

Key legal issues for influencers and brands (and how to deal with them)

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Social media influencers are among the most recognized and highly paid individuals in the world.

Their prominence has been fueled by the explosive growth of TikTok, Twitch and OnlyFans; the continued growth of Instagram, YouTube and Snap; and the astonishing amounts of money flowing in and around those platforms. Social media has also created unparalleled opportunities for brands to market their goods and services, and they often work with influencers in doing so.

Novel legal issues and risks have emerged for both influencers and brands. Key, recurring issues relate to copyright licensing and infringement, disclosures and statements in endorsements, compliance with securities laws and defamation.

Understanding and addressing these issues is just as important for less prominent influencers as it is for brands and the most prominent influencers.

Posting content raises copyright licensing and infringement issues

At their basic level, copyright laws prevent the use of original creative work without the owner's permission. Section 102 of the Copyright Act identifies broad categories of copyrightable material, including virtually anything that can be expressed in a tangible medium of expression.

Influencers and brands may incorporate portions of another's copyrighted material when creating their own promotional content. For example, an image displayed during a YouTube stream or a song in an Instagram Reel. Licenses should be obtained before incorporating copyrighted material into such content.

Influencers need to be particularly careful when endorsing products that might be considered securities, such as non-fungible tokens and cryptocurrency.

The importance of obtaining licenses is illustrated by recent litigation between Warner Music and Iconic London, which alleges that Iconic utilized Warner's music in social media posts without permission. In recent court

decisions, particularly those involving Bang Energy, courts have held that influencers and brands have no right to exploit others' intellectual property for commercial purposes without obtaining the right to do so from the content owner(s). This is particularly so because most social media platforms' licenses and terms of use do not allow for the commercial use of music and similar material by users.

If influencers and brands do not obtain licenses, their posts will likely infringe the copyrights of others and, potentially, trademark rights and rights of publicity. This can occur directly when the influencer or brand posts infringing content on their social media. It can also occur indirectly when an influencer or brand materially contributes to posting infringing content.

Influencers, brands and anyone else involved in the infringement can then be subject to significant monetary exposure. The Copyright Act entitles copyright owners to recover the infringer's profits derived from the infringement and damages that are not already included in such profits.

Guidelines for making disclosures and statements in endorsements

The Influencer Marketing Hub estimated that the influencer marketing industry was worth \$16.4 billion in 2022, a staggering number that has grown by billions each year since 2016.

When marketing goods or services, influencers must avoid making false and misleading statements. For example, an influencer should not state that a product works extremely well when the influencer knows it does not work well or has never even used it.

Issues related to influencer endorsements have gained significant publicity in the wake of the collapse of FTX. Lawsuits have been filed against people

who endorsed or participated in advertising for FTX such as Tom Brady, Giselle Bündchen and Larry David.

False, misleading or uninformed statements can constitute violations of the Lanham Act's false advertising provisions, unfair competition statutes, securities laws, as well as state laws regulating advertising. If statements contravene such laws, influencers can be exposed to lawsuits seeking financial recovery as well as non-monetary relief such as injunctions. Influencers making objective claims should also be careful to make only claims that can be substantiated, as U.S. law requires that an advertiser has a reasonable basis to support all objective claims in their ads, under the Pfizer multifactorial test.

The Federal Trade Commission has the primary authority to regulate social media marketing, which involves regulating "unfair or deceptive acts or practices in or affecting commerce" (15 USC 45(a)(1)). The Food and Drug Administration can also be involved if an influencer markets prescription drugs or medical devices. Guidelines released by such regulators are critical for influencers to carefully review and comply with.

The FTC's "Endorsement Guides" and "Disclosures 101 for Social Media Influencers" set clear guardrails for influencer advertisements and give insight into the FTC's enforcement approach. First, they define advertisements broadly to include any form of promotion and even go as far as stating that "tags, likes, pins, and similar ways of showing you like a brand or product are endorsements."

Second, they explain that influencers must disclose any "financial, employment, personal or family relationship with a brand." Financial relationships are not limited to monetary payments and can include the receipt of goods or other benefits. Third, disclosures must be clearly and

conspicuously placed within an endorsement. Footnotes, small text and links to disclaimers won't suffice. The FTC guidelines include far more detail than is noted here, so they should be fully reviewed and digested.

Although some of these requirements may seem onerous, compliance is important, because the FTC has a track record of strictly enforcing them, albeit mainly in relation to brands rather than individual influencers. For example, in March 2020, the FTC sued Teami for marketing and selling tea using deceptive health claims and endorsements from influencers who did not disclose that they were being paid to promote Teami's products. Teami and the FTC entered into a \$15.2 million settlement and the individual influencers were spared.

In 2017, online gaming influencers TmarTn and Syndicate were not so lucky. The FTC charged them with deceptively endorsing the online gambling site CSGO Lotto, by failing to disclose that they jointly owned the company and that other influencers were being paid to promote the company.

The FDA has also been active in this space. In August 2015, it sent a warning letter to Duchesnay, Inc. regarding a post by Kim Kardashian promoting a morning sickness drug, as it was "false or misleading" because it failed "to communicate risk information associated with its use" and "omit[ted] material facts." Duchesnay was compelled to take corrective action and Kardashian was compelled to amend her post.

These issues and regulatory actions are not limited to the United States. Australian legislation passed in 2022 prohibits influencers from promoting certain health products if they receive monetary or non-monetary compensation for doing so. Further, the UK's Advertising Standards Authority names and shames influencers who breach advertising regulations in its online list of "non-compliant social media influencers."

Influencers, brands and their advisers should be aware of the variance in advertising regulations in different jurisdictions.

Importance of complying with securities laws

Influencers need to be particularly careful when endorsing products that might be considered securities, such as non-fungible tokens and cryptocurrency, as they are subject to securities laws and the SEC's regulatory purview.

The importance of diligence was recently illustrated by celebrities embroiled in the FTX scandal, who were both named in class action lawsuits and subject to Federal and State regulatory investigations for their endorsements of FTX's products.

It was also shown by the SEC's recent settlements with Paul Pierce and Kim Kardashian after they both failed to disclose being paid about \$244,000 and approximately \$250,000 respectively to promote EthereumMax tokens. Pierce agreed to pay about \$1.4 million and Kardashian agreed to pay around \$1.26 million in disgorgement and fines.

Earlier in 2018, the SEC settled with Floyd Mayweather and DJ Khaled for failing to disclose payments they received for promoting the initial coin offering of Centra Tech. They were each fined hundreds of thousands of dollars and prohibited from promoting securities for years.

Given the complexities associated with securities laws, it is critical for influencers to identify potential issues and seek advice before endorsing products that might be considered securities.

Defamation risks

Social media is fast-paced and often incites strong emotions. Influencers should be careful to avoid making defamatory statements about another person or brand on social media. Statements regarding brands are particularly problematic, because the impact of defamatory statements, and therefore the quantum of damages, can be substantial.

Although we have seen few defamation-related cases involving influencers' social media activity, that does not mean such actions have not played out behind closed doors or that influencers should not worry about such liability. As the market continues to grow and platforms like Twitter are decreasingly regulating speech, we are likely to see more of these actions.

It is also important to know that risks vary among jurisdictions. For example, Australia has plaintiff-friendly defamation laws that can work against influencers.

Proactively protecting your brand and reputation

Professionalism and proactivity are critical. Many influencers generate more revenue than most small businesses and should operate accordingly. Proactive compliance with laws, such as those outlined above, is important.

So is brand protection, including by registering and enforcing trademarks (like Giannis has been doing with the "Greek Freak" mark) and copyrightable material (like choreographer JaQuel Knight has done with his dance moves). Allowing others to freely utilize your images, marks or other content is dilutive and harmful to your business.

Many issues can be mitigated if you have an engaged, experienced and intelligent team of advisers. Professionalizing business practices can avoid legal troubles and insulate an influencer's brand. This includes ensuring that business transactions are clearly and comprehensively dealt with in written

contracts.

Not only is this likely to help address issues before they become problematic, it is also an indicator of an influencer's level of sophistication. For example, contracts can include provisions that disclaim and indemnify influencers from liability resulting from non-compliance with specific laws and, importantly, personal or other injury resulting from use of a brand's goods or services. They can also provide influencers with pre-approval rights, so that before a brand posts content, it is subject to the influencer's final review. Such clauses can help influencers avoid being embroiled in damaging and costly lawsuits.

The cost of proactively dealing with issues is almost always less onerous and expensive than engaging lawyers and other advisers to deal with problems after they arise. Think of Paul Pierce and Kim Kardashian: Had they been properly advised to disclose their interests in EthereumMax, they may have both avoided financial penalties and likely hundreds of thousands paid to advisers to deal with the SEC, not to mention the reputational damage.

The constant spotlight on influencers heightens the importance of diligence in understanding and complying with, legal and regulatory guidelines. Addressing issues such as those discussed in this article is essential to minimize the risk of legal action, protect influencers' brands and advance their careers.

In the social media-driven world, reputation and image are everything.