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# Advertising

## Terri J. Seligman

### Celebrity Talk-Back

Remember the Grammy's a few years back, when Arby's shouted out to Pharrell Williams on Twitter, requesting the return of its hat? And Pharrell, good sport that he was, tweeted back at the restaurant chain, accusing it of starting a "roast beef"? Other brands with hat-wearing trademarks jumped into the action. Hilarity and rampant re-tweeting ensued. A social media win for all involved.

Unfortunately, that exchange was the bane of advertising lawyers everywhere: the celebrity was perfectly game about having a public exchange with a brand without (presumably) getting paid and he didn't sue. That result led to marketing teams everywhere demanding why, pray tell, they couldn't do the same thing. After all, say the marketers: (1) everyone talks about celebrities on social media, so why can't we? And (2) Arby's did it and didn't get sued.

We ad lawyers much prefer the unfortunate example set by Duane Reade who, readers may remember, really stepped in it by posting (without permission) a photograph of Katherine Heigl emerging from one of its stores with the easily recognizable Duane Reade shopping bag. Heigl sued for millions of dollars for the unauthorized use of her name and likeness for commercial purposes, in violation of her right of privacy and publicity under New York law, false endorsement under the Lanham

Act and unfair competition. (New York's statute, like those of many other states, requires the written consent of any individual whose name or likeness is used for commercial purposes.) We prefer that example, not because we're filled with *schadenfreude*, but because it helps us in counseling our clients that engaging with celebrities in social media without their permission can be a risky move.

### Commercial Speech by Brand Owners: Factors to Consider

And it is. Because unlike "everyone" (e.g., your cousin, your neighbor, you), a brand may be engaged in commercial speech when posting on social media—at least that's what celebrity plaintiffs will argue if they object to the brand's use of their name or likeness. Like most advertising issues, however, this one is a little more complicated than just "it's risky" and the counseling is a little more nuanced than just "for godsakes, don't do it!" There may well be good arguments for why the post could be considered editorial or newsworthy (that is, not commercial) and that the celebrity at least implicitly consented for the brand's engagement with them on social media.

Here are some of the factors we consider:

Who started it? Arby's really lucked out by starting the exchange itself and getting a positive response (rather than a

demand letter). But sometimes—oh lucky day!—the celebrity talks to the brand first, calling the brand out by name, and maybe even using the "@" symbol to really get the brand's attention. Sounds like consent, right? So, acknowledging that call-out is probably okay. However, amplifying the exchange or including an explicit marketing message in the response could significantly change the analysis.

Is there a brand pile-on happening? Did the celebrity say or do something that is attracting attention from everyone and their mother, including lots of other brands? As everyone knows, doing what others are doing doesn't make it safe, but in this scenario, the fact that everyone is jumping into the fray makes the whole discussion seem more newsworthy (that is, maybe not commercial speech). And it might make it less likely that the celebrity will go after any one particular brand. Consider, though, do you want to be the brand going first?

Does it seem that the celebrity's appearance in your clothing, in your store, eating your food, or otherwise engaging with your company's products on social media (which is what's making your social media team salivate) purposeful? Like, are they holding up the wrapper for your sandwich with the logo front and center? Again, like an "@" sign, if it seems like the celebrity is saying hi to the brand, the brand can probably say hi back; the celebrity is at least implicitly consenting to the public conversation. (But *see* caveats above.)

Who is the celebrity involved? Do they have a track record of filing or threatening right of publicity actions? The fact that someone has not sued before certainly isn't dispositive of their willingness to allow brands to use their name or

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likeness, but the fact that someone has is an important warning sign.

Does the celebrity involved have a big endorsement deal with, say, your competitor? Guess whose attention you'll get if you engage with that celebrity?

The bottom line is that these are nuanced judgment calls, with a lot of factors at play. If a brand is in the fortunate position of having a celebrity (on their own initiative! without payment!) say nice things about it or appear on social media

using its products, the brand can bask in the glory. And marketers should remember that the celebrity probably has significantly more followers than the brand itself does, which means that, without doing anything further to amplify the message, the brand has already won.

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