

Influencer Marketing and Trademark Enforcement: Navigating a New Frontier

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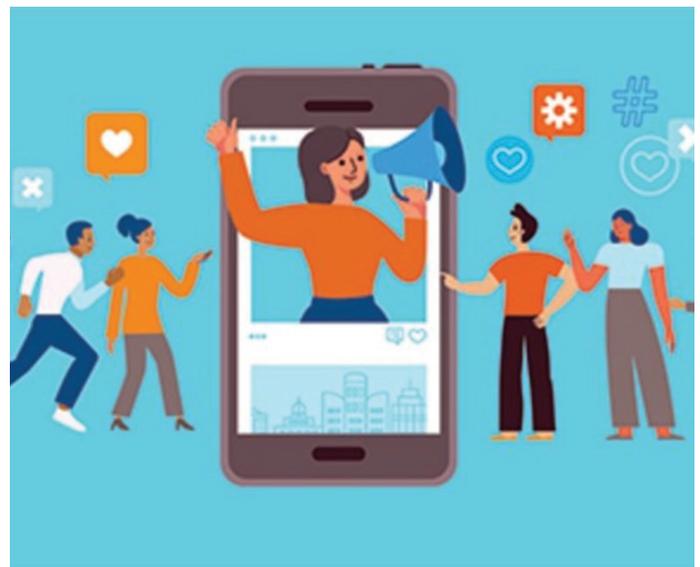
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Influencer marketing has revolutionized how businesses promote their brands in the social media age. Platforms such as Instagram, TikTok, and YouTube enable brands to reach millions instantly through trusted “voices” known as influencers.

As influencers incorporate trademarks into their content—whether through sponsored or unsponsored posts, product placement, or brand endorsements—they may unwittingly expose themselves and the brand owners to liability for trademark infringement, false or misleading advertising claims, and actions by the Federal Trade Commission (FTC).

Problems may arise when the influencer does not publicize that they are being compensated by brands for their use or endorsement of a product. They may also arise when consumers believe an influencer is selling goods that are sponsored by a brand, when, in fact, they are not. This potential for confusion among consumers prompts closer scrutiny of influencer behavior and heightened trademark enforcement efforts by companies seeking to preserve the goodwill and distinctiveness of their brands.

This article examines the intersection between U.S. trademark law and influencer marketing,



social media influencer

highlighting key legal principles governing the unauthorized use of marks, secondary liability, and compliance with FTC guidelines.

Lanham Act, Trademark Infringement, False Advertising, and Related Claims

Influencers may face legal liability under trademark law for direct and/or contributory trademark infringement. To prove trademark infringement under the Lanham Act, a plaintiff “must demonstrate that (1) it has a valid mark that is entitled to protection and that (2) the defendant’s actions are likely to cause confusion with that mark.” *Tiffany &*

Co. v. Costco Wholesale Corp., 971 F.3d 74, 84 (2d Cir. 2020).

To prove contributory trademark infringement, a plaintiff must show that the defendant had specific, not just general, knowledge of the infringement. *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 107 (2d Cir. 2010).

The case *Petunia Prods. v. Rodan & Fields, LLC*, Case No. 8:21-cv-00630-CJC (C.D. Cal. 2021) provides an example of such a case against an influencer. Plaintiff Petunia was a cosmetics company that owned the BROW BOOST® trademark, used in connection with its “Billion Dollar Brows” eyebrow product. Defendant Rodan & Fields, LLC (R&F) allegedly sold a product called “Brow Defining Boost” and used a social media influencer, Molly Sims, to promote the product. Sims authored a blog post favorably reviewing R&F’s product.

The blog post included a product image and price, and a link to R&F’s website where the product was available for sale. Plaintiff named both R&F and Sims as defendants, alleging trademark infringement, contributory infringement, and related claims. Sims moved to dismiss for failure to state a claim against her.

Sims argued that Plaintiff did not sufficiently plead that she used the asserted trademark in commerce. The court disagreed, finding that Sims’ use was in connection with advertising the product. Sims “express[ed] concern that ‘legitimate commentary’ will be stifled if the court considers the Blog Post to be commercial use.”

But the court held that “the blog post reflects more than mere commentary, which is protected by the First Amendment.” The court observed that the blog post linked to R&F’s website where the product was sold and that it “seems to be” a paid advertisement. The court held that Sims “thus crossed from the protected consumer commentary to commercial use.”

Sims also argued that plaintiff had not sufficiently pled that the blog post was likely to confuse consumers as to the source of the product. The court rejected Sims’ argument because, *inter alia*, given the similarity of the marks, “it is possible that readers of Sims’ blog post might believe that the [product] is affiliated with plaintiff.”

The court also held that identifying R&F as the product source on the blog post did not eliminate the possibility of consumer confusion, as readers could still infer a connection between R&F and plaintiff.

The court, however, granted Sims’ motion to dismiss the contributory infringement claim because the complaint did not “adequately allege[] that Sims intended to induce infringement with her blog post, wrote it with knowledge of the alleged infringement, or exercised any control over any other party’s infringement.” The *Petunia* case provides a stark warning to influencers that they may be liable for trademark infringement in connection with products they promote.

Influencers may also be subject to liability for false advertising. To prove false advertising under the Lanham Act, “a plaintiff must establish that the message at issue is (1) either literally or impliedly false, (2) material, (3) placed in interstate commerce, and (4) the cause of actual or likely injury to the plaintiff.” *Souza v. Exotic Island Enters.*, 68 F.4th 99, 118 (2d Cir. 2023) (quotations omitted).

Amazon’s lawsuit against two influencers in *Amazon.com, Inc. v. Fitzpatrick*, No. 2:20-CV-01662 (W.D. Wash. Nov. 12, 2020), provides an example. There, Amazon brought a claim of false advertising and false designation of origin under the Lanham Act against the defendants.

Amazon alleged that the case “revolves around a pair of individuals [] who engage in social

influencer activities on various websites and apps for the admitted purpose of promoting, advertising, and facilitating the sale of counterfeit luxury fashion goods by the Seller Defendants.

Together, they engage in a sophisticated campaign of false advertising for the purpose of evading Amazon's counterfeit detection tools." The case later resolved through settlement agreements.

Other cases demonstrate that even seemingly minor actions by influencers, such as use of hashtags, can lead to a claim under the Lanham Act. For example, in *Chanel Inc. v. WGACA LLC*, 2018 WL 4440507 (S.D.N.Y. Sep. 14, 2018), Chanel alleged that What Goes Around Comes Around (WGACA) misused Chanel's trademarks in advertising and created a misleading impression of affiliation or endorsement.

Chanel alleged that WGACA employed influencers to promote the hashtag #WGACACHANEL despite having no affiliation with Chanel. The court denied WGACA's motion to dismiss, finding that WGACA's use of Chanel trademarks and marketing tactics could plausibly cause consumer confusion.

FTC Endorsement Guidelines

The FTC Endorsement Guides (16 C.F.R. Part 255) provide additional regulatory oversight regarding the use of endorsements and testimonials in advertising. These guides require influencers to disclose material connections with brands in a clear and conspicuous manner. The FTC has taken numerous actions against companies that violated its guidelines and has issued several warnings to influencers.

Proactive Legal Strategies for Brands Using Influencer Marketing

To mitigate risks, trademark owners should verify that the influencers they engage adopt best practices when endorsing or promoting their brands on social media. Comprehensive contracts are critical, outlining permissible trademark use, disclosure requirements, and indemnification clauses. When featuring trademarked products, influencers should confirm they have the trademark owner's authorization to reference or display the mark.

For unsponsored personal reviews or commentary, influencers must adhere to nominative fair use guidelines, avoiding any implication of official endorsement. This means they should use the mark only to the extent necessary to identify the product or service, without suggesting any sponsorship or affiliation. In addition, they should avoid language or imagery that implies an official partnership unless explicitly authorized by the trademark owner.

Clear and conspicuous disclosure of paid or sponsored relationships is essential to comply with trademark laws and FTC regulations. Influencers should also accurately depict the products they promote. Exaggerated or false claims risk consumer backlash, liability under consumer protection laws, and allegations of trademark misuse and tarnishment.

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