

PRESENTED BY
K&L GATES

Social media: *the sequel*

K&L Gates' Savannah Hardingham and Zara Lim tackle the latest legal issue.

IN THE JUNE issue, we looked at social media influencers and the potential legal risks faced by brands which fail to disclose when posts are sponsored. Now we take a look at the importance of ensuring that contracts between fashion brands and social media influencers or bloggers are in place and that they are clearly drafted to cover the range of legal issues that may arise during the course of a collaboration. Below we set out the contractual "must haves" for a successful fashion label-influencer relationship.

Sponsored Posts

As we wrote in June, it is important that brands do not mislead consumers when engaging influencers to promote their brand. To protect themselves, fashion brands should ensure that contracts contain clauses that require any relevant commercial relationship between the brand and the influencer to be appropriately disclosed in every online post. The contract should also set out how this disclosure is to happen.

Previews and Shows

Brands should ensure that contracts clearly set out any confidentiality requirements surrounding previews of collections and runway shows that bloggers and influencers are invited to attend. Be clear as to whether or not photos and video footage of the collections and events can be posted online, particularly if the event is a confidential preview of a collection. The contract should also set out any specific requirements or conditions that the brand wants met when the usage of photos and images are permitted. For example, the brand may want to ensure that the posts are in line with the brand's identity or values, and that any images or footage posted are of a reasonable quality. If so, these requirements should be clearly spelled out.

Product Tests and Reviews

Similarly, some fashion and accessory brands provide sample products to influencers to test and review on their blogs, social media accounts or platforms such as YouTube. These products are often provided to these people to try out before they are finalised or released to the public, sometimes on the understanding that the product will not be posted about until it is finalised or released.

For brands planning to register their designs (to protect against copying), this kind of situation raises some red flags. Design applications must be filed before a design is publicly disclosed. Any public disclosure or non-confidential use of a product prior to a design application being filed

will invalidate the design. This risk can be dealt with by imposing contractual obligations on the influencer that requires the design be kept confidential, until the design application is filed. These types of contractual terms can be complex and are best drafted by a lawyer.

Even if a brand does not intend to register its design but does not want the test product posted about until a certain date for commercial reasons, this should also be set out in the contract.

Photographs

It is important to be clear about who owns the copyright in photos produced by influencers and whether the brand is permitted to reproduce such photos.

Fashion bloggers often take their own photos wearing products provided to them by a clothing or accessories brand. The brand may want to use these photos, however in order to avoid any copyright disputes, it is imperative that it has the permission of the copyright owner to do so. It is therefore prudent to clarify in the contract whether the brand has permission to use any photos taken by the influencer that feature its products. Brands should also be aware that if the influencer has a third party taking the photos, the photographer is likely to be the owner of copyright in the photos and is the party that needs to approve any such use.

After the Collaboration

Finally, brands may want to consider including a clause that prevents influencers from publishing disparaging comments about the brand, especially after the relationship comes to an end.

If you are unsure how to go about drafting an appropriate contract, we recommend that you talk to a lawyer about preparing a pro forma contract that can be adjusted each time your brand collaborates with a new influencer. This can be a cost effective way to ensure that your brand is protected. ■

For more information about issues relating to social media 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.

