.com/news/magazine-14640719>.

⁷ Supra Note 1, page 9n40.

⁸ Ibid, page 9n41.

⁹ Taylor, Porcher L., III, Fernando M. Pinguelo, and Timothy D. Cedrone. “*The Reverse-Morals Clause: The Unique Way to Save Talent’s Reputation and Money in a New Era of Corporate Crimes and Scandals.*” *Cardozo Arts & Entertainment Law Journal* 28, no. 1, page 66-67, (2010).

He was famous for not only producing several hit songs but also for his lifestyle and thought process, which gained him the reputation of “good Elvis” at the cost of losing several dollars by refusing to advertise alcohol and tobacco. However, he later confessed to falling prey to alcohol, gambling and smoking. This led him to confess before a church congregation and begin a ‘born again’ Christian life, abstaining from all the vices. Though in 1968, Boone’s multi-year contract with Dot Studios was expiring, he was brawling with his conscience if he should sign a deal with a comedian named Bill Cosby. He was perturbed about Bill’s talent label for it depicted two semi-nude artists, so he urged that the contract would cease ‘if anything unseemly’ would happen. Discontent with the fact of nude pictures of John Lennon and Yoko Ono on the album, “Boone, ready to opt out of the deal, met with label executives. They were sympathetic to his religious concerns and agreed to a “reverse morals clause”— Boone’s contract would lapse if the record company, not the performer, did something unseemly. Finally, it was agreed that no formal contract would be drawn up.”¹⁰ The first reverse morality clause was struck in a talent agreement through an oral negotiation, but this sowed the seeds for reverse morality clauses in talent and endorsement agreements.

III. JUDICIAL INTERPRETATION OF MORAL CLAUSES

Michael Nadar, who played the role of Dimitri Marick on ABC’s television drama ‘All my Children’, was arrested under the offence of criminal sale of cocaine. ABC’s attorney informed him that he was under suspension ensuring the drug charge against him, and his future employment would be determined by the fate of the case, and if the charges were fallacious, then he could resume work. In spite of his going to a drug treatment programme, ABC formally terminated their contract with Nader for breaching the ‘clear language and intent of the moral clause. His moral clause stated, “If, in the opinion of ABC, the artist shall commit any act or do anything which might tend to bring Artist into public disrepute, contempt, scandal, or ridicule, or which might tend to reflect unfavourably on ABC,ABC may, upon written notice to Artist, immediately terminate the Term and Artist’s employment hereunder.” Nadar framed several issues concerning the termination, which include the discriminatory nature of ABC towards his ‘disability’ of cocaine addiction was incongruous with Federal law, New York State law, and New York City law. He also added charges such as fraudulent misrepresentation and fraudulent inducement. However, the court repudiated all these issues and felt that the company was within its contractual confines to have terminated the contract with Nader. It also stated that Nader failed to prove that his morality clause was vaguely worded and the fact that he did not

¹⁰ Ibid, page 80.

transgress the moral clause was baseless since his arrest grabbed media attention which fell within the connotation of a morality clause. It also repudiated the procedural fallacy of the termination as Nader stated that the suspension notice was not ‘immediate’ *“But, as the District Court correctly noted, the contract provides that “ABC may upon written notice to Artist immediately terminate,” not that it must do so. In any event, ABC sent its termination letter only 20 days after Nader’s arrest. This is a reasonable amount of time to evaluate Nader’s conduct and make an employment decision.”*¹¹

Social media is a double-edged sword. Though it gives one a platform to express their opinion, one has to face the flak if one’s opinion is incongruous with that of society. It is often difficult for the court to determine the degree of public rage produced by tracing tweets, and Mendenhall’s case is a classic example of that. Though there was proof that his posts outraged public sentiments, there were also posts where people supported his opinion. In 2008, Mendalhall entered into a talent agreement with Hanesbrand to advertise their products under the Champion Trademark, which contained a moral clause forbidding the celebrity from *“public disrepute, contempt scandal or ridicule, or tending to shock, insult or offend a majority of the consuming public.”*¹² In 2011, he tweeted his opinion on Islam, women, and parenting and compared the National Football League (NFL) to the slave trade. Alarmed by such tweets, Hanesbrand invoked a morality clause and severed its ties with the celebrity for not extending the beliefs of the brand in an appropriate manner. He sued the company for breach of contract and non-payment of the due amount. His moot argument was that the moral clause was too broad and should only be invoked for criminal convictions, rather than curbing free speech. The company stated that it had recorded evidence of various tweets in counter to Mendalhall which expressed public condemnation. The court was in a conundrum considering the discourse regarding the nature of public response to Mendalhall’s tweets. It felt a factual record to analyse public’s reaction and replies to his tweets and then conclude whether the company was justified in terminating its contract. *“When, as in this case, there exists a material dispute of fact, such a determination goes beyond the scope of a motion for judgment on the pleadings, and therefore judgment as a matter of law is not appropriate at this stage of the proceedings.”*¹³ *“With this in mind, the court held that it was necessary for the company to prove the existence of a verifiable public scandal in order to defeat a claim of breach of good faith and fair dealing.”*¹⁴

¹¹ *Nader vs ABC Television Inc’*, 150 F. App’x 54 (2d Cir. 2005).

¹² North Arizona University, Mendenhall and HanneBrand Inc., <https://in.nau.edu/ethics/mendenhall-hanesbrands-inc/>.

¹³ *‘Rashard Mendenhall vs Hanesbrand Inc’*, 856 F. Supp. 2d 717 (M.D.N.C. 2012).

¹⁴ Patricia Sánchez Abril and Nicholas Greene, Contracting Correctness: A Rubric for Analyzing Morality Clauses, 74 Wash. & Lee L. Rev. 3, page 63, (2017).

With the proliferation of social media, pictures go viral within a blink of an eye. Michael Zigomanis, a Hockey player was approached by Cheetah energy to star in one of its commercials in 2011. They entered into a talent service agreement in which a minimum amount of two hundred thousand dollars would be paid to him across four years if he utilises the extension option available to him. In 2010, prior to signing the contract, he had sent two nude pictures to his partner which were later circulated by an unknown person on the internet. In 2011, the media uncovered the pictures and they went viral on the internet. In 2012, the company terminated the contract since Zogomani made headlines for such a controversy. Zogomani decided to take legal recourse and challenge the termination of his contract since the pictures were not circulated by him on the internet hence there was no breach of the moral clause. He claimed the remaining balance of the amount that he would have been entitled to if the contract would not have been terminated. The trial court opined that Zigomanis was not the brand ambassador rather he only consented to advertise the product, therefore the company received what it had negotiated for and a moral clause could not be triggered by private dissemination of an intimate pictures within a relation prior to signing the contract since these clauses are not retrospective in nature. It also awarded him damages for the unpaid amount of the four years contract. The company appealed, but the Court of Appeal reiterated the Trial Court's judgement and said that the court was justified in its reason. *"Mr. Zigomanis's understandable, subjective desire to suppress publication of the photographs and to distance himself from them is evidence only of his desire for privacy, not of the community's reaction. Meanwhile the widespread public interest that was generated when it became known that the photographs were online says nothing about the community reaction to Mr. Zigomanis's act in sharing those photos only with an intimate party."*¹⁵ It also accepted the practice of sharing intimate pictures within a relationship of two consenting adults, the expected privacy in doing so, and privacy clauses highlighted in various legislations reflecting the public policy.

IV. CONSEQUENCES OF CORPORATE NEGLIGENCE

As companies have become increasingly cautious of their image, they impulsively invoke the morality clause if the celebrity has managed to make headlines which can cost them a huge amount.

Chris Weber who was the face of Fila was arrested at the airport for possession of marijuana, which led to Fila terminating its contract with Weber. Dejected, he knocked the doors of court and filed a suit for wrongful termination of the contract since his employment contract stipulated

¹⁵ *'Zigomanis vs Ontario Inc. (D' Angelo Brands)'*, 2016 ONSC 7053.

that termination could only result due to conviction. It was held that “*an arrest is not the same as a conviction for a crime or a plea of no contest.*”¹⁶ The company was mandated to pay 2.6 million dollars for its wrongful termination.

Charlie Sheen, who played the role of Charlie Harper in *Two and a Half Men* was suspended from the show by Warner Brothers and CBS after indulging himself in alcohol, drugs and publicly making derogatory remarks about the show producer. Sheen brought a suit against Warner Brothers and claimed that his contract required a ‘felony conviction which involved a moral turpitude under federal or state or local laws’. The company then relied on a ‘force majeure’ clause which was very broad, “*producer is prevented from or hampered or interrupted or interfered with in preparing or producing the Series or any Program thereof or in utilizing Performer’s services hereunder...by reason of any other cause or causes of any similar nature or beyond our control, or by reason of the death, illness, disfigurement, Default or Incapacity of a member of the continuing principal cast of the series.*”¹⁷ The company stated that his inebriated state rendered him unable to perform his essential duties. Eventually, both the parties decided to settle the matter through private arbitration and the company paid twenty-five million dollars to the actor as settlement.

V. SUGGESTIONS

The biggest loophole of these clauses is that morality is a highly elastic term and it greatly fluctuates with changing circumstance and time. The inherent subjectivity of the word ‘morality’ demands these clauses to be precisely worded so that the celebrity is aware of the exact conduct sanctioned by the company. Companies often draft a nebulous and broad morality clause attempting to accommodate any sort of inappropriate behaviour under it. Vague clauses also give rise to interpretation which empowers the celebrity to challenge the termination. Instead, the company should strictly mention the slew of unwarranted actions that it does not stand by and does not want the celebrity to indulge in. Companies should not impulsively invoke a morality clause simply because the celebrity has managed to garner public attention, rather they should critically evaluate whether that action or conduct of the celebrity is covered under the morality clause. Hasty termination can wrap the company in trouble if the celebrity challenges its termination in court which can also dig a hole in their pockets. Sometimes if the offense is not that which necessitates the invocation of a morality clause the company can fine

¹⁶ Caysee Kamenetsky, ‘The Need for Strict Morality Clauses in Endorsement Contracts’, Pace Intellectual Property, Sports and Entertainment Law Forum, Volume 7, page 297n20, (2017).

¹⁷ Eriq Gardner, Reuters, Morals clause at issue in Charlie Sheen legal fight, (March 9, 2011), <https://www.hollywoodreporter.com/business/business-news/charlie-sheens-contract-was-actually-165309/>.

the celebrity or issue a public statement of condemnation of the conduct of celebrity. Similarly, making the celebrity do community service can also serve as a good alternative and by this manner he can reform himself and contribute to society. Outrightly terminating the contract results in halt in production and additional time lost in looking for a new celebrity.

VI. CONCLUSION

The birth of a morality clause was due to a scandal and it gradually gained recognition to protect company's stake from the immoral conduct of the celebrity. In spite of being drafted broadly or narrowly, its purpose is to save the time and money of both parties from litigation since the employer mentions the grounds for termination at the time of employment and only if the latter agrees does the contract come into existence. It establishes a moral benchmark and serves as a guide for the celebrity. Hence, including a moral clause as a part of the employment agreement is a prudent decision. However, various interpretations of morality and a device used by companies to muzzle freedom of speech and expression serve as its impediments. Invocation of a morality clause has great repercussions on a celebrity's career since he might face stiff resistance from future employment avenues. Therefore, courts should scrutinize and oppose those morality clauses that prohibit legal conduct than those that just censor unlawful activity. Companies should constantly evaluate their contracts and eliminate ambiguity in any of their clauses. At the same time, celebrities should also carefully read all the employment clauses so that they are completely aware of what they have signed up for.

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