

Series of articles and Legal studies



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Influence Marketing: Legal Framework and Challenges

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Influencer marketing has rapidly found its niche among the tools that help companies to gain in e-reputation, visibility, notoriety and therefore, to boost their sales.

Influencer marketing is a type of marketing tool, a strategy involving collaboration with an influential person, an “influencer”, to promote a product, a service or simply an idea.

The history of influencer marketing goes back long before the creation of the Internet and social media platforms. In fact, in Roman times (105 BCE), highly anticipated gladiatorial fights were advertised on billboards throughout the city. Popular gladiators often achieved celebrity status, and even promoted casual products such as oil and wine.¹

The Pope and the Queen of England, at a decisive moment in human history, were the first to promote the use of medicine to people who struggled to believe in it.²

But the first modern influencer marketing campaigns date back to the beginning of the 20th century where in the 1920s, brands were launching a single product. So they created characters to emotionally trigger consumers’ buying decisions.

Santa Claus is probably the most popular figure in the history of influencer marketing, at least in Western countries. The cuddly, bearded man we know today was invented by Coca-Cola and has become much more than just a brand influencer to this day. Another well-known character is Tony the Tiger, who graces the packaging of Kellogg's promoting the cereals as a breakfast.³

Regardless of the marketing medium, whether it is used on billboards, television, radio or social media, or even on a podium, influencer marketing is still considered the mainstay of all strategies, stimulating consumers' emotions by embedding and anchoring the product or service in their minds, thus influencing their behavior and choices.

By definition, influence is the capacity to have an effect on the character, development, or behavior of someone, something, or the effect itself. It’s about creating a hidden and concealed sort of authority of one person over another.⁴

Social media influence is a marketing term that describes an individual’s ability to affect other people's opinion through social media communication. Therefore, influencers act as a common friend that connects the brand to the targeted consumers.

As per the exponential development of social media platforms such as Youtube, Tiktok, Facebook and Instagram, businesses and brands converged to use micro and nano influencers instead of mega and macro influencers.

The reason behind is that they are known for their high rate of engagement with their community. In general, they generate more leads with their posts and get more reactions than mega and macro influencers. This is due to a simple reason: the smaller the community, the better the connection with their followers.

The importance of influence in the market has led us to question, investigate and study its legal framework.

¹ The History of Influencer Marketing, available at: <https://grin.co/blog/the-history-of-influencer-marketing/>

² Peter J. Bowler, Iwan Rhys Morus, Making Modern Science: A Historical Survey, University of Chicago Press, 2005

³ The History of Influencer Marketing, available at: <https://grin.co/blog/the-history-of-influencer-marketing/>

⁴ Ro. Washington, Social Policy and Social Welfare 1 Feb, 1980

Our study will focus on social media influencers, natural persons, excluding any marketing product or fantasy character created to influence consumer behavior.

Defining the status of an influencer is paramount, while framing the contractual relationship with the influencer and identifying the rights of influencers are even more important. This series of studies focuses on the legal tools of influencer marketing:

Episode 1: Who is a social media influencer?

A social media influencer is a user on social media who has established credibility in a specific industry such as fashion, technology etc. with access to a large audience and can be one who can persuade others by virtue of their authenticity and reach.

In 2017, the French Professional Advertising Regulatory Authority (ARPP) defined an influencer as an "individual expressing a point of view or giving advice, in a specific field and according to a style or a way of communication that is unique to him, to an identified audience."⁵

Several criteria are to be retained to identify an influencer:

- the person must be a natural person, although in some cases he or she may not be;
- the person must have an account on a social network;
- the person must have a certain number of followers referred to as a community of followers;
- the person promotes products or services in collaboration with brands;
- and in return, the person receives compensation.

A natural person There are influencers who are not natural persons. In fact, through the emergence of new technologies, notably artificial intelligence, artificial or virtual influencers have been developed by companies such as Imma (@imma.gram on Instagram) or Miquela (@lilmiquela on Instagram) in order to do promotional and advertising collaborations. This category of influencers does not fall within the scope of our study since they do not have a legal personality or a consciousness that would allow them to carry out legal acts. They fall into the category of marketing mascots where agreements bind their creators, usually a legal person.

A natural person is a human being with, as such, a legal status. In order to be an influencer, a person must be of age and not be partially or totally incapacitated. Otherwise, this capacity is exercised on his behalf by a legal representative.

This raises the issue of **underage influencers**. Indeed, the creation of an account on social media is generally conditional on the age of 13 (Instagram, Facebook or TikTok)⁶. But the risks of being exposed

⁵ COMMUNICATION D'INFLUENCEURS ET MARQUES, Autorité de Régulation Professionnelle de la Publicité, <https://www.arpp.org/actualite/communication-influenceurs-marques/>

⁶ Terms of use of Instagram, Facebook and TikTok

on social networks are serious and significant for minors. The reason why some countries, such as France, have established a specific regime applicable to minor / child influencers.

In fact, on 19 October 2020, the French legislator adopted Law No. 2020-1266⁷ aimed at regulating the commercial exploitation of the image of children under the age of 16 on online platforms. This law came into force in April 2021 and aims to fill a legal gap. It applies to minors under the age of 16 who are engaged in an activity that "falls within the scope of an employment relationship" and involves the dissemination of their image on the Internet. The law states that parents must create a savings account to deposit a portion of the child actor's compensation until he or she becomes of age.

The law also grants child influencers the protective rules of the labor code. This is the same regime as for child models, show business and advertising.

In addition, the law encourages video sharing platforms to adopt ethical guidelines. The aim is to inform minors about the consequences of the dissemination of their image on their private life as well as the psychological and legal risks.

The legislator has also imposed a right to be forgotten: the minor, he or she, can send a request to online platforms. The platforms are then under obligation to remove the corresponding content.

In the United Kingdom, the regime applicable to child influencers is not clearly defined; there is an exception for children working part-time, which they can do from the age of 13 except in areas such as television, acting, modelling. In this case, they will need a performance license.⁸

In the United States, the entertainment industry is exempted from the federal regime, thus leaving it up to individual states to regulate child entertainers.

In fact, the Coogan Act, passed by the state of California in 1939, provides employers with a method to better protect children. This law was established in response to the situation of actor Jackie Coogan, who, at age 21, discovered that his parents had spent all of the proceeds from his movies.⁹

To prevent such a situation from happening again, the law states that parents must create a savings account to deposit a portion of the child actor's salary until he or she turns 18. In 2018, legislators unsuccessfully attempted to revise the law to include "advertising on social networks". This law is intended to protect children from large corporations and thus prevent them from being subjected to abusive working conditions. But these laws do not apply to child influencers who find themselves in a gray area where the line between home and work remains blurred.

A social media account Social media are commonly known as website that allow their users to create a personal page to share and exchange information, photos or videos with their community of friends and their network of acquaintances.

The creation of a social media account requires an acknowledgement of the terms and conditions of use of these platforms. The terms and conditions vary depending on the platform chosen by the user and

⁷ Available at: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042439054>

⁸ The Children and Young Person's Act 1933

⁹ Jennifer González- More Than Pocket Money: A History of Child Actor Laws – available at: <https://blogs.loc.gov/law/2022/06/more-than-pocket-money-a-history-of-child-actor-laws/>

have the value of a binding contract between the user and the platform. They are non-negotiable and legally commit the user to their terms.

In the next chapter, we will outline the main implications of terms of use on the content created by influencers.

A community of followers A follower refers to a user who consciously chooses to see all of another user's posts in their news feed. In fact, influencers are classified according to the number of followers they have. According to the Meta classification, a mega influencer is an influencer who has over a million of followers. A macro influencer has between 100k and 1 million followers. A micro influencer has between 10k and 100k follower and a nano influencer has less than 10k followers.

In web marketing, the number of influencers plays an important role, because the popularity of a person or a company is often measured by the number of followers.

Nowadays, it is possible to witness a race for followers, which sometimes even takes the form of buying fictitious followers.

Indeed, and according to an article written by Eran Nizri¹⁰, founder and CEO of LEADERS, a leading influencer marketing group and published by Forbes Magazine on September 9, 2022, one of four influencers have bought fake followers.

The reason why this criterion is no longer strict. Nowadays, companies no longer base their choice of an influencer for a collaboration on the number of followers they have, but rather on their **engagement rate**. The engagement rate is a key performance indicator that measures, the level of engagement of Internet users with a content.

Collaborations with brands The main purpose of an influencer campaign is to promote a product or a service. The reason why, a collaboration with brands is a must. A collaboration is an agreement or transaction between a brand and a social media influencer to promote a product or service.

Influencers can be chosen on an intuitu personae basis by the brand to lead the campaign according to certain criteria, the main one being the quality and relevance of the followers and audience. Or influencers can themselves apply for an influencer campaign led by the brand, through marketing agencies or intermediary platforms.

A compensation In return for the content created, the influencer receives a compensation. Compensation can take several forms: either financial compensation with a fixed price negotiated between the parties, or a percentage payment through the engagement rate generated, or even, a compensation in kind through free services or products.

Difference between a brand ambassador and an influencer The borderline between ambassador and influencer is difficult to determine. The criterion is often a subjective one which is loyalty. An ambassador is usually a consumer of the brand that really cares about it unlike an influencer. The ambassador is loyal to the brand, defends it, constantly promotes it, whereas the influencer will talk less about it but will directly influence the buying behavior of his targeted audience, like a kind of mercenary. It is therefore

¹⁰ Available at: <https://www.forbes.com/sites/forbestechcouncil/2022/09/09/new-study-one-in-four-influencers-bought-fake-followers/?sh=2408684d6843>

important for a brand to identify its influencers and its ambassadors and above all to transform its influencers into ambassadors.

Therefore, a brand ambassador is definitely considered an influencer. But an influencer is not necessarily a brand ambassador.

Brand ambassador contracts often include an exclusivity clause, whereas influencer contracts do not. The purpose of this clause is to prohibit the brand ambassador from working for other brands that are in direct competition or in the same or a similar sector. Exclusivity must be limited in time, during which, an ambassador is not entitled to promote any goods or services from anyone other than the contracting one.

Exclusivity can also be total or partial: It is total or full when a brand ambassador is forbidden to promote any product or service except those of the brand he or she represents. Such a case is rare and even prohibited in some countries. It is partial when the exclusivity is limited to the same type of products and services offered by the brand. For example: A brand ambassador of Tissot, the watch company, is not allowed to promote watches of other brands than Tissot, but may promote a face cream or any other beauty product developed by another brand.

In any case, the exclusiveness question remains negotiable between the parties, as to the determination of its content and scope. And it remains valid within the limits of the will of both parties as long as it is

not absolute in time and does not infringe public order, good morals and the fundamental rights of the ambassador.

The notion of exclusivity will be discussed in detail with various illustrations in a later section on licensing.

➡ ➡ Next episode: Influencers' rights and obligations ➡ ➡