

LEGAL AND PRIVACY

Social influencer arrangements generate lawsuits and legal issues

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It is a truism that as new commercial and business arrangements are introduced and become popular, the law struggles to keep up.

This has been particularly the case with regard to social media, which seems to be evolving at the speed of light. The use of influencers is a popular and growing way to promote brands and products among luxury goods and fashion companies.

Antisocial

On the surface, the process seems simple: a brand contracts with an influencer a celebrity or someone who has a large following on social media to create a particular number of promotional posts or to appear at promotional events.

But two recent lawsuits between promoters and influencers show that the legal parameters of how to structure these arrangements are still being worked out.

Last year, promoter Studio 71 filed suit in Los Angeles Superior Court against YouTube star Bethany Mota.

Studio 71 claimed it had entered into a contract with her to promote a skincare brand across several social media sites and paid her \$325,000 to fly to Hawaii to create a promotional video, which she would post on her site, and also post on other social media. She flew to Hawaii, but Studio 71 alleged that she failed to create or post the video with the Hawaiian footage and failed to make the requisite posts.

In October, a public relations firm, PR Consulting, brought suit in New York Supreme Court against actor and social media star Luka Sabat.

The lawsuit alleged that Mr. Sabat entered into a contract to promote glasses for its client, Snap Inc., which required him, among other things, "to create original content for a minimum of four (4) unique posts: one (1) Instagram Feed Post and three (3) Instagram Story posts."

Mr. Sabat was also required to submit the posts to PR Consulting for review and provide analytics about the posts. He also agreed to be photographed wearing the product as part of the promotion. PR Consulting agreed to pay him a total of \$60,000, including \$45,000 paid on signing the agreement.

But Mr. Sabat failed to deliver: he made only one Instagram Post, failed to submit the posts for review or provide analytics, and failed to be photographed as agreed.

Mr. Sabat filed an answer in which he admitted that he signed such a contract but denied any of the breaches.

So, what can brands and the media firms they hire do to ensure that their attempts to use social media do not go bust and that they do not have to bring suit to protect their interests and possibly collect back paid funds?

Making it pay

The key is to structure the contract and payment schedule in a way to maximize protection.

Here are some things to consider:

- Spell out clearly what the influencer is required to do: how many posts, or appearances and on what social media sites.

Timing and schedules are often a source of contention. The contract should clearly delineate: (1) the duration of the campaign; (2) the deadlines an influencer must meet in creating sponsored content for review; and (3) the dates and times an influencer must share sponsored content.

If the influencer is creating multiple sponsored posts for a brand, marketers should clearly outline the amount of time between posts. Time deadlines should be written in the influencer's time zone or in a specified time zone (for example, Eastern Standard Time).

- Spell out clearly what the deliverables are. This should include not only the general content, but also the format. Is the deliverable an oral statement, a YouTube video, Instagram posts, or some combination? Then spell it out clearly.
- Structure the payments so that each separate act has its own payment. If the influencer has to make four posts, then the payments should be split into four, and earned as each post is made.
- If a cumulative effect is important, perhaps the payment structure should reflect that. To use the same example, if there are four posts contracted for, perhaps each post would earn 15 percent of the fee, with the remaining 55 percent paid when the last post is completed.
- If review or approval of posts or videos is required, then make that explicit in the contract, and condition the payment on the approval process. In other words, if approval is important, then make sure that no fee is due for an unapproved post.
- Do not pre-pay. The influencer should earn his or her fee first. If that is not agreeable, then the fee could be kept in escrow pending satisfactory completion of the project.
- Specify who owns or can use the content. Brands and promoters often wish to re-use content. But, usually, content created by influencers will be owned by them, including the copyright. Either provide that the content will be assigned to the brand/promoter or provide for a perpetual license. You may wish to do a license back to the influencer if he or she wishes to use it for their own promotions.
- Exclusivity or non-compete. The brand may not wish the influencer to promote other competing products, as that can dilute the effect of the promotion. If so, that should be provided for in some fashion. But this has to be reasonable in scope, otherwise a court may not enforce it. Consider limiting the exclusivity either by product lines and/or by time.
- Use an arbitration clause. Litigation is expensive. Arbitration, especially with agreed-upon expedited procedures, can be both less costly and time-consuming.

Terms of endearment

All contracts are ultimately a matter of bargaining power.

An influencer who is very much in demand might not agree to some of the above terms. But brands and social media promoters should try to structure the arrangement in the most favorable way to protect their interests.

Finally, promoters should require the influencer to disclose that he or she is being paid to promote the brand.

In 2017, the Federal Trade Commission issued a series of enforcement letters to Instagram influencers, noting that FTC regulations require them to disclose if their promotion had a "material connection" to the brand usually meaning that they are being paid to promote or endorse it.

The FTC has [online guidelines about product endorsements](#) as well as an [FAQ page with specific questions about social media endorsements](#).

The gist of the guidelines is that there has to be clear and conspicuous disclosure of the fact that the influencer is being paid to endorse the product.

Failure to follow these guidelines can lead to liability for both promoters and influencers.

The FTC recently announced settlements in suits it brought against promoters of products that used influencers and endorser advertising without following the guidelines.

Promoters and brands thus must require compliance with the FTC regulations to avoid any liability from a violation, not to mention the bad press from the FTC cracking down on the influencer.

USE OF INFLUENCERS can be a powerful tool to promote luxury and other fashion brands. But attention to the details of the influencer arrangement and the contract terms at the time of engagement can avoid significant problems and headaches later.

As in many commercial relationships, an ounce of prevention can be worth a pound of cure.

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