

# Haldanes

## Morals Clauses in Endorsement Contracts



**John McLellan**

**Partner, Head of Commercial and Media & Entertainment Groups**

**March 2015**

*(Photos: Latin Post; Hancinema; Touche! eMagazine; People; Fanpop; The Dallas Morning News; NY Daily; Pinterest; News Listverse)*

# Haldanes

## 1. Introduction

One of the key issues in sponsorship agreements currently under debate are so called “morals clauses”.

## 2. What is a morals clause?

A morals clause is a provision in a contract which prohibits and / or restrains certain illegal and / or immoral and / or unethical behaviour of a party (s) to the contract. It is often used to protect the image and reputation of the company; and most importantly, it enables one party to unilaterally terminate the contract (or some other form of intermediate redress) if the other party engages in conduct that could have some sort of negative impact upon the particular company, organisation or brand<sup>1</sup>.

## 3. The need for a morals clause

A morals clause is of crucial importance to an endorsee. It is very often investing large sums of money to engage an endorser to endorse the company’s products and / or services. In many cases, the company builds its advertising and marketing campaign around the endorser, in order to associate the endorser’s talents and achievements with the company’s products and / or services. It should be of major concern to the endorsee that its reputation and interests could be adversely affected by the acts (whether good or bad) of its endorser.

In recent years, morals clauses have been effectively enforced against many famous endorsers,



including Kobe Bryant (in connection with an accusation of sexual assault after having sex with a 19-year old hotel employee in 2003), Kate Moss (who was photographed using cocaine in 2005), Tiger Woods for extramarital affairs in 2009, and Lance Armstrong following his admission of illegal doping in 2009. *(Photo: uncontestedshots.com)*

An effective morals clause can be viewed as a shield to protect a company’s interests and reputation when an endorser has behaved immorally or improperly.

#### 4. Morals clause – Asia Perspective

What constitutes an immoral or improper behaviour cannot be judged by simply looking at the wording of a morals clause in isolation. Immoral or improper behaviour, must always be considered in the context of the beliefs, culture, social norms, and customs of a society at a particular period of time. For example, the infamous Edison Chen's sex photos scandal shocked the general public in Hong Kong as well as other Chinese communities. As a



consequence of the scandal, although Chen and other female artists involved in this incident did not commit any illegal acts, (indeed they were the victims of an illegal act) many of their endorsement contracts were terminated. Credit card company Manhattan Titanium withdrew all advertisements featuring Chen. Pepsi China, Standard Chartered Bank, Samsung, Levi's and the Hong Kong MTR, dropped Chen as an endorsee or declined to renew advertising campaigns involving him<sup>2</sup>. (Photo: [myfirstgossipblog.wordpress.com](http://myfirstgossipblog.wordpress.com))

It was reported that, several of Gillian Chung's (a member of Hong Kong pop group Twins) lucrative endorsement contracts were terminated as a result of the scandal. Hong Kong Disneyland Resort dropped the use of a Twins' music video for Chinese New Year celebration. Chung was dropped from performing in the 2008 Summer



Olympics opening ceremony by director Zhang Yimou<sup>3</sup>. Although Chung was obviously a victim of the scandal, the public did not appear too sympathetic to her situation, indeed, Chung's appearance on a TVB charity programme on 17 February 2008 attracted around 2,100 complaints to the Broadcasting Authority in Hong Kong<sup>4</sup>. All of Chung's scenes were cut from the theatrical release of *Forever Enthralled* (a Chinese biographical film about the life of Mei Lanfang, one of China's premiere opera performers) which was released on 5 December 2008. (It is unclear whether the decision to have Chung removed was made by the State Administration of Press, Publication, Radio, Film and Television of China was the result of Mei Lanfang's family's wishes<sup>5</sup>.) (Photo: [China.org.cn](http://China.org.cn))

# Haldanes



Most recently, an intimate video of TVB star Sire Ma dancing in lingerie spread virally on the Internet. Ma's image had already suffered a big blow in 2013 when it was reported that she was the third party in Wang Ziqi and wealthy businesswoman Laura Lee's lesbian relationship. Since the lingerie video scandal, Ma's image further plummeted.

TVB halted all of Ma's upcoming work plans. Ma was in tears at a press conference and admitted that she took the intimate videos and photos. Due to the pressure and consequent depression, Ma revealed that she had contemplated suicide<sup>6</sup>. *(Photo: Malaysia Chronicle)*

In August 2014 came the arrest of Taiwanese actor Kai Ko and Hong Kong actor Jaycee Chan (son of Jackie Chan), in relation to the illegal use and possession of marijuana. Ko has reportedly signed contracts with 19 brands for appearances in TV commercials, with two-thirds of the companies in the Fortune Top 500.



Jaycee Chan, the son of actor Jackie Chan, has been the brand ambassador for six brands. In light of the State Administration of Press, Publication, Radio, Film and Television's no-tolerance policy on TV commercials involving illegal images, brand campaigns fronted by Jaycee Chan, including Yuanye Tea, Dove Chocolate, and Kangta Shoes, have all been withdrawn from the various media platforms<sup>7</sup>.

In fact, it is reported that KFC has replaced Ko with Korean actor Kim Woo Bin as its endorser in China<sup>8</sup>. Other companies are still monitoring Ko's situation and are passing judgment against Ko until further discussions are made. Addidas dropped Ko as an endorsee and brands including NIVEA Men and a chewing gum company named Stride are said to have demanded damages from Ko<sup>9</sup>. Ko had been replaced by Jing Boran for his role in "Monster Hunt"<sup>10</sup>. *(Photo: CBC/Radio-Canada)*

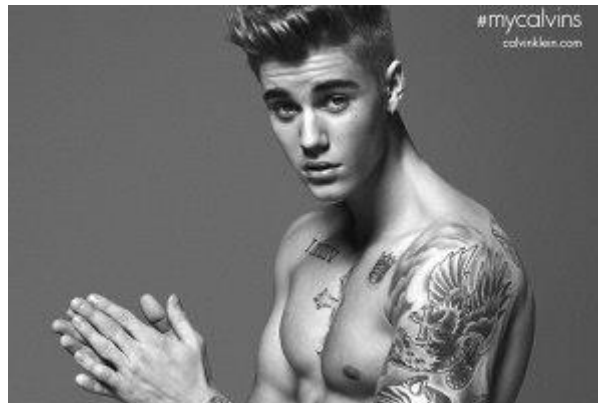


# Haldanes



Compare the position in the United States with that in Asia, where the leak of sex photos of Vanessa Hudgens, an American actress and singer, (well-known for her role in the High School Musical series), in 2007 did not cause serious damage to her career. Although there was speculation about Hudgens being dropped from High School Musical 3 in relation to the incident, the Walt Disney Company denied the rumours and even released the following statement to support her, “Vanessa has apologized for what was obviously a lapse in judgment. We hope she's learned a valuable lesson.”<sup>13</sup> (Photo: *greenbaypressgazette*). Likewise, when a sex tape featuring Kim Kardashian was “leaked” in 2007, the leak arguably enhanced her career and heightened her popularity. The tape became a bestseller in adult video stores and online markets. Kim Kardashian sued Vivid Entertainment, the adult video distributor who paid a million dollars for the leaked video. (It was later reported that Kim Kardashian reached an agreement with Vivid to share in the profits of the video, which is viewable online for a fee<sup>14</sup>.)

Justin Bieber, has been arrested and charged in connection with a variety of illegal acts in different countries and on numerous occasions (driving under the influence of drugs and alcohol, assault, vandalism, just by way of example). However, with over 40 million followers on Twitter and 15 million followers on Instagram, Bieber was named by Forbes magazine in 2012 as the third-most



powerful celebrity in the world. Despite these negative incidents surrounding Bieber, he was recently unveiled as an endorsee for Calvin Klein along with Lara Stone. Throughout the day of the release of Calvin Klein’s spring underwear campaign, the hashtags #mycalvins #JustinWereReady #newfaceofcalvinklein and terms “Calvin Klein,” “Lara Stone” and “Justin’s Calvin Klein” trended worldwide on Twitter. In January 2015, the hashtag #mycalvins has seen more than 1.85 million Twitter mentions<sup>15</sup>. (Photo: *Calvin Klein*)

# Haldanes

One can see from the above examples that, different societies and communities respond very differently to incidents of similar nature. Although a morals clause is commonly found in various endorsement contracts, the scope of the clause has to be judged in the context of the society or societies covered by the brand endorsement. Asian societies, in particular, tend to uphold a more conservative attitude towards the behaviour of a public figure.

The following morals clauses are commonly found in an endorsement contract for the services of an Asian artist:

*The Artist shall:*

- *maintain his/her clean, wholesome and healthy image;*
- *maintain his/her physical appearance and shall behave, during the term of the agreement, in accordance with the quality image and prestige of [the brand] and [the product]. In particular, the Artist shall have a distinguished and elegant behaviour, which includes the obligation not to smoke in public, from consuming mind-altering or illegal drugs, etc.*
- *not do or omit to do any act which will prejudice the association between the Artist and the product or will adversely affect the reputation and image of the product or the company;*
- *not engage in any act or conduct or make any derogatory statements which denigrate [the brand];*

In relatively recent years, it would have been common to see clauses prohibiting romantic relationships, marriage or pregnancy.

Endorsement contracts in China often have a clause to this effect:-

- *The artist shall not make any inappropriate remarks, expresses opinions or actions that may cause the Chinese Government officials to prohibit the broadcasting of the advertisement.*

Such a clause does not define what kind of remarks, opinions or actions would count as inappropriate, however, it is a fair bet, that standing on stage à la Björk and shouting “Free Tibet” would probably fall within the scope of conduct anticipated by this clause. Such conduct could have serious ramifications for the endorser and endorsee company in China.

## 5. How can a company's position be better protected?

The morals clause should be drafted specifically. A company signs a particular endorser to endorse particular brands because the endorser represents a specific concept or image that the company wishes to be associated with the product, service or brand. Companies should think carefully as to what that concept or image is and draft a morals clause that address the particular behaviour or conduct that could tarnish such concept or image. For example, endorsement contracts for products targeted at teenagers, companies may consider drafting morals clauses addressing behaviour involving drugs, smoking in public, getting drunk or swearing in public, wearing revealing clothing, or any behaviour that would tarnish a celebrity's wholesome and healthy image. For a married endorser who endorses products targeted to families, exposure of any extra-marital affairs by the media would tarnish his or her image associated with the products.

Further, the contract should provide for a mechanism to determine when a breach would occur. In the case of conduct resulting in a criminal investigation, the determination could be a criminal conviction or where a custodial sentence is imposed. However, a company may be reluctant to wait for actual criminal proceedings before being permitted to terminate a contract and may look to an arrest or a criminal investigation to be the relevant trigger. Moreover, there are often cases where inappropriate behaviour falls short of a criminal conduct, e.g. leaking of nude photos or scandalous videos online, fighting at a night club, appearing drunk in public. In such a situation, the company may set the determining trigger to be the disclosure of the particular photos by the news media.

Finally, the contract should provide for actions that the company can take if an endorser breaches the morals clause. Termination could be one of the remedies. Sometimes, however, a company may prefer not to terminate a contract but wants to show that it disapproves of an endorser's behaviour. Some morals clauses allow companies to levy a penalty and / or deduct payment rather than termination of a contract. For endorsement contracts with multi-year initial terms, considering the risks associated with the endorser's behaviour, the company may consider an "early exit fee" to terminate the contract. For example, if an endorser enters into a three-year contract with a celebrity with a fixed amount guarantee of which a certain amount is payable yearly, the company might try to negotiate an exit fee at the end of each year. This provides an option for the company if the endorser commits any inappropriate behaviour and the endorser would like to terminate the contract early.

## **6. Latest trend – A reverse morals clause?**

A relatively new twist is a so-called “reverse morals clause”; the purpose of which is to allow an endorser to receive compensation and / or terminate a contract if the company and / or its executives behave badly. One recent example occurred in February 2011, when John Galliano was terminated as creative director and designer for Dior after a video was released of him shouting anti-Semitic slurs in Paris. After Galliano’s comments were made public, Natalie Portman – who had recently signed an endorsement deal with the fashion house – said she did not want to be associated with Galliano. In March 2011, GoDaddy CEO, Bob Parsons, released a videotape of himself killing an elephant, leading to a public call for Danica Patrick and Jillian Michaels to terminate their sponsorship of the company. In late 2013, after allegations of racial profiling at Barneys were made in the press, Jay-Z chose to continue his partnership with the retailer. This despite a large public outcry, including a petition launched on Change.org with over 58,000 signatures calling for Jay-Z to end his collaboration with Barneys<sup>16</sup>.

Apart, therefore, from the traditional morals clause, when negotiating an endorsement contract or on behalf of an endorser, to protect their image and / or reputation from being adversely affected by the misbehaviour of the company and / or its executives, it is increasingly common to push for a reverse moral clause included in the contract.

## **7. Social media and endorsement contract**

A further consideration is the popular use of social media. Facebook, Twitter, Weibo and Instagram, have become a very common means for celebrity endorsers to share their lives, opinions and whereabouts instantly. Social media’s power to influence customers and brands is, to a certain extent, measurable, and can be calculated by the “likes” and “followers” that can be seen on any social media platform. World-over, celebrity endorsers often use Twitter (or equivalents) to promote brands openly. It was reported that Kim Kardashian, who has around 18 million Twitter followers, can earn around £ 7,000 for a single tweet mentioning a specific product. Others like Elizabeth Hurley, Victoria Beckham, Justin Bieber and Wayne Rooney have all tweeted about brands, either brands that pay them either per tweet or have endorsement contracts with them<sup>17</sup>.

Celebrities in Asia, like their counterparts in the West, have started incorporating social media in their brand endorsement contracts or are getting paid separately for tweeting about brands<sup>18</sup>. Any endorsement contract should, however, require an endorser to seek the company’s prior



approval before posting any comments / pictures online. In reality, this may be difficult to implement, especially for multi-brands endorsers, (e.g. Taiwanese artist, Jolin Tsai, who is an endorser for 14 different brands globally).

## 8. Conclusion

In summary, in drafting and negotiating an endorsement contract, a company should have an appropriate morals clause in place addressing the types of inappropriate or immoral behaviour that the company does not wish the endorser to be associated with; a mechanism to determine breach and should provide for remedies in the event of a breach. Not only do such measures protect the company's business, image or reputation in relating to an endorser's behaviour, they can also prevent the company from being criticised for reacting slowly when prompt action is required to mitigate adverse publicity.



John McLellan

Partner, Head of Commercial and Media & Entertainment Groups, Haldanes

With research by Timothy Wan and Karen Choi, Trainee Solicitors, Haldanes

# Haldanes

## References

1. The Streets — The Pressures placed on Athletes, Entertainers, and Management. 19 Seton Hall J. of Ent. And Sports Law 381, 482 (speech).
2. Mark Magnier. Los Angeles Times. 2008. Hong Kong ogles, blushes. [ONLINE] Available at: <http://articles.latimes.com/2008/feb/27/world/fg-hksex27>.
3. The Sydney Morning Herald. 2008. Dirty downloads: diva axed from Olympic ceremony. [ONLINE] Available at: <http://www.smh.com.au/news/web/dirty-downloads-diva-axed/2008/02/26/1203788320287.html>.
4. South China Morning Post. 2009. Avalanche of complaints against Twins star. [ONLINE] Available at: <http://www.scmp.com/article/626751/avalanche-complaints-against-twins-star>.
5. Time Out. 2008. Forever Enthralled. [ONLINE] Available at: <http://www.timeout.com.hk/film/features/18236/forever-enthralled.html>
6. Jayne Stars. 2014. Buddhism Stops Sire Ma from Attempting Suicide. [ONLINE] Available at: <http://www.jaynestars.com/news/buddhism-stops-sire-ma-from-attempting-suicide>
7. Asia Sponsorship News. 2014. Jackie Chan Takes Over Son's Endorsement Duties. [ONLINE] Available at: [http://www.asiasponsorshipnews.com/index.php?option=com\\_content&view=article&id=5591&Itemid=10](http://www.asiasponsorshipnews.com/index.php?option=com_content&view=article&id=5591&Itemid=10)
8. Jing Daily. 2014. Jackie Chan's son sends brands running from endorsement deals in wake of drug scandal. [ONLINE] Available at: <http://jingdaily.com/jackie-chans-son-sends-brands-running-from-endorsement-deals-in-wake-of-drug-scandal/>.
9. China Topix. 2014. Kai Ko to Pay NT\$50 Million for Endorsement Pull-out. [ONLINE] Available at: <http://www.chinatopix.com/articles/10704/20140916/kai-ko-pay-nt-50-million-endorsement-pull-outs.htm#ixzz3RQ1OK39J>
10. Ching.org.cn. 2015. 'Monster Hunt' reshoots after dropping actor Kai Ko. [ONLINE] Available at: [http://www.china.org.cn/arts/2015-02/03/content\\_34724369.htm](http://www.china.org.cn/arts/2015-02/03/content_34724369.htm)
11. The Age. 2002. Actress takes own life because of nude photo. [ONLINE] Available at: <http://www.theage.com.au/index.html>.
12. South China Morning Post. 2005. Remorseful actress commits suicide over sexy film role. [ONLINE] Available at: <http://www.scmp.com/article/490197/remorseful-actress-commits-suicide-over-sexy-film-role>.
13. USA Today. 2009. Disney backs 'High School Musical' star. [ONLINE] Available at: [http://usatoday30.usatoday.com/life/people/2007-09-07-hudgens\\_N.htm](http://usatoday30.usatoday.com/life/people/2007-09-07-hudgens_N.htm).

# Haldanes

14. CNN. 2011. “Anonymous buyer wants to take Kim Kardashian sex tape offline” [ONLINE] Available at <http://edition.cnn.com/2011/SHOWBIZ/celebrity.news.gossip/08/30/kardashian.sex.tape/>
15. Women’s Wear Daily. 2015. Justin Bieber Helps Calvin Klein's Social Status. [ONLINE] Available at: <http://www.wwd.com/media-news/advertising/justin-bieber-helps-calvin-kleins-social-status-8122051>
16. Douglas J. Wood & Keri Bruce. 2009. Celebrity Endorsements - The Devil Really is in the Detail. [ONLINE] Available at: <http://www.adlawbyrequest.com/2009/02/articles/industry/celebrity-endorsements-the-devil-really-is-in-the-detail/>.
17. Oliver Herzfeld. 2014. Why Jay-Z And Other Talent Should Seek Morals Clause Mutuality. [ONLINE] Available at: <http://www.forbes.com/sites/oliverherzfeld/2014/01/02/why-jay-z-and-other-talent-should-see-morals-clause-mutuality/>.
18. The Economic Times. 2013. Celebrities now include social media in endorsement contracts, get paid separately for tweeting. [ONLINE] Available at: [http://articles.economictimes.indiatimes.com/2013-07-17/news/40635241\\_1\\_social-media-endorsement-brand](http://articles.economictimes.indiatimes.com/2013-07-17/news/40635241_1_social-media-endorsement-brand).