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The Influencers and the Influenced: Effects of Social Media Influencers on Enforcement of Trademark Law in the U.S. and Europe

Abigail Dagher

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THE INFLUENCERS AND THE INFLUENCED: EFFECTS OF SOCIAL MEDIA INFLUENCERS ON ENFORCEMENT OF TRADEMARK LAW IN THE U.S. AND EUROPE

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INTRODUCTION

Some TikTok stars are earning more money than America’s top chief executives.1 Charli D’Amelio began posting videos of herself dancing on the app back in 2019 and made $17.5 million in 2021.2 With 133 million TikTok followers, a clothing line, and product promotions, D’Amelio earned more than the CEOs of Exxon Mobil Corp., Delta Air Lines Inc., and Starbucks Corp., among others.3 Together, the platform’s highest-paid “stars” collectively raked in $55.5 million in 2021, a 200% increase from the year before.4

As social media continues to shape consumer interactions and brand partnerships, social media influencers (SMIs) have become key players in the evolution of how platforms, communications, and technologies are being regulated.5 The 2021 case Petunia Products, Inc. v. Rodan & Fields, et al. exemplifies how courts are adapting to increased SMI involvement in brand development and platform engagement.6 In the United States, product manufacturers have been known to launch trademark infringement suits against each other but generally not against individuals.7 The District Court for the Central District of California refused to dismiss direct trademark infringement claims against model, actor, and SMI Molly Sims.8 Petunia Products could have been the first U.S. case in which an influencer was held liable for promoting a

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2 Id.
3 Id.
4 Id.
6 See generally Petunia Prods., Inc. v. Rodan & Fields, LLC, No. 821CV00630 CJC (ADS), 2009 WL 4261189 (S.D. Cal. Aug. 6, 2021); Jasmine Jackson, Cruelty-Free Makeup Co. Drops ‘Brow Boost’ TM Suit, LAW360 (July 29, 2022), https://www.law360.com/articles/1515912/cruelty-free-makeup-co-drops-brow-boost-tm-suit (since writing this Comment in 2021, the trademark case against Rodan & Fields and SMI Molly Sims has been dropped after the companies reached an “undisclosed settlement” though there will not be a decision on the merits, the issues and analysis remain salient).
8 Handler, supra note 7.
product that infringes a trademark. It suggests a shift in trademark infringement enforcement to potentially hold SMIs directly liable, resembling a trend already evident in European courts.

In the July 2019 case *Ferrari S.p.A. v. Philipp Plein International AG*, the Court of Genoa clarified its stance on the use of third-party trademarks by influencers. The Italian court ultimately held that SMIs’ use of third-party trademarks is lawful if the owner has authorized them to do so or if the images are not used only for commercial or advertising purposes. In both *Ferrari S.p.A.* and *Petunia Products*, the courts tackled an issue that has been gaining prominence in the most digital era yet—how to deblur the lines between what is private, public, and commercial on social media.

This Comment explores the emerging issue of SMI regulation through a comparative lens. Part I delves into the expanding reach and impact of social media influencers worldwide as well as their use of the most powerful platforms to engage with audiences young and old. Understanding just how deep fan loyalty has become and how some SMIs are capitalizing on these relationships offers a context for examining the perceived need for new rules to regulate their online conduct. Part II analyzes regulations in the United States and their transitional trajectories against the backdrop of the *Petunia Products* case. With these in conjunction, it becomes clearer that the United States needs to adapt its practices to safeguard the public and trademark owners more efficiently. Part III presents a comparative overview of similar procedures in some European countries. Finally, Part IV looks toward the future of dealing with Federal Trade Commission (FTC) enforcement and trademark infringement in the United States.

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11 *Id.*


This Comment contends that, by creating stronger more narrowly tailored government regulations like those in some E.U. Member States, the United States could, and should, offer increased protection for trademark owners as the grip of those influencers with the highest followings continues to tighten over consumers. Evolving FTC guidelines to speak more specifically about SMI trademark infringement would open additional necessary avenues through which some influencers’ deceptive, misleading, or improper practices should be challenged.  

I. THE RISE OF THE SOCIAL MEDIA INFLUENCER

Social media has become the largest expenditure category for many companies’ promotion budgets. As such, consumers are turning more and more toward those who are influencing social channels with their posts, pictures, and promotions. Within this booming field, SMIs are independent third-party endorsers who shape audience attitudes through their social media activity, facilitating connectedness and highlighting recommendations. SMIs rely on a variety of platforms to produce regular media content and practice peer-to-peer engagement with the public. Some SMIs have become famous outside of social media but then use social media platforms to advance their influence further. Other SMIs are “born and raised” on social media platforms and derive all of their fame from them. Regardless of their celebrity status outside of social media, influencers have heightened capabilities to associate with their respective audiences because of platforms’ easy methods of interaction.

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18 Carsten Schwenmmer & Sandra Ziewiecki, Social Media Sellout: The Increasing Role of Produce Promotion on YouTube, SOC. MEDIA & SOC’Y 1, 2 (2018).
20 Id. at 7.
21 Id.
There are four main tiers of SMIs based on follower count: mega (more than one million), macro (500,000 to one million), micro (10,000 to 50,000), and nano (less than 10,000). On average, in 2021, mega influencers made $6,786, and macro influencers made $5,043 per post.

The beginning of the isolating COVID-19 pandemic in 2020 also marked the start of a year that would ironically bring everyone closer together through social media. The platforms that, in one sense, offered a lifeline of informative updates also became avenues to shared experiences and a modern sense of interconnectedness.

In a 2020 study, over fifty percent of social media users were found to have preferred getting product information from influencers rather than straight from the brand or advertiser source. Creators also generally upped their social media output in 2019 and 2020.

Americans spent an average of eighty-two minutes per day on social media in 2020. In July 2021, there were 4.48 billion social media users around the world, making up more than half of the total global population. Approximately 233 million Americans were using some type of social media in 2021, which equates to seventy-two percent of the public.

The influencer marketing market is expected to reach $16.4 billion in 2022, which is a noticeable increase from $1.7 billion in 2016. As of June 22, 2021,

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26 Id.
29 Molla, supra note 25.
32 Jacinda Santora, 100 Influencer Marketing Statistics for 2021, INFLUENCER MKTG. HUB, https://influencermarketinghub.com/influencer-marketing-statistics/ (last updated Sept. 7, 2021); Rohit Chopra,
the influencer marketing industry made up roughly fifteen percent of global advertising spending. Influencer marketing is preferred by some advertisers for its scalability, or the ability to adjust the size of a campaign, which can provide a significant advantage over social activity using official brand accounts. Creating a larger campaign just means working with more influencers, which expands the industry even further.

With adolescents spending seventy-six percent longer on social media apps in 2020 than in 2019, it makes sense that children and teenagers are closely following the advice given by SMIs, even aspiring to future careers like the influencers they admire. According to a Facebook-commissioned online study, sixty percent of consumers worldwide would follow a brand on Instagram if it was being promoted by a creator who shared the consumer’s values and interests. At the reach of a screen or button, influencers have become trusted peers because they exude authenticity, access, and relatability.

SMI content is different from traditional television or billboard advertisements because “social media blurs the boundaries between private and public life, between the personal and commercial activity.” Endorsements by SMIs become intertwined with narrations of everyday life in social media posts. Additionally, even though some influencers may be unaware of their infringing or deceptive practices, many influencers lawlessly promote on social media, rarely disclosing compensation or connection to brands. Even some

34 Geyser, supra note 28.
35 Id.
36 Id.
38 Ranchordás & Gounta, supra note 19, at 5.
41 See id.
non-influencer users are pretending to be sponsored by incorporating illusory product placements in their posts.\textsuperscript{43} In turn, many consumers have come to believe that SMIs are merely praising products or services rather than endorsing them.\textsuperscript{44} Also, important is that digital marketing, unlike traditional advertisements, is algorithmically catered to social media preferences and browsing history, which muddles consumers’ experiences even further.\textsuperscript{45}

Deeper conviction and fan loyalty can be built when influencers have larger followings and more productive activity on their accounts.\textsuperscript{46} Analytics regarding an influencer’s activities on platforms, therefore, can dictate the scope of their relationships with brands.\textsuperscript{47} Relevant data includes an SMI’s number of followers, subscribers, views, likes and dislikes, as well as reposts.\textsuperscript{48} Data also reflects the depth of the influencer’s reach (the total number of people who see the SMI’s content) and impressions (the total number of times social media browsers have displayed the SMI’s content).\textsuperscript{49}

Brands will either focus on a reach or niche SMI, closely resembling the macro versus micro tiers, respectively.\textsuperscript{50} Whereas the reach method caters to mass appeal toward a larger audience, the niche approach focuses on targeted groups, cost-effectiveness, engagement, authenticity, and accessibility.\textsuperscript{51} Brands also have a variety of business models for their collaborations with social media influencers.\textsuperscript{52} The affiliate marketing strategy facilitates monetary payments to content publishers when users click their customized URLs.\textsuperscript{53} For example, an SMI may receive payment for posting a discount code and corresponding link. An exchange of goods or services occurs when a brand offers a SMI goods or services for a post, review, mention, or story.\textsuperscript{54} Endorsement deals provide a

\begin{thebibliography}{99}
\bibitem{44} Garson, supra note 42.
\bibitem{46} Ranchordás & Goanta, supra note 19, at 6.
\bibitem{47} Id. at 8; Kayla Carmicheal, Social Media Impressions vs. Reach: What’s More Important, HUBSPOT (Nov. 22, 2019), https://blog.hubspot.com/marketing/impressions-vs-reach.
\bibitem{48} Carmicheal, supra note 47.
\bibitem{49} Ranchordás & Goanta, supra note 19, at 8; Carmicheal, supra note 47.
\bibitem{51} Id.
\bibitem{52} Id.
\bibitem{53} Id. at 10–11.
\bibitem{54} Id.
framework by which the SMI, as somewhat of a brand ambassador, enters into an often exclusive contract with the brand to produce ads. Finally, SMIs could be the producer or provider of goods or services themselves, which may complicate their exact roles. SMI marketing can potentially develop deeper levels of trustworthiness and authenticity in the eyes of consumers. This bond, however, is easily erased when an influencer loses credibility, especially as consumers continue to become more skeptical on social media.

A. Social Media Platforms and How SMIs Use Them

Platforms’ terms of use usually deny access to infringers and prohibit content if it violates others’ rights. In addition, most have takedown procedures whereby trademark and copyright owners can request that content, including user-generated material, be removed. Top social media platforms for influencer marketing in 2021 were YouTube, Twitter, Instagram, TikTok, and Facebook. In a study conducted by Pew Research Center, a majority of eighteen to twenty-nine-year-olds said that they used Instagram or Snapchat, with half using TikTok, whereas only two percent of adults sixty-five and older use Snapchat. Facebook and YouTube remain more well-liked with older populations.

1. Instagram

Instagram has been deemed the “network of choice for influencer marketing campaigns” with a continuous increase in overall SMI marketing across 2020

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55 Id.
56 Id.
57 CPG Brands, supra note 37; see Percival, supra note 39 (“The brand benefits from this form of advertisement because by picking an influencer whose audience (i.e., the influencer’s ‘followers’) is within a desired demographic, the brand’s product or service reaches consumers in an authentic (because the follower trusts the influencer’s referral), more direct, and immediate manner.”)
59 Friedman, supra note 15.
60 Id.
62 See Geyser, supra note 28 (where Facebook was being used at comparable rates to TikTok).
64 Id.
and 2021. On the platform, influencers can use IGTV to create videos up to sixty minutes long which could include full tutorials of products, “how-to” series, or in-depth reviews. Instagram users can also schedule posts for up to six months in advance—a feature catering to brand relationships, especially those with endorsement deals. In 2020, Instagram introduced badges in Live: purchasable virtual stickers, which reflect fan support and generate creator profits. Other features, including In-Stream video ads, Live Shopping, Brand Collabs Manager, and Branded Content ads, are driving value for creators and aiding collaboration between SMIs and brand partners.

Though these new developments are making it even easier for brands and influencers to work together, Instagram has been enforcing measures to protect trademarks on its platform for years. In 2015, French luxury fashion brand Chanel lodged a complaint against Chanel Bonin regarding her Instagram profile. Bonin started the account “@chanel” on the app in 2011, about three years before the clothing company began using its “@chanelofficial” handle. In some of her posts, Bonin included products bearing the “Chanel” and “CC Monogram” marks. There were also comments under her pictures that referred to her account as “the Chanel account.” Even though it is uncertain whether Chanel instigated the proceedings against Bonin through the platform, Instagram seemingly still played a role in the dispute by temporarily disabling Bonin’s account and deactivating her posts that contained Chanel’s trademarks. Today,

Geyser, supra note 28.
Gotter, supra note 27.
Id.
to her 41.2 thousand Instagram followers, Bonin still goes by “@chanel”\textsuperscript{77} raising the question of whether the brand or influencer actually prevailed. Instagram warns, however, that it will disable accounts of users who “repeatedly post content that infringes someone else’s intellectual property rights.”\textsuperscript{78}

2. YouTube

YouTube was the most lucrative platform for brand deals in 2021, with businesses paying creators and influencers an average of $4,500 per post to advertise their products and services.\textsuperscript{79} Seventy percent of the platform’s users watch videos on their mobile devices, and cumulatively, its users watch over one billion hours of content on YouTube per day.\textsuperscript{80} The platform offers users the ability to submit trademark complaint forms, but it still recommends that trademark owners speak directly with creators to solve any issue, as the platform does not mediate trademark disputes.\textsuperscript{81}

3. TikTok

As social media users’ attention spans are progressively shrinking,\textsuperscript{82} TikTok has become a dominant short-form video force, making it the most downloaded app of 2020.\textsuperscript{83} Kids aged four to fifteen in the United States, United Kingdom, and Spain spend an average of seventy-five minutes per day on the platform.\textsuperscript{84} TikTok engagement rates are much higher for influencers of all reaches compared to those on Instagram and YouTube.\textsuperscript{85} Eighty-seven percent of SMIs on the app receive higher audience shares from TikTok over other platforms.\textsuperscript{86}

\textsuperscript{79} Biino, supra note 24.
\textsuperscript{80} Chris Kubbennus, 16 Social Media Statistics You Need to Know for 2021, KUBBCO (Jan. 6, 2021), https://www.kubbenco.com/16-social-media-statistics-you-need-to-know-for-2021/.
\textsuperscript{83} Kubbennus, supra note 80.
\textsuperscript{84} Geyser, supra note 28.
\textsuperscript{85} Id.
\textsuperscript{86} What Vision Do Advertisers and Influencers Have of Marketing With Influencers on TikTok?, SOCIALPUBLI (2021), https://socialpubli.com/es/blog/estudio-tiktok-2021/.
Since 2020, 86.5% of influencers on TikTok also recognized an increase in their own use of the app with over sixty percent doubling their time.\(^{87}\) Though numerous TikTok content creators have audiences spanning tens of millions, like Loren Gray with 54.4 million\(^{88}\) or Khabane Lame with 131.9 million,\(^{89}\) many do not have registered trademarks for their channel names or brand assets.\(^{90}\)

4. Facebook

In 2021, 1.82 billion people used Facebook at least once a day.\(^{91}\) A Facebook campaign that combines regular and influencer advertisements is eighty-five percent more likely to increase shopping activity over merely using regular advertisements alone.\(^{92}\) Facebook published an influencer marketing guide in 2021 that contained marketing notes, statistics, suggestions, and insights.\(^{93}\) According to its policies, advertisements “must not contain deceptive, false, or misleading claims.”\(^{94}\) The regulations also prohibit third-party infringement as advertisements “must not contain content that infringes upon or violates the rights of any third party, including copyright, trademark, privacy, publicity, or other personal or proprietary rights.”\(^{95}\)

Facebook Live, one of Facebook’s in-app features, allows users to broadcast live videos across multiple platforms at the same time. In Watch Parties, SMIs can now tag branded content partners, expanding influencer reach and collaboration efforts.\(^{96}\) Facebook reserves the right to remove or reclaim a

\(^{87}\) Id.
\(^{91}\) Kubernus, supra note 80.
\(^{95}\) Id.
username if a trademark owner believes the username does not convey the user’s actual name.\textsuperscript{97} Under the terms of use, users can also create a page to express brand support, remaining conscious not to cause any confusion with the brand’s official page or violate another party’s rights.\textsuperscript{98}

Ultimately, constant use of social media creates constant challenges for intellectual property law.\textsuperscript{99} The surge of user-generated content online, along with a multitude of domain name registration options and increased advertiser competitors have made the burden on trademark owners to police others’ use of their marks much heavier.\textsuperscript{100}

II. THE UNITED STATES’ APPROACH TO REGULATING INFLUENCER MARKETING

A. Trademark Laws in the United States

Unlike patents and copyrights, trademarks are governed by both federal and state law, with the Lanham Act being the primary federal statute.\textsuperscript{101} The Act defines a trademark as

\begin{quote}
[A]ny word, name, symbol, or device, or any combination thereof — (1) used by a person, or (2) which a person has a bona fide intention to use in commerce . . . to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.\textsuperscript{102}
\end{quote}

A trademark not only identifies a source but it also becomes part of a product, with the two working in tandem to reflect a brand.\textsuperscript{103} To be legally protectable,
a word mark\textsuperscript{104} must be distinctive,\textsuperscript{105} a requirement typically tested using the Abercrombie spectrum of distinctiveness, which categorizes various types of marks by strength and need for secondary meaning.\textsuperscript{106} Fanciful (i.e., GOOGLE for online services), arbitrary (i.e., APPLE for computers), and suggestive (i.e., NETFLIX for streaming services) marks are “inherently distinctive” and can be immediately protected as trademarks.\textsuperscript{107} Marks that are descriptive (i.e., COLD AND CREAMY for ice cream) are conversely not legally protectable instantly upon first use but may become protectable if they acquire secondary meaning.\textsuperscript{108} This means that the term acquires a secondary, source-identifying value while retaining its primary descriptive meaning.\textsuperscript{109} Generic terms (i.e., BREAD for a loaf of bread) are publicly understood as common names for products or services and are not protectable.\textsuperscript{110} Federal registration of a trademark, administered by the United States Patent and Trademark Office (USPTO), provides constructive notice and use, prima facie evidence of mark validity, and a basis for filing trademark protection abroad, amongst other benefits.\textsuperscript{111}

Because trademarks are designed to ensure that products come from where they are purported to originate, the laws concerning them aim to safeguard consumers.\textsuperscript{112} The underlying purposes of trademark law are to protect consumers from deception and confusion,\textsuperscript{113} safeguard authenticity of goods,\textsuperscript{114} and deter unfair competition.\textsuperscript{115} These purposes are accomplished by facilitating

\textsuperscript{104} See also Seabrook Foods, Inc. v. Bar-Well Foods Ltd., 568 F.2d 1342, 1344 (C.C.P.A. 1977) (where distinctiveness of non-word marks and trade dress is traditionally measured by the Seabrook factors: (1) the design or shape was a common, basic shape or design; (2) design or shape was a unique or unusual in a particular field; and (3) the design or shape was a “mere refinement of a commonly-adopted and well-known form of ornamentation for a particular class of goods viewed by the public as a dress or ornamentation for the goods”).

\textsuperscript{105} 15 U.S.C. § 1127 (a trademark must “identify and distinguish”).


\textsuperscript{107} J. THOMAS McCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 3:1 (5th ed.) (inherently distinctive trademarks “are so distinctive in and of themselves that they are irrefutably presumed to have achieved customer recognition as a symbol of origin immediately upon first use as a mark”).

\textsuperscript{108} Id.


\textsuperscript{110} Id.


\textsuperscript{112} NEW TECHNOLOGICAL AGE, supra note 101, at 873.

\textsuperscript{113} MCCARTHY, supra note 107, § 2:2.

\textsuperscript{114} NEW TECHNOLOGICAL AGE: 2020, supra note 109, at 893.

\textsuperscript{115} See id.
the flow of truthful information and reducing consumer search costs.\textsuperscript{116} The security trademark law creates “superimpos[es] ethical and moral norms on the competitive process,” which, in turn, reflect “society’s concept that certain forms of competitive behavior are unacceptable and unfair.”\textsuperscript{117}

Trademark infringement is thus not only illegal but also ethically and morally “unfair” to competitors and consumers alike.\textsuperscript{118} Infringement may also lead to an injunction, the fundamental Lanham Act remedy,\textsuperscript{119} that could result in required turnovers of SMI domains, accounts, or even entire online operations.\textsuperscript{120} Any trademark user bears the responsibility of respecting the intellectual property owner’s rights in addition to following applicable laws and terms of use.\textsuperscript{121} An infringing use is one that is likely to cause confusion, which both state and federal trademark laws protect against.\textsuperscript{122} The Lanham Act also creates a cause of action against cyberpiracy\textsuperscript{123} when a person, with a bad faith intent to profit from the use, registers or uses a domain name either identical or confusingly similar to an already-owned trademark.\textsuperscript{124} Using another’s trademark can be permitted, however, if the use qualifies as fair use.\textsuperscript{125} In line with the First Amendment, the fair use doctrine allows for use of another’s trademark in a non-trademark sense to describe another product or in its trademark sense to refer to the trademark owner or its product.\textsuperscript{126} Under a likelihood of confusion analysis, however, the fair use doctrine reflects societal norms by defining this likelihood by what consumers perceive to be confusing.\textsuperscript{127} Further, trademark law creates societal norms by establishing standards that shape consumer beliefs.\textsuperscript{128} In this way, trademark law actually leads, rather than follows, consumer expectations.\textsuperscript{129}

\textsuperscript{116} Dogan & Lemley, \textit{ supra} note 103, at 12.
\textsuperscript{117} McCarthy, \textit{ supra} note 107, § 2.9.
\textsuperscript{118} Id.
\textsuperscript{119} New Technological Age: 2020, \textit{ supra} note 109, at 1153.
\textsuperscript{120} Andrew Contiguglia, \textit{ Top 5 Legal Concerns for Influencers on Social Media}, \textit{Contiguglia} (June 17, 2020), https://contiguglia.com/blog/legal-concerns-for-influencers-on-social-media/.
\textsuperscript{121} Friedman, \textit{ supra} note 15.
\textsuperscript{122} Id.
\textsuperscript{123} 15 U.S.C. § 1125(d).
\textsuperscript{124} Friedman, \textit{ supra} note 15.
\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Dogan & Lemley, \textit{ supra} note 103, at 34.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
B. False Advertising Laws in the United States

Using another’s trademark misleadingly can still give rise to liability regardless of whether there is a trademark infringement claim or federal trademark registration. Section 43(a) of the Lanham Act provides a cause of action for false advertising. A false advertising claim may arise if an advertisement makes false or misleading statements about the trademark owner or its product in an unfavorable comparison or disparagement.

C. Consumer Protection Laws in the United States

While Section 43(a) of the Lanham Act provides a private right of action for false or misleading advertising, the Federal Trade Commission (FTC) regulates “unfair or deceptive acts or practices” through its rules, guidelines, and enforcement actions under the Federal Trade Commission Act (FTC Act). Using another’s trademark or referencing a company in advertising may violate Section 5 of the FTC Act, which prohibits misleading, deceptive, and unfair advertising.

The FTC created regulations regarding influencer marketing and began enforcing them in 2017. Its Endorsement Guides, which do not have the force of law, focus on requiring influencers to clearly and conspicuously disclose any material (including personal, familial, employment, or financial) connection with a brand or seller. They require that disclosure on media platforms be

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130 Friedman, supra note 15.
131 15 U.S.C. § 1125(a)(1)(B) (“Any person who . . . uses in commerce any . . . false or misleading description of fact, or false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.”).
132 Id.
133 Id.
easily findable and understandable while enabling the consumer to obtain sufficient context to make a judgment on the value of the endorsement.\textsuperscript{138} An endorsement encompasses tags, likes, and pins, amongst other various methods of support.\textsuperscript{139} On January 25, 2022, the FTC also released a guide for marketers regarding soliciting and paying for online reviews.\textsuperscript{140} The policy behind the FTC’s efforts is to ensure that all parties involved in social media activities are staying “on the right side of the law.”\textsuperscript{141}

To mitigate deceptive advertising, the FTC, under Section 5 of the FTC Act, carries out investigations and brings cases surrounding endorsements made on behalf of an advertiser.\textsuperscript{142} Although there are no fines for FTC Act violations, such conduct could result in law enforcement action orders requiring defendants to surrender any resulting money made.\textsuperscript{143} The lack of more serious penalties is a main contributor to noncompliance issues.\textsuperscript{144} Incentives to comply, other than not wanting to set a bad example,\textsuperscript{145} need enhancement.

The FTC is currently ramping up regulations as the trend of influencer marketing steepens in the United States, which will lead to amplified influencer accountability for social media activities.\textsuperscript{146} The FTC’s Endorsement Guides remain under review, with the likelihood of stricter penalties looming.\textsuperscript{147} In February 2020, the FTC accepted relevant comments from the public regarding the publications.\textsuperscript{148} Questions included whether or not free or discounted products bias consumer reviews and if technology changes should require Endorsement Guide adaptations.\textsuperscript{149} Accompanying the request for comments,  

\textsuperscript{138} Waxman, supra note 136.  
\textsuperscript{139} Id.  
\textsuperscript{141} Waxman, supra note 136.  
\textsuperscript{143} Id.  
\textsuperscript{144} Waxman, supra note 136.  
\textsuperscript{145} Id.  
\textsuperscript{146} Klein, supra note 137.  
\textsuperscript{147} Id.  
FTC Commissioner Rohit Chopra stated, “[M]isinformation is plaguing the digital economy, and recent no-money, no-fault FTC settlements with well-known retailers and brands to address fake reviews and undisclosed influencer endorsements may be doing little to deter deception.”

The FTC may also issue an administrative complaint if it has reason to believe that an advertiser is “engaging in unfair or deceptive practices in commerce.” First-time violations are treated as exceptions, but any following violations may lead to a civil penalty of up to $16,000 daily. The FTC must still determine whether new requirements should be introduced for media platforms and whether to activate civil penalty liability. With such a variety of channels open to SMIs, consumers, and brands, the FTC is wise to start developing rules that are geared towards the most powerful technologies like Instagram and TikTok.

On November 5, 2019, the FTC released “Disclosures 101 for Social Media Influencers.” The resource “provides influencers with tips from FTC staff about what triggers the need for a disclosure and offers examples of both effective and ineffective disclosures.” In addition, it highlights nuances of brand-influencer relationships that necessitate disclosures and emphasizes that SMIs should never assume that followers are cognizant of an influencer’s connection to its sponsor.

Since at least 2009, when the FTC revised its Endorsement Guides, endorsers have been made aware that they could be held liable for false or deceptive statements made in advertising. Even though current guidance is

150 Chopra, supra note 32.
152 Id.
153 Chopra, supra note 32.
154 See id.
156 Disclosures Guidance, supra note 155.
157 Id.
focused on false advertising, SMIs need to be at least conscious of the consequences their posts might have on intellectual property.\textsuperscript{160} Consumer confusion, which is at the heart of a trademark infringement claim, is also at the core of what the FTC is regulating through its attempts to nurture more honest and transparent social media activity.\textsuperscript{161} In addition, both the FTC and the court in \textit{Petunia Products} are shifting policies to maintain influencer accountability where products or money given to an SMI would affect the weight or credibility that a viewer gives to the review or promotion.\textsuperscript{162} It becomes justifiable then to say that

[U]nder the letter of the law it does not seem inherently wrong to hold at the pleading stage that paid endorsers are potentially liable under trademark law for the words they choose to say to consumers on behalf of would-be infringers, particularly when the endorsers actively facilitate consumers’ purchase of a product.\textsuperscript{163}

Though there is no federal statute providing a private right of action for consumers, state law stipulates that consumers may sue false advertisers or contact the state’s attorney general to investigate and enforce against deceptive practices.\textsuperscript{164} States’ attorneys general and public officials can also send demand letters or file lawsuits seeking injunctive relief or monetary compensation on the public’s behalf.\textsuperscript{165} Additionally, business competitors can send demand letters and file lawsuits.\textsuperscript{166} Consumers and competitors may also file claims with the National Advertising Division (NAD) of the Better Business Bureau, “which initiates an industry self-regulatory dispute proceeding, where non-compliance with a determination by the NAD may result in a referral of the case to the [FTC].”\textsuperscript{167}

\textsuperscript{160} Bannigan, supra note 159.
\textsuperscript{161} See id.
\textsuperscript{163} Bannigan, supra note 159.
\textsuperscript{166} Id.
\textsuperscript{167} Id.
Where FTC guidelines are more so focused on the disclosure aspect of influencer marketing,\(^\text{168}\) the *Petunia Products* case redefines how and when SMI is held directly liable for trademark infringement.\(^\text{169}\)


In *Petunia Products*, a California district court began redefining the bounds of SMI liability in trademark infringement.\(^\text{170}\) Petunia Products Inc. first registered the trademark “BROW BOOST” back in 2006\(^\text{171}\) under Class 3,\(^\text{172}\) which includes cosmetics and cleaning preparations, in connection with its “Billion Dollar Brows” eyebrow priming and conditioning product.\(^\text{173}\) In April 2020,\(^\text{174}\) Petunia brought trademark infringement, false advertising, and unfair business practices claims against skincare company Rodan & Fields (R+F) and SMI Molly Sims.\(^\text{175}\) Sims used the hashtag “#BROWBOOST” to promote the R+F “Brow Defining Boost” gel, which performed a similar function\(^\text{176}\) to Petunia’s product,\(^\text{177}\) (to her 587,000 Instagram followers.\(^\text{178}\) In the blog post, she also included an R+F link directing visitors to “learn more about how to purchase Brow Defining Boost” and a heading entitled “Shop the Product.”\(^\text{179}\)

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\(^{168}\) See generally Disclosures 101 for Social Media Influencers, supra note 155.

\(^{169}\) See generally *Petunia Prods.*, 2009 WL 4261189.


\(^{171}\) *BROW BOOST*, Registration No. 3100739.

\(^{172}\) See Get Ready to Search – Classification and Design Search Codes, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/trademarks/search/get-ready-search-classification-and-design#Classification%20find%20trademarks%20used%20on%20goods%20and%20services%20related%20to%20your%20business%20(linking%20to%20USPTO%20categorizes%20goods%20and%20services%20related%20to%20yours%20(last%20visited%20Feb.%2015%202022%20)(noting%20the%20USPTO%20categorizes%20goods%20and%20services%20related%20to%20trades%20into%20forty-five%20classes%20which%20are%20used%20on%20an%20application%20for%20trademark%20registration)).

\(^{173}\) Hu, supra note 170; Weiss, supra note 9.

\(^{174}\) Weiss, supra note 9.

\(^{175}\) *Petunia Prods.*, 2009 WL 4261189, at *5.

\(^{176}\) Id. at *2.


\(^{179}\) Weiss, supra note 9.
In the Ninth Circuit, to succeed on a trademark infringement claim, a plaintiff must show that the defendant used the plaintiff’s trademark in commerce and in a way that was likely to confuse customers as to the product’s source.\textsuperscript{180} At the core of her request to dismiss Petunia’s claims, Sims raised what seemed to be a First Amendment defense\textsuperscript{181} that the “breathtaking scope” of liability proposed against her would have “dramatic implications for inhibiting legitimate commentary” in conjunction with a fair use defense.\textsuperscript{182} Sims argued that liability for trademark infringement should not extend to third parties, like her, sponsoring products without previously having established if they were in violation.\textsuperscript{183} Sims also maintained that her R+F product sponsorship did not constitute infringement because it was not commercial use, rather just mere advertising.\textsuperscript{184} The court rejected Sims’ arguments and found that her blog post was a “paid advertisement,” thus rendering any chance of protected consumer commentary into commercial use.\textsuperscript{185} Under the likelihood of confusion analysis,\textsuperscript{186} the court also found that Petunia sufficiently argued likelihood of confusion.\textsuperscript{187} Since Sims wrote a blog post sponsored by R+F promoting a product that competed with, sounded like, and was marketed through similar channels as those for Petunia’s product, the court found it was possible that a consumer would infer affiliation between R+F and Petunia Products.\textsuperscript{188}

Had Petunia Products been affirmed, rather than dropped due to settlement, the inclination to name influencers as additional defendants in order to collect further damages would have been corroborated, making heightened protection measures through the FTC even more crucial for brand-influencer relationships.\textsuperscript{189}

\textsuperscript{180} Id.

\textsuperscript{181} See Petunia Prods., 2009 WL 4261189, at *5 (where the district court found that Sims’ blog post reflected more than mere commentary, so was unprotected by the First Amendment).

\textsuperscript{182} Hu, supra note 170.

\textsuperscript{183} Petunia Prods., 2009 WL 4261189, at *4; Arnold, supra note 178.

\textsuperscript{184} Petunia Prods., 2009 WL 4261189, at *5; Arnold, supra note 178.

\textsuperscript{185} Petunia Prods., 2009 WL 4261189, at *6.

\textsuperscript{186} AMF Inc. v. Sleekcraft Boats, 599 F.2d 348 (9th Cir. 1979) (considering eight factors (the Sleekcraft factors) to determine whether a use creates a likelihood of confusion: (1) strength of the mark, (2) proximity or relatedness of the goods, (3) similarity of the sight, sound and meaning of the marks, (4) evidence of actual confusion, (5) degree to which the marketing channels converge, (6) types of goods and degree of care consumers are likely to exercise when purchasing them, (7) intent of defendants in selecting the infringing mark, and (8) likelihood that the parties will expand their product lines).

\textsuperscript{187} Petunia Prods., 2009 WL 4261189, at *6.

\textsuperscript{188} Id. at *7.

\textsuperscript{189} See Arnold, supra note 178; Seror & Worth, supra note 7.
III. EUROPE’S APPROACH TO REGULATING INFLUENCER MARKETING

The European Union (E.U.) is more active than the United States in regulating SMIs.190 Social media marketing has become a billion-Euro business based on a digital form of word-of-mouth advertising.191 Utilizing SMIs across the continent has been described as “a well-known effective marketing technique which relies on the endorsement of information by trusted individuals within small communities or networks built on the basis of mutual trust and repeated interactions.”192 Under the European Union’s Unfair Commercial Practice Directive (UCPD), “traders” are obliged to disclose any commercial nature of their practice if not immediately recognizable contextually.193 In that scenario, an SMI must be performing a commercial practice by creating posts likely to distort consumers’ transactional behavior.194 Many European countries, including France, Germany, Italy, and Spain, have already implemented much stricter regulations than those in the United States, with fines for infringements amounting to as much as €300,000 and prison time.195

The European Competition Network (ECN) is made up of the European Commission (EC) and national competition authorities in E.U. Member States and aims to enforce EC competition laws against companies engaging in harmful cross-border commercial activities.196 The ECN created UCPD197 in 2005, enabling national enforcers to help curb unfair business practices including disseminating untruthful information or partaking in aggressive marketing techniques.198 As a part of its “New Deal for Consumers” initiative, the ECN amended the UCPD in 2019 to align with modernization and stronger enforcement of E.U. consumer protection rules.199 In its amendment, the ECN focused on creating individual remedies for consumers harmed by unfair commercial practices and enforcing transparency in online marketplaces to

190 Garson, supra note 42.
191 Ranchordás & Gouanta, supra note 19, at 4–5.
192 Id.
193 Id. at 3; Ducato, supra note 40, at 239; Directive 2005/29/EC, 2005 O.J. (L 149).
194 Ducato, supra note 40, at 239.
195 Garson, supra note 42.
197 Directive 2005/29/EC.
199 Id.
lessen consumer confusion. The original UCPD also addressed the misinforming nature of intellectual property infringement in the marketplace. A commercial practice, according to the UCPD, is misleading if it “causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise” and involves any marketing that would cause confusion with a competitor’s mark.

Also included in the UCPD is an amendment to the directive concerning misleading and comparative advertising (Directive 84/450/EEC). The modifications stipulate that comparative advertising is prohibited if it “discredit[s] or denigrate[s] the trademarks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor” or if it “take[s] unfair advantage of the reputation of a trademark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products.” Equally disallowed are practices that “present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name” or create confusion between marks. This acknowledgment of consumer confusion as a result of intellectual property infringement or malpractice is absent in the United States’ FTC Endorsement Guidelines discussed above.

European Advertising Standards Alliance (EASA) is an aggregate of self-regulatory bodies. EASA is comprised of twenty-eight national advertising self-regulatory organizations, thirteen European and non-European advertising industry organizations, and corporate members. If consumers believe that an advertisement in another country is non-compliant, they can file complaints either in their own country’s self-regulatory body or directly with the EASA. That receiving body will then investigate according to its regulations and forward the outcome to

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201 Directive 2005/29/EC.
202 Id. art. 6.1.
203 Id.
204 Id.
205 Id. art 3a(1)(f).
206 Id. art 3a(1)(g).
207 See generally Disclosures 101 for Social Media Influencers, supra note 155.
208 Selling Under the Influence, supra note 164.
209 Id.
210 Id.
the originating country. Ultimately, advertising legislation is formed at the E.U. level but is interpreted and enforced by the member states. Because of this, however, some inconsistencies may arise over member states permitting advertisements that others might not.

A. Relevant Trademark Law in Europe

Nationally, trademarks in Europe can be registered either at industrial property offices of E.U. member countries or at the E.U. level in the European Intellectual Property Office as a European Union Trade Mark (EUTM). These avenues coexist and complement one another.

The Court of Justice for the European Union (CJEU) has noted that the essential function of a trademark is to guarantee origin identity of a trademarked product by distinguishing it without any possibility of confusion. Under Article 5(1) of the Trademark Directive (TMD), protection against confusion is mandatory in all E.U. Member States. The likelihood of confusion, according to the CJEU, arises either when the public confuses the sign and the mark in question or when the public incorrectly assumes a connection between the sign’s proprietors and those of the mark.

As a whole, European trademark law is not as broad as U.S. trademark law, as E.U. minimum standards do not allow room for subjective interpretation. Additionally, all of the Member States listed below are civil law countries in which statutes reflect national laws that are non-extendable by a judge’s discretion. Despite these boundaries, common sanctions thread throughout the

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211 Id.
212 Id.
213 Id.
215 Id.
218 Senftleben, supra note 216.
219 Id.
221 Id.
European countries to specifically hold both influencers and brands accountable for non-compliance.\textsuperscript{222}

\textbf{B. France}

In France, all influencers’ advertising posts must comply with intellectual property laws.\textsuperscript{223} According to the French Authority of Professional Regulation of Advertisement (the Autorité de Régulation Professionnelle de la Publicité or ARPP), SMIs both express views and give advice, acting both editorially and collaboratively.\textsuperscript{224} ARPP represents advertisers, agencies, and the media and sets out industry codes of practice which, like the FTC’s Endorsement Guides, emphasize the importance of distinguishability in SMI communications.\textsuperscript{225}

Under French Consumer Law, an influencer and a brand can be held liable together, often being held jointly accountable.\textsuperscript{226} Both are at risk of severe penalizations for any failure to disclose compensation paid to an SMI.\textsuperscript{227} Influencers in violation can be fined up to €300,000 and can be imprisoned for up to two years, while brands can be fined up to €1.5 million.\textsuperscript{228} In addition, both parties could be forbidden from carrying out a trade or business activity for up to five years.\textsuperscript{229} ARPP and the French Law on Confidence in the Digital Economy (LCEN) create a legal obligation for influencers to post transparently about any collaborations they may have with brands.\textsuperscript{230}

\textit{Petunia Products} has even made its way to France.\textsuperscript{231} The team at a French intellectual property law firm spoke about the case in a 2021 blog post noting the replacement of advertising agencies with influencers and that trademark

\begin{itemize}
\item \textsuperscript{223} \textit{Influencer Marketing Guide}, supra note 165, at 46.
\item \textsuperscript{226} Anderson, supra note 222.
\item \textsuperscript{227} Garson, supra note 42.
\item \textsuperscript{228} Anderson, supra note 222.
\item \textsuperscript{229} Id.
\item \textsuperscript{231} Id.
\end{itemize}
infringement cases against SMIs are “flourishing.”\footnote{232} In these types of cases, a French judge would consider both the influencer’s awareness of the infringement and the extent it could confuse the public mind to determine liability under trademark law.\footnote{233}

C. Germany

Germany is “one of the most active jurisdictions in protecting consumers from misleading advertising through influencers” and has registered a “surprisingly high number” of cases against SMIs.\footnote{234} Some cases speak towards the impairment consumers experience when faced with influencer marketing.”\footnote{235} While others “depict[] the social media user as a consumer who is particularly careful, if not even biased, regarding influencers,” pointing to a case law division.\footnote{236} The latter set of cases relies on notions that SMIs with higher followings presumably act with commercial intent, that younger generations are technologically savvy and thus disclosures are unnecessary, and that these instances need evaluation on a case-by-case basis.\footnote{237} Such a dichotomy between legal impressions highlights the frictions between SMIs and regulatory frameworks, as well as the ever-present uncertainty surrounding how to approach rule-making in this modern territory.\footnote{238}

In November 2021, Germany’s Federal Supreme Court (BGH) shed light on cases regarding SMI posts relating to third-party products.\footnote{239} The Ministry of Justice has also amended the Unfair Competition Act surrounding the applicability of its provisions depending on whether the advertising is paid for or not.\footnote{240} The BGH’s recent decisions reflect allegations of misleading advertising in which the German Competition Association sued prominent German influencers.\footnote{241} Ultimately, it was found that influencers “regularly act[]

\footnotesize{\begin{itemize}
  \item Id.
  \item Id.
  \item Selling Under the Influence, supra note 164; Ducato, supra note 40, at 252.
  \item Id. at 255–59.
  \item Id. at 258.
  \item Id. at 257–58.
  \item Id. at 258–59.
  \item Id. at 258–59.
  \item Id.
  \item Id.
\end{itemize}}
inter alia for the benefit of the company with advertising posts.”

If SMIs receive consideration for their posts, their actions benefit the advertisement companies. If they do not receive such consideration, then posts are only vulnerable if they are “excessively promotional in [their] overall impression (i.e., if the promotion of the third-party business is more than merely collateral),” which is determined on a case-by-case basis. SMIs’ financial incentives in marketing campaigns are therefore playing an increasingly decisive role in Germany’s advertising regulatory practices.

D. Italy

In Italy, both legislation and self-regulation shape influencer marketing laws. The Italian Consumer Code, which contains key SMI provisions, emphasizes honesty and transparency in advertisements, and the Italian Civil Code includes unfair competition rules. Instituto dell’Autodisciplina Pubblicitaria, the advertising self-regulatory body, is a non-profit organization recognized by the Italian Supreme Court as it is considered to be the authoritative source for the best marketing and advertising practices in the country.

In 2017, Italy became the first European country to intervene in the field of influencer marketing when it “invited” SMIs to indicate the commercial nature of their business relationships in promotional posts through its Italian Competition Authority (AGCM). AGCM, a non-governmental administrative authority, can issue cease and desist letters as well as fines ranging from €5,000 to €5,000,000 to both brands and SMIs alongside a publication of its decision. A national court will establish any infringer’s liability for damages suffered by competitors if there is misleading conduct that

242 Id.
243 Id.
244 Id.
245 Id.
246 Anderson, supra note 222.
247 Id.
248 Id.
249 Ducato, supra note 40, at 245.
250 Anderson, supra note 222; Ducato, supra note 40, at 245.
violates the unfair competition provisions of the Civil Code. Civil court proceedings, however, have yet to be used between competitors in Italy.

At issue in *FERRARI S.p.A. v. Philipp Plein International AG* was fashion designer Phillip Plein’s Instagram post which included videos of shoes in his collection placed on the hood of a Ferrari with the car’s logo prominently displayed. This, the Court found, created the possibility that consumers could mistakenly believe that the two brands were in partnership. Even though the urgent proceeding against him had begun and he had received Ferrari’s cease and desist letter, Plein continued to use the automobile company’s logo on Instagram while promoting a jumpsuit he designed.

The Court first deemed Ferrari’s trademarks as well-known and, subsequently, that they were eligible for more extensive protections under Article 20.1.c of the Italian Code of Industrial Property and Article 9.2.c of the Regulation (EU) 2017/1001, which grants trademark owners the right to prevent third parties from using their marks for commercial purposes. It then went on to affirm the principle that “the unauthorized use of third-party trademarks by an influencer is lawful to the extent that the images depicting the trademarks are not perceived by the general public as having commercial or promotional purposes, but as scenes that describe the influencer’s real life (or the lives of others).” On the other hand, when consumers can conceivably only attribute those images to a commercial or promotional meaning, the use of the third-party trademark is unlawful. This occurs, the Court stated, when trademarks are posted without authorization:

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251 Anderson, *supra* note 222.
253 *Influence or Advertising?*, *supra* note 12.
254 *Id*.
255 Fabiana Bisceglia, *Influencers: To What Extent are They Allowed to Lawfully Portray Third-party Trademarks in Their Social Media Content Without Authorization?*, GLOB. ADVERT. LAWS. ALL. (June 19, 2020), https://www.mondaq.com/unitedstates/trademark/955728/influencers-to-what-extent-are-they-allowed-to-lawfully-portray-third-party-trademarks-in-their-social-media-content-without-authorization (discussing how urgent proceedings may only be ordered under the Italian legal system if there is prima facie evidence that the petitioner’s demands are well-grounded and if the petitioner is suffering damages with the possibility of increasing pending a full proceeding on the merits).
257 Bisceglia, *supra* note 255.
258 *Id*.
a) together with statements or captions that have a clear promotional purpose; b) in a context mainly intended for commercial communications, such as a website or social media pages – as in the case at stake; c) in images that per se are aimed at highlighting a product for promotional purposes and not at describing scenes of the influencer’s life or the lives of other people (e.g., “scenes where people eat, rest, walk, party on, talk, etc.”).\textsuperscript{259}

The Court found that Plein visibly led consumers to confusedly think that he had partnered with Ferrari, evidenced by the shoes matching the color of the car in one of the posts.\textsuperscript{260} In a proceeding 2020 case,\textsuperscript{261} the Court of Milan ultimately prohibited Plein from using Ferrari’s trademarks, ordered the prompt removal of the posts, and issued penalties of €300,000 in damages as well as €10,000 for each infringement.\textsuperscript{262}

\textbf{E. Spain}

National laws and self-regulation are both in force in Spain.\textsuperscript{263} The Spanish Advertising Act 34/1988 (LGP) and the self-regulatory body “Autocontrol” provide advertising rules where the latter also includes a highly respected code of conduct and arbitration court for dispute resolution.\textsuperscript{264} Non-members of Autocontrol are not bound by its decisions unless they accept its arbitral authority.\textsuperscript{265} The Spanish Act 3/1991 on Unfair Competition (LCD) and Spanish Royal Legislative Decree 1/2007 on the Defense of Consumers and Users (LPCU) also provide a legal framework for advertisements.\textsuperscript{266}

Regulations in Spain do not include provisions that explicitly address influencer advertising.\textsuperscript{267} On November 28, 2019, however, the Plenary of the Advertising Jury Autocontrol held that an SMI’s Instagram post violated the “authenticity of advertising” principle in Section 13 of the Advertising Code of Conduct because it evidenced a collaboration with a company but failed to clearly warn viewers that it was an advertisement.\textsuperscript{268} Presently, there is no case

\textsuperscript{259} Id.
\textsuperscript{260} Influence or Advertising?, supra note 12.
\textsuperscript{262} Influence or Advertising?, supra note 12.
\textsuperscript{263} Influencer Marketing Guide, supra note 165, at 100.
\textsuperscript{264} Id.
\textsuperscript{265} Id.
\textsuperscript{266} Id. at 101.
\textsuperscript{267} Id. at 100.
\textsuperscript{268} Id.
The International Trademark Association, however, has recognized that either the brand or the influencer can be held liable and vulnerable to civil actions or administrative sanctions for infringement under the Unfair Competition Act, General Advertising Act, as well as under Spanish consumer and intellectual property laws. “Liability for the content lies with the party with editorial control, which ordinarily is the influencer,” but can also include the brand or even the social media platform subject to Spanish e-commerce laws. Fines can reach up to €601,012.10 or 5 times the product value.

IV. STEPS IN THE RIGHT DIRECTION: HOW INFLUENCERS, BRANDS, AND PLATFORMS CAN ADAPT

A. What Should Influencers Do?

The most important step mega, macro, and even micro SMIs can take presently is to negotiate and better understand contractual agreements. Many relationships created between business associates and influencers are informal, like brief exchanges on Instagram direct messages, and therefore are weak in that they may not be legally binding as actionable contracts. Informal language usually used in these instances muddy interactions even further where material misstatements or omissions, whether intended or not, may translate to heightened influencer liability. SMIs must take responsibility to adhere to the FTC’s regulations to tell the truth, not be misleading to consumers, and substantiate their advertising claims.

Strong indemnification clauses are becoming increasingly important in sponsorship agreements, but even these do not completely mitigate the threat of lawsuits. Influencers should also take heightened precautions in ensuring that

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269 Id. at 104.
270 Anderson, supra note 222.
271 Id. at 8.
272 Id.
273 Garson, supra note 42.
275 Contiguglia, supra note 120.
276 Id.
277 Handler, supra note 7.
they are not infringing upon another’s trademark, or other intellectual property, which can be done starting with a trademark search on the Trademark Electronic Search System (TESS) or the employment of a legal professional. Continuously monitoring what people are saying online and taking action against threats of legal jeopardy are also fundamental. Before sharing consumer comments, ratings, or feedback, an SMI should get written consent from the consumer before including it in advertising. To use branded content or a direct reference to products or services offered by other companies, an influencer must obtain special authorization from the company. SMIs should remain cautious about everything they post to avoid liability and navigate the arbitrarily inconsistent monitoring and enforcement measures taken by social media sites. Additionally, influencers should proactively protect their own brands through trademark registration as this can differentiate and strengthen their portfolios and reach. For example, Kim Kardashian owns a trademark for her name for advertising and endorsement services. To expand their influencer marketing capabilities and personas, SMIs should at least acquire the same handle across their social media accounts.

B. What Should Brands Do?

In the United States, “a brand can be secondarily liable if it had constructive knowledge of its agent’s use of [another’s] intellectual property.” Every time a company works with an SMI, it becomes liable for the content the SMI is posting, which may include infringing material. An increase in influencer indemnification demands can mean pricey financial exposure for brands and companies employing SMIs as well as more difficult hurdles in sponsorship agreement negotiations. Greater oversight is crucial in not only catching possibly prohibited activity but also in maintaining loyal relationships with followers. These connections are financially and

278 Seror & Worth, supra note 7.
279 Contiguglia, supra note 120.
280 Id.
281 Id.
282 Id.
283 Kulp, supra note 274.
284 Id.
285 Lince, supra note 90.
286 Selling Under the Influence, supra note 165.
287 Garson, supra note 42.
288 Seror & Worth, supra note 7; Arnold, supra note 178.
289 Arnold, supra note 178.
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reputationally beneficial as SMIs could very easily turn their fan bases against brands, leading to public relations nightmares.290

Influencer Marketing Agreements should cover everything from compensation to content and placement of disclosures in posts.291 Developing and implementing social media policies that contain roles, responsibilities, regulations, legal and security risks, accountability, and steps for reporting concerns are fundamental actions in stabilizing these partnerships.292 Because platforms, like TikTok, have a primarily young audience, it is also prudent for brands to develop an extra-legal clause in their SMI contracts to avoid any age-related content issues.293 Granting influencers the proper licenses or assignments to use or display trademarks and other intellectual property is also crucial.294 These should include proper termination clauses that address possible infringement.295

Under the same notion, brands should take prompt, but not overly aggressive, action against influencers as claims may escalate quickly and swiftly backfire.296 There must be genuine and thorough conversations between brands and influencers to cover, in depth, the relevant guidelines and precedent surrounding posts on social media.297 These mutual considerations result in legally fortified media presences, as well as stronger, more authentic brand voices understood amongst diverse audiences.298 Committing to thorough and consistent trademark practices like clearances and policing can deter infringement claims, such as those faced by Rodan & Fields, or forced rebranding.299 Truly infringing uses must be challenged, questionable uses should be monitored, and harmless uses can be ignored.300

290 Id.
292 See Garson, supra note 42.
293 Lince, supra note 90.
295 Id.
296 Arnold, supra note 178.
297 Gotter, supra note 27.
298 Id.
299 Sarah Albertsein et al., Court Holds that Influencers can be Liable for Use of a Brand’s Infringing Trademark, JD SUPRA (Sept. 23, 2021), https://www.jdsupra.com/legalnews/court-holds-that-influencers-can-be-8414623/.
300 Friedman, supra note 15.
C. What Should Platforms Do?

With the resources and influence to do so, e-commerce platforms, or those social media networks that incorporate commerce aspects, should do more to support both brands and SMIs.\(^{301}\) Amazon has taken a prominent role by filing a lawsuit against influencers who were promoting counterfeit products online and undermining the otherwise legitimate work of different influencers.\(^{302}\) By increasing educational services regarding SMI marketing and intellectual property regulation, potential risks could be more easily mitigated, and the platforms, brands, and influencers would reap the rewards of more cost-effective results.\(^{303}\)

Social media platforms are also capable of generating their own messages as well as dictating customer behavior by either human curation or the use of algorithms to decide how content is displayed.\(^{304}\) Even though SMIs have the First Amendment right to free speech, sites still have control over influencers’ communications as they can edit, combine, and draft additions to user content.\(^{305}\) Lawsuits against platforms’ decisions to remove or host content are generally unsuccessful as the State Action Doctrine\(^{306}\) and Section 230 of the Communications Decency Act (47 U.S.C. § 230) stand as federal law barriers.\(^{307}\) The latter grants immunity to providers of interactive computer services, which include social media platforms, for hosting others’ content and for restricting access to “objectionable” material if done so “voluntarily” and “in good faith.”\(^{308}\) Because the First Amendment protects against state action, courts have previously held that the right is not implicated by actions of private platform companies, which are unlikely to ever be viewed as state actors.\(^{309}\) Section 230 is unlikely to change as an adaptation would restrict First Amendment protections given to SMIs and therefore be unconstitutional.\(^{310}\)

\(^{301}\) Arnold, \textit{supra} note 178.

\(^{302}\) Id.

\(^{303}\) Id.

\(^{304}\) Contiguglia, \textit{supra} note 120.

\(^{305}\) Id.

\(^{306}\) See Michael Patty, \textit{Social Media and Censorship: Rethinking State Action Once Again}, 40 \textit{MITCHELL HAMLIN L. J. PUB. POL’Y & PRAC.} 99, 113 (2019) (noting that the U.S. Constitution only applies to actions or omissions of state, not private actors).

\(^{307}\) Contiguglia, \textit{supra} note 120.

\(^{308}\) Id.

\(^{309}\) Id.

\(^{310}\) Id.
CONCLUSION

To properly protect intellectual property during this digital era, federal regulations need to incorporate more specific provisions tailored to mega and macro influencers’ improper uses of trademarks on social media. As platforms make it more feasible for brands and SMIIs to collaborate, procedures at the government level and beyond should make it easier for trademark owners to protect their intellectual property rights.

By comparing Petunia Products in the United States to FERRARI S.p.A. in Italy, it becomes evident that courts around the world are having to rethink developments in trademark infringement as social media plays a more prevalent role in how intellectual property is viewed, used, and advertised. Included in this is even how photographs on platforms are used as tools to reflect endorsements, sponsorships, and promotions. With the ability to share life moments so easily with people globally, there becomes an instant, far-reaching correlation between trademark infringement and platforms. Although the differentiations between what is private, public, and commercial have been discussed in trademark cases for years, social media is creating new nuances that have further obscured conceptual confines. It is between these dimensions that courts are now trying to define how influencers, who are benefitting from lucrative posts, should be held liable for their actions.

As trademark protection expands beyond its traditional core—broadening the connection to, sponsorship, and affiliation with trademark owners—it becomes even more crucial to delineate boundaries in enforcement. European courts and regulatory bodies have already implemented harsher penalties to match influencers’ growing compensations and prominent positions in commerce. U.S. trademark owners are just as susceptible as those in Europe to the rapidly expanding scope of SMI advertising. so now is the time for U.S. courts and regulatory bodies to incorporate mega and macro influencer liability into existing consumer protection policies and practices. These systems should consider younger populations that are dominating some social media platforms. Imposing stringent rules only against those influencers who have followings of 500,000 or more or that are surpassing a certain profit threshold would target more problematic practices. This approach would also consequently push micro and nano influencers to start thinking about their actions differently, hopefully

311 New Technological Age: 2020, supra note 109, at 899.
312 Anderson, supra note 222.
encouraging increased recognition of intellectual property rules to avoid infringement.

Whereas some influencers are genuinely unaware of their merchandising missteps, others do not feel the need to follow FTC guidelines.\textsuperscript{313} Investigative measures to uncover factors like partnership specifics, knowledge of infringement, post profitability, and social media prowess can differentiate accountability levels between influencers. Mega and macro SMIs should be held liable for trademark infringement by the FTC through fines or discontinuations of their brand partnerships to increase overall influencer compliance with current and future regulations.\textsuperscript{314}

ABIGAIL DAGHER


\textsuperscript{314} \textit{Id.} at 205.