

NAVIGATING LEGAL CONSIDERATIONS IN INFLUENCER MARKETING: A GUIDE FOR ATTORNEYS



JIM CHESTER is a partner in the Dallas-based technology law firm Klemchuk PLLC. For the past 25 years, he has advised national and international companies, resolving legal challenges involving corporate matters, intellectual property, technology transactions, e-commerce, and international transactions. He is a Professor of Practice at SMU's Cox School of Business, teaching entrepreneurial law and business law classes to undergraduates and MBA students. He previously taught international trade law and international business law classes at Baylor Law School for 20 years. Among his numerous honors, Jim has been named a Super Lawyer by Law & Politics Magazine for a dozen

consecutive years and listed in the Best Lawyers in Dallas by D Magazine. He has earned an AV Preeminent rating from Martindale Hubbell, as well as a perfect 10.0 rating on Avvo. An involved community member, Jim currently serves on the city council for the City of Heath, Texas. He also is a director on the Texas A&M-Commerce Foundation Board and is a mentor and advisor to the TAMU-Commerce Venture College and SMU's INCubator program.

Jim graduated from the University of Houston Law Center with a Master of Laws in International Economic Law and from South Texas College of Law with a Juris Doctor degree. He graduated from A&M-Commerce with high honors and a double-major in Economics and Political Science. He can be reached at jim.chester@klemchuk.com.

For many years, the most valuable form of consumer advertising involved television commercials. Many television ads featured people extolling the virtues of various products and services, and these endorsements typically came from the ranks of athletes and celebrities who had gained fame through their success in sports, modeling, or entertainment.

However, an increasing number of consumers no longer watch traditional television, opting instead for commercial-free streaming services like Netflix, YouTubeTV, and Hulu. This shift has forced makers of consumer products to find new ways to reach potential consumers.

Fortunately for makers of consumer products and their advertising firms, the downturn in television viewership coincided with the rise of social media platforms like Facebook, YouTube, Instagram, and TikTok. These platforms generated a new type of product spokesperson: content creators (commonly referred to as influencers).

Most content creators are not anointed by a cabal of advertisers nor selected for their prowess at

throwing a baseball or making action films. Instead, most start their own social media channels and produce content for a small number of followers. No special sports talent or studio backing is required. All one needs is a camera and microphone, a creative hook, and commitment to post regularly. A little luck never hurts, of course. Over time, they grow a grassroots following and eventually gain the attention of advertisers who provide free products and direct compensation to content creators willing to share their endorsements and reviews via their own platforms.

So-called "influencer marketing" has become immensely lucrative. According to some estimates, the global influencer market was less than \$2 billion in 2016 but has exploded to more than \$21 billion as of 2023.¹ The rise of the global influencer market affords opportunities for individuals seeking to become influencers and content creators with very little startup costs. However, because content creators often do not have legal guidance, their assets and interests are vulnerable to attack and theft, and they could also face costly legal actions from others or from the government.

Of course, most do not become rich from their content creation venture. While only a small percentage of content creators earn over \$1 million, nearly a quarter make \$50,000 or more a year.² Of those, about half are full time content creators, while the rest use social media platforms as a “side-hustle” or financially friendly hobby.

This article is tailored to attorneys who provide counsel to content creators and/or those clients engaging with content creators and influencers, offering a comprehensive exploration of legal considerations in this dynamic industry.

WAYS THAT BRANDS AND CONTENT CREATORS WORK TOGETHER

Before an attorney can advise a content creator or brand, they must first understand the risks involved. Key to understanding these risks is an appreciation of the various ways brands can partner with content creators. Here are some of the ways content creators earn money from their content, and how they partner with brands:

Brand Ambassadors

One way that influencers earn money is by serving as brand ambassadors, based on their experience with a certain brand. Sponsored postings are comparable to brand ambassadorships, but there are a few differences.

For example, sponsored articles are often one-time events, whereas brand ambassadorships are frequently long-term commitments. An influencer might, for example, sign a six- to 12-month ambassador arrangement with a brand.

When an influencer is a brand ambassador, they do more than just promote the brand on social media. They frequently appear as a model or spokesperson for the product on the brand’s social media channels or website.

Affiliate Marketing

When influencers share a link to purchase a product, they receive a part of the transaction if a follower buys something through that link. As a result, affiliate marketing has become one of the most popular methods for influencers to earn money.

In their daily social media posts, fashion influencers, for example, are likely to offer links to the clothing they are wearing. Their fans buy the products, generating a cash stream for the influencer. The affiliate commission may be as low as a few percent, depending on the item. However, the money can quickly pile up for influencers with many followers.

Advertising Websites

Bloggers have been using advertising on their websites to monetize traffic for a long time. Bloggers may earn money only when a visitor clicks on an ad or whenever it appears on the screen, depending on the type of ad. Sidebar and in-content advertising can be incredibly profitable for bloggers with substantial traffic to their websites.

Digital Products and E-Courses

Many influencers sell digital items to educate their followers on a specific topic. A travel blogger, for example, might build an entire course on how to travel on a budget. A fashion influencer might write an eBook about putting together a capsule wardrobe. Selling online courses may bring in thousands of dollars every month for some people.

Donations, Tipping, and Subscriptions

Tipping and contributions are other methods influencers use to get money. Some influencers, for example, offer a page on their websites where followers can donate money to the influencer. Likewise, some feature a link where followers can purchase a cup of coffee from them. Using services like Patreon as a kind of tipping is another option. It works based on a membership model, in which followers can sign up to donate a set amount of money to an influencer each month. The influencer may

create content only available to Patreon backers in other circumstances.

Reselling of Clothing

It's becoming more typical for fashion influencers to generate money by reselling the items they promote. In addition, these influencers frequently purchase significantly more clothing than they require, primarily to show their fans a range of outfits. Then, many people sell their lightly used products on a separate Instagram page or Poshmark.

Sales from Live Events

Live events, whether in-person or online, provide another opportunity for influencers to generate income. A travel influencer, for example, could make money by booking a vacation for a limited group of followers. On the other hand, a fashion influencer might make money by conducting a live closet sale where fans can buy worn goods that they've showcased on their social media platforms.

Product Lines Created Particularly for Influencers

Influencers can also generate money by creating product lines. Some influencers start from the ground up with their own product lines. Other influencers leverage their following to form partnerships with businesses, launching beauty lines, clothing lines, and other products.

Each of the foregoing income streams creates its own type of legal issues that must be addressed by content creators.

LEGAL CHALLENGES FOR CONTENT CREATORS

Unlike prior generations of ad spokesmodels, sports stars, and other celebrities, today's content creators typically don't have teams of lawyers, managers, and agents protecting their interests. As such, they often do not have legal guidance and can fall prey to pitfalls and costly legal issues.

Whether a content creator makes \$500 a year or \$10 million, they must protect their legal rights, respect

the rights of others, and comply with state and federal advertising laws.

Intellectual Property

Intellectual property (IP) refers to range of creative properties that content creators own, including the content they post and upload, as well as their own name, image, and likeness (NIL). These rights, which typically fall under either copyright or trademark law, must be identified, secured, and then enforced. Unfortunately, many content creators do not fully appreciate or understand their IP rights. In addition, content creators must respect the IP rights of others, or risk legal action and social media bans for infringement.

Legal Entities

Once content creators begin to monetize their content, it often makes sense for them to form a legal entity. These entities, like limited liability companies (LLCs) and corporations can provide a number of benefits, including limited liability protecting their personal assets from claims related to the business. Choosing an entity requires consideration of a number of factors, such as tax implications and management flexibility, and should involve discussions with legal counsel as well as tax planning.

Contracts

Like any business, contracts drive the relationships between content creators and their various clients, vendors, affiliates, and advertisers. Contracts of principal importance for content creators include endorsement contracts and the terms of use for the platforms where their content appears.

Endorsement or brand ambassador relationships are important sources of income for many content creators, and these relationships are governed by contracts. These agreements outline what services the content creator is expected to provide, as well as what type of compensation they will receive. Aside from the definition of services and compensation, key terms in these agreements often involve IP and NIL rights and termination provisions.

All users of social media platforms must comply with the terms of use for those platforms, and those terms are contractual obligations which govern a wide range of behavior on and with the sites. Otherwise, they risk censure or even removal from the platform. For content creators, having an account suspended or demonetized can effectively close their business.

Regulations and Disclaimers

In addition, content creators must comply with state and federal advertising laws, including Federal Trade Commission (FTC) regulations and guidelines against false and deceptive advertising.

If a content creator agrees to serve as a brand ambassador or otherwise endorse a product through social media, their endorsement message should make it obvious when they have a relationship (i.e., a “material connection”) with the brand. A material connection to the brand includes a personal, family, employment, or financial relationship to the brand, such as the brand paying the content creator or giving them free or discounted products or services.

Financial relationships aren’t limited to money and can include anything of value to mention a product. For example, if a brand gives a content creator who mentions one of its products free or discounted products or other perks, they must make a disclosure.

Telling followers about these kinds of relationships is important because it helps keep recommendations honest and truthful, and it allows people to weigh the value of content creator endorsements.

It is the responsibility of the content creator to make these disclosures, to be familiar with the FTC’s Endorsement Guides, and to comply with laws against deceptive ads. A content creator cannot offload this responsibility to the advertiser or manufacturer who compensates them to promote their products.

According to the FTC’s publication, *Disclosures 101 for Social Media Influencers*, it is important to make

disclosures even if the content creator believes their evaluations are unbiased.³ Content creators should not assume their followers already know about their brand relationships, and they should keep in mind that tags, likes, pins, and similar ways of showing they like a brand or product are also considered endorsements. Of course, if content creators have no brand relationship and are simply sharing information about a product they bought and happen to like, they don’t need to affirmatively declare the absence of a brand relationship.

In making a disclosure, content creators must ensure people will see and understand the disclosure. The disclosure should be hard to miss and preferably placed with the endorsement message itself. Disclosures are likely to be missed if they appear only on an “About Me” or profile page, at the end of posts or videos, or anywhere that requires a person to click on a link or look elsewhere for the information.

A content creator should not mix disclosures into a group of hashtags or links. If an endorsement is in a picture on a platform like Snapchat and Instagram Stories, creators should superimpose the disclosure over the picture and make sure viewers have enough time to notice and read it.

If making an endorsement in a video, the disclosure should be in the video and not just in the description uploaded with the video. Viewers are more likely to notice disclosures made in both audio and video. Some viewers may watch without sound and others may not notice superimposed words. If making an endorsement in a live stream, the disclosure should be repeated periodically so viewers who only see part of the stream will get the disclosure.

In making disclosures, use simple and clear language. Simple explanations like: “Thanks to [brand] for the free product” can be sufficient, as are terms like “advertisement,” “ad,” and “sponsored.” On a space-limited platform like Twitter, the terms “[brand] Partner” or “[brand] Ambassador” are also options. It may also be advisable to include a hashtag with the disclosure, such as “#ad” or “#sponsored.”

Finally, content creators cannot talk about experiences with a product they haven't tried. If a content creator is paid to talk about a product and thought it was terrible, they can't say it is terrific. Additionally, content creators cannot make up claims about a product that would require proof the advertiser doesn't have, such as scientific proof that a product can treat a health condition.

SPECIAL CONSIDERATIONS FOR BUSINESSES ENGAGING INFLUENCERS

Brands wishing to engage influencers to promote their products must be cognizant of the same regulations and concerns discussed above. In addition, when working with content creators, companies must manage any legal risks that the relationship might create for themselves.

As such, when brands engage social media influencers as ambassadors or promoters, they must be aware of several legal issues and include specific contractual provisions to protect their interests.

Here are some of the key contract considerations that brands should address in their agreements with content creators and other influencers:

- **FTC Compliance:** Brands should ensure that their influencers clearly and conspicuously disclose their relationship, and the contract should specifically place the burden for compliance on the influencer.
- **IP Rights:** Brands should clarify who owns the content created by the influencers. Typically, the brand retains ownership, but influencers may have a license to use the content for their own promotional purposes.
- **Content Approval:** Specify that the brand has the right to approve content before it is posted. This ensures that the content aligns with the brand's values and messaging.
- **Exclusivity:** Define any exclusivity arrangements which would prevent influencers from promoting competing products during and after the contract term.
- **Term and Termination:** Establish the duration of the agreement and the conditions under which it can be terminated, including breach of contract or failure to meet performance metrics.
- **Compensation:** Clearly outline the compensation structure, including whether the influencer is paid a flat fee, commission, or receives free products in exchange for promotion.
- **Performance Metrics:** Set specific performance metrics or key performance indicators (KPIs) that the influencer must meet, and the consequences for failing to meet them.
- **Confidentiality:** Include a confidentiality clause to protect sensitive brand information and trade secrets.
- **Indemnification:** Address liability and indemnification, outlining who is responsible for legal consequences if there are issues related to the influencer's content.
- **Dispute Resolution:** Specify the method for resolving disputes, such as through arbitration or mediation.
- **Force Majeure:** Include a force majeure clause to account for unforeseen events or circumstances that may affect the influencer's ability to perform.
- **Rights Upon Termination:** Detail what happens to content, rights, and obligations upon the termination of the agreement.
- **Compliance with Laws:** Ensure that the influencer agrees to comply with all relevant laws and regulations, including copyright, trademark, and advertising standards.
- **Licensing and Endorsement:** Address any licensing or endorsement agreements, as well as any limits on the influencer's ability to endorse other products.
- **Data Privacy:** Ensure compliance with data privacy laws when handling consumer data collected during promotions.

- Geographical Restrictions: If applicable, specify any geographic limitations on the influencer's promotion activities.

These contractual provisions should be drafted with the guidance of legal counsel who specializes in influencer marketing agreements.

CONCLUSION

As noted above, the rise of the global influencer market affords opportunities for individuals seeking to become influencers and content creators with very little startup costs. Content creators and influencers must be aware of legal issues that govern their conduct in order to protect their rights and interests.

In addition, businesses seeking to partner with influencers need to ensure they comply with laws and must also protect their brands and operations from any risks or liabilities related to the relationship.

It is essential that both parties clearly understand their rights and responsibilities to avoid potential legal issues and protect their reputations. As such, brands and influencers should work with experienced legal counsel to draft clear and comprehensive agreements to govern their relationship and protect their respective interests. ▀

Notes

1 Werner Geysler, Creator Earnings: Benchmark Report 2022, Influencer MarketingHub, Aug. 2, 2022, available at <https://influencermarketinghub.com/creator-earnings-benchmark-report/>.

2 Id.

3 Fed. Trade Comm'n, Disclosures 101 for Social Media Influencers, available at https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf.