

Selling Under the Influence: How Brands Can Avoid Influencer Advertising Mistakes in the Cross-Border Context

Introduction

Since a man from Philadelphia bought a Sting album on his computer in 1994, making the first ever online retail transaction,¹ consumers have witnessed the continuous growth of e-commerce and online advertising. When COVID-19 arrived in early 2020 and stay-at-home orders sent people into their homes with the company of their social media feeds and electronic devices, that growth exploded. Online purchases, buy-online-pick-up-in-store sales, and holiday sales all saw massive growth early in the pandemic, and some analysts predict that consumers may permanently adopt commerce originating online as a preferred shopping experience after the pandemic.²

Advertising through social media, particularly through the use of influencers, has grown increasingly popular.³ Influencing is a form of a native advertising, where the advertising itself mimics the format of the platform on which it appears. A brand may pay a content creator, or “gift” their product to them, so the content creator “influences” their audience by promoting the product in content that suggests a personal endorsement posted in the ordinary course: “Loving this dress from [brand], it’s perfect for my birthday party tonight!” Because this kind of advertising is published on digital platforms accessible worldwide, such as Instagram, it gives brands a global reach immediately.

The huge recent growth in e-commerce and the global reach available through influencers can be positive for brands, but comes with its own risks. Influencers must take care to abide by laws governing misleading advertising as well as the use of intellectual property. These laws vary across borders, which means that the same influencer advertisement could be subject to different standards in different jurisdictions. And because brands can be held responsible for their contracted influencers’ violation of applicable laws, it is up to the brands to take appropriate steps to ensure that their influencer content is compliant.

Misleading Advertising

The foremost concern with influencer advertising is that because it is intended to look organic, it is not always clear that it is advertising. Consumers have a right to know when content is sponsored advertising. As such, various countries have taken different steps to require disclosure, and to punish non-disclosure.

If a brand pays an influencer to promote its brand and the influencer violates misleading advertising laws, the brand may be on the hook for the misconduct. In Switzerland, for example, an enforcement action was recently brought against both a brand and its influencers for engaging in misleading advertising.⁴ And Canada's Competition Bureau has warned that advertisers cannot shield themselves from liability by making representations to the public through an influencer instead of doing so directly.⁵ Because a brand might use influencers who are situated in another country, and because the influencers' content can easily reach consumers in yet other countries, the scope of potential liability is huge. Potentially, any competent jurisdiction may enforce its rules, and can levy fines and other penalties against brands to stop the brands' influencers' misconduct. The financial cost of such action could be enormous. To offset this risk, brands should take certain step to help promote influencer compliance with applicable laws and rules.

In the United States, consumer law prohibits deceiving consumers by concealing an advertiser's commercial relationship with the product.⁶ The Federal Trade Commission (FTC) has issued guidance detailing that it is the responsibility of influencers to make it "obvious" that their content is an advertisement when they have a "material connection" with the brand they are endorsing.⁷ A "material connection" can range from employment by the brand, to a financial relationship with the brand, to simply being given free products. To satisfy this requirement, an influencer's sponsored content should include a simple and clear disclosure that is "hard to miss."⁸ Brands risk liability for their influencers' posts even if the influencers are not in the United States. If posting from abroad, US law can apply if it is reasonably foreseeable that the post will affect US consumers.⁹ The FTC has indicated that if law enforcement becomes necessary based on influencer misconduct, the FTC's focus will usually be on the brand or the public relations and/or advertising agency hired by the brand.¹⁰

The United Kingdom also prohibits misleading omissions, such as not disclosing that a "trader" (the statutory name for a brand in the UK) has paid for a promotion. Influencers must "mak[e] clear in the content" that it is advertising.¹¹ Where advertising originates outside of the UK but is available within the UK falls within the jurisdiction of UK enforcement.¹² The influencer and the brand share responsibility for making sure that content is labeled as advertising, and each can be held responsible for violating misleading marketing rules.¹³ In October 2020, the UK Competition and Market Authority (CMA) concluded an investigation of hidden advertising by influencers and celebrities on the Facebook-owned social media platform Instagram, and determined that Instagram was not doing enough to address the problem of misleading advertising. In response, Facebook Ireland committed both to prompt its users to clearly disclose whether they have been paid to promote a particular product or service, and to put systems in place to detect posts and content that do not comply with these disclosure obligations. Other commitments undertaken by Instagram will affect not only UK users, but also anyone – globally – who directs their posts to UK users. Instagram is now

obliged to report regularly to the CMA on its progress in regulating advertising on its platform.¹⁴

In the European Union, influencer content is considered to be misleading advertising if it conceals from the consumer “the extent of the trader’s commitments, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product which causes, or is likely to cause, a person to take a transactional decision that he would not have taken otherwise.”¹⁵ To avoid violating this regulation, influencer communications must clearly identify that the content is commercial (i.e., advertising), and on whose behalf the communication is being made. While this guidance seems simple, there are concerns about consistency across the EU, as advertising legislation is made at the EU level but interpreted and enforced at the member state level.¹⁶ This can lead to inconsistent results, where the same advertising disclosure could pass legal muster in one member state but not in a neighboring state where it is just as likely to be viewed.

For example, Germany (one of the most active jurisdictions in protecting consumers from misleading advertising through influencers) and France require disclaimers highlighting the promotional nature of the post to be in the countries’ official languages, and have deemed disclaimers in English only to be insufficient. In Germany, influencers must tag their posts with expressions such as *Anzeige* (“advertising”) and *Werbung* (promotion).¹⁷ In France, influencer advertising must bear the labels *publicité* (“advertising”), *sponsorisé par* (“sponsored by”), or *en partenariat avec* (“in partnership with”).¹⁸ On the other hand, in Italy, the Italian Antitrust Authority (AGCM) recently found that the disclaimers in English used by 13 influencers and celebrities were adequate to clearly and transparently highlight the promotional purpose of the posts published.¹⁹ Brands directing their advertising into the EU should take note that countries within the EU have used their own laws to hold brands liable for their influencers’ misleading advertisements. In Italy, an enforcement action was recently brought against both a company and its micro-influencers (micro-influencers are influencers with smaller audiences).²⁰ Misleading advertising directed into the EU can also run afoul of the European Advertising Standards Alliance (EASA), which acts as an aggregator of self-regulatory bodies. EASA comprises 28 national advertising self-regulatory organizations, 13 European and non-European advertising industry organizations, and corporate members. Consumers who believe that an advertising communication coming from another country is not compliant may file a complaint either with their own country’s self-regulatory organization or directly with EASA, which will then forward it to the competent body in the relevant country. That body will then investigate according to its own regulations and forward the outcome to the originating country.

While China has not created legislation explicitly regulating online or social media advertising, a collection of existing laws apply to advertising by influencers. Under the

Advertising Law of 2018, advertising must be presented in a way that makes it identifiable to consumers as advertising.²¹ Advertising published in mass media must be clearly designated as “Advertising” to differentiate it from other non-advertising content and avoid misleading consumers.²² Furthermore, under The Interim Measures for the Administration of Internet Advertising, which includes some more detailed regulations about Internet advertising, Internet advertisements should also be identifiable and clearly marked as “advertisements.”²³ China can and has fined foreign companies for directing misleading advertising into China.²⁴ In recent years, brands have been fined and even banned for violating advertising laws in China. These penalties are not limited to undisclosed advertising, but include misleading advertising (including exaggerations such as “the best...” and racial, ethnic, religious, and sexual discrimination. As such, it is always recommended that a brand seek review from local counsel to ensure that it and its influencers are complying with all local laws and rules.

Russia generally prohibits advertising that would not be consciously perceived by consumers as advertising because of its potential to mislead.²⁵ The Federal Anti-Monopoly Service (FAS) makes case-by-case determinations of whether communications are this type of prohibited indirect advertising.²⁶ If the FAS finds that content qualifies as misleading indirect advertising, it is empowered to impose administrative fines against both the brand and the influencer(s) in question.²⁷ Notably, however, the FAS cannot levy fines against the brand if the brand is not registered to do business in Russia.²⁸

In addition to regulatory enforcement, some countries also provide a private right of action for consumers victimized by misleading advertising. In the US, for example, while there is not a federal statute that provides for a private right of action by consumers, state laws provide for consumers to sue false advertisers, or to report false advertising to a state’s attorney general for enforcement.²⁹ In most states, consumer protection laws allow action against an advertiser when a consumer is harmed by it—for example, by being induced to purchase a product they would not otherwise have purchased if their purchase was induced by content they did not know was advertising.³⁰ Under these state laws, brands found liable for misleading advertising may have to pay fines to the state, damages to consumers, or both.³¹

How can brands ensure compliance with misleading advertising laws, when at a tap of an influencer’s phone, an advertisement can be sent all over the world and therefore be subject to differing requirements? By erring on the side of caution. In laws, rules, regulations, and guidance from countries all over the world, the same term appears repeatedly: *clear*. Influencers should use visible, obvious, easily understood, and repeated signals to unambiguously identify their content as advertising, such that no reasonable consumer could think that it is *not* advertising. The FTC guide provides a useful review of best practices for various types of content, including photos, videos, livestreaming, and vanishing content.³²

Unauthorized Use of Intellectual Property

Another concern with influencer advertising is the unauthorized use of intellectual property, such as copyrighted works, brand names and logos, and a person's name and likeness.

Copyright protects original works of authorship. This includes writings, photographs, videos, audio recordings, artwork, and other creative materials. It does not include ideas, concepts, principles, procedures, or methods of orientation. Copyright exists from the moment of a work's creation, and does not necessarily require formal legal protection, such as registering the work with the US Copyright Office or pursuant to the EU Directive on Copyright in the Digital Single Market. Once copyrighted work is created, it generally cannot be used by a third party without the creator's permission.

Brand names and logos are intellectual property that indicate the source of goods of services and distinguish brands from one another. While they may be formally protected, such as a trademark registered with the US Patent and Trademark Office or the World Intellectual Property Organization, a level of common law protection exists in many countries that allows the earlier user of a brand name or logo to prevent subsequent use by another person.

Finally, intellectual property rights exist with respect to a person's name and likeness, and individuals in many countries have the right to control the use of their name and likeness for commercial purposes.

The possibility of a brand being held liable for its influencers' unauthorized use of intellectual property is varied. In general, however, if an influencer uses intellectual property that does not belong to the influencer, and they do not have permission to do so, the influencer risks liability for itself and the brand for which it is advertising. In the US, a brand can be secondarily liable if it had constructive knowledge of its agent's use of the intellectual property.³³ Other countries, like the UK, are more lenient, and will not impose liability unless the brand facilitated the infringement.³⁴ Nevertheless, because the internet allows content to be broadcast far and wide, brands should exercise caution and monitor their influencers' content to ensure that the influencers are complying with applicable intellectual property law and rules.

Intellectual property rights, and the manner in which unauthorized use of intellectual property can be enforced, varies within countries and from country to country. With very limited exceptions, influencers do not have the right to use others' intellectual property without their permission. Fortunately, there is a simple solution for influencers to avoid facing legal action for unauthorized use of intellectual property: *permission*. If an influencer wants to use someone else's copyrighted work, such as

music, or some name or brand name, the influencer should consult with counsel and seek the written permission of the owner before repurposing the intellectual property.

Responsibilities of Brands and Best Practices

So how can brands best protect themselves from liability for their influencers' conduct?

First, the relationship between a brand and an influencer should be governed by a contract. Having a contract enables brands to impose requirements to ensure influencer compliance with law and rules, and to make sure that those requirements are followed. It also allows brands to allocate responsibility in the event of noncompliance.

Second, brands should institute clear procedures for how influencer content will be presented to the public. This may include practical requirements, for example, required hashtags on a post, a "this is a sponsored post" statement that must be reiterated every so often during a livestreamed promotion, or a disclaimer filter that must appear on vanishing content posts. Brands should consult with counsel in developing these procedures to make sure that they comply with requirements in the strictest jurisdiction foreseeably within the sponsored content's reach.

Third, brands should make influencers aware that permission is required for influencers to use others' intellectual property. Brands should require proof of written permission for the use of third-party intellectual property by their influencers, and should consult with counsel to ensure that their influencers' use of third-party intellectual property complies with applicable law and rules. While disclaimers can be standardized, influencers usually retain control over the creative aspect of their content, thus creating more room for error in the use of third-party intellectual property. As such, brands/influencers may contract to require the influencer to indemnify the brand for any unauthorized use of third-party intellectual property in the influencer's content. This may be of limited benefit, however, as influencers may not have deep pockets, and owners of intellectual property may still press for a finding of liability against the brand to receive meaningful relief.

Finally, brands should closely monitor their influencers to ensure compliance with the brand's prescribed disclosure requirements and to make sure that any third-party intellectual property repurposed by their influencers is authorized.

Conclusion

Influencer advertising offers a valuable way for brands to advertise their products, but influencer content is easily distributed around the world and is thus subject to variable legal and regulatory requirements. Because ultimate liability for influencer misconduct may lie with brands, brands should err on the safe side by contracting with influencers, requiring that they clearly identify their content as advertising in specifically prescribed

ways, and ensuring that their influencers obtain permission to use third-party intellectual property. By imposing these conditions on their relationships with influencers, and monitoring to ensure compliance, brands can enjoy the benefits that influencer advertising while reducing the risk of being blindsided by fines or penalties for violating laws or rules in another country.

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² <https://www.forbes.com/sites/johnkoetsier/2020/06/12/covid-19-accelerated-e-commerce-growth-4-to-6-years/?sh=48747cc9600f>.

³ <https://www.wired.com/story/inside-the-industry-social-media-influence/>.

⁴ <https://www.roschier.com/newsroom/influencer-marketing-in-social-media-recent-swedish-case-law-offers->

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⁵ <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04372.html>.

⁶ https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf.

⁷ <https://www.ftc.gov/tips-advice/business-center/guidance/disclosures-101-social-media-influencers>.

⁸ *Id.*

⁹ *Id.*

¹⁰ <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking#socialmediacontests>.

¹¹ https://www.legislation.gov.uk/ukxi/2008/1277/pdfs/ukxi_20081277_en.pdf.

¹² <https://www.asa.org.uk/advice-online/remit-country-of-origin.html>

¹³ <https://www.inta.org/wp-content/uploads/public-files/advocacy/committee-reports/Recent-Developments-in-Influencer-Marketing-and-Unfair-Competition.pdf>

¹⁴ <https://www.theguardian.com/technology/2020/oct/16/instagram-to-crack-down-on-hidden-advertising-in-uk>

¹⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006L0114>.

¹⁶ https://ec.europa.eu/info/law/law-making-process/applying-eu-law_en.

¹⁷ <https://www.mondaq.com/germany/social-media/888160/influencer-marketing-labelling-requirements-in-germany>

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¹⁹ [https://www.agcm.it/dotcmsCustom/tc/2024/6/getDominoAttach?urlStr=192.168.14.10:8080/C12560D000291394/0/E6B624BBD0F6A573C12584150049D1EE/\\$File/p27787_all.pdf](https://www.agcm.it/dotcmsCustom/tc/2024/6/getDominoAttach?urlStr=192.168.14.10:8080/C12560D000291394/0/E6B624BBD0F6A573C12584150049D1EE/$File/p27787_all.pdf)

²⁰ <https://www.mondaq.com/italy/advertising-marketing-branding/936990/the-italian-competition-authority-closes-first-case-on-micro-influencer-marketing-hidden-advertising#:~:text=On%20February%2025%2C%202020%2C%20the,unrecognizable%20advertising%20on%20social%20media>.

²¹ <https://wipo.lex.wipo.int/en/text/374499>

²² *Id.*

²³ Article 7 of Interim Measures for Administration of Internet Advertising

²⁴ <https://www.mondaq.com/china/advertising-marketing-branding/538378/risky-business--liability-for-false-or-misleading-advertising-under-prc-law>

²⁵ [http://en.fas.gov.ru/upload/documents/Federal%20Law%20No.%2038-FZ%20On%20Advertising%20\(as%20amended%20in%202014\).pdf](http://en.fas.gov.ru/upload/documents/Federal%20Law%20No.%2038-FZ%20On%20Advertising%20(as%20amended%20in%202014).pdf).

²⁶ *Id.*

²⁷ *Id.*

²⁸ <https://www.mondaq.com/russianfederation/social-media/829508/influencer-marketing-in-russia-legal-traps-and-pitfalls>

²⁹ Kathleen S. Morris, Expanding Local Enforcement of State and Federal Consumer Protection Laws, 40 Fordham Urb. L.J. 1903, 1910–11 n.36–37 (2013)

³⁰ <https://www.acc.com/sites/default/files/resources/upload/Kilpatrick-Navigating-US-Legal-Issues-Advert.-Campaign.pdf>

³¹ Morris, *supra* n.30, Appendix.

³² <https://www.ftc.gov/tips-advice/business-center/guidance/disclosures-101-social-media-influencers>.

³³ https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=3463&context=fac_schol

³⁴ *Id.*