

3 The social media influencer

From Love Islanders and Premier League footballers to Hollywood A-listers, celebrities have an undoubted, almost inherent, ability to *influence*. Whether the impressionable subject is a cohort of 'regular' individuals, or indeed a corporate entity – the ability is unquestionable. Of course, this is not a novel concept – celebrities have for decades occupied the pages of national magazines and tabloids, however the mediums by which their influence may be exerted have changed drastically over recent years, leading to the exponential growth of the potential target market of impressionable subjects, in both number and the increased diversification of its demographic. As for whether we will see the 'metaverse influencer' promenading around sporting their sponsor's products any time soon, that is another question. However, for now, brands remain focused on the utility of social media influencers as we know them today.

This vast audience that social media has presented, has naturally grabbed the attention of brands across a plethora of industries hoping to harness this relatively new-found marketing opportunity. The rise of the social media influencer is well documented, and brands were quick to respond to this new kind of celebrity, drawn by the promise of direct, instant access to their thousands, or in some cases, millions of followers.

This led to somewhat of a gold rush, with brands snapping up influencers for campaigns often giving little regard to any legal formalities or regulatory responsibilities (to the extent any such responsibilities existed at the time). However, it is fair to say that the arena is now more established with the advent of reliable performance metrics, specialist influencer agents, advertising regulations and codes of conduct for social media platforms. Given these developments, a brand should take stock and consider whether it is maximising its engagement with this new method of marketing as well as ensuring it does so in compliance with legal and regulatory requirements. With this in mind, there are a number of common questions and deliberations that every brand should think about when considering influencer partnerships.

Practical considerations

Every brand will have its own idea of the ideal influencer, but some considerations crop up across the board:

Reach: How many followers do they have? What is their frequency of engagement? Are their followers the right demographic? It is also worth considering if you can verify the influencer's metrics. It is not unknown for less well-known influencers to inflate their number of followers by using bots or buying large numbers of 'followers'. Any reputable influencer should be able to provide metrics showing the number, location and levels of interaction of their followers.

Whilst accounts with large fake followings are easy to spot once you know what to look for, there are some tell-tale signs. Are there an unusual number of followers in low-income countries? Is there a lack of engagement by those accounts? Investing time in this validation process will help ensure that you receive maximum 'bang for your buck' by engaging with genuine, human followers.

Previous work: What other brands and in what sectors has the influencer promoted? Do you know the results?

Risk: How likely is it that the influencer will act in a manner that proves damaging to the brand? What happens if the influencer does something that causes reputational damage – do you, for example, really want them to be smoking while promoting your teeth whitening brand? Can you terminate if they do?

It is important to bear in mind that influencers are, naturally, keen to create an impression. Unfortunately, this burning desire can sometimes lead to some profound lapses in judgement. From faking trips to exotic destinations to being culturally insensitive, there are many ways in which an influencer can suffer a fall from grace. Whilst it can be almost impossible to pre-empt these blunders, it is important to consider how you will mitigate the damage your brand might suffer in such a scenario. Whilst it is fairly uncommon for brands to sue for damages, you should ensure there are wide rights to terminate your relationship.

Cost: How much will it cost you? While it will inevitably be a reflection of an influencer's performance against the above 'metrics', the fees charged by influencers can vary hugely – from Cristiano Ronaldo's reported ability to charge in excess of £1 million to endorse a product, to the newest back-bedroom influencer charging a nominal fee to help in their establishment.

Content

Ordinarily it is expected that the influencer will be responsible for producing the content. Clients tend to have a common belief that this produces the most authentic content that stands the best chance of connecting with a target market. However, there are a number of points a brand should consider.

Firstly, what has been the theme of their previous content, and will this complement your brand? Similarly, how much freedom as to production of content do you want the influencer to have – do you want a right of pre-approval? Who will pay for any production costs? And what rights do you want in respect of the content post-campaign?

Next come questions about who owns the content? Generally, we would expect that the majority of the intellectual property rights in the content will vest in the creator (usually the influencer), with the brand being granted a worldwide, irrevocable, royalty-free licence to use the content on their own platforms.

Lastly, there's the matter of longevity – how long do you expect the content to remain available? And where there are to be a minimum number of posts or story lengths?

But beyond engaging an influencer, and their content ideas, firms also need to consider the social media platforms the content will appear on, and whether they will have either brand or sector exclusivity and if so, for how long?

There are also issues to be resolved in relation to freedom to use other influencers along with when payment must be made to the influencer – is it before or after the campaign? And can you make payment conditional upon any other metrics being achieved such as click-through, reach or sales?

Regulation #ad

The days of influencers releasing paid-for content with the unsuspecting follower being none the wiser are now long gone. Now, paid-for content falls under the remit of consumer protection law and nearly always will be covered by the regulations of the Advertising Standards Authority (ASA).

The key questions to consider here are whether the influencer's agent has provided suitable advice to their client to ensure compliance? Could their non-compliance affect you? And are there any platform-specific guidelines that influencers must follow?

Recently we have seen the ASA take to naming and shaming those who have been found to be routinely breaching the rules. Those in breach will take pride of place on the ASA's website for three months and will be subject to spot checks and enhanced monitoring.

Chloe Ferry, Jodie Marsh and TOWIE's Lucy Mecklenburgh have each been contacted by the ASA and asked to provide assurances that they would include ad labels in their posts. Having decided not to provide any such assurance (or having chosen to renege on it), they found themselves on the 'naughty list'.

Whilst time is often of the essence when campaigns need to be rolled out on short notice, it is vital that you do your due diligence, check the influencer doesn't have form and, finally, ensure you have an agreement in place that documents the various rights and responsibilities in respect of regulatory compliance. Having a good influencer agreement in place is critical.

The influencer agreement

A well-drafted agreement is often the key to maximising engagement with a target audience and maintaining brand reputation – it will make clear what is expected from both parties, avoid common commercial problems, and ensure the campaign is conducted in accordance with any legal and regulatory requirements.

A sound agreement should be as simple and straightforward as possible; and make clear to both parties what is expected from the influencer, bearing in mind that they may not always have legal representation or advisers.

If you tend to work with influencers regularly on various different campaigns over a longer period, then it is worth considering using an overarching framework agreement. This will ensure that there is a defined set of overarching rights and obligations governing each engagement that will help save both time and money down the line.

In summary

It was almost inevitable that the influencer 'ad market' would mature into a regulated space. But as with anything, this brings with it further obligations that the parties must comply with. The safest way to ensure compliance, as well as ensuring that the brand receives what it expects from the arrangement, is by concluding a well-drafted, clear and accurate agreement that underpins the partnership.

4 Consequences of failure

Businesses are aware of what follows from any failure to adhere to, or fulfil, a contract. They know they'll suffer non-payment, loss of reputation and risk legal action. But what happens when a loss is incurred indirectly because of another's (in)actions?

Consider, a printer that cannot complete a job because their presses keep breaking down. They've not willingly let the customer down, but that customer will have its own clients who, in turn, could make a loss on the printer's failure. Resolving this situation could get very messy.

The general position

According to Mohammed Toqeer, a solicitor in the commercial team at Harrison Clark Rickerbys, the general position under English contract law is that 'the party who is legally or contractually bound to perform an obligation under contract will be in breach of contract if it fails to perform the obligation'. As a result, he says that the other side can claim damages for the loss it has incurred and could even have the right to terminate the contract.

Chris Else, managing partner at Else Solicitors, agrees and says that apart from compensation or damages, they could 'seek a court order for specific performance if the contracting party is not able to complete the work it had agreed to do'. They could, in other words, be ordered to (somehow) fulfil the bargain.

But logically, and usually, he says that the claim is for monetary damages.

As to how damages are awarded to compensate for loss, Else says that they are calculated differently to 'liquidated' or agreed damages which are usually detailed in a written contract in advance. He says that 'if damages are not prescribed, then normal contractual rules of putting the party in the position they would have been in had there been no breach of contract would apply'.

By way of example, Else says that net loss calculated on this basis can lead to a more costly outcome for the party in breach: 'If, for example, I had agreed to do xyz at a particular rate of say £1,000, and I was unable to carry out the work which cost ultimately £2,000 for an alternative contract or to complete, I would be liable to pay £1,000 damages for breach of contract to put the customer back in the position he would have been (or expected to be) in had I complied with my contractual obligations.'

He offers, however, a cautionary note though – that the cost of rectifying the breach of contract should not be unreasonable 'as to be a failure to reduce or mitigate the loss'. This means that it would be unreasonable and disproportionate if the customer set out to deliberately have the work completed in an excessive or over-expensive way.