

John Adams

MERCHANDISING
INTELLECTUAL
PROPERTY

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Merchandising Intellectual Property

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Preface

Merchandising has grown rapidly in the United Kingdom over the last decade, not withstanding certain legal difficulties. Some of these difficulties have been of the industry's own making. In particular, American forms and practices have been adopted with little regard to local conditions. The *Holly Hobbie* case is the most notorious example of the problems to which this can lead. The fact, is however, that provided merchandisers are prepared to adapt to local conditions, operations which are perfectly satisfactory from a legal point of view, can be set up in the United Kingdom. There has hitherto been no specialised text dealing with the particular problems which arise in relation to merchandising in the United Kingdom. This book aims to fill this gap, and to offer the information in a concise and readily accessible way by providing checklists etc. Not only has there been little to refer to for guidance on the relevant legal principles in this field, but there have been few precedents of agreements suitable for local conditions from which to work. Again, it is hoped that the precedents provided in this volume will at least provide some guidance. Finally, because many people who work in the industry (especially overseas traders) do not have ready access to legal sources, very full Appendices are provided containing the statutory and other texts to which they may have occasion to refer – a sort of 'instant library' of source materials, as it were.

Writing the first book in a field is always difficult. As the seventeenth century bibliographer Thomas Bassett wrote 'To do a thing first, and to do it properly, is more than (perhaps) any has as yet pretended to do; and therefore this [work] may well be capable of emendment [sic] or additions at least'.

The law in this book is stated as at 1 February 1987.

John N Adams

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Illustrations

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The first three illustrations show some of the antecedents of merchandising.

Merchandising: a historical survey

by Iain C Baillie

Early history

The use of 'characters', i.e. fictional persons or situations, for the marketing of products, probably first originated in the toy industry which is still one of the major markets. That famous character 'Santa Claus' is recorded in various toys back to the beginning of the nineteenth century and probably also in the eighteenth century. The classic figure 'Punch' apart from his historic significance as a puppet figure, appears in other toys and models at least as far back as the early nineteenth century. If one can regard certain incidents in the Bible as creating 'characters' then toy Noah's Arks can be traced back to Germany in the sixteenth and seventeenth centuries. There is a reference in 1642 to a sign of a Noah's Ark in a toy shop in Germany. In the mid-nineteenth century children's china was made with scenes from Charles Dickens' works. The use of personalities for toys is evidenced by a clockwork figure of General Grant smoking a cigarette made in 1877, and there is a portrait doll from about 1864 representing the famous Swedish singer Jenny Lind. When she visited the United States in 1840 thousands of paper portrait dolls made in Germany were sold during her visit. One of the first characters from comic strips, namely the 'Yellow Kid', was made into a jigsaw puzzle in 1896.

A form of reverse character merchandising was the use in the 'Pets Grocery Stores' and other products made by the firm of Mason and Parker of toy packets bearing the names of real products, such as Fels-Naphtha Soap, Uneda Biscuits, and Van Camps Pork and Bacon.

That ever popular toy the teddy bear was initially named after President Theodore 'Teddy' Roosevelt as a result of a cartoon in 1903 in the Washington Post by the cartoonist Clifford Berryman showing 'Teddy' Roosevelt refusing to shoot a bear cub. 'Alice In Wonderland' figures for soft toys were produced prior to World War I and later in 1923 a 'Peter Pan' model was made by Chad Valley.

One of the first major examples of character merchandising must have been the works of Beatrix Potter. As Margaret Laine in the book *The Magic Years of Beatrix Potter*, records: 'In 1903 after the success of the book *Squirrel Nutkin*, her characters "Peter Rabbit" and "Nutkin" had become nursery heroes. Soft "Peter Rabbits", made of velvet and fur appeared in Harrods and a squirrel named "Nutkin" had been bought by Mr Potter in the Burlington Arcade'. As Miss Laine comments 'A tiresome lady, who seems never to have heard of the tricky question of copyright, was proposing to design a nursery wallpaper with a frieze of Beatrix Potter animals'. Miss Potter was 'astonished and delighted by her success though she was understandably irritated by the wallpaper lady'.

Beatrix Potter is reported to have attempted to produce a 'Peter Rabbit' soft toy. Not only, however, were attempts to manufacture hindered by the monopoly of the European market by German manufacturers, but some of these manufacturers pirated her characters and she found the pirated versions on sale here in London. This led her in 1910 to support tariff reform, but there is no report as to whether she sued the pirates.

Establishment of character merchandising

However, it was probably in 1934 with the first appearance of 'Mickey Mouse' and, later on, of the other Disney characters that the concept of character merchandising expanded to become a significant part of merchandising. Spreading out from toys to clothing and other articles for children, the industry started to gather momentum.

Thus, the concept of 'characters' started to grow at the end of the last century with the popular magazines and comic strips. Then with the arrival of films, later radio and finally television and with the growth of marketing and advertising, character merchandising made more and more impact. Stemming both from the sponsorship concept and the toy concept there came the association of more and more goods with characters and manufacture of goods 'embodying' these characters.

Finally, in the mid 1960s there came to be a recognised industry of character merchandising and the growth of character merchandising agents, who have now established themselves as a recognised professional group.

Commercial potential

The commercial potential is obviously immense. In 1974 a Disney Productions' Annual Report indicated royalty revenues of over \$15,000,000 while in 1978 the Disney Merchandising Division sold \$27,000,000 in merchandise; in 1975, sales of 'Womble' products were quoted as £18,000,000 and in 1978 *Star Wars* was quoted at one point as having made \$25,000,000 from box office revenue and \$22,000,000 from licensed goods. Cy Schneider in *Advertising Age*, 30 April 1979, states that Kenner Products sold over \$100,000,000 worth of *Star Wars* merchandise (mostly toys and games). He also points out that *Mary Poppins* by Walt Disney was a saleswoman for 46 manufacturers and sold everything from umbrellas to luggage to shoe polish. His estimate in the USA for retail value of licensed goods and services from cartoon characters in 1978 was \$2.1 billion and for 1979, \$3.1 billion. There is no need to go far to see the volume of 'Peanuts' goods, particularly 'Snoopy' goods.

A 1981 US campaign for a US character 'Strawberry Shortcake' (a little girl) projected a life of at least 25 years and a multitude of licensing potentials.

Therefore, although character merchandising has, perhaps, a long history and has been growing substantially from the 1930s ('Mickey Mouse' is now over fifty) nevertheless, it is only during these last ten to fifteen years that character merchandising has become the major and established field of marketing which it is now. Recent evidence is that this type of marketing cannot continue at the rate of growth which showed over the ten to fifteen years up to 1981, but certainly for as long as one can foresee it will remain a major aspect of marketing.

Sources of characters

The present sources of characters tend to be from television and films. A major example in the film industry was, of course, *Star Wars*. Examples from television are so numerous as hardly to need mentioning. For instance, there was the very popular *Kojak* which has become enshrined in the law on this field. The series *6 Million Dollar Man* which created the trade mark 'Bionic' as distinct from the original somewhat limited meaning of this word is an obvious example of the effect of this medium. The classic character creations from the comic strips, are also still very popular. 'Superman' came from the comic strips into radio and television shows and finally to the major film *Superman – The Movie* creating character merchandising based both on the original comic strip figure and on the materials from the film. 'Wonderwoman' is another example of movement from the comic strip to television as is 'The Incredible Hulk'.

Equally, there are characters created in books, such as 'James Bond', i.e. 'Agent 007', the character created by Ian Fleming, which was enlarged by the series of very successful films. The theatre though not so significant a source has resulted in, for example, 'Peter Pan'. Children's books are, of course, still a very fruitful source of such characters and one need only mention Beatrix Potter and 'Peter Rabbit', and also 'Winnie The Pooh' and 'Paddington Bear'. In Great Britain, there is the 'Mr Men' series, another typical example of book characters moving into character merchandising.

A classic example of cartoon popularity is, of course, 'Peanuts' with the inimitable 'Snoopy'.

Merchandising does not necessarily always involve a character. Thus, the film *Jaws* appears to have been merchandised by the symbol of the film, i.e. the rising shark symbol. We shall see later there is a problem when the characteristic that becomes fixed in the public mind is merely a word or title such as 'Jaws'.

The creation of characters is, of course, not confined to the areas of communication industries, i.e. books, comic strips or cartoons, films, television and radio. Other industries can create characters, and an example would be the greeting card industry where classic instances are 'Holly Hobbie' and 'Strawberry Shortcake'.

Characters from advertising

A new development also is the creation in advertising of characters which develop a life independent of the original product and move into the area of character merchandising. This, apparently at the present time, appears to be primarily a British phenomenon, although one can think of the Exxon (Esso) tiger and the Kellogg's 'Tony The Tiger'. Examples for instance, in Britain, are 'Buzby' and the Typhoo Tea character 'Gnu'. Indeed, some old characters such as the 'Bisto Kids' are now being modernised and used for merchandising as well as their original function of selling the goods with which they were first associated.

Traditionally the advertising industry seems to have viewed with some suspicion the use of characters in marketing and there is, perhaps, some vagueness in the boundary between character merchandising and the creation for advertising purposes of a particular character relating to one product. In so far as character merchandising law is concerned, the problem

arises when a character, which has gained some public recognition in advertising one specific product of one manufacturer, is then applied by that manufacturer or others for the sale of other products; generally this only happens when the character achieves some form of independent life and public recognition, apart from the product which was originally advertised, though this in itself can, clearly, create problems.

Market for character merchandising

The market for character merchandising tends to be primarily directed at children and teenagers which is of considerable significance in regard to the areas for which trade mark protection might be sought, as will be seen later in the discussion on trade mark registration. Nevertheless, there are markets directed at adults, for example in the toiletries field, and certainly the character merchandising industry is always pushing more widely the nature of products to which the characters can be applied.

While the 'block buster' feature characters attract attention and create the immense returns, it can be seen that a wide variety of characters can, by careful merchandising directed at the correct market, secure a valuable return in royalties. Even an unsuccessful film can sometimes secure a significant return by merchandising. Thus, *Sergeant Peppers Lonely Hearts Club Band* did not have the success as a film compared to *Grease* or *Saturday Night Fever* but nevertheless had a very successful merchandising return.

Introduction

The terms 'character merchandising (or marketing)', 'personality (or reputation merchandising)', or simply 'merchandising', from a commercial point of view cover closely related fields, which, however, from a legal point of view, are very different. 'Character merchandising' involves the use in the marketing or advertising of goods or services of a fictional personality or situation. 'Personality merchandising' involves the use of the true identity of an individual, or occasionally an animal, in the marketing or advertising of goods or services. Between these two types, lies a rather unclear area where fictional characters played by real actors are used. In these cases it is difficult to separate the actor from his screen personality. To many people the fictional character is real. In addition to these situations, there is another type of merchandising operation which is becoming increasingly prevalent at the present day. That is, the use of famous trade marks to sell products far removed from their original associations. For example, Coca-Cola has been used to sell items of clothing, and similarly Kodak. Some of these uses, as eg Coca-Cola on T shirts, are simply a form of advertising. In other cases, when more obviously trade mark use of the original mark is being made, it is really a case of the trade mark owners seeking to exploit the reputation which attaches to their famous marks. Since, as we shall see, the goodwill attaching to those marks enables the proprietors, rightly, through the action of passing off to enjoin their use by third parties in fields somewhat removed from those covered by the original registrations, there would appear to be no objection, whether legal or otherwise, to the trade mark proprietors being able to extend their registrations to cover such fields. This type of operation presents, in the main, only the problems generally encountered in trade marks law which are adequately covered by existing texts, it is not a primary concern of this book. The focus of this book is character and reputation merchandising, and the particular problems involved in these operations.

Probably the characteristic common to both of these kinds of operation, is the importance of the character, or whatever, *as a commodity in its own right*, independent of the goods, or services, to which it is attached, or with which it is associated. No doubt the goods or services may themselves be desired, *but so also of itself is the character*. In this respect, there is an obvious difference between characters and trade marks. Classically, trade marks were an indication to the public about the origin of goods, a symbol to facilitate consumer choice. A residual element of this classical concept of a trade mark is still alive in the United Kingdom. However, whilst superficially it may seem reasonable to insist upon something like the classical concept of a trade mark, in the real world things are not ordered in quite such a straightforward way, and such insistence is less persuasive. As with characters, some trade marks become valued by consumers as

commodities in their own right, as things independent of the product to which they were originally attached – as eg Coca-Cola, and it becomes very difficult realistically to separate this aspect from their true trade mark aspect. Similarly, in the case of some characters, where over the years a reputation for good quality associated with them (as a result of well-run merchandising operations) has grown up, a distinct trade mark aspect has come to attach to the characters.

When we turn to personality merchandising, we find both the commodity aspect and the consumer choice aspect, inextricably intertwined. Products were commended by persons of consequence from the earliest days of advertising (and before advertising in the modern sense came into existence). Today, endorsement of products, especially sports goods by well-known sportsmen, is much the same thing. By contrast, in much of the merchandising involving pop stars, it is the commodity element which is dominant.

Whilst the common basis of all true merchandising is the subject of the operation as a commodity in its own right, the uses to which this form of activity is put differ widely. People such as sportsmen, whose effective working lives in the activity for which they have become known is necessarily rather short, use merchandising as a way of maximising their incomes in the brief periods during which they flourish. Similar uses are made of it in the constantly changing entertainment world. It also provides a valuable spin-off for the motion picture industry, especially in these days of small cinema audiences (not to mention video piracy). It has also proved of value in fund raising for many charities and non-profit making organisations – eg the World Wild Life Fund panda has been extensively merchandised, and the National Trust now have many shops and products bearing their name. The National Football League in America runs a very extensive operation, and no doubt the time may come when some of our professional sports associations may do likewise (some operate in a small way already).

From a legal point of view, it is the subject of a merchandising programme as a commodity in its own right, which presents difficulties. The concept simply does not fit comfortably into the existing intellectual property categories, and the various types of merchandising operation each present their own special difficulties.

Although the phrases ‘character merchandising’, ‘personality promotion or marketing’ etc tend to be used both in relation to the licensing *and* the selling of goods to which the reputation is attached, it is obviously necessary from a legal point of view to distinguish the two. For that reason, it would perhaps be better to use the terms ‘character’ or ‘reputation *licensing*’ to distinguish that aspect of the arrangement. Certainly in a legal agreement one should never use the word ‘merchandising’ to define the transfer of rights from the owner of the reputation to the licensee. This matter of terminology can also be a matter of some delicacy when dealing with prestigious cultural organisations, where resistance may be encountered if their licensing activities are described as ‘merchandising’. It will be much more acceptable to describe them simply as ‘licensing’. This book is concerned with both the licensing and selling operations, and the phrase ‘merchandising’ provides a convenient umbrella for this combination, however, the distinction mentioned above should be borne in mind, at least when drafting agreements.

Most merchandising operations involve three key persons: the owner of the property to be merchandised; the licensees, who will use and market the

goods or services to which the property is attached; and the agents who will negotiate the licences. Obviously, other important people will be involved, such as distributors, but these three lie at the heart of the operation, and it is with their problems, and especially those of the owner and agent, with which this book is concerned.

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