SEPTEMBER 2021

DEVOTED TO LEADERS IN THE INTELLECTUAL PROPERTY AND ENTERTAINMENT COMMUNITY

VOLUME 41 • NUMBER 8

# THE Licensing Journal®

Edited by Gregory J. Battersby and Charles W. Grimes

## FEATURES



## COLUMNS



Wolters Kluwer

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# Brand x Brand: Collabs and Cobranding


## *Lisa Pearson and Marc Lieberstein*[1]

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Throughout the COVID-19 pandemic, brands engaged in collaborating and co-branding like never before.

- Consummate collaborator Supreme, the New York streetwear brand, partnered with make-up artist Pat McGrath. The result? A lipstick in Supreme's signature shade of red. Dropped last September, it reportedly sold out in a mere 8 seconds.[2]


- In an even less intuitive match, Crocs urged consumers to "Put these on your bucket list: Kentucky Fried Chicken X Crocs Clogs," with a fried chicken pattern, striped base, and detachable charms (known to Croc aficionados as Jibbitz) made to resemble—and smell!—like fried chicken drumsticks.[3] They, too, sold out.[4]

- In a more eleemosynary approach, Vans launched its "Foot the Bill" cross-branding initiative to support small businesses across the country during these unprecedented times. Among the many small business selected to design their own limited edition Vans shoes and t-shirts, and receive all proceeds from their sale, were Zabar's delicatessen and Nom Wah tea parlor in New York, the Black Cat music club in Washington DC, and Jensen Guitar & Music Co. in Santa Barbara, California, among other local favorites of the consumers who nominated them.[5]


What are the drivers of this collaboration craze? Why did it seem to gain so much traction during the pandemic? And what business, practical and legal considerations should brand owners take into account before jumping on the collaboration bandwagon?

## Drivers

"Collaboration" is a buzz word of our times, and brand collaborations proliferated during the pandemic. Of course, well before anyone had ever heard of COVID-19, "collabs" were relatively common, often designated by the collaboration sign "x"—as in LV x NBA, Virgil Abloh's limited edition menswear collection uniting the emblems of the two brands. Given the popularity of the collaboration symbol "x," there are a surprising number of conflicting opinions as to what the "x" stands for and how to pronounce it. ("By" as in a 2 x 4 piece of lumber? Perhaps "ex" or "times" or "cross"? Not pronounced at all, like a hyphen?).[6] In 2019, Vogue, that arbiter of style, went so far as to pronounce the x passé and call for its retirement.[7]

Yet brands ignored Vogue's dictate and doubled down on collabs during the pandemic. It makes perfect sense. Homebound consumers were bored and glued to their screens. They turned to social media to stay engaged and e-commerce to make purchases in unprecedented numbers. Collabs offered something new and often entertaining from familiar brands consumers could trust.

Michelle McLaughlin, CEO of Brand Activation Consulting, commented on the surprising number of food x fashion collabs: "[t]here were a lot of things coming together during COVID that highlighted the indulgent brands people are consuming. . . .Consumers were looking for nostalgia and things that they knew, so that is where we went."[8] For example, early last Spring, the beauty brand Hipdot launched HIPDOT X REESE'S, a vegan make-up collection bearing the familiar trade dress of Reese's peanut butter cups. (It was not, however, edible.) [9]

From a brand owner's perspective, collabs provide an attractive option for launching new products, in good times but especially in bad. Good collaborations capture the recognizable goodwill of each partner's trademarks, resulting in increased brand awareness and a bigger pool of potential purchasers prepared to pay a premium price for the cobranded product. They also generate hype, often without paid advertising, epitomized by the social media frenzy surrounding the "drops" of streetwear brands like Supreme. That once disruptive streetwear business model, driving demand through periodic releases of limited edition co-branded products, has gone mainstream. Notably, at year end 2020, fashion industry giant VF Corporation closed on its purchase of Supreme for over $2 billion, itself a buzzworthy event. Many of VF's other brands had previously collaborated with Supreme.

Collabs can refresh and re-contextualize a brand, introducing it to new pools of purchasers and different trade channels. "A Chanel snowboard or IKEA x Craig Green make Chanel and IKEA modern and culturally present and curious. An unexpected collaboration attracts collectors, cultural pioneers and hypebeasts."[10] It can rejuvenate interest in commoditized product categories.

Collabs also typically reduce the expense of new product launches. In addition to the free advertising, brand owners can save costs by pooling their talent, design and manufacturing resources, marketing budgets, and promotion and distribution channels. Perhaps most important in uncertain times, collabs can be styled as a short-term relationship to bring to market a single product or collection and allow

the partners to test the viability of a longer term commitment.

In a nutshell, as Dan Beem, President of Cold Stone Creamery, has observed: "Co-branding can be an effective strategy to survive down times and even grow. It can create new revenue streams, increase momentum and raise brand awareness as well as reduce costs."[11]

## Staying Relevant

As with licensing deals more generally, generating revenue is not always the primary objective for brand collaborations. Other frequently cited reasons include increasing brand awareness, extending the brand to new categories of goods and services, opening new trade channels for core products, protecting trademark rights in ancillary classes, and aligning with corporate strategy. Of course, where revenue is the key objective, financial metrics will, in large part, dictate the deal structure. But if other factors are the primary or even a secondary goal, consumer research and/or test marketing help avoid potential pitfalls. Risks can also be reduced by limiting the scope and duration of, and investment in, the collaboration. Many one-off collaborations have morphed into enduring licensing relationships over time.

## Social Responsibility

One popular trend is for brands to seek out collaborators known for their commitment to a cause such as environmental sustainability in order to capture the growing consumer base that places a premium on social responsibility.[12] An interesting recent example of just such a collab was launched by two different shoe brands—adidas and certified B Corp allbirds.[13] Together they claim to have created the ultimate sustainable sneaker, "FUTURECRAFT.FOOTPRINT", with the lowest carbon footprint on record.[14]

Like most collabs, the new product bears the marks of both collaborators. As is frequently the case, the collaboration also resulted in the creation of new potentially protectable intellectual property, in this case trademark rights in the product mark FUTURECRAFT.FOOTPRINT and related slogans, copyrightable works such the product packaging and advertisements, and possibly patentable designs and inventions. In any collaboration agreement, provisions addressing ownership and future exploitation of the parties' existing and newly created marks and other intellectual property must be front and center.[15]

The parties should also consider how they will handle clearance, registration, and enforcement of new intellectual property rights both during and after the collaboration.

Of course, it is not always possible to predict changing tides in consumer sentiment. Lessons can be learned from the long-term licensing relationship between Lego and Shell.

Many decades after Lego and Shell first launched their co-branded construction sets, Greenpeace launched a campaign to stop Shell from drilling oil in the Arctic. The centerpiece was a polished YouTube video depicting a bucolic arctic scene built of Lego bricks and figurines gradually engulfed by an oil spill, culminating in a plea for Lego to terminate its partnership with Shell.[16] While protesting that Greenpeace was misdirecting its message, Lego took heed and averted further bad publicity by exiting the relationship. The takeaway? Times change, tastes change. Collaborators must focus on the duration and termination terms of their agreement in an effort to protect themselves against such contingencies.


## The Right Fit

The key to successful collabs is a good fit between brands and a good understanding of their cross-over appeal. Because it was perceived as too much of a stretch, the recent collab between the self-described "collaboration hub" Slack and the venerable shoe brand Cole Haan faltered. In October 2020, the brands announced that they would be releasing a new $120 sneaker featuring Slack's corporate logo and signature colors. For Cole Haan, an enthusiastic Slack user, the cobranded collection was a way to introduce its 90+ year old brand to new, younger consumers, particularly in the tech space. But according to Adweek: "The partnership was a head scratcher


for some. GQ described the collaboration as bizarre and 'way past the point of irony,' while a few folks on Twitter mocked the corporate pairing."[17]

Consumers need to understand the *raison d'etre* of the collab and see value in it (even if the value is the novelty or humor of an odd coupling like KFC x Crocs footwear). When MISSONI launched its affordable knitwear line for the general merchandise retailer Target in 2011, "[Target's] shelves quickly emptied and their website crashed, all before noon. Regular


fashionistas and fervent shoppers were finally able to get their hands on luxury goods, without taking out a loan to do so."[18] Missoni has been collaborating with Target ever since.

In stark contrast, Target's 2012–2013 collaboration with high end fashion retailer Neiman Marcus for a curated holiday gift collection featuring 24 big name fashion designers reportedly flopped.[19] Although far more affordable than Neiman Marcus's typical holiday offerings, the cobranded collection was evidently priced too high for Target. Nor did the participating designers offer lower priced versions of the clothing for which they were known, Target's tried-and-true formula. Instead, the Neiman Marcus collection for Target included such items as Diane von Furstenberg yoga mats and Oscar de la Renta dog food bowls. *Time* concluded there was a fundamental disconnect with the target (Target) consumer:

> Neiman Marcus is famous for its holiday catalog chock-full of whimsical (read: strictly discretionary) items with sky-high price tags, but the people at both stores who curated the collection overestimated the appetite for this kind of stuff in the mass market. The brand isn't really considered trendy or edgy; instead, it's the vanguard of aspirational consumerism. And it would seem that a brand image reliant on the idea of old-money luxury clashes with the egalitarian ethos of cheap-chic fashion.[20]

Many trademark practitioners might also advise against the "mash-up" logo these collaborators adopted for their line, shown at right, which could diminish the source identifying function of their respective marks.[21]

Most successful collaborations fall into one of four buckets:

1. ingredient brands, such CREST toothpaste with SCOPE mouthwash;
2. complimentary brands, such as Nike's AIR DIOR designer sneakers;
3. cooperating brands who play different roles in the marketplace, exemplified by the MISSONI x TARGET collab; and
4. certification brands, like Underwriters Laboratories (UL), which function as a seal of approval for products meeting the certifier's requirements.

The obvious reason: consumers can readily understand what each party contributed, and so the value proposition of the co-branded product is self-evident.

## Quality Control

Brands entering collabs must also be aligned on their quality expectations. Most brand owners want to ensure that products are consistent with their brand image, of good quality for their price points, supplied by honest and dependable manufacturers, and sold by and through reputable channels. But the parties' quality expectations may well differ, particularly when they are in different industry sectors or purchase and sell through different trade channels.

Approval procedures play a crucial role in ensuring that each brand's quality standards are met. In a short-term collaboration for a single product or collection, the products can be pre-approved and the quality control provisions streamlined. But in longer term relationships, the approval provisions warrant careful evaluation. For example, Authentic Apparel entered into a non-exclusive license agreement with the U.S. Army for Army-branded apparel. It grew increasingly frustrated when the Army refused to approve proposed products and advertisements such as a campaign featuring Duane Johnson (the Rock) in military style clothing. Authentic felt it was being deprived of its right to make trademark use (as opposed to decorative use) of the Army's marks.

Authentic took the battle to court. The Army won, first on summary judgment in the U.S. Court of Claims and then on appeal to the Federal Circuit.[22] This was not surprising, given that the license agreement at issue explicitly provided that Authentic had to submit all uses of the licensed marks "for [the Army]'s advance written approval, in [the Army]'s *sole and absolute discretion*," and further that Authentic "shall not have any rights against [the Army] for damages or other remedies by reason of [the Army]'s failure or refusal to grant any approval."[23] While the Federal Circuit agreed with Authentic that it would be improper for the Army to withhold approval in bad faith, it held that these provisions were otherwise enforceable:

> At bottom, Authentic agreed to give the Army broad approval discretion… Authentic agreed to bear the risk that the Army would exercise that discretion to Authentic's detriment, at least so long as the government did not act arbitrarily or in bad faith… Authentic's allegation that the detriment has indeed come to pass is simply not a reason to uproot the parties' bargain.[24]

The Federal Circuit also concluded that the Army had not acted in bad faith when it limited its approvals to "decorative" rather than source-identifying uses.[25]

To avoid protracted disputes and possible litigation, it is desirable for collaborating parties to agree in advance upon some benchmarks or parameters as to acceptable uses rather than leaving product or advertising approval up to one party's sole discretion. In some cases, the parties are so concerned about approval logjams they include a provision appointing a neutral third-party decisionmaker to assist them.

## Force Majeure

The COVID pandemic was a fertile time for collabs, as brands strived to stay relevant in the midst of unprecedented challenges. It also reminded contracting parties that it is foreseeable that unforeseen events will derail their best laid plans, even if they cannot foresee the specific event. Brands should therefore expect that post-pandemic collab agreements will contain much more robust force majeure, indemnification, and termination provisions. Brands will likely be negotiating hard over payment and supply obligations. More stringent provisions, like requiring a letter of credit to secure payment or at least two sources of supply, may be mandated.

## Conclusion

Vogue may be weary of collabs, but consumers and brand owners are not. Brand owners who have witnessed the synergies of successful collabs will no doubt continue to explore co-branding opportunities in the wake of the pandemic. Collaborating brands should, of course, be mindful of the business risks; conduct their due diligence and market research; ensure they are aligned on mission, culture, and standing in the marketplace; and put their agreement in writing. They may also want to start off by collaborating on a one-off product or collection to give them a chance to gain trust in each other and confidence in the marketplace appeal of their co-branded products.

Over a century ago, Mark Twain observed: "There is no such thing as a new idea. It is impossible. We simply take a lot of old ideas and put them into a sort of mental kaleidoscope. We give them a turn and they make new and curious combinations."[26] Kirby Ferguson updated and distilled that idea in his memorable line "[E]verything is a remix."[27] Think of a brand collaboration as a remix. The best ones spark innovation through "new and curious combinations" of brand assets and equity and, by doing so, create products that attract new and curious consumers.

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