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4 KEY TAKEAWAYS

The Modern Innovative License: Creative Monetization Strategies for Your Brands

On May 2, 2022, Marc Lieberstein, a Brand Licensing and Franchising Partner at Kilpatrick Townsend moderated a panel at the International Trademark Association (INTA) 2022 Annual Meeting titled: "**The Modern Innovative License: Creative Monetization Strategies for Your Brands**." Joining Marc on the panel were: **Jessica Cardon**, General Counsel, YMF Carpets, Inc.; **Alan Kravetz**, CEO, Full Sail IP Partners; **Tom Lingard**, Partner, Stevens & Bolton LLP; and **Sanjana Sharma**, Associate General Counsel, UL. Marc and the panelists engaged in a lively discussion around new ways brands are monetizing that include traditional and nontraditional values and through unique relationships that did not exist a few years ago – collaborations, celebrities, live and virtual influencers, social media, and the Metaverse.

Here are some takeaways from the panel presentation:

1

The modern license relationship. New marketplace forces are changing the license relationship making it more important than ever to pick your brand collaboration partners carefully and to choose experienced and nimble partners. Aside from, and in some instances a direct result of, the COVID-19 pandemic, brands are pivoting to new product lines and/or new distribution channels. Brand collaborations are on the rise, even among competitors, e.g. adidas x Allbirds. Celebrities and Influencers (both real and virtual) are being employed by brands due to the shift in marketing power. New marketplaces are growing – Web 3.0, the Metaverse, social media, gaming/e-sports; and brands are looking for new ways to enter. Consumer demographics are also mandating changes to the brand license relationship; Millennials and Gen Z are expecting brands to align with their morals and values and engage in ESG. And last, we now have new kinds of currency that may potentially impact the brand relationship and how payments are made and secured.

2

New brand monetization strategies. With the new consumer marketplace demand shifting emphasis to ESG/CSR and values, brands are finding monetization opportunities in pivots toward new products/services/technology that comply with the new marketplace demands. Certification and ingredient licensing are often used by brands to verify and create trust with consumers on the brand's ESG commitment and values. UL, the B Corp., GOOD HOUSEKEEPING are good examples. Commercializing internal tools and technology your company has built is also a modern form of brand monetization, see for example Amazon's AWS service. The "D to C" (direct to consumer) fulfillment model is also becoming a more prevalent brand license monetization strategy, especially with the growth of ecommerce and other online retail/distribution channels, e.g., Web 3.0 and the Metaverse. And brand loyalty programs and subscription strategies are being employed to grow and generate new licensing revenue streams. And while not necessarily new, there is a trend now where old or even retired brands are being acquired, rehabilitated and licensed out for revenue generation. Collaboration among brands – co-branding opportunities; joint ventures; and profit-sharing arrangements – are all brand monetization strategies that are now being implemented more often than ever before.

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3

Modern license terms. New forms of currency are entering the marketplace – cryptocurrency. Old forms of currency are subject to large fluctuations, e.g., the ruble. So, your new modern license will need to account for such currency fluctuations. Terms like "letter of credit" or "liquidated damages" are now present in brand license agreements to secure payments and account for market disruption. Royalty rate terms are changing too. Agreements are including large advances that are credited toward future royalties; variable royalty rate schemes are being employed to account for increased demand. And while in many traditional brand licenses the licensee spending requirements are inching upward to account for the new channels that the licensed products must now travel in, some brands are mandating lower marketing minimums because digital marketing appears to be less expensive than standard print/television marketing. Celebrity and influencer brand deals are seeing higher allocations toward celebrity/influencer services and marketing agencies. Supply chain provisions are crucial now, up and down the chain, including audit provisions, product testing, compliance and traceability. Pricing terms and policies around Minimum Advertised Pricing and Resale Price Maintenance are also more commonly found now in modern license agreements so brand owners can maintain brand value and avoid dilution.

Legal considerations. Parties to the modern brand license should take into account the importance of due diligence, namely, do I have the right partner; or is this a good opportunity for my brand? Have you conducted clearance and filed trademark applications for the new brand category/sub-category/territory. Have you checked on existing arrangements that may restrict your ability to enter the new license or pivot to the new product category? Have you considered anti-trust, labor and regulatory issues? Aside from the importance of the grant language and its specificity, modern brand license parties should consider scope, duration and exclusivity; exit/termination provisions; reputational risks/controls; compliance with regulatory landscape (e.g. advertising/influencer codes/transparency; in the US the Federal Trade Commission and state laws govern); ownership of IP (e.g. artworks underlying NFTs); enforcement/ breach (particularly for NFTs and in the metaverse); and compliance with ESG and Greenwashing rules (FTC and state regulations). And let's not forget about cross-jurisdictional issues like: data privacy/safe harbor; biometrics regulations; tax (including charitable aspects); and import/export issues including Brexit and sanctions.

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