

SOCIAL MEDIA LAW: INFLUENCER CONTENT

Gowlessence: the insider view into the legal side of the influencer marketing industry

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Meet Gowlessence, the latest beauty brand to pop up on your social media feed. Gowlessence produces cleansers, creams and serums that its customers swear make them look good on the outside, while also making them feel good on the inside. Gowlessence's demographic is millennials that justify their indulgence on "self-care" by investing in Gowlessence's promise of organic, cruelty-free products and lifestyle.

Gowlessence's advertising campaign for its new Self-Care Serum is being devised. The majority of Gowlessence's sales in the previous year came from "click-throughs" and "swipe-ups" on their Instagram; following this success, the brand decides to invest heavily in posting like-worthy content. As such, Gowlessence's marketing team come up with a three-pronged plan to deliver a beautifully curated profile to attract maximum sales.

Gowlessence intends to post: (1) reposted content it's found on the internet, including other Instagram accounts (for example, a "Winning Baby" meme congratulating itself on removing its makeup after a night out); (2) reposted content created by its followers, where Gowlessence has been tagged (for example, a happy customer glowing as a result of Gowlessence products); and (3) reposted content that Gowlessence has paid its influencers to produce. This series of articles will examine the challenges for brands running campaigns involving user-generated content.

Influencer content

Isabellicious is one of Gowlessence's celebrity influencers. When she produces advertorial content, she uses a photographer to ensure the image is high-quality. Generally, a photographer will own all the rights to photos taken - however, prior to any shoot, Isabellicious ensures that the photographer signs a written assignment, assigning all the

image rights to her. This gives all the rights to the photos to Isabellicious as if she had taken them herself.

Isabellicious' assignment also includes a waiver of the photographer's moral rights, which avoids the obligation on Isabellicious to "credit" the photographer when she posts the pictures. This means that she isn't restricted in any way in how they are exploited, giving Isabellicious the option to keep or transfer these rights on to a third party.

This works well when Isabellicious is working with UK-based photographers, but where she works with UAE-based photographers (which happens regularly as she travels to Dubai often, in an attempt to grow her Middle Eastern following) and the relevant assignment is made under UAE law, a waiver of moral rights is more complicated. In the UAE, the author of a work may only undertake not to exercise their moral rights in relation to a specific person/entity, provided that the agreement specifies the works and specific uses to which the undertaking applies.

The more detailed these provisions are, the greater the likelihood that they would be held to be valid and enforceable. If Isabellicious is able to detail precisely how the images will be used, then a waiver of the photographer's moral rights is possible - though this is unlikely as she isn't able to foresee all the possible uses. Therefore, in the assignment, Isabellicious just lists the present intended use of the images. In the event that she wants to use some of the images for another purpose, she will have to get another assignment from the photographer.

Content ownership

Isabellicious has been paid by Gowlessence to post three pictures featuring the Self-Care Serum. She's been given a detailed brief concerning how Gowlessence wants the content to look, and accompanying captions to ensure the relevant disclosures are included. In the first draft of the agreement sent to Isabellicious from Gowlessence, the provision dealing with the ownership of the advertorial content produced by Isabellicious sits with Gowlessence. Gowlessence has built ownership of the content into the fee they pay to Isabellicious as they want to use the content as and when they want.

Content licence

Isabellicious refuses to accept this clause, as she doesn't want to give up ownership of

her content. As she is a high-profile celebrity influencer, she has strong bargaining power - Gowlessence is aware that her association with them will be valuable. As such, they are willing to compromise with Isabellicious: she gives Gowlessence a one-year exclusive licence to use the digital content for the use of skincare advertisements on Instagram, subject to her approval.

This agreement means that Gowlessence won't be able to use the content outside of the 12 months. Once this time period expires, the entitlement to use the content reverts back to Isabellicious. While this may seem quite restrictive, Isabellicious' profile is such that Gowlessence are more concerned with her producing content for its campaign rather than its ownership of that content.

Where advertising campaigns involve paying influencers to post advertorial content on their own page, there will be a negotiation between the influencer and the brand on intellectual property rights. As such, brands should consider if the "star power" of the influencer is worth not receiving any rights to the content - or if it views the fee to be inclusive of ownership of the content created.

Wherein, for brands, content ownership is valuable, it may well be that a long-term relationship with an influencer and their large following is more important. Regardless, it's imperative that brands are aware of the ownership of any advertorial content created - to avoid facing a claim for copyright infringement.

Check out our previous instalments on the ownership of social media content:

- [Ownership of social media content: Memes](#)
- [Ownership of social media content: user-generated content](#)
- [Ownership of social media content: influencer content](#)

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