

Beauty and the Brand: Drafting contracts for the commercial use of someone's likeness

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Introduction

When does a model or actor own her own image? This was the question posed by American fashion model Emily Ratajkowski in her September 2020 exposé for *New York Magazine* entitled, "Buying Myself Back: Emily Ratajkowski on Reclaiming Her Own Image".¹ The 7,000 word article addressed many aspects of the often fraught working relationships as between models, performers, photographers, agents, and more. But underpinning the entire piece is the question of control over how images of Emily are portrayed in the public sphere.

In the opening paragraphs, she tells of her confusion when a photographer sued her for copyright infringement: she had posted a photograph he had taken of her, without his consent, on her Instagram account. She recounts that her lawyer told her, "despite being the unwilling subject of the photograph, I could not control what happened to it."

It is well established that English law currently does not recognise a unified image right, which is known generally in the United States as a right of publicity, and in Europe as personality rights. In practice, this means that the photograph's subject is not entitled to control the image in question without permission from the relevant copyright owner or its licensees.

Even in jurisdictions with strong personality rights, the issue is rarely straightforward, and legal questions often turn on privacy, commercial context, and the unique circumstances of the person's public profile. Notwithstanding this however, freedom of contract provides ample opportunity for a photograph's subject (**Talent**) to exert at least some control over how another brand, studio, or agency (**Brand**) uses her image. And, importantly, the contractual relationship need not be zero-sum.

This article explores nine practical issues and aims to show it is possible to protect the interests of both the Talent and the Brand:

01. Picture this: Defining "image" and its usage
02. Is this pose for free? Payment and payment in kind
03. She's got the look: Modifications and appearances
04. My image, my choice? Determining creative control
05. Confusing copyright: Legal ownership vs practical permissions
06. What did you just call me? Reputation management
07. Taking a stand: Corporate philosophies and ESG
08. When life gets in the way: Contingency planning
09. More than just a pretty face: Remember the human element

Practical Points to Consider

01. Picture this: Defining "image" and its usage

Once the Talent agrees to work with the Brand, the parties must agree as to which aspects of the Talent's image are to be used. However, 'image' is a nebulous concept, and often means much more than just a picture. 'Image' is often defined as legal name, nicknames and social media handles, signature, film footage, voiceovers, illustrations, realistic digital renderings, biographical information, or indeed any other elements or characteristics of the Talent's persona, identity, or personality. Because the Brand is usually the one providing the agreement, it is usual to see the definition drafted very widely as a starting position. Where the Talent is an established public figure or otherwise seeks a more limited commercialisation of her image, a narrower definition is to be expected.

It will also be necessary to set out the actual parameters of usage. The widest of these would permit the Brand to use the image in any manner, in any medium, for any purpose, in any jurisdiction, (often, "anywhere in the universe"), perpetually. This provides the Brand with unfettered rights to use and reuse the image as desired. However, whilst a Brand may want flexibility to use the Talent's image across a variety of materials, the Talent may only feel comfortable with a more limited

usage. Context is likely to be key, here, and in particular where the Talent has already engaged in similar commercial endorsements with other companies.

02. Is this pose for free? Payment and payment in kind

Payment to the Talent in exchange for use of her image can be structured in a variety of ways. Up-front fees often the most straightforward, but royalties, perhaps based on the success of the marketing campaign in question, may also be appropriate. Things worth considering could include if the Talent's promotional activities yield better-than-expected marketing results, or if she otherwise goes above and beyond in her promotional activities. On the other end of the spectrum, it may be necessary to reserve withholding of future payments if the Talent substantially damages her reputation, or that of the Brand.

If the Talent is not particularly well-established or known in the target market, a Brand may offer payment in kind: gifts, holidays, products or indeed even just discounts on any of these things are often used as consideration. A Brand may also promise to give the Talent "exposure" through its social media accounts or other advertising. That said, this approach is becoming increasingly unpopular and should be treated with caution. In recent months especially, models, influencers, and actors are increasingly seeking more market-rate remuneration, or at the very least, some form of nominal payment or expenses.

03. She's got the look: Modifications and appearances

Some of us will have personal experience with enhancing our own photos through filters and makeup apps, before posting them to social media. In the same way, a Brand will want the right to change the way the Talent looks. However, a Brand should note that modifications and alterations the photo editing stage can be risky, especially when changing the appearance of the Talent's weight, skin tone, hair, or distinguishing features.

By way of example, Beyoncé's sister and fellow singer Solange Knowles², and Kenyan-Mexican actress Lupita Nyong'o³ both appeared in separate photo shoots only to have the appearance of their hair substantially edited. In both instances, the women expressed their frustration and disappointment with the decision taken by the publications. This in turn resulted in wide-spread backlash against the respective magazines, and was considered as form of subtle or covert racism by some.⁴

It is best not to assume that other "improvements" will necessarily be welcomed by the Talent, either. When Simone Welgemoed, a deaf ballet dancer, appeared in an advert for Virgin Active, her cochlear hearing implant was airbrushed out. The dancer immediately complained, saying: "I guess my cochlear implant shamed you so much that you had to edit it out. Well you just edited out a part of who I am and didn't ask my permission and I'm not ok with that".⁵ Notwithstanding the above, pragmatic compromises are certainly feasible. The Brand could be permitted to edit out blemishes, and wrinkles on clothing (or indeed the face!), for example, but not to remove freckles or scars.

Aside from digital modifications, it may be desirable for the Brand to stipulate the on-going requirement that the Talent maintain her physical appearance. It is therefore not uncommon for the Talent to be contractually obliged to keep a fit and healthy lifestyle, or to not change body dimensions and hairstyle. Where this is of critical importance to the Brand, changes to any of the above may be drafted so as to constitute grounds for termination, or else require consent. However, in light of body positivity and acceptance movements, as well as consideration for the Talent's mental and emotional wellbeing more generally, such clauses should be treated with caution.

04. My image, my choice? Determining creative control

Many agreements require the Talent to acknowledge that the Brand has sole discretion regarding editorial decisions, as well as how the Talent's image is ultimately used or shared. If the Talent is meant to upload the content to her own social media accounts, the Brand may also have an approval mechanism in place before the image goes live.

The Talent, on the other hand, will also want some element of control. The mere fact that the Talent's likeness is to be shared with thousands or even millions of others does not make it any less personal for the individual depicted. Individuals with strong personal brands may seek to have some input on the marketing strategy or business plan associated with their likeness. Irrespective of which party ultimately wields the most creative control, the language surrounding the process should be prescriptive to avoid uncertainty.

05. Confusing copyright: Legal ownership vs practical permissions

Copyright arises automatically to protect the unique and creative effort of the creator once the work is expressed in a fixed medium. Although this is a straightforward concept for legal practitioners and scholars, the idea that the Talent may require consent from the rights holder (often the photographer or the Brand in question) in order to post an image in which she is depicted is often seen as counterintuitive. In Emily Ratajowski's case, as with countless others who have expressed a similar frustration, it can be presented as unfair or even unethical.

To this point, it may be considered beneficial to set aside strict interpretations of copyright, and instead allow the Talent to share the images associated with the campaign. Drafting to this effect takes into consideration the pervasiveness of social

media, as well as the innate desire many of us have to share work that we have contributed to, or otherwise helped to shape.

06. What did you just call me? Reputation management

Everyone makes mistakes, and most people can recall a time in which they forgave a friend or family member for a misstep - or else sought forgiveness themselves. And naturally, the Talent depicted in a photograph is of course a human capable of error. Unfortunately, the mistakes of notable individuals are often put under the spotlight, and can prove impossible to erase from the public's collective memory.

If the Talent is involved in a scandal, a Brand may therefore seek to swiftly distance themselves. However, this can be difficult to manage absent the requisite contractual provisions such as an anti-disparagement clause, or a so-called morality clause.

Anti-disparagement clauses typically require the Talent to not make or communicate to any person or in any public forum any defamatory or disparaging remarks about the Brand. A morality clause might prohibit the Talent from participation in certain types of publicised political debate, reckless behaviour which endangers the safety or well-being of themselves or others, and recreational drug usage. Making comments which are sexist, homophobic, racist or offensive are also frequently prohibited.

However, it should be noted that such clauses must be carefully drafted, so as to take into consideration the Talent's rights to expression. In all cases, it is prudent to include a carve-out for truthful statements made in connection with legal proceedings or HR investigations.

07. Taking a stand: Corporate philosophies and ESG

Research shows that consumers are increasingly concerned about environmental, social, and governance (ESG) issues when making purchasing decisions. Movements such as Black Lives Matter and #MeToo have received considerable press coverage in recent months, but other important issues include LGBTQ+ diversity and inclusion, as well as gender pay equality, environmental sustainability and workers' rights.

Together with (and perhaps in part because of) this public pressure, celebrities and influencers are now more likely to use their public status to advocate for corporate change. Companies are also using ESG issues as an opportunity to improve their own public perception, or otherwise to differentiate themselves in a crowded field. British fashion retailer Jigsaw⁶ and UK-headquartered financial giant HSBC⁷ notably launched prominent pro-immigration campaigns, ostensibly in light of the United Kingdom's referendum to leave the European Union.

A Brand should therefore be alive to the fact that the Talent may wish to work with a company whose values mirror her own. Furthermore, celebrities and consumers alike may have little appetite to overlook comments made by executives which are homophobic, sexist, racist, or just plain rude. Several years ago, the founder of American athleisure retailer Lululemon infamously made derisive remarks about overweight women wearing his company's yoga leggings.⁸ This caused considerable public backlash and substantial brand damage, ultimately leading to the founder's resignation.

08. When life gets in the way: Contingency planning

If 2020 has taught us anything, it is that even seemingly immutable ways of working and socialising can be disrupted. This is important to consider especially where the Talent is expected to carry out a series of engagements or activities under her contract with the Brand. In such cases, it may be sensible to address what happens if the Talent's performance of her obligations is disrupted or materially suffers for whatever reason.

Rather than use a boilerplate force majeure clause, this provision could be tailored to cover the Talent's particular circumstances, bearing in mind her other professional and personal commitments. It may also be worthwhile to consider having notification procedures in place for extenuating circumstances, for example late submission of social media content, or late arrivals for events. Such scenarios need not necessarily trigger termination or even a temporary suspension of the working relationship: instead, the clause is primarily intended to encourage communication.

09. More than just a pretty face: Remember the human element

It is often tempting to use template photograph licences and standard release forms when seeking to use an individual's image for advertising or promotional campaigns. And indeed, in some scenarios, these contracts do serve their purpose adequately. But it is also worth pausing to note that many precedents still contain onerous or unbalanced provisions which may no longer be appropriate. For example, some contracts - alarmingly - require the Talent to waive any rights she may have to make a claim for harassment she may experience whilst in the studio or on set.

Contracts concerning the use of someone's likeness therefore necessitate a nuanced approach to drafting, and particular attention should be given to context, reputation, and the most unpredictable variable of all: human emotion. Although it may not always be possible to agree to each of the Talent's requests regarding how her likeness is treated, it is always possible to address such requests with respect.

As famed photojournalist Eve Arnold, OBE, Hon. FRPS said, “If a photographer cares about the people before the lens and is compassionate, much is given. It is the photographer, not the camera, that is the instrument.” In a world seemingly flooded with manipulated and airbrushed content, it is all the more important to engage in open and honest dialogue with each other.

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Authors



Kelsey Farish

London - Walbrook
+44 (0) 20 7894 6320
kfarish@dacbeachcroft.com