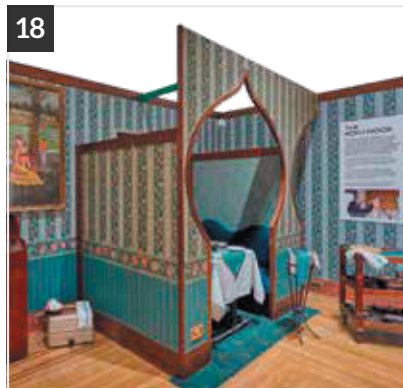


GOVERNANCE & LEADERSHIP



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BOARDS BEHAVIVING BADLY

Recognise any of these? After many years of getting up close and personal with trustee boards, **DIANA GARNHAM** pulls no punches in her catalogue of bad behaviour

Have you ever left a board meeting with a sense of frustration and wondering whether it was time well spent? Did the meeting discuss the key issues? Or was it dominated by the non-urgent or by the views of one or two individuals? Did it feel worth your effort and commitment? Did you feel valued? If any of these ring true, then I wouldn't blame you for thinking of walking away and finding a charity where board meetings are more meaningful and effective and where you feel you are valued for your skills and experience.

Understanding why boards fail to fully engage with and include all the expertise in the room is key to dealing with their failure to be effective. The answers lie not in tackling process and procedures but in addressing the

behaviours around the table – conscious or otherwise – that get in the way of a productive and effective board.



In the Inner Sanctum Board, a small group of probably long-serving individuals seem to be the only ones who really know what's happening

We all find it hard in boards made up of fellow volunteers to call out the bad behaviours that make us feel uncomfortable. It's a hard conversation for anyone to have. I have attempted to classify some badly behaved boards as a way of helping people to discuss and address these issues, hopefully with a little humour along the way.

Boards dominated by individuals

If you are experiencing a sense of being under-informed, or outside the loop on key issues or feeling there are too many decisions you've not been involved in, then you may be asking yourself why you are there. Maybe you were faced with a monologue and very little discussion – everyone nods and agrees to

everything and you're wondering if anyone is thinking like you are. As a trustee, you might describe feeling "carefully managed". If others are feeling the same, attendance at meetings is probably poor. These are all symptoms of boards dominated by individuals, my first and most common group of badly behaving boards. There are quite a few in this category and,



"Should we get around to the agenda at some point?"



The chairman has clear views that he always shares

in all of them, trustees report that it doesn't feel like a board of equals.

In the **Chair-led Board**, for instance, the chair has probably been around a long time and may refer to it as "my charity" – they've made it clear they are leading the charity. They could be a founder, a political appointment such as a minister or just someone who has been in post for ages. They will feel it's OK to take up a large amount of the discussion time at meetings and will likely set out their personal view or position at the outset: you might not even get a word in. These individuals demand loyalty and, if a strategy exists, it's presented as their vision.

A variation on this would be the **Inner Sanctum Board** where a small group of probably long-serving individuals seem to be the only ones who really know what's happening – the rest of the board feel they are less important, not valued and there to make up numbers – you're definitely a lowlier level of trustee and you might hear the term "senior trustees" to describe the others.

In a **Duopoly Board**, the chair and CEO make up a dominant pair of like-minded individuals who sort everything out between them and simply inform the board what's been decided. Classically in this type, you'll see papers tabled late or verbal reports made, leading to boards regularly making decisions with no advance paperwork. These two individuals may be very good chums, and it's not clear when and if the CEO is being held to account by the chair.

In the **CEO-led Board**, there will be many similar behaviours, but it will be the CEO taking the stage and leading discussion and decisions. Maybe the CEO will have been around much longer than any of the trustees – they know

everything and can fix everything. You might hear them describe the board as a "necessary evil". In all these settings, it can be very challenging to be a trustee.

Boards who don't take it seriously

The next group are the boards with bad behaviours that indicate they are not taking their roles seriously. They may even recognise that things are not right but don't get around to dealing with it: there's talk but no action.

If you are on a **Social Board**, it's probably quite enjoyable, but there is not much trusteeship going on. You're probably

organisation very well and it doesn't feel joined up. But you can also get away with not reading the papers in advance, and you can leave early because not much is going to happen that involves you. You are almost certainly being asked to put your trust in the judgement and leadership of the committee chairs. On the **Disengaged Board**, this behaviour has gone so far that board members don't read the papers beforehand, catch up on emails at the meeting, arrive late and leave early – if they show up at all. Some of your fellow trustees have lost interest and are only turning up out of duty or habit.

You might hear the CEO and chair describe the board as a "necessary evil"

surrounded by friends and trustee business time is eroded by socialising, catching up on personal news and exchanging gossip. Because you all know each other well, you may also think alike and will tend to conform – you don't challenge thinking and have a light touch on scrutiny: people are content to describe the organisation as "ticking over nicely". No one asks whether it could be doing more or if it is failing to meet need or seize opportunities.

Then there is the **Rubber-Stamping Board** where the key work is undertaken by an army of subcommittees, which in turn appear like the mini fiefdoms of those in the Inner Sanctum. The subcommittees make the decisions and the board receives reports it doesn't discuss or scrutinise. It feels formulaic and process driven and there is no exploration of future strategy. As a trustee, you may feel you don't really know the

Boards who have lost sight of their role

There is a group of struggling boards who have forgotten how to be trustees. These boards have lost sight of their key roles and duties and, if you are on one, you may feel the priority is just to survive, to keep the charity going. Something is getting in the way and it could be due to poor support, a lack of skills, leadership or experience, funding and resource issues, or a lack of strategy – all in all, this leads to a preoccupation with survival and a focus on the immediate day-to-day issues. A common type is the **Management/Operational Board** that gets far too deep into the detail (especially common in small organisations with no staff); this can easily morph into the completely **Overloaded Board**, where trustees feel they can't focus on their proper roles because papers are overwhelming, running often to hundreds of pages at a time.


The meetings may be very long and exhausting; you might actually dread them coming up in the diary. In reality, the agenda is packed out with too many minor items and trustees struggle to navigate towards decisions that should properly be led by the executive making clear recommendations. Or worse, a key item is buried somewhere in a late paper on page 267 and the board only knows it made a decision when they see the minutes. Beware: a lazy or weak CEO or executive team could be upwardly delegating and, as a consequence, evading responsibility for executive actions and delivery.

accountancy, law, science, investment or property, reflecting a key area of interest or risk for the organisation. Unfortunately, those technical issues can end up dominating the board and the key performance indicators and it's unlikely that anyone gets round to asking whether the organisation is having any real impact. If you are a non-technical person on this board, it may feel as though your interest or perspective isn't valued or important – perhaps as a user, communications specialist or stakeholder champion. Alternatively, if you are one of the technical trustees, you may be

your chair as these boards engage in a wide range of bad behaviours that will keep you from making an impact – at least until you've been around for 10 years or more.

Finding well-behaved boards

To finish, I have a few suggestions to help you find the right kind of board for you, and how to avoid badly behaved boards.

- Think about the cause or purpose of the organisation. Do you have an affinity with what they are seeking to achieve? Or, at the very least, a strong interest?
- It's a two-way process. You will want to understand what you can bring to the board and what they need from you, as well as what you will learn and enjoy from being part of that trustee world.
- Don't agree to join a board just to do a friend a favour.
- You should ask to meet a couple of trustees first to find out how they think the board is working now. You could even ask to observe a couple of meetings, or offer to join a board committee as an external co-optee. That will give you a chance to feel whether you'll fit, and how you can make a valuable contribution. And, of course, you can look out for some of those bad behaviours.
- You should also expect a good level of induction, as well as ongoing mentoring and support, to get you settled in. 

Diana Garnham is a consultant at RDBInsight and trustee of the Cae Dai Trust and of Christ's Hospital

*All illustrations by Scott Garrett,
www.garrettworld.co.uk*

It is bad behaviour to keep people beyond eight years and, over time, all organisations need to minimise risk by refreshing the thinking on the board

Boards that lack diversity

My final group of badly behaved boards are those that lack diversity. The **Cloned Board** is where people are recruited to fit, probably from the same social network or professional circle, and people who think differently may not be made welcome; if they are there, they may find it hard to be heard. Anyone in this position is likely to feel very isolated and undervalued.

Similar behaviours will be found in the **Clique Board**, which will probably be representative of various stakeholder communities who have a strong, possibly personal interest in the work of the organisation. Each group of interests may have clear ideas about what they want from the charity and cliques develop around issues: little attention will be paid to trusteeship.

In the **Technical Skills Board**, members are recruited for exclusively for skills such as

frustrated that you're being pigeonholed in the "technical" box rather than being encouraged to bring the full breadth of your experience to the board. And meanwhile, the CEO may simply be getting on with all the other aspects of running the charity, beyond real scrutiny, and viewing you as a pro bono adviser.

Boards that won't move on

I have saved one of the worst until the end. The **Long Service Board**: this is the one that simply ignores the rules and good practice and people serve on, and on, and on, claiming that they are utterly irreplaceable. Rotation is a good thing, as it brings fresh thinking and energy onto the board and fosters diversity. Put simply, it is bad behaviour to keep people beyond eight years and, over time, all organisations need to minimise risk by refreshing the thinking on the board. If you find yourself a newbie on this board, you'll need a lot of support from



“Item 198 – What colour should we paint the shed?”

SHARING POWER, building trust

Birmingham Museums Trust won the overall award at this year's Charity Awards for its Collecting Birmingham exhibition which transformed the way the museum engages with the city's diverse communities. **TANIA MASON** went to see them

If you visited Birmingham Museum in the first half of 2016, you probably had the privilege of seeing what is believed to be the oldest Qur'an in the world, when it was on display in the centre of the museum's new Faith in Birmingham Gallery. This Qur'an, which is owned by the Cadbury family, has been carbon dated to within ten years of the life of the Prophet Muhammad. The ancient manuscript could only be displayed in the museum for six months because of the risks of light exposure so, after the exhibition ended, the museum's curators were left with the question of what objects should replace the Qur'an in the new gallery to reflect the significance of the Islamic faith to the people of Birmingham.

At the time, the museum was a year into a three-year project called Collecting Birmingham, which was the brainchild of the charity's director, Dr Ellen McAdam. When McAdam joined Birmingham Museums Trust in 2013 from Glasgow Museum, she was struck by the absence of items on display that reflected post-WWII Birmingham and particularly its working-class and immigrant communities. "Let's just say there are a lot of pre-Raphaelites in the collection here," she says wryly.

happening in Birmingham, especially not within the immigrant communities because they didn't trust the museum service." The bottom line was that the exhibitions and collections in the museum's venues were not representative of the city's diversity, and neither were its visitors.



I felt very strongly that the museum hadn't been representing the real Birmingham **ELLEN MCADAM**

"Birmingham used to have a reputation in the UK cultural sector for playing it safe with its programming," McAdam adds. "It was always heavily dominated by fine art. There was not enough, in my opinion, about local history and local issues. I felt very strongly that the museum hadn't been representing the real Birmingham."

She was determined to change this, not only for reasons of principle and progress, but also to put the museum on a more sustainable financial footing. Birmingham Museums Trust had been converted to

children's gallery next to the tearoom, because we knew that would appeal to family visitors. Some members of staff were so outraged by this they left, because they said children don't belong next to the art. But where are the visitors of the future going to come from? Similarly, although it's the principled thing to do to try to attract more diverse audiences, it's also good business sense because, by the time of the next census, 50 per cent of Birmingham's population will be BAME."

However, when the curatorial teams began reaching out to Birmingham's communities

to explore what sort of items the museum should acquire to better reflect the lives of its diverse population, they came up against a distinct lack of goodwill. Curators became aware that people did not trust the museum, largely because previous attempts to engage with them had been piecemeal and clumsy, and objects that had been donated in the past had not been treated with care and respect.

Rachel Cockett, the museum's director of development, admits: "I've worked here since 2000 and, if you'd asked us in 2000 if we were representative of the people in the city, we'd have said yes. It's true there were lots of projects aimed at representing and collecting from people in the city, but the projects remained just that – projects. Staff would leave and the collected items wouldn't be fully documented, the relationships would drift and, by the time we got more funding for another community project, we'd be treated with much more caution by the people we wanted to work with."

Collecting Birmingham

Staff realised that if they genuinely wanted the museum to reflect the city's multicultural and socioeconomic diversity, they needed to



We've learned that sometimes it's OK not to collect anything but to have developed relationships which will bring a lot of goodwill and powerful ambassadors **RACHEL COCKETT**

There was also no tradition in Birmingham of citizens donating objects to the museum unless they were very wealthy. "If you cleared out your grandmother's attic in Glasgow and you found your grandfather's medals, your first thought was to give these to the museum," explains McAdam. "But this wasn't

a charity in 2012 and its funding from Birmingham City Council was gradually reducing, so it needed to replace this with earned income. However, McAdam was to encounter resistance to her plans from both internal and external sources.

"One of the first things we did was to install a

deconstruct its outdated, colonial attitude to collecting and adopt a new approach that addressed ethical questions around power and value in the process of collecting objects and interpreting people's lives. They applied to the Heritage Lottery Fund for a grant to underpin this work and, in 2015, were awarded £500,000. The Collecting Birmingham project was born, with the theme "Growing up, living and working in Birmingham".

The project focused on four groups that had been under-represented: the Caribbean, Muslim and LGBTQ communities, and people under 25. Over the next three years, the trust worked hard to rebuild relationships and engage new audiences in the city. More than 3,500 people were consulted at 83 events, open days and workshops and, by the end, the trust had acquired, through purchase and donation, more than 1,800 new objects – against an initial target of just 40.

Faith in Birmingham Gallery

It was through consultation events that curators settled on the two items that would succeed the ancient Qur'an display and represent Islam in the Faith in Birmingham Gallery. Dr Rebecca Bridgman, curatorial and exhibitions manager, knew that Christie's was about to hold a sale of Islamic art and artefacts. She contacted Birmingham City Mosque and asked if it would allow the museum to conduct a consultation event among the congregation.

"Previously, we'd done consultation events only at the museum so it was a big step change for us to go out into the community and do it there," Bridgman says. "We took photographs of the

objects that were coming up for auction and set up a stall outside Friday prayers at the mosque where we invited people to vote for the objects they wanted us to buy. Then we went back the next day and did a more in-depth consultation where we explained a bit more about each of the items."

Two of the objects that worshippers selected were an Ottoman Qibla indicator, an instrument used by Muslims to determine the direction they should face for their prayers, and a 19th century French replica of a 14th century Egyptian glass lamp. Says Bridgman of the latter: "I thought this was a real outsider that people wouldn't necessarily be interested in, but what people told us at the consultation was that they liked the idea of a French imitation because they knew it wasn't stolen from any mosque."



We set up a stall outside Friday prayers at the mosque and invited people to vote for the objects they wanted us to buy REBECCA BRIDGMAN

These acquisitions were the first purchase of Islamic art for Birmingham's collection in a century and, even though Collecting Birmingham has now ended, the items continue to take pride of place in the Faith in Birmingham Gallery. "Birmingham is one of the most faithful cities in the UK, with over 75 per cent of the population identifying with one faith or another, so that was the idea behind this gallery," Bridgman explains. "We didn't just want it to be about faith, we wanted it to be about faith in Birmingham, and it was the first gallery where we worked with communities in the city

from the very start – we established a working group that helped us design the gallery and identify the themes within it." Other items on display include the Sultanganj Buddha, a Bahá'í marriage certificate, a T-shirt belonging to a local Rastafari child and the uniform of a Christian street pastor.

The relationship with Birmingham City Mosque has endured too: museum staff are now liaising with the mosque committee to purchase a collection of items related to Pakistani sport.

Knights of the Raj exhibition

In another triumph for Collecting Birmingham, the museum worked with acclaimed Birmingham street artist Mohammed Ali on an exhibition called Knights of the Raj.

Ali had been engaging with the trust as an artist for over a decade and, when he was invited to curate an exhibition that celebrated Birmingham curry houses and the Bangladeshi families that ran them, he jumped at the chance.

"This was very personal to me," he says. "My late father was one of those Bangladeshi migrants who was part of the historic curry trade that transformed British cuisine. They were mostly single men who arrived here in the 60s, established these restaurants and then married local women or brought wives here from Bangladesh."



But, even for Ali, it wasn't easy to gain the trust of families from that community, and he invested a lot of time using his and his father's connections to build relationships with restaurant owners past and present to get their views on what sort of objects the museum should display to represent their lives and their stories.



This 70s-style restaurant was being ripped apart and it was a perfect opportunity to preserve it. We literally climbed into the skip and started hauling things out MOHAMMED ALI

A breakthrough came one day as he was passing the Koh-I-Noor restaurant, which had opened in the 1970s but closed in 2016 for refurbishment. Ali saw that the premises were being gutted and the interior thrown into a skip. "I realised that this old-fashioned, 70s-style restaurant was being ripped apart and it was a perfect opportunity for us to preserve it as part of Knights of the Raj and Collecting Birmingham. We literally climbed into the skip and started hauling things out."

Rebecca Bridgman takes up the story: "I remember getting this call from Mohammed on a Wednesday night saying 'we've got to get into this restaurant because they're tearing it apart'. So we used some money from Collecting Birmingham to hire some freelance technicians to come in and cut out one of the booths and, somehow, they managed to get it out through the back door."

The booth was reassembled in the Knights exhibition at the museum. Rolls of wallpaper found at the restaurant were applied to the walls, the rescued carpet was relaid and the table was set with tableware recovered from the skip.

In the end, dozens more objects were also collected for Knights of the Raj, including photographs, menus and a service trolley and, after the exhibition closed in Birmingham, it went on temporary display at the Museum of Food and Drink in New York. Today, the Koh-I-Noor booth remains in Birmingham's permanent collection and Mohammed Ali has subsequently joined the trustee board of Birmingham Museums Trust.

Messy collecting

Rachel Cockett recalls: "It took a really long time to collect from some of the communities in this project. The act of acquisition could be felt to be oppressive. When groups feel oppressed or subject to racism, they are uncomfortable with the authority of institutions, and that means we have to take a long time – and in some cases are still taking

a long time – to build those relationships.

"We're now taking a much more informal approach to collecting, which one of the team refers to as 'messy collecting'. We've learned that sometimes it's OK not to collect anything, but to have developed relationships which will stand – relationships which bring a lot of goodwill and powerful ambassadors

who will talk about what we do and share their experience of working with us. And in time, who knows, that may lead to collecting."

The lessons learned from Collecting Birmingham have prompted the trust to permanently change its policy on how it interacts with its audiences and collects objects for its venues. Bridgman says that while handing control over to people outside the museum was "quite a scary process, you do have to experience it to realise how valuable it is".

"I think people in the organisation now have really shifted their thinking," she says. "I can't see us ever going back to a situation where just the curators decide what we should have in an exhibition. Instead of asking 'what should we have in this exhibition?', now we say, 'who should we ask what we should have in this exhibition?' That's the difference."

Humility


Su Sayer, chair of the Charity Awards judges, describes Collecting Birmingham as "a shining example of a charity that had the humility to admit they weren't connecting with their audiences, and that they needed to radically change their approach".

"There are so many lessons here for the broader charity sector around giving up power and valuing lived experience as well as professional expertise."

The process was indeed unsettling for many museum staff, McAdam recalls. "Collecting Birmingham was difficult – there were a lot of staff who really didn't want to do it. But having done it and survived, it changed people. It was a transformational experience."

The new approach is also having an impact on audience diversity, she says: "Diversity in this building is rising – it's now at 20 per cent BAME visitors, though that's still not as high as we'd like. What we're having more difficulty with is recruiting staff from diverse backgrounds, and that's partly because museums are perceived, quite correctly, as being insecure and badly remunerated. But that will change in time." The trust is also trying to improve the diversity of its trustee board, initially by establishing a series of advisory panels that it hopes will provide a pipeline of diverse talent for the main board.

Going forward, McAdam and her team are developing a suite of training for other cultural institutions to share the lessons learnt from Collecting Birmingham, and she is sure that winning the Charity Awards will help to give credibility to that. She also wants to make connections with other under-represented communities in the city, particularly white working-class people.

Awards judge Lynne Berry suspects that the process of freeing the museum from local authority control and converting to a charity seven years ago had more of an impact than even the museum team gives credit for. "It may not have been a consciouss shift, but I think there is something here about a different agenda, about needing to demonstrate a connection to your public in a different way," says Berry. "Once you stop being an inward-looking public body that protects and you become a charity that looks outwards and enables, you see everything very differently." 

■ *Applications for the Charity Awards 2020 are now open. See charityawards.co.uk for details.*





TAKE YOUR marks

MATHEW HEALEY offers some advice on how to try not to get sued for defamation or trademark infringement when campaigning against rich powerful corporates

There are some client conversations that, as a lawyer, can cause alarm. A classic of the genre in the intellectual property (IP) sphere runs broadly thus:

Client: We've got something planned and [insert big corporate name here] is going to go ballistic. We need you to write us a letter saying there is no risk.

Lawyer: I'll need to think about this. What is it you're going to do?

Client: We're intending to rip off their intellectual property. Big style.

Lawyer: Keep talking. Which bits of their IP?

Client: All the most valuable stuff, really: names, logos, get up, the works. We're aiming to cause as much damage as we can. As you know, [big corporate name] has infinite money.

You may presume it would be commercial suicide to advise anything other than extreme caution in the circumstances. However, there are situations where your writer gulps down his tablets, clutches his textbook hard, defenestrates it, and sticks his neck out as far as he can bear. When a charity wants to run a campaign criticising a big business or its practices, the "straight bat" advice is substituted by some hardcore practical risk analysis.

Defamation

The easy bit first: it should go without saying that any statement (express or implied) that speaks ill of its target potentially gives rise to a claim for defamation. This shouldn't, in principle, be a problem, provided what you are saying is unequivocally true; generally, those in charge of charity comms aren't daft enough to spread blatant falsehoods.



Spending charitable funds on (futile) legal expenses is rarely a good look

Bear in mind, however, the onus is not on the claimant to prove whether a statement or allegation is false; it's on the defendant to show the opposite. As such, it may not be enough to feel you are in the right; in the final analysis you may need to prove what you are saying in court through objective evidence.

Though defamation claimants need to show they have suffered "serious harm", we suspect, here, that this will often not be a high hurdle to clear; the above-recounted phone exchanges should be privileged, but internal exchanges

outlining your plan to "stick the boot into [x]" may need to be disclosed in litigation.

Copyrights and wrongs

The thornier issues revolve around – to use the lingo – soft IP, such as registered trademarks and copyright. The initial analysis looks straightforward: you're blatantly going to use the other party's names, brand and logo. They are protected by the relevant law (the last of these qualify as "artistic" works for the purposes of copyright law, even if completely devoid of aesthetic merit). And the very nature of that protection is their owner can stop

others' unauthorised use and claim damages.

However, typically, the law's a bit more nuanced than that. First, regarding trademarks, the law perceives a difference between using another party's name to say things about them (which could include negative things) in, for example, a journalistic context, and abusing that party's valuable and hard-won trademark rights to unfairly damage their image, via what looks and smells like a commercial ad campaign. The line between the two is unbearably fuzzy – there is a shortage of case law in this area –

and legal uncertainty can, of course, help the party with the deeper pockets. The risk here is higher if your target is able to make a case that your campaign is unfair in some respect: again, this is very much a “smell test” and, in assessing risk, you may need to think beyond the literal truth or falsity of any claims you make.

Turning to copyright, there are various exemptions around use of copyright materials such as for use in education or for news reporting. But there is no exemption that allows the use of others’ branding and suchlike to slate their owner.

The sole possible exception is around caricature, parody and pastiche; there is a limited right to ape another’s work for humorous effect. But there are issues here. First, it’s the nature of the beast that each of these is, by definition, comedic in character. And that’s something that would need to be tested in court. The leading case in this area substantially concerns Dutch lawyers seeking to persuade a panel of judges of various other assorted EU nationalities that a Flemish-language xenophobic skit on a cartoon series was funny (from an objective standpoint, obviously). The practical difficulty is obvious and this, of course, means that there is abundant uncertainty as to where the boundaries lie.

Also, a key nuance is often missed. It’s not enough for the campaign to be amusing or to send up its target; the exemption seems to apply only where the copyright work itself is parodied. A campaign that artfully pokes fun at a company’s logo or advertising may qualify; simply using a company’s copyright materials to mock it will not.

It’s important to remember the worst-case scenario is a very serious one: a court injunction curtailing your campaign and an award of compensation and/or legal costs against you. We’ll leave it to your judgement as to how this looks from a PR point of view, but spending charitable funds on (futile) legal expenses is rarely a good look.

Online campaigns

Where your key campaigning tools are websites and social media, in our experience it’s more likely that the other party will employ various takedown procedures than drag everyone off to court. This could involve contacting your internet service provider, or using Facebook, YouTube etc’s established and easyish-to-use trademark/copyright complaint forms. There are no certainties, and the approach taken by the other party is fundamentally outside your control.

At first blush, this sounds like a reason not to use electronic means to spread your message.

But we think it’s possible to cast the availability of a quick and relatively easy resolution (for everyone) as a positive. You would have to also recognise the possibility that the campaign could go viral across multiple platforms, at which point it would (for better or worse) be outside everyone’s control.

It can be hugely problematic if your target gets wind of a magazine ad the day before it goes to print – and very expensive if you are forced to remove it from hundreds of billboards and bus shelters

Poster pains

You should also bear in mind the different picture around campaigns that use traditional physical media; magazine and billboard advertising can give rise to the biggest difficulties if things go wrong. It can be hugely problematic if your target gets wind of a magazine ad the day before it goes to print – and very expensive if you are forced to remove it from hundreds of billboards, bus shelters etc. We’ve seen conventional advertising campaigns come a cropper in this way, and it’s a miserable outcome for everyone involved.


Obviously, we are aware of various people having run critical campaigns at different times that ran all kinds of legal risks without encountering serious difficulties. Clearly, brand owners recognise that, sometimes, the reputational ill effects (for them) arising from taking action outweigh those that flow from not doing so. There are well-documented cases of big corporates enduring serious social media backlashes from taking heavy-handed action to end campaigns. It’s pretty easy to find examples of campaigning videos and images that have been left in plain view for a number of years without their targets taking any action.

Risks versus rewards

The balancing act between risk and reward is a difficult one. In our experience, campaigns will be more likely to evade complaints where the overall approach is constructive, and concentrates on encouraging brand owners to make realistic and achievable changes –

you’ve a better chance of receiving a balanced response to asking a coffee chain to use recyclable cups, for example, than if you criticise BP for drilling for oil or McDonalds for selling meat products.

A sense of humour may go a long way – not just from the legal parody defence perspective but also in terms of likely reactions. This is so much easier for a lawyer to write than for you to achieve but, in a perfect world, you may want your target to say: “That’s really cheeky. Do they have a point?” rather than “This is an outrage! Let’s sue”.

We think it probably follows that the biggest risk of things going pear-shaped arises if you allege anything that is not demonstrably fair or true. Not only would that potentially expose you to a claim for defamation, and (per the above analysis) trademark infringement, but you may also find that your moral high ground is compromised, and the party in question could take a view that any potential reputational fallout is manageable and/or the lesser of evils. 

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