

# DECEPTIVE PRODUCT ENDORSEMENT:

## Unauthorized use of a Celebrity's Name and Likeness

By Doug Bania

Celebrities are struggling to protect their names and likenesses from unauthorized usage of their voices, names, signatures and photographs. Once their names and likenesses have been misrepresented, there is a possibility that damage has occurred. The estimation of damages and arrival at an appropriate measure of fair market value for usage of the intellectual property varies greatly from one celebrity to another, depending on industry, marketplace, the celebrity's endorsement history, professional accomplishments and public image.

This article looks at one of the ways to determine the appropriate financial compensation for the unauthorized use of elements of a celebrity's persona in an advertising campaign. We will review the basic outline and format of unauthorized usage by a media company, in using and exploiting the celebrity's name and likeness in its advertising campaign (the "Campaign"). We subsequently quantify the different components of the financial compensation for the unauthorized use of the name and likeness and associated goodwill.

This case involves a celebrity who spent his entire life maintaining his image in both his public and private life by being heavily involved in charitable, civil and social activities and by not subjecting himself to situations that might damage his clean cut and moral reputation. Consequently, the Celebrity is known as a forthright but eminently moral figure.

The media company participated in unauthorized usage of the Celebrity's name and its associated goodwill during the running of the Campaign. The Campaign made a play on the Celebrity's name in a sexual fashion, which

would in all likelihood, be seen as antithetical to the Celebrity's reputation. Thus, the damage identified extends beyond the conventional Fair Market Value of the rights, and may encompass damages relating to mental and emotional distress.

### Product Endorsement History

The merchandising of intellectual property rights has been a key business strategy as far back as 1870. With the rise of mass communications since the early years of the 20<sup>th</sup> century, entertainers began endorsing consumer products in advertisements. Subsequently, businesses have been willing to spend a significant portion of their advertising budgets in acquiring the rights to use celebrities because they stand to gain benefits.

In the 1970s, Gallup and Robinson reported that 15 percent of prime-time advertising featured celebrities. In the following decade, advertisers used celebrities even more often, and this trend continued into the nineties, when empirical studies estimated approximately 20% of all advertisements use some form of celebrity endorsement. A more recent estimate indicates that nearly 25% of all commercials involve celebrity endorsements trying to inform and persuade. The cost of these endorsements, on the other hand, is more difficult to observe given the privacy in which such agreements are kept. Nevertheless, the advertising trade publication "IEG Endorsement Insider" claimed celebrities directly received licensing fees amounting to more than \$800 million in 2001.

### Multiple Approaches to Establishing Fair Market Value for Damages

When valuing intangible assets, it is

prudent to consider the different valuation methodologies in light of the information available and the current situation in order to determine the best method or methods of ascertaining the fair market value of the assets in question.

An overview of several valuation methodologies commonly used to determine fair market value is presented below:

#### Cost Approach

The historical cost to develop the asset is sometimes used to determine its value. According to economic theory, this is not an accurate approach because the cost to develop the asset and the market value are not necessarily the same. Keeping in mind the definition of fair market value, a purchaser of the asset will only pay an amount that will enable him to earn a reasonable return based on the expected revenue and expenses that will result from utilizing the asset. Generally, this approach is better suited to patents and technology that have not been developed commercially since it reflects the cost a company could avoid by purchasing, rather than duplicating, a similar research and development effort.

#### Income Approach

The Income Approach is utilized for valuing intangible assets with a significant history of use. This approach is based on determining the projected future income stream attributable to the asset under consideration. This approach is one of the most widely used methodologies in intangible asset valuation because the information required is relatively accurate and often is readily available. The information necessary to utilize this method includes the following:

1. Future income stream
2. Duration of the income stream
3. Risk associated with the generation of the income stream

The value of the asset is calculated by taking the net present value of the revenue stream associated with the use of the asset. This method utilizes a forecast of revenue based on factors such as historical results, industry

trends, and the competitive environment. The Income Approach is not appropriate in this instance because there is no significant history of use of the Celebrity's name as it relates to this campaign.

#### Relief from Royalty

The Relief from Royalty method is a variation of the Income Approach that establishes the value of the intellectual property as the capitalized value of the royalties that the company is relieved from paying due to its ownership of the assets. This method provides a measure of the value by determining the avoided cost. This method is appropriate to use when the assets in question have indirect or direct comparable licensing information to utilize.

Relief from Royalty is calculated by assuming that the business does not own the intellectual property, and thus has to pay a royalty for its use. Essentially, the fair market value is the present value of those avoided royalties. The Relief from Royalty method uses royalty rates that are based on marketplace transactions and uses a forecast of revenue as in the Income Approach.

#### Market Approach

With the Market Approach, intellectual property and intangible assets are valued by comparing the assets in question to transactions involving similar assets that have occurred recently in similar markets. This approach is best if an active market exists that can provide several examples of recent arm's length transactions and includes adequate information on their terms and conditions. Most intangible assets are not traded frequently enough to be able to establish comparable market value. Moreover, it is very difficult to get enough detail on the comparable transactions to be certain that a truly comparable situation exists.

EXHIBIT I - Campaign Impressions

Medium	Type	Period	Impressions (Thousands)
Glamour mag	1 pg 4 col ad	1 monthly issue	2,362
Cosmopolitan	1 pg 4 col ad	1 monthly issue	2,996
Vanity Fair	1 pg 4 col ad	1 monthly issue	1,181
O (Oprah) mag	1 pg 4 col ad	1 monthly issue	2,721
Shape magazine	1 pg 4 col ad	1 monthly issue	1,618
Lucky magazine	1 pg 4 col ad	1 monthly issue	971
Essence magazine	1 pg 4 col ad	1 monthly issue	1,057
Latina magazine	1 pg 4 col ad	1 monthly issue	358
		<b>TOTAL MAGAZINE IMPRESSIONS</b>	<b>13,264</b>
Outdoor	King Sized Poster on train	4 weeks	22,988
	50 showings		
Outdoor	Transit Shelter	4 weeks	52,889
	50 showings		
Outdoor	Subway Platform Poster (half)	4 weeks	196,560
		<b>TOTAL OUTDOOR IMPRESSIONS</b>	<b>272,437</b>
		<b>TOTAL IMPRESSIONS</b>	<b>285,701</b>

Source: Nielsen Media Research, Viacom outdoor, Audit Bureau of Circulations

#### Method Employed

Based on the information available in this case, we determined that the Market Approach is the most appropriate methodology for calculating the fair market value for the celebrity's use in the Campaign. In addition, we must look to the market for similar personalities with the celebrity's status, who have used their name and likeness in similar endorsements.

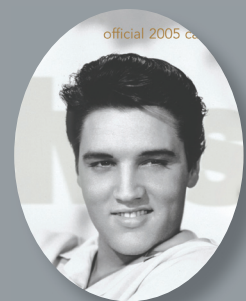
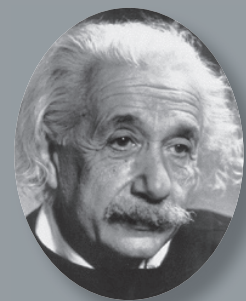
#### Extent of Unauthorized Use

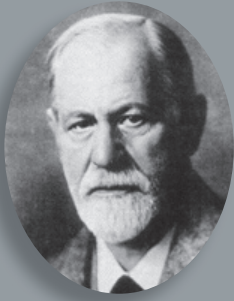
The right to choose whether, and how, one's identity is used for commercial purposes is a highly valuable property right particularly to celebrities who trade in it. Because the Celebrity is not a "willing seller," it is not relevant for us to examine the Celebrity's cur-

rent and past endorsement deals because he was/is a willing participant in those endorsements. In determining a proxy amount for the Celebrity's use in this Campaign, we must examine the extent of the Celebrity's use, the Celebrity's overall marketability and particularly focus on comparable deals with similar celebrities to calculate the fair market value for the use of the Celebrity's name and likeness. For the purpose of this assessment, the extent of use is defined in terms of the number of consumer impressions through various print and outdoor media (e.g. magazines, bus advertisements and subway kiosks) that the Campaign generated during the relevant time period. Exhibit I above

EXHIBIT 2 The Celebrity's Q Score Comparison

Personalities	One of my Favorites	Very Good	Good	Fair Poor	Total Familiar	Positive Q Score	Negative Q Score
The celebrity	13	19	23	15	69	18	21
All Athletes	6	8	13	9	36	14	24
All performers	6	6	12	8	33	16	25





shows the number of impressions generated, with details of the advertising media utilized. The number of consumer impressions is significant, approximately 286 million. We used this number of impressions to guide us in choosing comparable endorsement deals for our Market Approach assessment.

#### **The Celebrity's Marketability**

Marketing Evaluations' Q Scores have provided clients with data to aid in their marketing, advertising and media efforts for over 40 years. Q Scores are one of the industry standards for measuring familiarity and appeal of performers, characters, sports and sports personalities and broadcast and cable programs, as well as company and brand names. When companies are in the process of choosing the right personality to endorse their products, they will often rely on Q Scores to obtain consumers' reac-

tions to that particular individual. A high Q Score is a strong indicator that consumers will accept the personality endorsing the product.

Exhibit 2 shows that the Celebrity's scores favorably when compared to over 160 athletes and over 3,000 performers, who were part of the Q Score test. This information indicates that the Celebrity commands a high degree of marketability in terms of potential commercial uses of his name and persona. Although we must look at other personalities involved with similar endorsement deals for the Market Approach because the Celebrity was not a willing participant, it is important to know that he is a perfect candidate for analogous endorsements, if he chooses to participate.

#### **The Celebrity's Endorsement History**

Although the Celebrity has engaged in endorsement activity using his perso-

na for commercial purposes for many decades, he asserts that he would not agree to participate in this endorsement regarding the Series. As a result, it is necessary to examine transactions involving comparable celebrities and comparable uses to properly access fair market value.

The fair market value of the use of the Celebrity's name and likeness for commercial purposes is established with reference to comparable transactions entered into on a mutually voluntary and informed basis. In the recent past, the Celebrity has licensed his publicity rights in business to promote his name in various commercial ventures. Yet the comparability is not direct, as important elements, such as the scope of outdoor advertising media, and the combination of performance fees and publicity rights are different. Consequently, other transactions involving comparable public personalities must be considered to arrive at a complete analysis of comparables, which incorporate the key elements of an advertising campaign, similar in scope to the Campaign.

#### **Calculation of Damages**

From our research of comparable transactions, we identified fees paid to a variety of other celebrities for product endorsements who command a level of compensation comparable to the Celebrity. Exhibit 3 shows eight different examples of celebrities who have provided commercial endorsements ranging from Chevy trucks to Callaway Golf equipment. It is interesting to note, the minimum fee identified was \$1.0 million and the maximum fee was \$40.0 million, which, in every case, represents compensation paid to a willing participant.

When calculating the damages for the unauthorized use of a celebrity's name and likeness, it is important to understand the celebrity's endorsement history, professional accomplishments and public image. For instance, when valuing Kobe Bryant's name and likeness, you need to look into his professional career as well as his personal life.

The purpose of this analysis is to illus-

*Source: Internet research of publicly available documents performed on Lexis Nexis*

**EXHIBIT 3 - Celebrity Comparisons**

Endorser	Product/Company	Fees	Term
Anna Kournikova	Multiway Sports Bra/Shock Absorber XSN Sports/Microsoft's	\$8.0 million	4 years
James LeBron	Nike, Coke and Upper Deck Trading Cards	\$10.0 million	6 years
	Nike	\$90.0 million	3 years
	Sprite	\$10.0 million	4 years
David Beckham	Adidas	\$12.15 million	4 years
Cal Ripken Jr	Chevy trucks, Fram oil filters and Starter apparel	\$9.0 million	1 year
Jim Furyk	Hershey/Reeses	\$2.0 million	2 years
	Argent	\$1.5 million	1 year
	Exelon energy	\$1.0 million	1 year
Michael Campbell	Callway/Golf Equipment	\$1.5 million	1 year
Yao Ming	United Telecomm Corp	\$3.0 million	3 years
Kobe Bryant	Nike	\$40.0 million	5 years



## TOTAL LICENSING

trate that the Celebrity is well in line with the compensation being offered in other product endorsement advertising campaigns with comparable celebrities.

The advertising and promotion campaign that employed the goodwill, image and persona of the Celebrity was a multi-media campaign, with advertising found in multiple magazines and on literally thousands of buses, as well as hundreds, if not thousands of kiosks, posters and other installations. We have established base numbers for use of a celebrity persona in various media. Based on our research, we found that some comparable celebrities charge anywhere between \$75,000 and \$100,000 per image use and per media placement. The corresponding celebrity advertising costs for the other media are shown in the Exhibit 4 below. As a conservative estimate, for use in a single magazine a performance or endorsement fee of \$75,000 can be considered appropriate.

- In this case, the Celebrity's goodwill and persona were used in at least eight magazines, with approximately 13 million consumer impressions. Therefore, eight endorsement fees for eight magazines at \$75,000 each totals \$600,000 (See Exhibit 4 & 5);
- The Celebrity's goodwill and persona were used in an intensive campaign using city buses. Based on media research from leading advertising agencies, we estimate that there were approximately 23 million consumer impressions using the Celebrity's goodwill and persona in advertising support for the Series. Fees for this type of exposure are estimated at \$175,000 (See Exhibit 4 & 5);
- Finally, the Celebrity's goodwill and persona were used on bus stops,

### EXHIBIT 5 - Cost Per Impression in Various Media (in 2000)

Type of advertising media	Cost per Thousand Impressions 'CPM' (Adults 18+)
Newspapers Half Page, B&W	\$23.32
TV Spot 30 Prime-Time	\$20.54
Newspapers Quarter Page, B&W	\$11.66
TV Network 30 Prime-Time	\$11.31
Magazines 4 Color 1 Page	\$9.62
Radio 60 Spot Drive-Time	\$5.92
Transit King Size Bus Poster (12 weeks)	\$4.87
Outdoor Subway Kiosks	\$3.90

Source: OAAA, ORG (from:AAAA Media Matters, Harris Media Systems Ltd, AC Nielsen, NTI, FCC, NAA, MPA)

subway kiosks, posters, and possibly other media, having a possible impact of over 249 million consumer impressions. Fees for this type of exposure are estimated at \$1,524,000 (See Exhibit 4 & 5).

- Therefore, the combination of these various usages of his goodwill and persona, means that, in total, the Celebrity would have been justified in setting a fee (if any fee were possibly acceptable to him) of approximately \$2.25 million (See Exhibit 4 & 5). Furthermore, the Celebrity should be awarded damages in the form of corrective advertising. Corrective advertising is calculated as the advertising costs necessary to replicate a multi-media advertising effort in similar proportion to the Campaign. The purpose of this ad-

vertising effort is to inform the public of the unauthorized usage of the Celebrity's image and persona, and to show that the Celebrity does not endorse the Series and he has no association with the Series whatsoever. Whether or not the Celebrity elects to launch such an effort is irrelevant; he must be compensated in the event he elects to do so.

Consequently, additional compensatory damages for corrective advertising are estimated at the total media cost of: \$450,000 (See exhibit 4)

#### Conclusions

Based on our analysis, it is our opinion that circumstances and compensation sufficient to entice the Celebrity to be connected in any way with the Series, would have called for compensation in the neighborhood of \$2.675 million.

### EXHIBIT 4 - Estimated Celebrity and Media Costs

Media	Units	Impressions Thousands (a)	Media Cost per Thousand (b)	Celebrity Fee per Thousand (c)	Total Celebrity (a) x (c)	Total Campaign Media Cost (a) x (b)
Magazines	8 Monthly magazines	13,264	\$ 9.62	\$ 45.24	\$600,000	\$127,600
Buses	1 Monthly run	22,988	\$1.62	\$7.63	\$175,473	\$37,317
Kiosks/Shelters	1 Monthly Run	249,449	\$1.30	\$6.11	\$1,524,849	\$324,284
					\$2,300,322	\$489,201

