Social Media and Influencer Issues in the Fashion, Apparel & Beauty Industry

Web Conference | Tuesday, July 23, 2019
12:00 p.m. – 1:00 p.m. ET
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- Certificates of attendance will be distributed to eligible participants approximately eight weeks after the web conference via email.
Today’s Speakers

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Agenda

1. Selecting The Right Influencer
2. Tips for Influencer Agreements
3. Interacting With Online Content
SELECTING THE RIGHT INFLUENCER
Selecting the Right Influencer

- What is your end GOAL?
- Does the person fit the brand?
- Have you REALLY done your research?
- Is the partnership worth it?
What Can Go Wrong? Let’s Talk Spectacles
**PR Consulting v. Luka Sabbat (2018)**

- **Facts:** On October 30, 2018, PR Consulting, on behalf of Snapchat, sued social influencer, Luka Sabbat, for breach of contract and unjust enrichment. The complaint alleges:
  - Sabbat agreed to post certain content on social media in connection with a “Spectacles Marketing Campaign” undertaken for PRC's client, Snapchat.
  - Four unique posts: one Instagram Feed Post and three Instagram Story posts. Two of the Story posts were to be during New York Fashion Week and one Story post during Milan/Paris Fashion Week.
  - PRC agreed to pay Sabbat $60,000; $45,000 was paid to Sabbat upon signing the contract.
  - Sabbat allegedly made only one Instagram Feed Post and one Instagram Story post.

- **Takeaway:** Selecting the right influencer is *critical.*
What Can You Do To Avoid This?

4-Step Plan

1. 
2. 
3. 
4.
1. Evaluate Your Partnership Goals

- **Increase Brand Exposure**
  - **Base:** Influencers appeal to a wide base, including millennials and Gen-X.
  - **Authenticity:** Influencers typically share similar background with most of their audience, thus allowing them to connect better.
  - **Loyalty:** Influencers have a relationship with their audience that can enhance the loyalty to brands they promote.

- **Build Followers and Engagement**

- **Generate Leads/Sales**
2. Assess the Influencer’s Fit

- Identify the target audience for your brand.
  - Does the influencer appeal to that particular market?
- Ensure the influencer’s values align with the brand’s values.
3. Investigate, Investigate, & Investigate!

- **Devumi LLC (2019) Lawsuit:**
  - On January 30, 2019, the New York Attorney General announced a settlement barring Devumi LLC from selling fake followers and likes on social media platforms.
  - According to the settlement, Devumi’s customers included a multitude of musicians, athletes, politicians, and models, and academics. Customers used Devumi’s services to portray that their products were more popular than they really were.
  - The AG stated Devumi’s services “deceived and attempted to affect the decision-making of social media audiences, including: other platform users’ decisions about what content merits their own attention; consumers’ decisions about what to buy; advertisers’ decisions about whom to sponsor.”

- The FTC Endorsement Guide states “if ‘likes’ are from non-existent people or people who have no experience using the product or service, they are clearly deceptive, *and both the purchaser and the seller of the fake ‘likes’ could face enforcement action.*”
3. Investigate, Investigate, & Investigate!

- Brands should refuse to work with influencers who do not disclose social media engagement information.
- Brands should limit partnership to only influencers who have verifiable followings and accompanying engagement levels.
- Avoiding “one-off posts” and building long-term relationships with an influencer builds trust and credibility.
3. Investigate, Investigate, & Investigate!

- **Red Flags: Fake Followers:**
  - Sudden and inconsistent increase in followers.
  - Mainly overseas followers.
  - Suspicious following activities.
  - Limited number of posts in relation to followers.
  - Little to no social media engagement.
  - Consistently off-topic comments.
4. Determine If The Return Is Worth The Investment

- The reach and impact of influencer marketing should be measurable from the start of the partnership.
- Brands should employ the same measurements, standards, and return on investment (ROI) calculation used for other marketing tools to influencer marketing.
  - These measures include impressions, clicks, shares, likes, story views, etc.
TIPS FOR INFLUENCER AGREEMENTS
Overview

1. Deliverables
2. FTC Compliance
3. Moral Clauses
4. Approval Rights
5. Internal Controls
6. Other Standard Terms
1. Deliverables

- **A. EXPECTATIONS**
  - Spell out precisely what is expected from the influencer.
    - How many posts, what kind of posts, where the location should be, on what social media sites, etc.
  - Clarify what the deliverables are.
    - This should include the general content AND the format.
    - Is the deliverable a YouTube video, Snapchat Story, Instagram posts, or some combination?
1. Deliverables

- **B. SCHEDULE**
  - The delivery schedule should clearly outline:
    1) the length of the campaign;
    2) all deadlines that the influencer must meet when creating sponsored content for review; and
    3) the dates and times an influencer must share sponsored content.

- If the influencer is creating more than one sponsored post for a brand, companies should outline the amount of time between each post.

- Deadlines should be written in the influencer’s time zone or in a specified time zone (e.g., Pacific Standard Time).
1. Deliverables

- **C. EXCLUSIVITY**
  - The contract should specify who owns or can use the content.
  - Typically, content created by influencers will be owned by them.
  - Ensure that the content will be assigned to the brand or provide for a perpetual license.
  - If a brand does not want the influencer to promote other competing products, as that can dilute the effect of the promotion, exclusivity should be reflected in the contract.
1. Deliverables

D. PAYMENT

- The payment structure should designate each separate act has its own payment.
  - If the influencer has to make three posts, then the payments should be split into three, and earned as each post is made.
- Do not pre-pay for posts.
  - The influencer should earn each separate fee.
  - If the brand and influencer do not agree to this arrangement, then the fee should be placed in an escrow account pending satisfactory completion of the Agreement.
- If approval is critical to the agreement, ensure that no fee is due for an unapproved post.
2. FTC Compliance

- The Federal Trade Commission’s (FTC) guidelines for paid content require that ALL paid social endorsements be “honest and not misleading.”

- According to the FTC, brands need to have reasonable programs to train and monitor influencers.
2. FTC Compliance

- **FTC Focus on Influencers**
  - In April 2017, the FTC sent out over 90 letters to social influencers and advertisers notifying them to clearly and conspicuously disclose their relationships with brands on social media.
  - Noncompliance with the FTC exposes brand owners to cease and desist orders, fines, mandated customer refunds, corrective advertising obligations and other penalties.
2. FTC Compliance

- Disclosures – When to include?
  - If there is an **incentive of any kind**:
    - Monetary compensation.
    - Free products or services (even if not expensive).
    - Sweepstakes entries.
    - Chance to appear in a commercial.
    - Charitable donations from the company.
    - Travel and accommodations.
  - When in doubt, influencer should **DISCLOSE**.
Disclosures – Where to include?

- “Clear and conspicuous”
  - **YouTube**: In the video itself *and* in the description.
  - **Instagram**: Superimposed on the photo/video or in the first three lines of the description.
  - **Snapchat/Instagram/Facebook Stories**: Superimposed on photo/video/Story.
    - Disclosure should be easy to notice and read in the time followers have to look at the image.
  - **Twitter**: Starting a tweet with #ad would likely be effective.
2. FTC Compliance

- **Disclosures – What to say?**
- **Simple and clear statements**
  - “Brand’ gave me this product to try…”
  - “Brand” paid me to review this…”
  - #Ad, #Sponsored, #PaidAd, #Promotion
- **Space constraints are no excuse for inadequate disclosures!**
2. FTC Compliance

- *In the Matter of Lord & Taylor, LLC (2016)*
2. FTC Compliance

- *In the Matter of Lord & Taylor, LLC (2016)*
  - The FTC cracked down on Lord & Taylor for failing to disclose that certain influencers’ posts displaying the Lord & Taylor’s Design Lab fashion collection were paid promotions.
  - 50 influencers were paid to post Instagram photos of themselves in the same paisley dress and tag the corporate social media account @lordandtaylor.
  - Influencers reached over 11.4 million Instagram users in two days. The campaign led to 328,000 brand engagements with Lord & Taylor and the dress sold out.
2. FTC Compliance

- *CSGOLotto Inc., Trevor Martin, and Thomas Cassell (2017)*

Example of one of the non-FTC compliant tweets.
2. FTC Compliance

- **CSGOLotto Inc., Trevor Martin, and Thomas Cassell (2017)**
  
  - FTC settled its first-ever complaint against two social media influencers, Trevor “TmarTn” Martin and Thomas “Syndicate” Cassell, for failing to disclose their connection to a game they advertised to their online followers.
  
  - FTC charged the two men with false and deceptive advertising for posting tweets such as “I lied ... I didn’t turn $200 into $4,000 on @CSGOLotto ... I turned it into $6,000!!!!” without disclosing that they were co-owners of the game being advertised.
  
  - FTC alleged that the two paid other gamers in their social media circle to post about the CSGO Lotto game.
2. FTC Compliance

- **Takeaway**
  - Disclose all “material” connections.
  - All disclosures must be “clear and conspicuous.”
  - Space constraints are no excuse for inadequate disclosures.
  - Treat each post as a standalone advertisement.
3. Approval Rights

- Advertiser should have the ability to review, approve, and request revisions of influencer content.

- Ownership is a major consideration to take into account. Contract should specify who owns the sponsored content.

- Broad Usage License vs. Ownership depends on the extent of advertiser’s relationship with the influencer.
4. Moral Clauses

- Include a moral clause in the agreement.
  - Prohibits certain behavior in connection with influencer’s private life.
    - Example: "If at any time, in the opinion of Company, Influencer becomes the subject of public disrepute, contempt, or scandal that affects Influencer’s image or goodwill, then Company may, upon written notice to Influencer, immediately suspend or terminate this Agreement and Influencer’s services hereunder, in addition to any other rights and remedies that Company may have hereunder or at law or in equity."

- Provide for termination if influencer discriminates against any protected class.
4. Moral Clauses

- Potential Remedies Available Under Moral Clause:
  - Termination of the agreement.
  - Suspension of the agreement for a period of time.
  - Financial penalty for the behavior at issue without terminating the endorsement contract.
  - Payment of damages by the influencer for breach of the agreement.

- Companies should have a detailed plan for monitoring influencers.
5. Internal Controls

- Develop/implement a company social media policy.
- Monitor for compliance with training and social media policies.
  - Delegating responsibility to an outside entity (such as a PR firm) does not relieve advertiser of responsibility.
- Enforce non-compliance and breach of confidentiality with terminations or penalties.
- Use contractual agreements.
  - Remember: *a brand cannot shift liability to the influencer – both may be held liable by the FTC.*
6. Other Standard Terms

- **A. Warranties & Representations**
  - Contracts should include representations and warranties provision.
  - Influencers need to comply with all applicable laws and FTC guidelines.
  - Influencer’s content should not infringe upon any third party rights.
    - Copyright
    - Rights of Publicity
    - Trademarks
6. Other Standard Terms

- **B. Indemnification**
  - The FTC holds advertisers responsible for ensuring that influencers conform with the FTC’s guidelines.
  - Brands may potentially hold influencers *contractually liable* through indemnification provisions.
6. Other Standard Terms

- **C. Termination**
  - Agreement should clearly specify the start and end date.
  - Termination rights for:
    - Failure to comply with social media policies and FTC regulations (especially disclosures).
    - Material breach of the agreement.
    - Reputational damage. See *Moral Clause*.
    - Any reason?
INTERACTING WITH THIRD-PARTY CONTENT
Re-Sharing & Promoting Third-Party Content

- Typically the owner or creator of a post owns the copyright and the right to any revenue afforded by that content, even if a brand is tagged in the post.

- It is good practice to *always* obtain consent before re-sharing a third-party post, especially for commercial purposes.
  - Ask owner of the post via a comment on the original post.
  - Send owner a direct message.
Using Third-Party Content

- *Brammer v. Violent Hues Productions (2019)*
Using Third-Party Content

- **Brammer v. Violent Hues Productions (2019)**
  - Photographer, Russel Brammer, sued Violent Hues Production after discovering that the production company used Brammer’s photograph—without receiving consent—to promote a D.C. film festival on Violent Hues’ website.
  - Violent Hues published a cropped version of Brammer’s copyrighted photograph after finding the image on Flickr, a photo-sharing website.
  - The production company asserted a fair use defense and the district judge granted summary judgment in favor of the defendant.
  - On appeal, the Fourth Circuit reversed the lower court’s finding of fair use and determined that Violent Hues’ online use of Brammer’s photograph did not constitute fair use as a matter of law.
Referring to Third Parties

- *Kimsapprincess, Inc. v. Missguided USA (2019)*
Referring to Third Parties

- **Kimsaprincess, Inc. v. Missguided USA (2019)**

  - Social media mega-influencer, Kim Kardashian West, sued “fast-fashion” brand, Missguided, based, in part, on company’s Instagram posts:
    - Using lookalike models
    - Tagging Kardashian
    - Using Kardashian’s marks in posts advertising other companies’ products
  
  - **Claims:** Violation of right of publicity and unlawful misappropriation of Kardashian’s persona; trademark infringement
    - "Missguided systematically uses the names and images of Kardashian and other celebrities to advertise and spark interest in its website and clothing."
  
  - Kardashian sought $10 million in damages, injunctive relief, and punitive damages.
Referring to Third Parties

- *Kimsaprincess, Inc. v. Missguided USA (2019)*

- Latest Developments:
  - On July 2, 2019, a federal court entered a default judgment awarding Kardashian $2.7 million in damages and $59,600 in attorneys’ fees.
  - The court further ruled that Missguided is permanently enjoined from using any of Kardashian’s trademarks in connection with the sale, marketing, or distribution of its products.
Referring to Third Parties

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- **Katherine Heigl v. Duane Reade (2014)**
  - Actress, Katherine Heigl, sued convenience store, Duane Reade, for misusing and misappropriating a photograph of Heigl for commercial purposes.
  - Heigl was photographed by paparazzi near a Duane Reade store while she was filming a television show in New York. Without Heigl’s permission, Duane Reade posted the photo on its Twitter and Facebook accounts.
  - Heigl filed the lawsuit in the Southern District of New York, seeking no less than $6 million in compensatory and punitive damages.
  - In late 2014, Heigl voluntarily dismissed her lawsuit. In exchange, Duane Reade made a contribution to benefit the Jason Debus Heigl Foundation.
Third Party Trademarks As #Hashtags

- *Chanel, Inc. v. WGACA, LLC (2018)*

Chanel apparel as featured on WGACA website and advertisements.
Third Party Trademarks As #Hashtags

- **Chanel, Inc. v. WGACA, LLC (2018)**

  - Chanel sued What Goes Around Comes Around (WGACA) for trademark infringement. WGACA is a retailer of luxury preowned apparel that offers preowned Chanel products on its website and stores.
  - WGACA tagged photos of Chanel products with the hashtag #WGACACHANEL on its social media pages.
  - Chanel argued that the hashtag served “to create the impression that WGACA is affiliated with Chanel or is an authorized Chanel retailer.”
  - The Southern District Court of New York denied WGACA motion to dismiss, finding that the hashtag #WGACACHANEL may be taken as suggesting sponsorship or endorsement by Chanel.
Third Party Trademarks As #Hashtags

- Brands should ensure that influencers avoid using trademarks as hashtags in sponsored posts unless the brand owns the trademark.
Thank you.

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