



Mememes and Morals Clauses:

The Perils of Being “Internet Famous”

August 10, 2022 • Sekou Campbell

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Introduction

- The Issue
 - “How One Stupid Tweet Ruined Justine Sacco’s Life” (<https://www.nytimes.com/2015/02/15/magazine/how-one-stupid-tweet-ruined-justine-saccos-life.html>)
 - Who deals with Morals Clauses?
- Historical Context
 - Roscoe Arbuckle and the Red Scare
- Issues to Consider in Modern Application of Morals Clauses

The Issue

- She chuckled to herself as she pressed send on this last [tweet], then wandered around Heathrow's international terminal for half an hour, sporadically checking her phone. No one replied, which didn't surprise her. She had only 170 Twitter followers.
- Sacco boarded the plane. It was an 11-hour flight, so she slept. When the plane landed in Cape Town and was taxiing on the runway, she turned on her phone. Right away, she got a text from someone she hadn't spoken to since high school: "I'm so sorry to see what's happening." Sacco looked at it, baffled.
- **“Going to Africa. Hope I don't get AIDS. Just kidding. I'm white!”**

The Issue (continued)

Morals Clauses

Neither the Consultant, the Consultant's Representatives nor the Consultant's key personnel shall commit any act or do anything which might reasonably be considered: (i) to be immoral, deceptive, scandalous or obscene; or (ii) to injure, tarnish, damage or otherwise negatively affect the community and/or the reputation and goodwill associated with the Client. If the Consultant, the Consultant's Representative or the Consultant's key personnel is accused of any act involving moral or ethical issues, dishonesty, theft or misappropriation, under any law, or any act which casts an unfavorable light upon its association with the community and/or the Client or the Consultant is accused of performing or committing any act which could adversely impact the Consultant's events, programs, services, or reputation, the Client shall have the right to terminate this contract

Who Will See Morals Clauses?

A. Sports and Entertainment

1. Film/TV
2. Sports (NFL, NBA, NHL and MLB all have morals clauses in their CBA)
3. Influencers, endorsers, advertisers (sometimes a spokesperson or influencer may have obligations to third-party advertisers through agreements with networks (e.g., through indemnification clauses))

B. Non-Entertainment Related Fields

1. High-level executives across industries
2. Generally speaking, “public talent” that is connected to a significant corporate interest

Historical Context

- Roscoe “Fatty” Arbuckle (*See, e.g.,* Michael Schulman, Fatty Arbuckle and the Birth of the Celebrity Scandal, *New Yorker* (Oct. 11, 2021) (available at <https://www.newyorker.com/magazine/2021/10/11/fatty-arbuckle-and-the-birth-of-the-celebrity-scandal>)) (last visited July 28, 2022)
 - \$3 million deal with Paramount
 - Accused of sexual assault and murder after a party on Labor Day in 1921
 - A symbol for “Hollywood sin”
 - Reputation as a heavy drinker during the prohibition era
 - Nouveau-riche spender
 - Poor attitudes towards women
 - Eventually became untenable as a star for the studio and prompted adoption of “morals clauses” as a basis for termination

Historical Context

- Red Scare (Hollywood Ten Cases)
- Upon adoption of the “morals clause” in entertainment contracts in the 1920s, by the 1940s and 1950s, they were used to quash political dissent:
 - *Loew’s Inc. v. Cole*, 185 F.2d 641 (9th Cir. 1950)
 - Loew’s Inc. operated as Metro-Goldwyn Mayer (MGM)
 - Lester Cole was one of ten screenwriters questioned by the Committee of Un-American Activities of the House of Representatives (HUAC) chaired by McCarthy
 - Cole and the “Hollywood Ten” moved to quash subpoenas issued by HUAC
 - Cole was asked by HUAC “are you now or have you ever been a member of the Communist Party?” and the committee interpreted his answer as a refusal to answer the question and was cited for contempt by the House of Representatives
 - Cole’s morals clause read:
 - The employee agrees to conduct himself with due regard to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer or the motion picture, theatrical or radio industry in general. *Loew’s*, 185 F.2d at 645.

Historical Context

- *Loew's Inc. v. Cole*, 185 F.2d 641 (9th Cir. 1950) (cont'd)
 - MGM suspended Cole on December 2, 1947 interpreting his “refusal to answer” as an act that “shocked and offended the community, brought [himself] into public scorn and contempt...”
 - The Ninth Circuit, applying California contract law, reversed and remanded the case based on the exclusion of evidence that showed the effect of Cole’s actions on MGM’s public image
 - While the case settled after the Ninth Circuit’s opinion, the court provided an in-depth objective and subjective analysis of the questions posed:
 - “Did the plaintiff...tend to bring himself into public hatred, contempt, scorn or ridicule?”
 - “Did the plaintiff...shock, insult or offend the community?”
 - “Did the plaintiff...prejudice the defendant [MGM] as his employer or the motion picture industry generally?”
 - The court determined whether MGM believed Cole’s behavior breached his morals clause and whether a “reasonable” person would view such behavior as a breach of his morals clause focusing specifically on the distinction between membership in the Communist Party and Cole’s refusal to answer questions about his membership in the party

Historical Context

- *Twentieth Century Fox Film Corp. v. Lardner*, 216 F.2d 844 (9th Cir. 1954)
 - 20th Century Fox (“Fox”) discharged Lardner on November 28, 1947 because of his refusal to answer questions about his affiliation with the Communist Party
 - The Court in this case opined as to whether Fox waived its right to terminate based on conversations Lardner had with Fox executives and because Fox continued to use Lardner’s name post-termination
 - They also considered whether evidence of Lardner’s conviction of contempt should have been admissible in settling whether he’d breached his morals clause
 - The morals clause at issue read:
 - That the artist shall perform the services herein contracted for in the manner that shall be conducive to the best interests of the producer, and of the business in which the producer is engaged, and if the artist shall conduct himself, either while rendering such services to the producer, or in his private life in such a manner as to commit an offense involving moral turpitude under Federal, state or local laws or ordinances, or shall conduct himself in a manner that shall offend against decency, morality or shall cause him to be held in public ridicule, scorn or contempt, or that shall cause public scandal, then, and upon the happening of any of the events herein described, the producer may, at its option and upon one week’s notice to the artist, terminate this contract and the employment thereby created.
 - *Fox*, 216 F.2d at 848.

Historical Context

- *Twentieth Century Fox Film Corp. v. Lardner*, 216 F.2d 844 (9th Cir. 1954) (cont'd)
 - Cited heavily from *Cole* to hold that evidence of Lardner's conviction for failing to respond to HUAC's inquiries should have been admissible
 - The court in *Fox* could also rely on the "offense involving moral turpitude" language in Lardner's agreement finding three different categories of potential offenses involving moral turpitude:
 - Those crimes necessarily involving moral turpitude like fraud;
 - Those crimes are which are petty and do not suggest any issue of moral turpitude like a parking ticket; and
 - Those crimes which may be "saturated with moral turpitude" but do not require moral turpitude as an element for conviction
 - *Fox*, 216 F.2d at 851-52 (citing *In re Halliman*, 43 Cal.2d 243, 272 P.2d 768 (Cal. 1954)).
 - The court found refusal to answer HUAC to be an offense "saturated with moral turpitude"

Historical Context

- *Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87 (9th Cir. 1957)
- Similar facts to *Cole* but trial court found in favor of RKO and Ninth Circuit affirmed based on *Lardner* and *Cole*.
- Note untenable situation for the writers in these Hollywood Ten Cases
 - Refusal to answer violates the clause
 - Answering truthfully likely violates the clause given the animosity towards communism at that time
 - Answering untruthfully, if discovered, violates the clause as it would likely lead to a perjury conviction
- **First lesson** of morals clauses: Make sure a client is not currently in breach of the clause. Language to protect against such an issue might be to condition a breach on inconsistency with activities or behavior engaged in prior to execution of the Agreement.

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Mememes/Viral Video Effect on Morals Clauses

Speed

- Unlike the 1920s, 1940s and 50s or even the early 2000s, content can be obtained at any time and can explode in popularity at any time

Access to Media

- Those who can post broadly available content are not restricted to a small group of publishers

Inability to Verify Veracity

- While content is easily created and shared, there are few methods of screening for misinformation

Morals Clause Deal Points

- For the company:
 - Broad inclusion of various types of behavior including:
 - Accusations of those legal offenses “saturated with moral turpitude”
 - Effect on the company whether the behavior was lawful or not (“public disrepute,” “public scandal,” “contempt,” etc.)
 - Company’s discretion as to the determination of such effects

Morals Clause Deal Points

- For the individual:
 - Narrowing of behavior including:
 - Convictions or arrests of those legal offenses “saturated with moral turpitude”
 - Carve-out for behaviors the individual is already engaged in
 - Carve-out for protected speech that is determined to be “truthful” or a matter of opinion



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