Insights: Perspectives

5 Key Takeaways | Collabs and Co-Branding: Takeaways from our Collaborative Conversation

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Collabs and Co-Branding: Takeaways from our Collaborative Conversation

On February 3, 2022, Kilpatrick Townsend's Trademark & Copyright Team hosted its "2022 Advanced Client Seminar." Following *The Licensing Journal's* October 2021 publication of their article *Brand x Brand: Collabs and Cobranding*, Lisa Pearson and Marc Lieberstein, partners on the Kilpatrick Townsend Trademark & Copyright Team, invited Jonas Bruzas, Vice President & Chief Counsel Global Law, IP & Operations, Mondelez International, Harris Henderson, Deputy General Counsel, Hanesbrands, Inc., and Sara M. Vanderhoff, Associate General Counsel, Global Brands & Trademarks, adidas to join them for "A Collaborative Conversation" based on their extensive practical experience.

Here are some key takeaways:

1

Because "collabs" are so popular these days, business and marketing people like to call everything a "collab," so one of the first things counsel must do is figure out exactly what the client wants to do. This will dictate what form the transaction should take. Among the possibilities are a design services or endorsement agreement, a short form agreement for a one-off limited edition product, a full blown license agreement, a joint venture, or even a franchise agreement or acquisition. There is no standard form. Going forward, brands will likely use different collaborative models to achieve collective goals, bringing together new partners with new ideas, new products, new talent and new business models to the marketplace, i.e., collaboration via "crowdsourcing."

2

Know the business objectives for each collaboration. Each brand should consider (a) the purpose of the collaboration—generate revenue, expand the audience for the brand, pool resources or talent, meet a social responsibility goal, or create buzz; (b) the contemplated scope and duration of the relationship; (c) the potential adverse consumer reaction and reputational risks; and (d) possible future directions if the collab succeeds. These considerations will inform the most suitable deal structure and highlight key terms.

3

The collaborating parties must focus on the presentation of their mark(s) in order to keep their respective marks recognizable, strong, and enforceable against infringers. Their agreement should address ownership of their existing trademark and other intellectual property rights in the co-branded product or service, any new rights created during the relationship, and who will enforce them.

4

Conduct thorough and complete due diligence. For example, will the marketplace accept the brand's attempt to enter new trade channels or new categories of goods and services? Will the collaboration impinge upon any third party trademarks, violate extant license agreements, or hinder the brand's ability to pursue future business opportunities? A brand owner contemplating a collaboration should satisfy itself that the proposed collaboration will not be assuming unmanageable risks due to the expansion of use of a mark to new products or services for which it may not be registered, or risks arising from the other party's quality assurance protocols, compliance with supply chain and labor regulations, environmental and social governance, or reputation and image.

5

Approval, quality control and recall procedures are crucial terms in any collaboration to preserve and maintain a brand owner's reputation and good will. Strong indemnification provisions can provide some comfort for claims arising out of the other party's activities, and insurance provisions can also reduce potential exposure in connection with the collaborative products. Audit and inspection rights are also critical, not only for financial records but also for manufacturing, supply chain and materials obligations, enabling the parties to confirm that each is performing their obligations as expected under their agreement. The parties' agreement should also address exit and termination strategies.

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