

## Recent Developments in Influencer Marketing and Unfair Competition

### Introduction

With the proliferation of social media channels has come more and more ways for advertisers to interact with consumers. In fact, many companies are focusing more on social media marketing strategies, as opposed to traditional advertising methods such as print publications and radio and television broadcasts. One increasingly popular social media marketing strategy is the use of social media influencers. There are varying definitions of an “influencer,” and the term is so widespread that it now appears in *Merriam-Webster’s Dictionary*. The term generally refers to someone who is able to generate awareness and/or shift perception of something potentially resulting in consideration, intent, and/or a conversion behavior. In social media, an influencer’s degree of influence is measured by indicators which differ from platform to platform, but include such things as followers, subscribers, views and likes. An influencer can have anywhere from hundreds to millions of such indicators. This article covers various countries in different regions where recent developments have been publicized. In many countries, there are only the nascent beginnings of the development of a legal frame work for how to address issues of unfair competition with regard to the activities of influencer marketing. In those cases, we presented the most relevant information readily available. The article is not intended as an exhaustive presentation of all relevant legal developments but rather to act as a spring board for further monitoring of this up and coming area.

### Canada

Influencer marketing is regulated in Canada through the application of existing unfair competition laws under the Competition Act and through the Canadian Code of Advertising Standards.

The Competition Act. Canada’s Competition Act contains criminal and civil prohibitions against making false or misleading representations in order to promote the sale of a product or other business interest. Criminal offences are punishable by up to fourteen (14) years of imprisonment and potentially hefty fines. Although the Act does not mention influencer marketing by name, the Competition Bureau — a federal law enforcement agency — issued a bulletin in 2018 addressing influencer marketing. In this bulletin, the Bureau adopted the following positions:

- General applicability of the Act. The Bureau’s position is that the Act’s prohibitions against misleading advertising and deceptive marketing practices “apply to influencer marketing just as they do to any other form of marketing.”
- Disclosure of relationships. To avoid offending the Act, the Bureau cautions that influencers must disclose any “material connections” they have with the advertisers that engage them. The Bureau considers a “material connection” to be any relationship that “has the potential to affect how consumers evaluate the influencer’s independence” (e.g., discounts, free merchandise provided to the influencer). In one instance (not referenced in the Bureau’s 2018

bulletin), the Bureau conducted an inquiry into whether an advertiser had encouraged its own employees to try its new app, and to give the app a favorable rating online if they liked it. The Bureau's position was that the employees should have disclosed their relationship with the advertiser when placing their reviews, but did not do so. The Bureau and the advertiser resolved the matter by entering into a consent agreement, which described the advertiser as having updated its social media guidelines, and as having shown leadership in resolving the matter proactively with the Bureau. The advertiser did not admit to the Bureau's conclusions, but agreed (among other things) to pay an administrative monetary penalty of CAD \$1.25 million

- Claims must be genuine. The Bureau also warns that the opinions influencers express about products must be “genuine and based on actual experience.”
- The Act applies to advertisers, too. The Bureau warns that an advertiser does not shield itself from the Act merely by making representations through an influencer, instead of directly to the consumer. In the Bureau's view, the Act still applies to the advertiser, despite the degree of separation from the consumer that influencer marketing creates. In other words, an advertiser may attract liability under the Act for the statements that it causes or permits an influencer to make.

The Bureau's bulletin contains a checklist for use by influencers, and a second checklist for use by advertisers. The bulletin can be found online here: [competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04372.html](https://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04372.html).

The Canadian Code of Advertising Standards. The second way in which influencer marketing is expressly regulated in Canada is through the Canadian Code of Advertising Standards. Strictly speaking, the Code is not law, but rather a set of rules that the Canadian advertising industry uses for self-regulation. The Code is administered by an industry organization called Ad Standards, which is responsible for receiving complaints from the public and forwarding them to an independent Standards Council for determination. An upheld complaint may result in the advertiser being asked to take the offending advertisement down. Should the advertiser refuse, Ad Standards may take remedial action, including reporting the ad to the Competition Bureau for scrutiny.

The Code and its Interpretation Guidelines specifically address influencer marketing, stating that influencers must “clearly and prominently” disclose “material connections”, which are defined as any connection between the advertiser and influencer that “may affect the weight or credibility” of the influencer's representation. Ad Standards recently released detailed Disclosure Guidelines for influencer marketing, which can be found here: [adstandards.ca/wp-content/uploads/2019/02/Influencer-Marketing-Steering-Committee-Disclosure-Guidelines-Jan-2019.pdf](https://adstandards.ca/wp-content/uploads/2019/02/Influencer-Marketing-Steering-Committee-Disclosure-Guidelines-Jan-2019.pdf). The Disclosure Guidelines build upon the Code by providing detailed, medium-specific “best practices,” such as:

- Conspicuous disclosure. The disclosure of material connections should be “clear and conspicuous”. This includes using easily understood hashtags, such as “#ad” and “#sponsored,” rather than “#partner” or “#brand.” Influencers should lead with the disclosure — e.g., in videos, the disclosure should appear at the beginning rather than at the end.
- No blanket disclosures. The Disclosure Guidelines state that “blanket disclosures”, such as a one-time disclosure made in the influencer's social media account profile or bio, “fall below

the recommended standards.” Instead, “each individually sponsored post” should be connected to a specific brand, and the “nature of the material connection” disclosed.

To date, there has already been at least one consumer complaint to Ad Standards concerning an influencer. It arose from an Instagram post where the influencer reviewed a cosmetics product without disclosing that her review had been sponsored. The Standards Council considered this to be “disguised advertising,” in contravention of the Code. The post was corrected through the addition of the hashtag “#ad.”

## **European Union**

Influencer marketing is very popular in Europe, with brands spending more and more money on influencer campaigns. Given this accelerated trend, Europe has emerged as one of the strictest markets when it comes to the regulation of influencer marketing. Facebook and Youtube remain top of the list as the most popular social platforms that attract influencer marketing, with Instagram, Twitter and Snapchat following closely behind.

The e-Commerce Directive establishes harmonized rules across the EU on issues such as transparency and information requirements for online service providers, commercial communications, and electronic contracts and limitations of liability of intermediary service providers.

The Directive sets out basic requirements on mandatory consumer information, including rules on commercial communications (e.g. online advertisement and unsolicited commercial communications). The Directive also enhances administrative cooperation between the Member States and the role of self-regulation, to be implemented through national law.

In terms of influencer marketing, the Directive focusses on online service providers and the liability of the social network / platform on which the influencer marketing communication is published. However, there is no unified law across the EU in terms of the applicable law, regulation and overall approach to influencer marketing from the perspective of the “influencer” and “brand.”

There are several common threads, with the law in each EU country stating that all advertising and marketing communications must be transparent, clearly labelled in accordance with specific guidance, and that sanctions for non-compliance can be brought against both the influencer and the brand. However, in order to understand the nuances as to the regulatory framework, who is accountable, when and how posts should be labelled and what are the potential sanctions, it is necessary to visit separately the position of a few of the key European countries.

## **United Kingdom**

The regulation of influencer marketing is dealt with by the Advertising Standards Authority (ASA) and the Competition and Markets Authority (CMA), depending on the degree of control that the brand has over the content. The ASA is the UK's advertising regulator and makes sure that advertisements across the UK media stick to the advertising rules (the Ad Codes). The Committee of Advertising Practice (CAP), whose members represent advertisers, media owners and agencies, is responsible for writing the Ad Codes. CMA is the UK's primary competition and consumer authority with the responsibility for carrying out investigations and enforcing competition and consumer law.

Content should be clearly identifiable as an advertisement or a marketing communication as set out in the Consumer Protection from Unfair Trading Regulations 2008 (CPRs). The requirements of the CPRs are reflected in the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing, which is enforced by the ASA.

The key message from ASA and CMA to the influencer is not to be misleading by giving the impression that (1) the influencer is just a consumer when actually they are acting for their own business purposes or on behalf of a brand or other business; (2) the influencer bought something that was in fact given to them as a gift or on loan; and (3) the influencer used the service or product, when they didn't.

Wherever there is a payment (financial or free / discounted products) or any other reciprocal arrangement between an influencer and a brand, that commercial relationship must be made clear and clearly labelled or identifiable as paid-for content. Labels or identifiers should be placed in a prominent position where readers will see them before they choose to engage with the content. Different labels may be required depending on the extent of editorial control that the brand has over the content.

The correct label to use will depend on the extent of editorial control that a brand has over the content, which in turn will dictate whether content can be regarded as a marketing communication or not. If the influencer does not have editorial control of the content, CMA recommends that labels such as "ad", "advertisement feature" or "advertisement promotion" are used, including #ad and #advert. Where the brand or provider of a product retains some editorial control over the content then the content is likely to be considered a marketing communication. In addition, influencers can also use visual and contextual identifiers (such as brand logos) to call out their commercial relationship with the relevant brand, as well as tagging the brand's handle in any social media posts, as well as the use of the 'Paid Partnership' tool on Instagram in addition to hashtags, which is deemed acceptable.

The following provides some guidance as to what is deemed insufficient and likely to render the influencer and / or brand at risk: (1) tagging a brand or business in either the text, picture and/or video of a post without additional disclosure; (2) tagging a gift from a brand in either the text, picture and/or video of a post without additional disclosure; (3) using discount codes in a post without additional disclosure; (3) using ambiguous language without additional disclosure in a post (for example 'thank you'; 'made possible by'; 'in collaboration with'; or 'thanks to...'); (4) unclear use of hashtags, for example using #sp; #spon; #client; #collab; etc, or adding #ad directly after the name of the brand or business (for example #[BRANDNAME]ad), or when the disclosure (for example #ad, #advert) is not prominent because it is hidden at the end of or among other text and/or hashtags; (5) product placement where there is an associated (and undisclosed) payment or other incentive; and / or (6) disclosing the commercial affiliation only on an influencer's front, home or profile page.

The influencer and the brand can each be held accountable for breaching influencer marketing rules in the UK, as it is deemed a shared responsibility to ensure that content is clearly labelled and any commercial relationship that exists between the parties is made clear to consumers. The regulators have all made clear that it is the responsibility of influencers, their agents, and brands to keep up-to-date with relevant consumer protection law as well as any guidance from the ASA about complying with its Advertising Code. To aid compliance, CMA has published a compliance summary for influencers to ensure that they are aware of consumer protection law, which is also relevant to brands, marketing agents, intermediaries and all involved in the supply

chain. CMA has also published a quick guide for social media influencers, marketing companies, agents and brands to ensure they are aware of their obligations under consumer protection law, which is in addition to the joint guidance issued with CAP (“An Influencer’s Guide to making clear that ads are ads”) published in September 2018 which explains how to comply with consumer protection law and the Advertising Codes enforced by the ASA. CMA has also published guidance for traders on how to comply with the CPRs.

The ASA and CMA work closely together and the CPRs criminalise misleading advertising and prohibit unfair commercial practices, including "misleading omissions" and failing to make paid-for content clearly identifiable. Breaches in respect of marketing communications can lead to criminal prosecutions, unlimited fines and in very serious cases terms of imprisonment of up to 2 years. CMA is also now considering the role that platforms may play. The ASA will often deal with breaches in the first instance upon receiving a complaint from a member of the public or a competitor. If the ASA does investigate then it is possible that the influencer and the brand can be named as a party against which a "complaint upheld" finding is reached. Such rulings are published online and, as such, the parties involved may face negative PR. Serial offenders may be required to pre-clear all advertising with the ASA.

In 2018, CMA launched a consumer enforcement investigation into concerns that social media stars (bloggers, vloggers, celebrities) may not be declaring when they had been paid, or rewarded, to endorse goods or services. CMA’s investigation considered the extent to which celebrities and influencers were clearly and accurately identifying any commercial relationships with brands featured in their posts, and whether people may be being misled. As part of its investigation, CMA wrote to a range of celebrities and social media influencers to gather more information about their posts and the nature of the business agreements they had in place with brands. CMA also sought information from the public and in particular from people who bought products which were endorsed on social media. In January 2019, as a result of the investigation, 16 influencers (including singers Ellie Goulding and Rita Ora, and models Alexa Chung and Rosie Huntington-Whiteley) were forced to provide undertakings to improve disclosures in their social media posts to make it clear when they have been paid or otherwise incentivised to endorse a product or service.

## Germany

The legal requirements are constantly in development in Germany, however latest case law shows that many courts remain strict. Even posts where the products were self-purchased with no remuneration paid to the influencer have been deemed commercial and banned as “covert advertising”. In accordance with the "principle of separation", commercial and editorial content of a so-called post must be separated. If content qualifies as advertising it must be labelled as such in order not to be considered "covert advertising".

Again, both the brand and the influencer can be held accountable for covert advertising; the individual under German Unfair Competition law (UWG), the Telemedia Act (TMG) and the Broadcasting Treaty (RStV), and the brand under principles of Unfair Competition law for being vicariously liable for "interference liability".

Whilst most cases to date have involved claims against the influencer directly, brands should be aware of the risks involved. This applies not only for the labelling obligations, but also in relation to misleading claims. The more highly-regulated the market (e.g. food, cosmetics or medical devices), the more essential it is to have a sufficient labelling. For example, an injunction was

granted against an influencer's post showing a bottle and labelled with the hashtag "#detox". The court deemed this as a health related claim and ruled it as misleading by attributing effects or properties to the depicted food which it did not possess.

Where compensation for the post has an "economic impact", the content must be labelled accordingly. Again, compensation is not only payment, but also free / discounted products. It is recommended to label social media posts with clear German terms "Werbung" or "Anzeige" (advertisement) at the beginning of the post. It remains unclear whether equivalent English terms such as "advertisement," "sponsored" or "ad" would be considered sufficient by German Courts.

Sanctions against the brand include orders to cease-and-desist and to remove infringing posts, usually with provision for penalties for further violation. Influencers can also be held liable for damages as well as subjected to orders to cease and desist and to remove inadequately labelled posts. Consumer protection organizations or competitors can also send warning letters demanding cease and desist undertakings and initiate injunction proceedings. Brands also risk reputational damage once it is revealed that it has encouraged covert advertising amounting to consumer deception.

## France

The identification between editorial content and commercial content is again a feature under the French digital economy law, and in particular the principle of "identification of the advertising". Non-identification by the influencer of such content risks being categorized as a deceptive commercial practice under French Consumer Law, as to which the influencer can be liable with the brand often held jointly accountable.

Since 2016, France has moved away from whether or not the influencer received financial compensation as being the sole determining factor in terms of content constituting advertising. Three cumulative criteria now determine whether the influencer has to label its content as advertising (1) there is an element of editorial control from the brand over the content; (2) there is some form of promotional message by the influencer in the content; and (3) compensation has been given to the influencer in relation to the content (either as payment or a free product). In any event, the influencer is still obliged to inform the public as to the existence of any commercial relationship with the brand.

Advertising content must be identified as such at the very beginning of the post or video, with French law dictating that this must be in French. Recommended practice is to use appropriate French words such as "publicité," "sponsorisé par" or "en partenariat avec." As for commercial content, whilst this must also be made clear, it can be made during the post or video itself and through text accompanying the video or via a mention from the influencer.

Influencers as well as brands can be ordered to cease and desist and to remove infringing posts. Individuals can face imprisonment for up to 2 years and a fine of up to €300,000, and brands a fine of up to €1.5m. Both parties risk being forbidden to carry on a trade or business activity for up to 5 years. The court can also require companies to publish several rectified announcements.

## Italy

Legislation and self-regulation dictates the law in terms of influencer marketing in Italy. The key provisions are under the Italian Consumer Code, where all advertising and marketing communications must be transparent so as to allow the average consumer to make a conscious decision before making any purchase, therefore avoiding the illegal practice of "covert advertising", and the Italian Civil Code, where there is a risk falling foul of the unfair competition rules. The non-profit organisation Istituto dell'Autodisciplina Pubblicitaria (IAP) are the authoritative source for best practice in marketing and advertising in Italy, and recognised by the Italian Supreme Court. IAP's code of conduct states that where the commercial purpose of an influencer's opinion or comment cannot be clearly recognisable as such, then this is to be disclosed through "adequate means", as to which IAP's digital chart provides guidance.

If any influencer receives compensation or free / discounted products for their post, the content must be labelled accordingly. The type of label required depends on the form of compensation received. The Italian Competition Authority and IAP (through its digital chart) have identified general rules of conduct including the use of hashtags such as #sponsored #advertising #paidad, or in the case of products given for free to the influencer #productsuppliedby[brand name]. IAP has gone further to state that the possible advertising nature of the influencer's content should be clearly identified by including warnings at the initial part of the post such as "pubblicita", "promosso da [brand name]", "sponsorizzato da [brand name]" or "in collaborazione con [brand name]", and in the case of free / discounted products using "prodotto inviato da [brand name]" in the post. These warnings must be stated within the first three hashtags.

Again, both the brand owner and the influencer can be held accountable if the communication fails to adequately disclose to consumers the commercial purpose of the influencer's post or other non-editorial material. As well as cease and desist, the Italian Competition Authority can apply fines ranging from €5,000 to €5,000,000 and can publish its decision. Where the misleading conduct constitutes a violation of the unfair competition provisions of the Civil Code, the competent national court could also establish the infringer's liability for the damages suffered by competitors.

## Netherlands

Influencer marketing is dealt with under the Dutch Civil Code, and in particular the Dutch Advertising Code on Social Media, which states that all influencer marketing must be clearly labelled as an advertisement to avoid being misleading and in breach of the rules.

If compensation is received by an influencer for their posts, either the brand or the influencer can be held accountable for failing to inform consumers of the sponsored nature of the content. Again, compensation can be payment or free / discounted products.

Depending on the nature of the post, the influencer may include a statement notifying consumers the post is sponsored at the beginning of its blog / vlog and / or apply hashtags to the post, such as #spon #paid #sample #adv #prom.

Most complaints regarding influencer marketing are handled by the Dutch Advertising Code Committee, which is a self-regulatory body. Although not legally binding, the cases are respected by advertisers. The Dutch Authority for Consumers & Markets may also enforce laws regarding unfair trade practices and misleading advertisements, by imposing fines (up to a maximum of €450,000) and requesting deletion of the content. In most cases, they are more likely to issue a warning first prior to imposing a penalty.

## Spain

Influencer marketing is dealt with under a raft of Spanish law where either the brand or influencer could potentially be liable as follows: Unfair Competition Act (as against competitors and consumers), General Advertising Act (which scrutinises the lawfulness of the advertising and the minimum legal requirements to each advertising/sponsorship contract), Spanish Consumer laws (which require that all marketing content is seen as such by consumers so they are not deceived or misled into modifying their economic behaviour), and intellectual property laws i.e. Copyright Act and Trade Marks Act (which govern any unlawful use of articles, designs or brands). Civil actions can be taken against any person ordering/carrying out/cooperating with any infringement under these laws.

Liability for the content lies with the party with editorial control, which ordinarily is the influencer but can also be the brand where they have introduced restrictions or compulsory content. Additionally, subject to Spanish e-commerce laws, social media platforms have been considered comparable to email for sending marketing communication and can be held accountable.

If the promotion of products or services can be considered as marketing content it should be labelled accordingly, with captions such as "pubil" or "anuncio". Incorrect or absent labelling may lead to a finding that the advertisement is unfair to consumers for being misleading.

Both administrative sanctions and civil actions may be initiated against influencers, brands and / or the social media involved in the influencer marketing campaign. Fines are up to €601,012,10 or 5 times the value of the product. Influencers are less likely to be fined than brands, as the latter is deemed to be the beneficiary from the commercial arrangement and the marketing, but this will depend on the circumstances. Again, there is the general use of cease and desist and take-down orders.

In conclusion, the legal risks to brands and influencers across the EU can be considerably reduced by following a few basic rules: brand owners should enter into written agreements with influencers at all times, the influencer's post should be labelled with appropriate disclosure terms (depending on the country) and in a way that is visible at first sight, and both the brand and influencer should work together in respect of guidelines and examples of terms and claims that may or may not be used. We await further guidance from the regulators as to the position in respect of action against social media platforms when it comes to their role in influencer marketing.

## Russia

Russia has enjoyed the rise of social media platforms, including YouTube, Instagram, Facebook, as well as others. There are numerous influencers in Russia whose earnings are immediately connected with their role in social media. Despite the fact that some influencers have managed to diversify their activities and create offline business, the main income of majority of Russian influencers lies in Internet advertising, including, without limitation, integration and collaboration with brands and participation in promotional campaigns. The rise of influencer marketing has several legal implications including, in particular, consequences relating to influencer taxation, information obligations of influencers (e.g., verifying information and respect privacy), and antitrust and advertising regulations.



## Information Obligations of Influencers

In 2014, Russian legislators passed a federal law to regulate influencer's activities. The law applied to owners of websites and/or a single web page on which generally accessible information is placed and access to which exceeds 3,000 visitors per.

Under the law, influencers were prohibited from allowing their websites to be used for the purpose of committing criminal acts, disclosing state classified information classified or information otherwise specifically protected as secret, disseminating the materials containing public appeals for carrying out terrorist activities or publicly justifying terrorism, other extremist materials, pornographic materials, materials promoting violence and cruelty and the materials containing obscene language.

Additionally, influencers must verify the reliability of information before it is made publicly available and must immediately take down unreliable information and where prohibited from disseminating information about the private lives of citizens. The law also placed numerous other restrictions on influencers.

Because the obligations were too burdensome for influencers to effectively comply, the law was repealed in 2017.

## Antitrust and Advertising Regulations

The Russian federal law "On Advertising" considers that there are several persons in the process of advertising who must comply with advertising regulations. These include the advertiser (an entity purchasing the advertisement), the producer of the advertisement and the distributor of the advertisement. Influencers may, in some cases, be a producer and/or distributor of advertising and thus their advertising activities fall under the scrutiny of the Russian advertising regulations. These regulations require that advertising must be fair and truthful. An advertisement is deemed unfair if:

- 1) it contains incorrect comparisons of goods;
- 2) denigrates the honor, dignity or business reputation of a person, including a competitor;
- 3) by the given method, time or place of advertisement, if it is a guise for an advertisement of other goods or services;
- 4) is an act of unfair competition in accordance with the antitrust legislation.

An advertisement is deemed untruthful if it contains untrue information in a number of statutorily enumerated areas including, without limitation, comparative advertising, the qualities of goods, the price of goods, warranties, testimonials, research and testing, rules for games, competitions and gambling, and the identity of the manufacturer.

Among other things, advertisements may not incite wrongdoing, violence or cruelty, appear to be similar to road signs or otherwise threaten the safety of road, railroad, water, air traffic, disapprove of persons who do not use the goods, or contain pornography. Advertisements must not indicate approval by governmental bodies, display person's smoking or consuming

alcohol, use images of medical or pharmaceutical personnel (with some exceptions), or reference healing properties.

While all of the rules of advertising are generally applicable to Russian influencers, regulations and enforcement practice specific to influencers have yet to be established. However, it is anticipated that such specific regulation is likely in the near future given the immense force of influencer marketing in Russia.

## **South Africa**

South Africa was relatively behind the curve when it comes to influencer marketing compared to the United Kingdom and The United States. Until January 2019, consumers were protected against misleading influencer marketing via the general provisions in the Consumer Protections Act 68 of 2008. Under the Consumer Protection Act any advertisement must be 'fair and reasonable' which also ensure that the advertisement does not contain any misrepresentations (including, arguably, hiding the fact that the social media message is an advertisement and/or that the publisher was being remunerated for the message). Consumers could also make a complaint to the Advertising Standard Authority of South Africa (ASA) which published a non-binding code of conduct which sets out general guidance around advertisements, including that they must be truthful and honest (not misleading). The ASA went in to liquidation in 2018 and from the ashes the Advertising Regulatory Board of South Africa (ARB) was immediately created to ensure self-regulation of advertising in South Africa could continue with the key aim of protecting consumers. The ASA's original code of conduct was generally adopted by the ARB. However, in 2019, the ARB introduced new guidance targeted specifically at dealing with influencer marketing. The ARB's aim is to "provide a clear set of rules around social media marketing to ensure the protection of consumers and the promotion of ethical conduct by brand marketers and their representatives across all social media platforms and activities". Whilst there are no formal penalties for breaching the guidance, the self-regulating nature of the industry and the reputational damage that could be inflicted on the influencer or the underlying brand owner if the guidance is not followed has, generally speaking, resulted in adherence. The guidance (set out at Appendix K of the code of conduct - <http://arb.org.za/assets/appendix-k.pdf>) makes it clear that, the advertisement must:

- Not be deceptive, false or misleading;
- be identifiable as an advertisement (including, whether the influencer has been paid to make it);
- The hashtag #ad or #advertisement or #sponsored after the message is highly recommended; and
- Comply with Clause 10 of Section II of the code of practice which makes it clear that testimonials or endorsements (which, in essence, is what influencer message are) must be genuine and related to the personal experience of the influencer over a reasonable period of time. The influencer must therefore also have full knowledge of the goods/service he/she is advertising;
- The brand owner must give the influencer sufficient information about the goods/services they are endorsing to ensure the influencer has sufficient understanding.

Brand owners should also have written contracts with influencers that, as a minimum, include payment terms & conditions and an obligation on the influencer to only publish their own creative content (or clearly credit unoriginal content). Appendix K to the code is new and we will have to closely monitor the situation in South Africa to see if influencer's adhere to the code furthering the objectives of the ARB.

### **South America & Mexico<sup>1</sup>**

The most relevant recent developments in the region of South America and Mexico regarding the regulation of influencer marketing and its relationship with unfair competition only show a few steps forward. Countries in the region lack specific regulation covering influencer marketing, although application of existing unfair competition laws to influencer marketing in most countries in the region seems possible.

#### **Statutory & Regulatory Developments**

Argentina, Brazil, Chile, Colombia and Uruguay are countries that through National Councils of Advertising Self-Regulation have implemented internal codes of conduct in advertising applicable to their signatories. Although they do not specifically address influencer marketing (with the exception of Uruguay which does define "influencer" and mentions that they may become a reference for a brand), they would, in principle, also apply to influencer marketing as a form of advertising. In this regard, Brazil's local Advertisement Self-Regulation Council (CONAR) has asked several influencers to amend their posts in order to disclose that such posts constituted advertisements, as they have been sponsored by corporations, which also received warnings or complaints from CONAR.

INDECOPI (the unfair competition authority in Peru) is closely reviewing the posts of some local influencers to determine if they comply with local advertising regulations and also preparing guidelines for influencers with recommendations in order to avoid violating unfair competition laws.

Case Law. No specific cases of influencer marketing being sanctioned for unfair competition practices have received substantial attention in the media in South America and Mexico. Nevertheless, influencers and sponsoring corporations have been the subject of investigations in a few jurisdictions, in particular with respect to advertising practice. However, non-compliance with advertising regulation in influencer marketing could provide grounds for unfair competition cases between competitors using influencer marketing, in addition to other possible causes of action generated by such non-compliance against the influencer, the sponsoring corporation, or both, such as consumer protection or violation of advertising regulations directly.

### **United States**

Like any marketing strategy, the use of a social media influencer brings with it certain legal risks. There are various ways in which this may come up in the United States, including (1) a private right of action brought in state or federal court against a competitor, pursuant to state and/or federal unfair competition laws; (2) a proceeding before the BBB National Programs'

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<sup>1</sup> The scope of this section pertaining to South America is limited to the countries of Argentina, Brazil, Chile, Uruguay, Venezuela, Bolivia, Paraguay, Ecuador, Colombia and Mexico

(“BBB NP”) voluntary dispute resolution mechanisms; and (3) action taken by a federal administrative agency, such as the Federal Trade Commission (“FTC”).

Private Right of Action. Under the Lanham Act, federal law prohibits the use of false or misleading representations. 15 U.S.C. § 1125. The laws of individual states also may prohibit acts of unfair competition. For instance, California law prohibits “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . .” Cal. Bus. & Prof. Code § 17200. Similarly, New York law prohibits “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in [New York State] . . .” N.Y. Gen. Bus. Law § 349(a).

Competitors, however, have rarely used these laws to enforce against the use of social media influencers. In one recent decision, the U.S. District Court for the Southern District of New York dismissed federal and state claims relating to a competitor’s use of social media influencers. *Lokai Holdings LLC v. Twin Tiger USA LLC*, 306 F. Supp. 3d 629, 640-43 (S.D.N.Y. 2018). Defendant had asserted counterclaims against Plaintiff, which had used social media influencers to market its bracelets. Defendant alleged that the influencers did not clearly and conspicuously disclose that they were being compensated by Plaintiff. In support of its claims, Defendant pointed to the FTC’s Guidelines relating to social media marketing. The court, however, dismissed the counterclaims, finding that (1) “it is well settled that there is no private right of action under the FTC Act,” and thus a claim could not be based on the FTC Guidelines, (2) “the Lanham Act requires an affirmative misrepresentation or an omission that renders an affirmative statement false or misleading—not a failure to disclose something material”; (3) Defendant could not plead a California state claim because it “has not alleged any facts that plausibly raise an inference that the non-disclosure of paid endorsements is likely to lead consumers to believe that the endorsements are unpaid”; and (4) Defendant could not plead a New York state claim because it “has not alleged any facts showing how the conduct injured the public interest or that consumers were misled or confused by [Plaintiff’s] nondisclosure.” *Id.* In other words, in order to support a claim under the Lanham Act, California or New York state law, a competitor must be able to allege more than simply a failure to disclose that the social media influencer is being compensated.

BBB NP Dispute Resolution. BBB NP provides dispute resolution and other programs. One such arm is the National Advertising Division (“NAD”), which provides a voluntary dispute resolution program that many major U.S. advertisers have agreed to participate in and comply with, as an alternative to more costly and contentious litigation in order to resolve advertising disputes. A proceeding may be initiated either by a competitor, or by the NAD itself. Ultimately, the NAD makes a recommendation regarding whether an advertising claim is substantiated, should be modified, or should be discontinued.

In a few instances, the NAD has decided claims between competitors relating to the use of social media influencers. These cases are discussed below and confirm that influencer marketing will be held to the same standards as any other form of advertising.

- *Unilever United States, Inc. (Hellmann’s REAL Ketchup)*, Report #6235, NAD/CARU Case Reports (Dec. 2018): Kraft Heinz made various claims regarding Unilever’s advertising for its Hellmann’s Real Ketchup Brand. For instance, Kraft Heinz challenged social-media-influencer posts, paid for by Unilever, that cautioned consumers to stay away from ketchup containing high fructose corn syrup because it

is “evil” and “fake” and to choose Hellmann’s Real Ketchup that was “better-for-you” and “healthier.” After the proceeding was initiated, Unilever voluntarily distanced itself from its paid influencer posts and represented that it would modify or remove the posts. In its decision, the NAD stated that it would treat the voluntary discontinuance of Unilever’s influencer marketing campaign “as though NAD recommended their discontinuance and the advertiser agreed to comply.”

- *MillerCoors, LLC (Miller Lite Beer)*, Report #6227, NAD/CARU Case Reports (Dec. 2018): Anheuser-Busch claimed that MillerCoors’ advertising campaign that used influencers in “taste testing” videos falsely suggested that MillerCoors’ products tasted better. The NAD recommended that MillerCoors discontinue the videos as NAD found that the implied preference claims were not substantiated.

In addition, in at least one case, the BBB NP’s Electronic Retailing Self-Regulation Program (“ERSP”) brought claims relating to the use of social media influencers. The ERSP itself brought an inquiry against Alo, LLC in *ALO, LLC (Alo Yoga)*, Report #429, ERSP Case Reports (Jun 2019), and found that Alo used Instagram influencers who failed to disclose their material connection to Alo. The ERSP identified approximately 60 Instagram accounts that endorsed Alo’s clothing without disclosing that they were being paid or given free merchandise. The ERSP noted that Alo was violating the FTC Guidelines and recommended that Alo monitor its influencers. Alo argued that it had sent guidelines to its influencers and done all it could. Yet, the ERSP found that even though “the marketer may not control the editorial content of Alo Yoga influencers’ posts . . . this does not relieve social media influencers from the requirement to include a clear and conspicuous disclosure” and the responsibility is on the “marketer [to] effectively monitor Instagram posts by Alo Yoga influencers to ensure that any material connection between the influencer and the marketer be clearly and conspicuously disclosed.” Alo agreed to comply and while the ERSP referred the case to the FTC, the FTC did not take action.

Regulatory Actions. Various federal administrative agencies also have enforced against companies and their social media influencers. For instance, the FTC is an administrative agency that has the power to prohibit “unfair methods of competition in or affecting commerce” and to regulate businesses in relation to “unfair or deceptive acts and practices in commerce.” 15 U.S.C. § 45(a)(1). Claims under the FTC Act are brought and litigated by the FTC itself. As noted above in the *Lokai* case, there is no private right of action that would allow a company to sue another company. The FTC issues various guidelines and regulations that provide parameters for businesses. In 2009, the FTC revised its Endorsement Guides to reflect new marketing techniques involving endorsements, testimonials, native advertising, and social media influencers. The updates, codified at 16 C.F.R. § 255, are meant to enforce the same truthful advertising laws that apply to other forms of advertising. In September 2017, the FTC also posted a FAQ to reiterate and clarify the requirements for bloggers and influencers when making endorsements. See <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>. On November 6, 2019, the FTC released its “Disclosures 101 for Social Media Influencers.” This document largely reflects the 2009 Endorsement Guides, but is specifically targeted towards social media influencers and what disclosures they are required to make. See [https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508\\_1.pdf](https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf).

Under the Endorsement Guides, advertisers and influencers are both responsible for making unfair or deceptive claims. 16 C.F.R. § 255.1(d). In addition, any connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement must be fully disclosed. *Id.* § 255.5. The concept of an “endorsement” is broad and refers to “any advertising message . . . that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.” *Id.* § 255.0(b). The FTC has enforced its regulations relating influencer marketing. Below are some examples:

- *In re Warner Bros. Home Entm’t Inc.*, No. 152-3034: The FTC brought claims relating to Warner Bros.’s use of YouTube influencers to promote its video game *Middle Earth: Shadow of Mordor*. Influencers were paid and given advance copies of the game in return for promoting the game, but that was not disclosed in the YouTube videos. In 2016, Warner Bros. settled the case and agreed to a final consent order that barred it from failing to make such disclosures in the future. See <https://www.ftc.gov/news-events/press-releases/2016/07/warner-bros-settles-ftc-charges-it-failed-adequately-disclose-it>.
- *In re GSGOLotto, Inc., et al.*, No. 162-3184: The FTC filed claims against two online video game influencers, Trevor “TmarTn” Martin and Thomas “Syndicate” Cassell, for endorsing and failing to disclose their material connection to CSGO Lotto Inc. (which also was charged). Martin and Cassell failed to disclose in their videos that they were the president and vice president, respectively, of CSGO Lotto. In 2017, the case was settled and the defendants agreed to a final consent order prohibiting all parties from misrepresenting that any endorser is an independent user or ordinary consumer of a product or service. This was the first time that the FTC charged and issued a final consent order against social media influencers themselves for failing to disclose their material connections. See <https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against>.
- *Federal Trade Commission v. Devumi, LLC*, No. 9:19-cv-81419-RKA: The FTC filed a complaint in the U.S. District Court for the Southern District of Florida alleging that Devumi and its owner and CEO used their websites to sell fake indicators of social media influence, including fake followers, subscribers, views, and likes to users of social media platforms, including LinkedIn, Twitter, YouTube, Pinterest, Vine, and SoundCloud. For instance, the FTC alleged that defendants sold fake Twitter followers to actors, athletes, musicians, writers, and others who wanted to increase their appeal as online influencers, as well as to motivational speakers and law firm partners, investment professionals and others who wanted to boost their credibility to potential clients. In October 2019, the FTC and defendants filed a proposed court order settling the FTC’s charges, which the court then approved. The settlement banned the Devumi defendants from selling or assisting others in selling social media influence to users of third-party social media platforms, and from making, or assisting others in making, misrepresentations about social media influence. The order also imposed a monetary judgment of \$2.5 million against Devumi’s CEO, although upon payment of \$250,000, the judgment will be suspended. The remainder of the judgment will immediately become due if the CEO is found to have misrepresented his financial condition to the FTC. See <https://www.ftc.gov/news->

[events/press-releases/2019/10/devumi-owner-ceo-settle-ftc-charges-they-sold-fake-indicators.](#)

Other administrative agencies also have enforced against companies and their social media influencers. For instance, the Food and Drug Administration (“FDA”) has cracked down on influencer endorsements that fail to communicate risks associated with an endorsed drug. The FDA has sent warning letters relating to Kim Kardashian’s social media posts about the DICLEGIS drug (relating to morning sickness) and relating to posts about e-liquids that did not disclose the material health or safety risks regarding nicotine. See, e.g., <https://www.ftc.gov/news-events/press-releases/2019/06/ftc-fda-send-warning-letters-companies-selling-flavored-e-liquids>. In another context, the SEC has charged celebrities for unlawfully touting initial coin offerings of cryptocurrency, as they failed to comply with federal securities laws. In another context, the SEC has charged celebrities for unlawfully touting initial coin offerings of cryptocurrency, as they failed to comply with federal securities laws. See <https://www.sec.gov/news/press-release/2018-268>.

As can be seen from the above discussion, while social media allows advertisers to reach consumers quickly and efficiently, such posts still must comply with applicable unfair competition laws and regulations in the United States.

### **Conclusion**

Influencer marketing is a new and rapidly expanding advertising vehicle for trademark owners. As the nature, scope and use of influencer marketing evolves, we expect to see more laws and regulations, government monitoring, supervision and enforcement and private claims based on principles of unfair competition between brand owners.