

THAT'S ENTERTAINMENT

SPECIAL EDITION

Owning Celebrity Rights is Not as Easy as You Might Think

Read on for a candid interview conducted by Jeff Loeb, partner at Loeb & Loeb whose area of practice is estate planning and trust administration. Jeff will be interviewing Mark Fleischer. Mark Fleischer's grandfather, Max Fleischer, founded Fleischer Studios Inc., in 1919. Max, along with his brother, Dave Fleischer, produced some of the world's best-known cartoons, including the beloved Betty Boop.

JEFF: What are the celebrity rights owned by Fleischer Studios? For example, besides the "image" of Betty Boop itself, does Fleischer own other rights? Is that common among the owners of celebrity rights?

MARK: Fleischer Studios owns the copyright, trademark rights and other intellectual property rights in the Betty Boop character and her family of characters, such as KoKo the Clown, Bimbo, Pudgy and Grampy. Fleischer Studios also owns the rights in a later developed character, Baby Boop (Betty as a baby). Included in this group of rights would be rights similar to those that a living celebrity owns and has the right under California law to pass on upon death, specifically the celebrity's name, voice (in some cases), signature, photograph and likeness.

J: What are the traditional methods of exploiting celebrity rights? What are some of the newer, developing methods you're seeing in the digital era?

M: The traditional method of exploiting celebrity rights is to license the person's or character's attributes (such as likeness, name, signature, voice, etc.) to third parties for use on articles of merchandise

and in connection with activities as a spokesperson for a product or service. For example, we have licensed Betty Boop's likeness to roughly 250 product manufacturers in the United States alone. In today's world, celebrity/character attributes are being used in connection with a wide variety of digital and other uses, from cell phone ring tones to website avatars/hosts.

J: Is there an "art" to licensing celebrity rights? Do you recommend the use of a licensing agent?

M: Licensing celebrity/character rights is a true art of commerce, and, unless you are a genuine expert in that field, I strongly recommend that you not try this at home; rather, engage a professional licensing agent. Let me use Fleischer Studios as a case in point. King Features Syndicate (a unit of Hearst Holdings) has been our worldwide exclusive licensing agent since 1973.

Their management team consists of a president, a COO, heads of domestic and international licensing, a head of creative affairs, a head of legal and business affairs, a head of marketing/promotion and a head of new media/Internet. In today's licensing marketplace, I can assure you that anyone who tries to serve as his or her own agent creates a substantial risk of losing a lot of value, not to mention revenue. What happens all too often is that the rights owner is not in the mainstream of licensing opportunities and, lacking the experience, knowledge and expertise needed to evaluate licensing opportunities, jumps at whatever comes his or her way. Often, however, the long-term strategic play will yield far more than the deal that generates a modest amount of money in the short term but, in some way or another, damages the property.

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- J: What are some of the things you should consider before selecting a licensing agent?**
- M:** Before selecting a licensing agent, you need to consider the depth of the prospective agent's expertise, sophistication and infrastructure, all of which are needed to have a real understanding of this business. That understanding includes knowing which licensees are the most effective in which markets and are reliable in their accountings, knowing how to efficiently weigh competing opportunities, knowing how to create appropriate yet marketable style guides and other artwork and knowing when and how to enforce the applicable quality standards required of the licensees. In addition, the licensing agent must be able to service the hundreds of licenses that may be in force at any given time.
- J: Are there any industry standards in terms of agency commissions?**
- M:** A typical licensing agency agreement will give the agent a commission of between 25 percent to 50 percent, depending on the strength of the property and the degree of infrastructure the agent will be required to bring to bear, and will require the agent to obtain the owner's approval over key creative, business and financial matters.
- J: Is there such a thing as "too much exploitation," and what's the downside associated with that?**
- M:** The primary risk here is that consumers tend not to buy merchandise bearing a celebrity image or voice if that merchandise is so widely available in the marketplace or so prevalent in the consumer population as to make it too commonplace. A good example is the absolute glut of T-shirts, coffee mugs, key chains, and other merchandise for sale in the shops near Times Square in Manhattan. You won't find Princess Diana's image on any of that merchandise for reasons that I think are obvious.
- J: What's involved in trying to protect your rights from infringement on a domestic and global basis? What's the risk of rights falling into the "public domain"?**
- M:** This is one of the most important aspects of celebrity/character rights ownership. If you are not vigilant in your efforts to enforce your rights, you create a risk either of those rights falling into the public domain such that you lose your exclusivity, and, therefore, no one needs to pay you a license fee for the use of those rights, or of being barred from later pursuing any claims because of the mere passage of time. Enforcement efforts typically begin with a sternly-worded letter from legal counsel advising the infringing party to cease and desist from further exploitation of your rights, to recall any merchandise currently in the marketplace and to account for, and turnover to you, any and all funds received through the wrongful exploitation of your rights. If that doesn't work, then the next step is to file a legal action to enjoin the wrongful conduct and obtain an award of monetary damages including compensation for any damage to the reputation of the property occasioned by the wrongful conduct. Of course, doing this on a global basis has become a real challenge for many rights owners simply because some countries don't recognize these rights as being subject to exclusive ownership.
- J: How do you make sure you're receiving all of the income due you from the worldwide exploitation of your rights? What are some of the common mistakes made by rights owners in the audit process?**
- M:** We're very fortunate in that King Features is very vigilant on our behalf in enforcing with the licensees the timeliness and accuracy of their accountings. Their ability to do this is due in large part to the strength of the relationship King has with its licensees. Revenue shortfalls that result from erroneous calculations are typically caught by the agent upon conducting a careful review of the statements rendered by the licensee, for example, applying the wrong formula for determining the license fee to be paid on a particular form of exploitation. The more difficult situation is where there has been a complete failure to report a particular source of revenue, whether intentional or accidental. That's where you really need to rely on the knowledge and expertise of your agent who should know what was required to be reported by the licensee on the periodic statements and to flag any omissions. The most common mistake of which I'm aware is letting too much time pass before exercising an audit right only to learn that the license agreement placed a time limit on your right to do so.
- J: How do you keep the Betty Boop image fresh and current particularly in view of Betty's age and the changing demographics in the consumer marketplace?**
- M:** Keeping Betty Boop fresh is an art unto itself. It really comes down to the artwork treatment of the character, at all times retaining those elements that have made her so universally and timelessly popular, yet updating the character sufficiently to make her constantly accessible to successive generations of fans. We have always had to push the envelope a little without stepping over the line. For example, Betty Boop has always been sexy, but without being sexual. What our culture considered sexy in 1930 is not exactly what we consider sexy today. If you compare the original 1930's look of Betty Boop to her look today, you will see a character who has gradually morphed from a primarily voluptuous, rounded body to one with a harder, more athletic one. Additionally, Betty has always been iconoclastic, but without being radical. As society's perception of those values has changed, Betty's character has similarly evolved without having ever crossed over the line. I think one major reason we have been so successful in doing this is due to the partnership that has developed between Fleischer Studios and King Features – the two companies have worked so closely together to balance the need to keep consistency in the character with the need to develop and grow. Ultimately, we have to remain true to the foundational course set by my grandfather. His signature was surrealism, so there must always be something surreal about Betty Boop. My grandfather gave her certain core values, but, while remaining faithful to those, he was not afraid of taking risks.

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