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K&L Gates investigates social media influencers and the “pay per post” market.

ANDY WARHOL'S OFTEN quoted prediction that “in the future, everyone will be world-famous for 15 minutes” has never been truer than right now. The rise of social media has given users a platform to speak directly to infinite numbers of consumers, thereby controlling media content and distribution and democratizing power and influence within the media. As a result, “social media influencers” have become an important resource for fashion labels to promote their brands. However, as demonstrated by recent experience, labels should be taking a careful and sophisticated approach to utilising social media influencers or risk falling foul of the law.

There is no one definition of a social media influencer but, in essence, these are social media users who have amassed a profile that gives them the power to market particular brands, products or messages to their large number of followers. Social media influencers can be celebrities or well-known personalities such as sports stars, musicians and actors, however there are an increasing number of influencers whose profile, and influence, derives first and foremost from their social media presence itself. Most importantly though, whoever the influencer is, the endorsements of social media influencers can be big business. It has recently been reported that radio and TV presenter Jules Lund raised more than AU\$750,000 to launch Tribe, an app that seeks to connect brands and influencers in a manner that will capitalise on the growing “pay per post” market.

However, brands need to be conscious that, while it may seem that social media is part of a brave “new world”, the same laws apply to endorsements in these forums as to those in more traditional forms of media. Brands will be at risk if the result of an influencer's post is that consumers are likely to be misled or deceived. In the US, retailer Lord & Taylor recently settled a claim by the Federal Trade Commission arising from allegations that it had paid at least 50 influential Instagram users and the fashion magazine *Nylon* to promote its Design Lab range though positive online endorsements without making the proper disclosures. Although Lord & Taylor incurred no financial penalties (for this “first offence”), it did submit to orders which require it to disclose when it is compensating social media influencers for endorsing its products or face fines of up to US\$16,000 per violation.

It is up to each brand to utilise appropriate and consistent social media guidelines to ensure that consumers are not potentially misled. Given the restrictions of social media, brands and influencers may wonder how a commercial relationship can be appropriately disclosed in this setting. In a newspaper or on a traditional web page, it would not be out of place to include a detailed disclaimer explaining any commercial relationship that exists. On the other hand, the 140 character limit for Tweets means that including the same kind of detailed disclaimer is not so easy in the Twitter-sphere. While the adequacy of any disclaimers could ultimately be a matter to be determined through the Courts, Australia's peak trade association for online advertising in Australia, IAB Australia, has released Social Advertising Best Practice Guidelines which suggests that adding “sponsored story”, “sponsored post” or “(SP)” to the end of a social media post, or including the words

“sponsored”, “paid” or “client” in the post, may be sufficient.

Some keys tips for brands to keep in mind to avoid the risks of operating in this new marketing environment are as follows:

- Consider the brand's legal obligations not to mislead consumers (and ensure that commercial goals do not override these).
- Develop and adhere to a social media policy that ensures that any relevant commercial relationships between the brand and social media users are appropriately disclosed. Distribute the policy internally and to social media influencers that your brand deals with.
- If you are in doubt, seek legal advice regarding the risks arising from commercial relationships with social media influencers or particular posts that are of concern. ■

For more information about issues relating to social media please contact Savannah Hardingham, Special Counsel at K&L Gates (savannah.hardingham@klgates.com). This article is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.



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