

Fashion influencers: The legal side

Influencers are, indeed, influencing the fashion world in a big way. Nowadays, having a vast presence on social media is becoming a must-have for brands many of which are turning to the work of influencers in an attempt to boost their social media presence and, in turn, significantly increase sales.

But whilst the use of influencers can be positive for your brand, there are legal implications to using them.

The importance of contracts and what they should cover

If you are planning to use an influencer to promote your brand, one of the first questions should be what of the contract? There are a range of issues to be considered.

Control

You should consider the level of control you want to exercise over an influencer's posts. Do you want the right to vet or approve the posts before they are made or remove unsatisfactory posts after they are made? Or perhaps you prefer not to exercise any control and instead give the influencer complete creative freedom (despite the inherent risks associated with granting such freedom).

Early termination

You should carefully consider the circumstances under which you are able to terminate the contract. It is commonplace to provide for a right to terminate the contract where the influencer has committed a material breach.

But have you considered including more specific termination rights? Today's hero could be tomorrow's villain. What if your influencer is involved in a media scandal?

Exclusivity

How exclusive is your arrangement with the influencer? Does he or she have exclusivity to make posts in certain territories or via certain channels? Also, do you want to restrict your influencer from working with competing brands? If so, which are those competitors?

Payment

How are you going to pay the influencer? Is it on a per-post basis, per-view basis or are you paying a fixed fee over a specified period? Or perhaps the payment is in the form of 'gifting' the influencer pieces from your collection?

Intellectual property

Who owns the copyright in your influencer's posts? There are two reasons why it would be beneficial for your brand to have ownership in the copyright. Firstly, it is possible to envisage the contents of a particular post being something of value (like a catchy slogan or iconic image) that you may wish to use or exploit going forwards. Secondly, your brand's ownership of the copyright in the posts would allow you to prevent other brands or influencers from copying valuable content in future.

Also, your contract ought to contain, at the very least, a warranty that the influencer's posts do not infringe the intellectual property rights of third parties.

Lastly, you may want to consider including provisions which give your brand the rights to use the data generated from the influencer's posts, such as the number of views and comments. These statistics could provide valuable insight into what works and what doesn't work for your brand in terms of effective marketing.

Duration

Will the contract cover a specific social media campaign or advertising promotion within a fixed period? Or perhaps you prefer for the contract to run for an indefinite period until one party notifies the other to terminate it?

The parties

Who are you entering into a contract with? Will your contract be with the influencer or the influencer's agent? Or perhaps it will be with the provider of an online platform which brokers the relationship between you and the influencer? It is important that it is clear which person or entity you have a contractual claim against should something go wrong.

Reputation

Who carries the risk for a post which damages your brand's reputation? What should the consequences be?

Regulatory issues: advertorial vs editorial

Alongside considering the contractual issues when using influencers, there are regulatory issues to think about.

In order for an influencer's post to be considered an advertisement for the purposes of the CAP Code both of the following would need to take place:

1. the influencer has to be paid in some way. Payment could be in the form of money or, for example, a product given for free.
2. The brand must have had some form of editorial control over the content of the post. The threshold as to what constitutes control, however, is very low. For example, final approval, or sign off, of a post by the brand, even if it is the only thing the brand is required to do, is likely to constitute control. Under a recent ruling, the Advertising Standards Authority (ASA) has said that even a mere obligation in a contract to promote the brand in a "positive light" could constitute control.

If, after applying the above, the posts are deemed to be advertisements, the CAP Code will apply and require that the content of the posts would need to be **obviously identifiable** as advertisements. The ASA has suggested including labels such as "#ad" to make this clear.

Even where the CAP Code does not apply, consumer law bans any practices which use editorial content in the media to promote a product, where the brand has paid for the promotion, without making that clear in the content or by images or sounds clearly identifiable by the consumer.

The Competition and Markets Authority (CMA), which enforces The Consumer Protection from Unfair Trading Regulations (CPUTR), recently launched an investigation into concerns about social media stars not properly declaring when they have been paid to endorse products.

Regulatory issues: the GDPR

Data protection law changed significantly on 25 May 2018 with the introduction of the General Data Protection Regulation. All fashion businesses within the EU (and in some circumstances, outside the EU) are affected by the GDPR, regardless of size, sector or turnover. It is therefore very important your brand has taken the necessary steps to ensure that information your brand processes about its influencers is in accordance with the requirements of the GDPR.

Also, your contract ought to contain provisions which require the influencer to comply with the requirements of applicable data protection legislation, particularly if you anticipate that he or she might make posts that mention or include other people.

To discuss these issues, or if you are planning to use an influencer to promote your brand, please contact the Fashion Law team.



Arjun Majumdar

Associate

amajumdar@foxwilliams.com

+44 (0)20 7614 2607

This overview is general guidance. It should not be relied upon without first taking separate legal advice. Neither the author nor Fox Williams LLP accept any responsibility for any consequences resulting from reliance on the contents of this document.