

Billion-Dollar UFC Enters Merchandising in a Big Way:

On June 10, 2008, the UFC announced the introduction of UFC-branded action-figures which will hit retailers in time for Christmas 2009. Live on cable-giant CNBC, Dana White publicly declared, "We just closed a deal with JAKKS and these are going to be available next Christmas," as the camera zoomed in on action figures of Chuck Liddell and Brock Lesnar.

Soon after the CNBC segment aired, the UFC announced on its website a flurry of other licensing and merchandising deals for products that will soon be available to consumers across the world. "Soon, you will be able to shop with your UFC-branded credit card at retailer JC Penney, who will be creating UFC Hot Zones in August that will sell shirts and

headwear in the Young Men's department. Silver Buffalo will introduce UFC-branded watches, barware, bar accessories, lighting, wall decor, and billiards and darts accessories. You can even light your favorite cigarettes with UFC-branded Bic lighters!"

"There's going to be incredible UFC-branded product," said Randy Klein, the UFC's Vice President of Licensing and Merchandising. "We're establishing a benchmark of MMA product that no one has ever seen before. We're going to be in retailers all over the world with our video game, apparel, and sports collectibles. It's really an exciting time right now."

"This puts our merchandise on a global scale. The fans have been waiting for UFC product for years and now we've joined up with some of

GOOD DEAL FOR FIGHTERS?

“By Rob Maysey, Esq.”



the biggest and best companies in the world to produce authentic UFC-licensed products.”

One wonders, ‘what is in it for the fighters?’ Also, is the product being moved because of the popularity of the athletes who actually compete, or the promotion that provides the stage of competition? This is a question that Zuffa ambitiously attempts to obfuscate with the smoke and mirrors referred to by Dana White.

As discussed below, Zuffa’s move into the licensing arena is coupled with an effort to obtain executed Marketing Rights agreements from the athletes, and to take as always, the lion’s share of the profit.

Marketing Rights Agreement

I have received, from multiple sources, a copy of the Marketing Rights Agreement (“Agreement”) that is being circulated by Zuffa to fighters for signature. Multiple parties have asked me to review and provide my thoughts on this Agreement. In short, my input has been requested to answer whether this Agreement is a good deal for fighters. Instead of answering each person individually, I will post my thoughts here.

Upon reading the Agreement for the first time, my initial reaction is best described as shock. The descriptions I received from managers, agents, and others as to the nature of the Agreement did not always match the Agreement’s actual terms. The Agreement, in short, is absurd for fighters,

UFC Marketing Rights Agreement Highlights

In exchange for granting Zuffa the Merchandise Rights, a fighter is entitled to (i) ten percent (10%) of gross revenue for sales of Licensed Merchandise completed by Zuffa, and (ii) twenty percent (20%) of gross revenue for royalties and/or license payments received from third parties.

The Agreement grants Zuffa an exclusive license prohibiting even the sale of autographed photographs!

The Agreement operates to strip even the fighter himself of the opportunity to profit on his own Identity in the marketplace. Not only are fighters being asked to sign an agreement that grants likeness rights to Zuffa on a worldwide, exclusive basis (to the exclusion, incredibly, of even the fighter himself), the term of the Agreement is forever.

The term of the Agreement lasts forever, and the Marketing Rights for fighter are held by Zuffa even after a fighter is cut!

The Agreement requires a fighter to make up to six (6) appearances per year, and each of the appearances may be required of the fighter for no additional compensation.

The Agreement contains no audit rights which would provide a mechanism for a fighter to enforce the terms of the Agreement and to verify payments are fair.

The Agreement enables Zuffa to divert royalty and licensing payments by shifting income that could be classified as a license or royalty fee entitling a fighter to payment, into a payment that is Zuffa's income alone.

The Agreement requires a fighter to warrant that all permissions have been obtained to utilize third party marks and copyrights.

The Agreement does not offer any royalty or license payments for video games and DVDs.

The Agreement prohibits a fighter from not only using Licensed Marks of Zuffa but also mere words alone!

The Agreement, in short, is absurd for fighters, and drastically impacts their marketing and revenue producing ability throughout, and even after their athletic careers.

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Essentially, Zuffa is seeking to obtain a license to use a fighter's likeness rights in the development, distribution, marketing and sale of Licensed Merchandise. By executing the Agreement, a fighter grants Zuffa a license to utilize the identity of such fighter in the sale, production and distribution of Licensed Merchandise. The license to utilize the identity of a fighter in connection with the sale of Licensed Merchandise is collectively defined in the Agreement as "Merchandise Rights."

In exchange for granting Zuffa the Merchandise Rights, a fighter is entitled to (i) ten percent (10%) of gross revenue received by Zuffa in connection with the sale of Licensed Merchandise directly or indirectly by Zuffa, and (ii) twenty percent (20%) of the gross royalty revenues received by Zuffa from third parties in connection with the commercial exploitation of Licensed Merchandise by such third parties.

So, what is the problem? Sounds great, right? Zuffa is sharing with fighters the lucrative licensing rights it seeks to exploit. As Dana White recently told Yahoo Sports, 'with the merchandising and all the ancillary stuff, the fighters are going to be paid when they're sitting on their couch.' White continued:

"It's going to be a great situation for them. They'll still be paid when they fight, but now, when they're sitting at home doing nothing and checks are rolling in and they're making money, that's when they'll know they've hit it."

As described below, the Agreement represents the proverbial wolf dressed in sheep's clothing.

The Marketing Rights Agreement Bares Its Teeth

The Agreement grants Zuffa an exclusive license prohibiting even the sale of autographed photographs!

At least some managers and agents believe the Agreement grants Zuffa a non-exclusive license. Thus, these managers are far more apt to overlook some of the problematic features of the Agreement, as they believe the fighter will be able to exploit their identity elsewhere. Admittedly, after my initial read-through, I came to the same conclusion. The Agreement does not contain exclusive language in the logical sections of the Agreement that you would typically expect while reviewing a license agreement.

The forms of Agreement I have seen, however, each contain the following provision:

"The Merchandise Rights shall be ZUFFA's sole property in perpetuity throughout the world, which ZUFFA shall hold free and clear from any and all claims of fighter or anyone claiming through fighter."

If the Merchandise Rights are Zuffa's sole property, they can belong to no one else, and are indeed exclusive. Zuffa holds the Merchandise Rights free and clear of all claims of the fighter, or anyone claiming rights through the fighter.

Likewise, the Agreement operates to strip even the fighter himself of the opportunity to exploit his own identity in the marketplace. As discussed above, the Merchandise Rights granted to Zuffa apply to Licensed Merchandise, which includes without limitation, all apparel, footwear, hats, photographs, souvenirs, toys, collectibles, trading cards, and any and all other similar type products.

If Merchandise Rights are Zuffa's sole property, a fighter would be prohibited from selling such items as t-shirts, autographed photographs, souvenirs, and other collect-

ibles bearing the fighter's own identity! Likewise, if a fighter becomes a star and is approached by a shoe manufacturer or apparel company to create a signature-product bearing the fighter's identity, Zuffa is entitled to (i) prohibit such product from being produced as the sole owner of the Merchandise Rights, and/or (ii) demand compensation in the form of 80% of the royalties that would have been received by the fighter.

Tellingly, Dana White informed Rolling Stone magazine that, "fighters are dumb mother-f'ers," and the licensed products featuring the identity of a single fighter are not selling because of that fighter's identity, but instead, because of the UFC brand. Thus, even with products sold displaying the identity of a single fighter, Zuffa is entitled, by this Agreement, to eighty or ninety percent (80%-90%) of the profits that would have been earmarked to the fighter individually.

The Terms of the Agreement Lasts Forever

The Merchandise Rights granted to Zuffa in the Agreement are worldwide, in perpetuity, which means, the Merchandise Rights granted to Zuffa endure forever. Not only are fighters being asked to sign an Agreement that grants likeness rights to Zuffa on a worldwide, exclusive basis (to the exclusion, incredibly, of even the fighter himself), the term of the Agreement is, in theory, forever. The Agreement, as stated above, explicitly provides that the Merchandise Rights are Zuffa's sole property in perpetuity. . .

Curiously, the Agreement contains a later section that sets forth the term of the Agreement. Initially, the term of the Agreement is for a period of three (3) years. The term, however, automatically renews for additional three (3) year periods until such time as Zuffa alone, elects to terminate the Agreement. Thus, it appears as though this section is provided for the sole reason of allowing Zuffa to terminate the Agreement to avoid future payments to a fighter.

The Marketing Rights For a Fighter Are Held by Zuffa Even After a Fighter Is Cut!

The Agreement contains the following provision, which enables Zuffa to retain all Marketing Rights, even after a fighter's promotional contract is terminated and the fighter is cut:

"The termination or expiration of either or both of the Promotional Agreements shall not affect or terminate the grant of the Merchandise Rights or any of the general or specific provisions of this Agreement, which shall survive any such expiration or termination."

This provision is most disturbing and serves to incredibly hamper a fighter's ability to capitalize off his identity throughout his career. Likewise, this provision is especially damaging as it will hinder the efforts of both fighters and competing promotions alike going forward.

The vast majority of fighters will fight in multiple promotions during the course of their careers. Even those who graduate from local shows to the UFC and remain with the UFC for an entire career will most likely reach a period of time when they are available to bidding promotions. By entering this period of free agency or limited free agency (in the event Zuffa has a chance to match competing offers), the fighter is, in theory, enabled to maximize earning potential by offering his services up to bid.

The inclusion of this clause not only hurts the earning capacity of the fighter directly by drastically curtailing his ability to capitalize on his Identity, but indirectly serves to greatly reduce the marketing ability and competitive standing of those competing promotions that may bid for a fighter in the future.

The impact of this provision should not be ignored nor under-appreciated. If competing promotions and fighters alike are not able to capitalize on the identity of the fighter in the building of other brands (including the individual brand of the fighter himself), the open market which serves to drive fighter earning capacity higher is drastically compromised.

The Agreement Requires a Fighter to Make up to Six (6) Appearances per Year.

As a lawyer, the notion that time is money is ingrained upon us from our stints as summer associates. Our most valuable commodity that we have to offer anyone, be it our employer, our clients, our friends, or loved ones, is our time. That said, the Agreement contains a provision which requires the fighter to make up to six (6) scheduled appearances to assist in the advertising, publicity, and promotion of the sale of Licensed Merchandise that includes fighter's identity. . .

The catch . . . each of the appearances may be required of the fighter for no additional compensation. This hardly seems reasonable. Especially in light of the fact that the fighter is only receiving ten percent (10%) of the revenue generated by the sale by Zuffa of Licensed Merchandise, and only twenty percent (20%) of the sale of Licensed Merchandise by third parties.

The Agreement Contains No Audit Provisions.

Typically, in a contract that contains a provision that ties compensation to revenues received in the future, the party to whom compensation is due will obtain audit rights to verify that the payment it actually receives is in accordance with the contractual terms. For example, you may recall, in the Randy Couture situation involving Zuffa. Couture had audit rights to verify Zuffa's pay-per-view figures. Couture's total compensation was tied to the pay-per-view performance of the events he participated in.

This Agreement, however, does not provide any such audit rights to the fighter. This Agreement requires only that Zuffa provide fighter with a "statement of royalties earned by Fighter hereunder during the previous calendar year. . ." Thus, a fighter has no contractual means to actually verify that the royalties he receives are in accordance with the terms of the Agreement.

The Agreement Enables Zuffa to Divert Royalty and Licensing Payments.

The Agreement contains a seemingly innocuous provision that provides as follows:

"The fighter shall not be eligible for any royalties with respect to any other goods, services, or otherwise in connection with the exploitation of the Merchandise Rights as defined herein."

Lawyers are typically wordy, admittedly, but provisions are not included in contracts without reason. Why, then is this clause inserted into the Agreement? Simply, this provision enables Zuffa to shift income that could be classified as a license or royalty fee entitling a fighter to payment into a payment that is Zuffa's income alone. How is this possible? Instead of negotiating for the highest royalty or license fee possible, Zuffa is now contractually enticed to negotiate bifurcated deals involving separate marketing agreements, consulting agreements, or third-party service agreements. Any revenue obtained by Zuffa pursuant to any such agreements would go to Zuffa alone.

The Agreement Requires a Fighter to Warrant that all Permissions Have Been Obtained to Utilize Third Party Marks and Copyrights.

The Agreement contains a provision where the fighter represents and warrants to Zuffa that all permissions have been obtained from third parties for the utilization of all trademarks, copyrights, phrases, expressions, and the like. Is the fighter prepared to make such a representation and warranty? Have all permissions been obtained from any and all sponsors? Isn't Zuffa in better position to obtain the requisite permissions in the first place?

Imagine a scenario in the future where a clothing company or other sponsor falls out of favor with Zuffa and demands that all products featuring its trademarks be pulled off the shelves. This Agreement enables Zuffa to recover all damages incurred as a result of such action from the fighter in the event requisite permissions are not obtained in advance.

The Agreement does not offer any Royalty or License Payments for Video Games and DVDs.

The DVD market is extremely lucrative. UFC DVD's are typically amongst the best selling sports-related DVD's on the market. The UFC video-game being developed by THQ will likely sell millions of copies and provides another extremely lucrative licensing fee for Zuffa. Unfortunately for fighters, the Agreement contains a provision excluding video games, DVD's, and the like from the scope of the Agreement. Thus, no royalty or licensing fees are payable for such products pursuant to the terms of the Agreement.

The Agreement Prohibits a Fighter from Not Only Using Licensed Marks of Zuffa but also the Mere Words Alone!

The Agreement contains a provision which prohibits a fighter from utilizing not only any of the Licensed Marks of Zuffa, including the marks of the Ultimate Fighting Championship®, UFC®, the Octagon, Ultimate Fighting®, Ultimate Fighter®, Pride Fighting Championships®, Pride®, and any logos, pictures or other representations of ZUFFA's intellectual property but also prohibits a fighter from using the mere words alone!

This is an incredible contractual term that not only prevents a fighter from using the marks owned by Zuffa, but from also merely using words representing nothing more than undisputed, and public factual occurrences. Georges St. Pierre for example, by the terms of this Agreement, would be prohibited from marketing himself using facts alone. A statement such as "Georges St. Pierre, UFC Fighter" would violate the terms of this Agreement, unless prior permission was obtained from Zuffa.

It is beyond comprehension that such a term would appear in an athlete's contract in another sport. Could you imagine a contract that prohibited Emmitt Smith from mentioning, for marketing purposes, the fact that he is a former All-Pro running back of the Dallas Cowboys? This provision, in my opinion, would be unenforceable under applicable intellectual property laws, but the Agreement grants Zuffa a contractual hook in which to threaten and institute litigation. Lawyers are expensive, and lawsuits

are lengthy, time consuming propositions. The effect of such a clause severely inhibits and chills a fighter's ability to use nothing more than factual occurrences for marketing purposes.

The Indemnity Required of Fighter is Fraught with Danger.

The Agreement requires a fighter to indemnify and hold harmless Zuffa, and its subsidiaries and affiliates, and each of their members, managers, directors, officers, employees, representatives, agents, and contractors from and against any and all claims, damages or expenses that Zuffa might incur arising from or relating to any negligent or intentional acts or omissions by fighter or anyone affiliated with fighter.

Anyone affiliated with fighter? Whom does that include exactly? Affiliated with a fighter isn't defined in the Agreement, though the list of indemnified parties is spelled out with specificity. This provision is fraught with danger and provides a powerful tool to Zuffa to utilize against a fighter in the future.


Brand

This entry provides my thoughts on the Marketing Rights Agreement currently being circulated by Zuffa to fighters for signature. In short, I urge you not to sign this Agreement. By doing so, you drastically minimize your earnings capacity going forward.

In the next installment, I will discuss the power and importance of brands, and how a brand could be effectively utilized by fighters to not only enhance their marketing power but also to provide a far greater share (nearly all) of the licensing revenue that is generated by the likeness rights of the athletes who actually compete.

To preview, the percentage share of gross revenue players receive in other major sports is 59% in the NFL, 57% in the NBA, 55.6% in the NHL, and 53% in MLB. In mixed martial arts, because no centralized league exists, fighters could take even higher percentages of licensing revenue. As will be discussed, fighters need only adopt a uniform brand of their own and assign group licensing rights to an association they own and control to realize the lion's share of the ancillary revenue Zuffa seeks to retain for itself.

I will close for now with the following thought. Imagine a video game branded with the UFC marks but without the likeness or identity of any recognizable fighters. Imagine, again, a second video game offering with no promotional marks whatsoever but featuring the brand adopted by the athletes themselves and containing the identities of all of today's recognizable stars, including Gina Carano, Big John McCarthy, Randy Couture, Quinton Jackson, Chuck Liddell, Fedor Emelianenko, Sakuraba, and the like. Which game would appeal more to the general public?

Don't let the wolf pull the wool over your eyes. 

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Special thanks to CageSide Live! for their help with this article.

*Blog was edited to clarify definitions of Gross Revenue and Gross Royalty Revenues.

ENDNOTES

1. Gerbasi, Thomas. UFC Gets Major Boost with Industry-Shaking Merchandise Deals, Yahoo Sports, June 18, 2008. <http://www.ufc.com/index.cfm?fa=news.detail&gid=12696>.

2. Pishna, Ken. UFC Makes Major Deals, Debunks Rumors on CNBC, mmaweekly.com, June 10, 2008. <http://www.mmaweekly.com/absolutenm/templates/dailynews.asp?articleid=6457&zzoneid=13>.

3. Dana Whites comment in full, provided to Rolling Stone Magazine, was:

"See, this is the one part of the business I f'ing hate. Everybody wants more money, they want it now. And then all these fighters are like, we're the superstars, not the UFC! It should all be about us. You dumb motherf'ers. You don't know what your f'ing with. I'm a promoter, and a lot of this is built with smoke and mirrors." Heedgaard, Erik. What the F**k Is Dana White Fighting For? Rolling Stone, June 12, 2008.

4. Licensed Merchandise is defined in the Agreement as without limitation, all apparel, footwear, hats, photographs, souvenirs, toys, collectibles, trading cards, and any and all other similar type products, including the sleeves, jackets and packaging for such products.

5. Identity is defined in the Agreement as the name, sobriquet, voice, persona, signature, likeness and/or biographical of Fighter solely in connection with the development, manufacture, distribution, marketing and sale of Licensed Merchandise.

6. Merchandise Rights are defined in the Agreement as the unrestricted worldwide right to use, edit, disseminate, display, reproduce, print, publish and make any other uses of the Identity of fighter in connection with the development, manufacture, distribution, marketing and sale of Licensed Merchandise.

7. Iole, Kevin. Y! Exclusive: Fertitta shifts from casinos to cage, Yahoo Sports, June 18, 2008. http://sports.yahoo.com/mma/news;_ylt=Ah8NkDylm6.uKjADFC09oU9Eo14?slug=kifcplans061708&prov=yahoo&type=lgns.

8. As stated above, in the event the Identity of multiple fighters is utilized in the sale of any product, the fighters share is split with all such fighters included in the product offering.

9. The Agreement excludes from its coverage, among other things, all video games or other interactive devices, home video and computer games, arcade video games, hand held versions of video games, video slot machines, CDROMS, DVDs, Internet applications, wireless, video and audio cassettes and discs developed. . .