

NAVIGATING THROUGH THE INFLUENCER ERA

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I. COMMENTARY OVERVIEW

Danielle Garno is a Fashion, Beauty, & Luxury Goods Attorney and Partner at Holland & Knight in Miami, Florida. Danielle focuses primarily on issues faced by the fashion industry, including but not limited to intellectual property, advertising, marketing, social media, and influencers. Throughout Danielle's career, she has collaborated with and represented fashion brands of all sizes from start-ups to multi-national and even global brands. Danielle helps these brands navigate through arising legal issues and counsels brands on expanding and sustaining a successful public image. In this Commentary, Danielle provides advice based on her experience with how to carefully proceed through the new influencer era.

II. BACKGROUND

1. Based on your expertise in the fashion industry, how do you define influencers? Are influencers advertisers?

An influencer can be anyone who has the ability to impact and inspire others. Influencers, as the term is used today, can absolutely be advertisers and are often used to promote products. "Micro influencers" tend to have anywhere between 1000 to 100,000 followers and focus on a specific niche. They tend to be industry experts, and brands utilize them to reach a specific and engaged consumer set. Alternatively, "macro influencers" have followers in the six and seven figures, and brands often use them to target the masses. Over the years, there has been a trend towards the micro influencers to reach a specific consumer. The industry has moved away from inauthentic advertising to the masses by using

celebrities or macro influencers who have become celebrities in their own right.

2. Is whether someone is an “influencer” predicated on their photos and videos being posted for the sole purpose of advertisement or sales?

Not necessarily, although most are today. I think the ultimate influencer creates a connection with his/her/their followers because the content resonates with the influencer’s followers without the posts/videos being an ad. That is what brands are striving for—authenticity—with the influencers they use. I think that Meghan Markle is a good example because she purportedly pays for her own wardrobe.

3. Where do we draw the line between someone who is an “influencer” and someone who is just influential? For example, if a professional athlete with 250,000 followers on Instagram decides to go live after a workout to talk with their fans and is drinking a Gatorade throughout the live video, do they need to comment on the sponsorship deal that they have with Gatorade even if there is no intention to advertise or sell the product?

The Federal Trade Commission (FTC) regulations don’t really draw a distinction.¹ If there is a material connection between the brand and the influencer that a consumer would not necessarily be aware of, then a disclosure must be made. Every time there is a post without a disclosure, it would constitute a new violation of FTC regulations. Here, there is a material connection between Gatorade and the athlete that a consumer may not be aware of, and therefore, a disclosure that Gatorade sponsors the athlete should be made. This applies even if the influencer/athlete has become an actual fan of the product and posts about it after his/her/their contract is over.

4. There has been a flurry of recent lawsuits related to athletes getting in legal trouble as influencers. In your opinion, will recent lawsuits filed against athletes like Stephen Curry and Tom Brady based on their endorsements of FTX, the cryptocurrency exchange company, set a precedent that requires athletes and influencers to be responsible for the products they endorse?² Will it make athletes more cautious about the companies and products they endorse?

1. 16 C.F.R. § 255.5 (2023).

2. Complaint at 2, *Garrison v. Bankman-Fried*, 2023 U.S. Dist. LEXIS 66369 (S.D. Fla. 2022).

Yes, it should make influencers more cautious. We first saw this when Molly Sims was sued for contributory trademark infringement in connection with a cosmetic, when she was merely promoting the product as a celebrity/influencer.³ To protect themselves, influencers should request that the brands indemnify them for any fees and costs in defending themselves in connection with the promotion of the brands' products.

III. FEDERAL TRADE COMMISSION EFFORTS AND ACTIONS

1. Overtime, as the influencer industry has evolved, so has litigation involving deceptive advertisement and product infringements. The FTC has attempted to cease deceptive advertisements by drafting a “Disclosures 101 for Social Media Influencers” that sets forth Endorsement Guides that go further into detail about how advertisers and endorsers can stay on the right side of the law.⁴ What are some things you would add to their list of recommendations for influencers to better protect themselves and their sponsor brands from FTC enforcement actions? Are there any specific clauses or indemnifications that influencers should be looking out for?

Influencers should always follow the guidelines to prevent them from violating Section 5 of the FTC Act.⁵ The disclosures should be clear and conspicuous and, if on Instagram, before the “more” link. Influencers can also be held liable—not just the brands—so it's important they follow the rules as well. As an influencer, I would require an indemnity provision (as mentioned above) and a reverse morals clause in case the brand does something that is not in line with the influencer's image and could potentially harm the influencer. These types of clauses allow the influencer to terminate the contract and disassociate with the brand—ideally without suffering any financial harm.

IV. SHIFTING THE BURDEN TO THE COMPANIES

1. The FTC takes the position that it is the influencer's responsibility to incorporate disclosures, abide by their Endorsement Guides, and comply with laws against deceptive advertising.⁶ Is there an

3. *Petunia Prods. v. Rodan & Fields, LLC*, 2022 U.S. Dist. LEXIS 135324 (C.D. Cal. 2022).

4. *Disclosures 101 for Social Media Influencers*, FED. TRADE COMM'N, <https://www.ftc.gov/business-guidance/resources/disclosures-101-social-media-influencers> [<https://perma.cc/8VEG-XMJ4>] (last visited Apr. 13, 2023).

5. *Id.*; 15 U.S.C. § 45.

6. 16 C.F.R. § 255.5 (2023); *Disclosures 101 for Social Media Influencers*, *supra* note 4

argument to be made that this responsibility should be placed on the company, considering the company's resources and expertise (e.g., Legal and Marketing Department)? Do you think requiring influencers to shoulder this legal responsibility seems inequitable and places influencers at significant financial and legal risk?

The influencer has the responsibility to incorporate the disclosure in the post because the influencer is the person posting the content, but the brands are required to communicate those requirements to the influencer.⁷ Practically, the FTC is more likely to take action against the brands than against the influencer, since it is the brand who is the advertiser, so it's important for the brands to monitor their influencers to make sure that (1) they are making claims that are accurate about the product, and (2) that the requisite disclosures are being made and that they are clear and conspicuous.

Again, an indemnity provision can help protect an influencer from exposure if the brand does not adhere to the FTC's regulations.

2. How can advertisers and brands better clarify their expectations or educate influencers to avoid potential legal issues? How much of an obligation do advertisers and brands have to make their expectations as clear as possible to influencers? What are best practices when drafting influencer agreements to protect a company from liability if an influencer fails to comply with FTC requirements?

Brands have an obligation to ensure that their influencers follow the regulations. Best practices are to have a compliance program that includes a written contract, monitoring, training of influencers, etc. Compliance programs need to be specifically tailored to each company since they all work somewhat differently and tend to have different social media marketing program objectives. The contract should have a provision that allows the brand to terminate the contract if the influencer violates the regulations. The brand should have the ability to counsel the influencer, train the influencer, and terminate, if necessary. Monitoring influencers' posts is essential to the compliance program, so the brand can take immediate action if necessary. Brands should also have an indemnity provision as well as a morals clause.

("As an influencer it's your responsibility to make these disclosures, to be familiar with the Endorsement Guides, and to comply with laws against deceptive ads.").

7. 16 C.F.R. § 255.1 ("Advertisers are subject to liability . . . for failing to disclose material connections between themselves and their endorsers.").

V. SHIFTING THE BURDEN TO THE PLATFORMS

1. Social media networks like Instagram and Tik Tok profit from influencers using their platform for marketing, not only because it encourages people to consume more content, but also because brands and influencers pay to “boost” sponsored posts. What role, if any, do these social media networks play in policing the posts on their networks and enforcing the FTC guidelines within their own network? Should they play more of a role?

The platforms have tried to be helpful with their sponsored content disclosure tools, but the FTC has said that they don’t think that the platforms’ built-in disclosure tools are adequate for making the requisite disclosures which still need to be made by the influencer—like #ad.⁸ It would be nice if the platforms would police the posts for sponsored content and deceptive advertising, but the platforms have done a good job of shielding themselves from any liability by claiming they are merely a third-party platform.⁹

VI. WHAT’S NEXT?

1. Throughout your career, you have undoubtedly witnessed many changes in the fashion industry. With technology and social media evolving at a pace we have never seen before, there will surely be many more changes to come. What changes do you predict will occur in this industry in the future? How can brands and influencers start preparing?

The advent of Artificial Intelligence (AI), deep fakes, and the metaverse is a game changer. There are many influencers now who aren’t even human and who are being represented by traditional talent agencies. Regulatory enforcement agencies are going to need to enhance their monitoring technologies to ensure the public at large isn’t being deceived (see Pope in Balenciaga jacket).¹⁰ It’s a good time for brands to make sure they have an adequate compliance program in place while they explore these new technologies.

8. *Disclosures 101 for Social Media Influencers*, *supra* note 4 (“Don’t assume that a platform’s disclosure tool is good enough, but consider using it in addition to your own, good disclosure.”).

9. 47 U.S.C. § 230(c)(1).

10. Erin Keller, *Pope Francis in Balenciaga Deepfake Fools Millions*, N.Y. POST (Mar. 27, 2023, 8:00 PM), <https://nypost.com/2023/03/27/pope-francis-in-balenciaga-deepfake-fools-millions-definitely-scary/> [<https://perma.cc/HS8W-6N79>].

