

Under the influencer: Trade mark and copyright infringement

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Influencers frequently advertise or post reviews on products/brands on social media platforms such as Instagram, Facebook, TikTok, providing advice and recommendations that many consumers will use in making purchasing decisions.



Image source: George Milton – [123RF.com](#)

Influencer marketing has become a powerful tool, but it comes with its own set of challenges, including the risk of trade mark or copyright infringement.

In South Africa, trade mark law is governed by the Trade Marks Act, No. 194 of 1993. The Act provides protection for trade marks, which include any sign that is capable of being represented graphically and can distinguish the goods or services of one trader from those of another. This includes brand names, logos, devices, and other elements commonly found on products.

Infringement

Under the Trade Marks Act, trade mark infringement occurs when a person uses a trade mark that is identical or similar to another person's registered trade mark in relation to similar goods or services, and in a manner that is likely to cause confusion or deception. This applies to influencer marketing as well, where an influencer promoting a product with a similar or identical trade mark to another brand's registered trade mark, may be deemed to be infringing on the registered trade mark.

It is important to note that in South Africa, trade mark infringement is a civil offence and can also result in legal action being taken against the infringing party. The Trade Marks Act provides for a range of remedies for trade mark infringement, including damages, injunctions, and orders for the destruction of infringing goods.

When posting online content, influencers should bear in mind that citing/using another party's trade mark, brand name or logo etc requires certain permission.

Misleading or false advertisements by influencers can also result in liability in the form of trade mark infringement. Any statement made which could result in confusion in the marketplace as to the ownership of a product/brand may therefore hold an influencer legally responsible.



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In a recent United States case (*Petunia Products, Inc. v. Rodan & Fields, LLC and Molly Sims*), a cosmetic company owned the trade mark Browboost in respect of an eyebrow product. A competitor advertised its own eyebrow product Brow Defining Boost on social media with the hashtag Browboost and employed an influencer to blog about the product. The court held that a social media influencer could be sued for direct trade mark infringement when endorsing products.

An influencer who incorrectly creates an impression that products or services are associated with each other, could have possible passing off claims brought against them in South Africa. For a passing off claim to be successful, the brand owner would need to prove an existing reputation in their brand, the use thereof by the influencer creating a misrepresentation in the minds of consumers that the brands are related and that monetary damage resulted.

It is vital for influencers to bear in mind when discussing or advertising a brand, that they have the relevant agreements and permission in place from the brand owners. Proper contracts inserting protection from liability clauses and limitations to the use of the brand need to be considered, especially in circumstances of paid advertising agreements to ensure that the influencer, as well as the brand owner, is protected in terms of their rights.

Influencers should always bear in mind that in posting reviews about a brand or featuring a branded product, they are reaching potential customers in a manner which could ultimately promote or negatively impact a brand. Therefore as mentioned, it is important to ensure that adequate contracts between the parties are in place. The brand should also be well researched, properly protected and true statements made.



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Copyrighted works

The Copyright Act, 1978 of South Africa governs copyright and allows for the right to control the use and distribution of certain works. One does not have to register copyright in South Africa, as it automatically exists the moment an original creative work is in a material form.

Therefore, influencers also need to consider whether they are using any party's work which may be copyrighted.

As the use of influencers in marketing campaigns continues to grow, it is essential for businesses to work closely with attorney's in the intellectual property field to ensure that they comply with trade mark and copyright legislation. Similarly, influencers must exercise caution when using copyrighted works in their social media content, ensuring that they have obtained the necessary permissions or licenses to avoid potential legal repercussions.

Transparency

Moreover, appendix "K" of the Advertising Regulatory Board Code relates to a code specifically applicable to social media marketing. In this regard, influencers are required to mention if the products or services they are promoting are part of an advertising campaign and if they are "sponsored/ paid for". Influencers should also state whether they received the product/service in return for media coverage. Should an influencer create an account in the form of a parody, this is required to be clearly stated to ensure transparency to consumers.

Brand owners likewise must ensure that any claims made by the influencer comply with the standards of the Advertising Regulatory Board Code. They need to ensure mandatory declarations and marketing regulations applicable to particular industries are well communicated to the influencer, and that the influencer is well-informed about their product. A written contract is also required for paid influencers.



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Unauthorised use

Additionally, brand owners need to be watchful for any unauthorised use of their trade marks or any unauthorised affiliation with the brand. Likewise, their copyrighted works should be protected and potential infringements looked out for.

Recognised social media platforms often have measures in place, which brand owners can make use of in attempts to protect their brands online. For example, YouTube, Facebook, Twitter and Instagram can verify famous brands. Further, Instagram allows you to report any intellectual property violations together with online platforms such as Amazon and eBay, which allow for registration of certain intellectual property rights or products allowing for easier removals of infringing content.

It is imperative therefore for brand owners to familiarise themselves with options available to them to ensure that trade mark infringements are swiftly dealt with.

Further protection

To protect their trade marks/ copyright in South Africa, brand owners can take similar steps to those outlined in the article, including conducting regular trade mark searches, establishing clear guidelines for influencer partnerships, and incorporating trade mark/copyright infringement clauses in influencer contracts. Additionally, brands can be registered as trade marks with the Companies and Intellectual Property Commission (CIPC) to strengthen the legal position and to gain

greater protection.

As such, trade mark searches, registration of brands and staying abreast with brand/copyright usage (unauthorised and authorised) should always be prioritised to ensure proper and adequate protection for brand owners.

As indicated above, influencer marketing can also lead to legal issues, particularly in the realm of trade mark and copyright infringement for influencers.

In conclusion, while influencer marketing can be a valuable tool for brand owners, it is essential for influencers to understand and comply with South African trade mark and copyright legislation to avoid the risk of any infringement. By taking proactive steps to protect their trade marks, brand/copyright owners will ensure they are not only maximizing the benefits of influencer marketing, but are complying with South African trade mark and copyright laws.

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