

Cautionary notes for companies and influencers

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Influencer advertising

In 2022, even the most pessimistic advertiser is unlikely to bet on the fact that the rise in popularity of the influencer industry is going to dissipate anytime soon. Companies are increasingly turning to social media influencers of different backgrounds and followings to market their products, campaigns and companies.

One of the reasons for this shift is the fact that this form of advertising is generally comparatively less costly. Through influencer advertising, companies no longer need to allocate significant budgets toward television and radio advertising, which often includes location and equipment costs, the hiring of photographers etc. In this day and age, it is often the influencer who bears the responsibility for these expenses, including photographers, videographers, hair, make-up and anything else that may be required to bring the hiring company's advertising/marketing vision to fruition.

There are several legal aspects in this ever-evolving market that both companies and influencers should bear in mind when undertaking to advertise in this manner. Although South African courts have not yet dealt with a significant number of influencer/social media-related cases, there is much to be learned from some of the prominent international influencer/social media cases that have arisen of late.

Aspects for the company to consider

As an organisation looking to work with an influencer, it is advisable to, among other things, ensure that certain clauses are particularly well-drafted in any influencer contract.

For instance, invariably a company would want to ensure that it retains its right to review and thereafter approve or deny content before it is uploaded to social media. This serves to avoid problematic and/or damaging content from being published, thereby tarnishing the company's reputation and even potentially exposing the company to claims.

Moreover, well-drafted breach, termination and dispute clauses are necessary to ensure that the company is able to enforce its rights in the event of social media-related damages being suffered. The importance of some of these clauses is illustrated in the international cases of Snap Inc (PR Consulting Inc) v Luka Sabbat (approximately a \$90 000 claim) and Konus (Catwalk to Sidewalk Inc) v Luka Sabbat (approximately a \$40 000 claim), where in both instances the celebrity contracted to advertise certain products simply failed to satisfactorily fulfil his contractual obligations.

Both companies were constrained to enforce their rights in terms of the provisions of the contract, in order to recover the amounts already paid.

Aspects for the influencer to consider

Many influencers do not have a legal background and, as a result, are unaware of some of the consequences associated with certain clauses contained in commercial contracts. It is for this reason influencers are strongly encouraged to seek legal advice, prior to signing any influencer contract. Legal issues that are particularly relevant to the influencer industry include unreasonable restraint of trade practices, the

use of the influencer's content outside of the bounds of the agreement for no additional compensation and being held liable for customer dissatisfaction in relation to a product or experience being advertised by the influencer.

The legal risk to influencers is real and can be material, resulting in significant financial losses.

For example, in 2018 the American Securities and Exchange Commission brought charges against professional boxer Floyd Mayweather Jr. (Mayweather) and music producer Khaled Khaled (DJ Khaled), for failing to disclose payments they had received for promoting investments in Initial Coin Offerings (ICOs), whereby new currencies are sold to investors (essentially promoting certain ICO issuers/cryptocurrencies as being reliable and generally a good investment).

The ICO issuer was subsequently charged by the Securities and Exchange Commission, premised on allegations that its ICO was fraudulent. Without admitting or denying the findings of the Commission, Mayweather and Khaled agreed to pay disgorgement, penalties and interest to the value of \$614 775 and \$150 725, respectively. In addition, Mayweather agreed not to promote any securities for three years and DJ Khaled agreed to a similar ban for a period of two years. The United States office for the southern district of New York filed parallel criminal charges against the pair.

Read more on the [legal dangers of a side hustle](#).

It is evident that as the impact of influencers increases in the advertising industry, the need for carefully considered legal drafting and jurisprudence in this area will increase. In South Africa, this is largely, albeit indirectly, regulated by the Consumer Protection Act and more specifically Appendix K to the Code of Advertising Practice (being the Social Media Code published by the [Advertising Regulatory Board](#), a document many influencers may not be familiar with).

The industry is largely unregulated and, given the fast-changing nature thereof, closely regulating it is likely to prove challenging. This, however, serves to place an even greater responsibility on bodies such as the Advertising Regulatory Board to keep a close eye on the developments in the industry, to ensure that companies, influencers and customers are adequately protected.

It also highlights the need for all parties involved to obtain proper legal advice, preferably at the inception of the commercial influencer relationship, enforcing the old adage that prevention (in this instance, both from a risk and cost perspective) is better than cure.



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