

SOCIAL MEDIA LAW: USER-GENERATED 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 its 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) re-posted content created by its followers, where Gowlessence has been tagged (for example, a happy customer glowing as a result of Gowlessence products); and (3) re-posted content that Gowlessence has paid its influencers to produce (user-generated content (UGC)). This series of articles will examine the challenges for brands running campaigns involving user-generated content.

User-generated content

Gowlessence likes to re-post images posted by its followers where its products are featured. This is a useful marketing tool in influencing its audience - if they see a "real-life" follower looking glowy - the result of a Gowlessence product - then they're more likely to make that purchase too. Gowlessence wonders why there's no "re-post" button on

Instagram, as this would make this process a lot more convenient. However, Instagram was never designed for "re-grams". In fact, under Instagram's terms of service, account holders are responsible for "proper use" of content shared on the platform - any conduct that isn't, is a violation of its terms of service.

Though, with Instagram not seeming to take independent action against those re-posting UGC without permission (apart from when put on notice from copyright holders), utilising UGC is a practice that Gowlessence intends to continue. Nevertheless, there are pitfalls which Gowlessence must be aware of when reposting UGC, to avoid unfavourable legal ramifications.

Permission

Often, Gowlessence will spot great UGC when scrolling through its "explore" page on Instagram. Gowlessence has heard about the myth that if the content has been uploaded publicly, it's free to use. Unfortunately, this myth overlooks the core legal concept of copyright. Uploading content does not void its copyright protection and the need to obtain the consent of the copyright owner to use it. As Gowlessence's followers own the copyright in their images, Gowlessence must get permission to re-post the photos. If not, Gowlessence runs the risk of infringing other users' copyright. Fortunately, Gowlessence has found that its followers usually do give their permission, as they are excited about the prospect of being featured on Gowlessence's Instagram feed or story.

Explicit permission

The most prudent way for Gowlessence to gain permission before posting UGC is by obtaining explicit permission from the original content creator. To do this, Gowlessence should manually contact users to ask them for explicit permission to re-post their content - either through a rights management system, or through commenting/direct messaging them. This way, Gowlessence will have a "paper trail" showing the explicit permission given to post the UGC to counter any accusations of copyright infringement.

Implicit permission

The second way that Gowlessence can get consent from its followers to use their UGC is to obtain implicit permission. Gowlessence regularly posts stories calling on its followers to post pictures of themselves with Gowlessence products, promising that the best

content will be re-posted on its account. Gowlessence stipulates that followers should use the #GowlessenceGlowUp hashtag when posting. Where users include this hashtag in their content, this is implicit permission from users that Gowlessence can use that UGC.

However, while this mechanism would constitute "interim" permission, this alone does not constitute formal consent. Even if an image depicts Gowlessence products or brand, the copyright in the image is still owned by its original creator. This remains the case even if Gowlessence includes a link in its bio to its terms and conditions (which cover its use of UGC). Therefore, it would be prudent for Gowlessence to receive explicit permission from users to ensure any future legal issues are avoided - especially if Gowlessence intends to use the UGC for commercial purposes.

Third parties

Third party intellectual property

Gowlessence will need to consider its position where there is third-party content embedded in the UGC, which may need separate licensing. For example, if a user posts a story of themselves wearing Gowlessence's Loose Lips Lipstick with a song playing in the background, rather than going through the hassle of securing a synchronisation licensing fee for use of that song, it would be more efficient for Gowlessence to re-post the video with no sound.

Third party privacy

Gowlessence has an office in the UAE to service its large client base there. The UAE stands out from other jurisdictions in that it has very strict privacy laws relating to personal privacy. The various laws which cover privacy make it a criminal offence to use digital means to breach someone else's privacy, including by taking pictures of others, or publishing or displaying those pictures. Additionally, UAE copyright law states that, in the absence of an agreement to the contrary, a person who takes a picture of another cannot distribute or publish such picture without the consent of the person appearing in the picture.

Gowlessence therefore must be extremely careful when featuring UGC on its UAE social media, especially where the content features third parties. When asking for permission from the account holder of the UGC to use the content, Gowlessence should also confirm that any third parties in the content also consented to their appearance. If this proves too

cumbersome, Gowlessence should steer clear of re-posting any UGC featuring third parties in the UAE.

Reputation management

Gowlessence is keen to ensure it receives all the appropriate permissions when posting UGC - not just to avoid any legal issues, but also to dodge any reputational risks. A user using the #GowlessenceGlowUp hashtag may not appreciate that their image may be posted for all of Gowlessence's followers to see. While posting UGC is a beneficial way for Gowlessence to interact with its followers, Gowlessence should be aware of the legalities of UGC - so that it can avoid a situation where UGC creators who have not given their consent attempt to claim damages from the brand to compensate for a licence fee.

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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