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INTELLECTUAL PROPERTY INFRINGEMENT AND THE POSSIBILITY OF INFLUENCER LIABILITY

Andrea Otero

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I. Introduction

As technology and social media have continued to advance, the way in which companies are reaching a new audience has changed as well. Advertising has completely changed as many people are now using social media to find new information and sometimes even their news.¹ Companies have taken advantage of this change and employed new ways of advertising to reach larger audiences through the use of “influencers.” Notable startups have built their companies by employing influencers and increasing the reach of their brand.² By utilizing “influencers,” these companies have been able to sell their products to a narrowly tailored audience and increase their sales by having influencers become trusted advocates for their brand.³

According to Forbes, an “influencer” is defined as “someone who has the power to influence the perception of others or gets them to do something differently.”⁴ Influencers are credited for “influencing,” which is a way to reach a targeted audience promoting a specific product.⁵ Companies utilize influencers through paid advertisements to endorse their products.⁶ Influencer marketing grew from a \$1.7 billion industry in 2016 to an expected \$16.4 billion dollar industry in 2021.⁷ This changed the dynamic for paid advertising, causing companies to set aside separate budgets for content and influencer marketing.⁸ The brands that have begun to optimize influencer marketing and have set aside a separate budget increased from 4% to 59% in 2020.⁹

Influencers with large followings could be earning millions of dollars through paid sponsorships with brands.¹⁰ It is estimated that a “micro-influencer,” an influencer with 10,000 to

*Andrea Otero, Juris Doctor Candidate May 2022, Saint Thomas University College of Law, ST. THOMAS JOURNAL OF COMPLEX LITIGATION, Member. I would like to thank the Journal of Complex Litigation and my mentors for all their guidance and support throughout this process of writing and publishing this note. Finally, this article is dedicated to my parents, who have always encouraged me to follow my dreams and never give up.

¹ Gil Appel, et al., *The future of social media in marketing*, 48 J. OF THE ACAD. MARK. SCI., 80 (2020).

² Sean Ludwig, *5 Companies Built on Influencer Marketing*, US CHAMBER OF COMMERCE (Dec. 30, 2019), <https://www.uschamber.com/co/grow/marketing/influencer-marketing-success-stories>.

³ *Id.*

⁴ Gerardo A. Dada, *What Is Influencer Marketing and How Can Marketers Use it Effectively*, FORBES (Nov. 14, 2017), <https://www.forbes.com/sites/forbescommunicationscouncil/2017/11/14/what-is-influencer-marketing-and-how-can-marketers-use-it-effectively/?sh=4823c26c23d1>.

⁵ John Farmer, *Leading-Edge Law: Are Social Media Influencers Liable for Trademark Infringement for the products they endorse?*, RICHMOND TIMES-DISPATCH (Nov. 21, 2021), https://richmond.com/business/leading-edge-law-are-social-media-influencers-liable-for-trademark-infringement-for-the-products-they/article_8ad2beb6-080b-50fc-98db-00c20f741f4f.html.

⁶ Dada, *supra* note 4.

⁷ Jacinda Santora, *Key Influencer Marketing Statistics You Need to Know for 2022*, INFLUENCER MARKETING HUB, <https://influencermarketinghub.com/influencer-marketing-statistics> (last updated Mar. 29, 2022).

⁸ *Id.*

⁹ *Id.*; see also Ying Lin, *10 Influencer Marketing Statistics You Need To Know In 2022 [Infographic]*, OBERLO (Dec. 16, 2021), <https://www.oberlo.com/blog/influencer-marketing-statistics> (explaining that marketers and agency professionals “say they are going to increase their influencer marketing budgets in 2021”).

¹⁰ Erin Gobler, *How Do Influencers Make Money?*, CLEVER GIRL FINANCE, <https://www.clevergirlfinance.com/blog/how-do-influencers-make-money/> (last updated on Oct. 22, 2021).

50,000 followers, could make anywhere from \$40,000 to \$100,000 per year.¹¹ Influencers primarily make their money through sponsored content, which is when a company pays an influencer to feature their product or service on the influencer’s social media pages.¹² As a result of this transition into influencer advertising, influencers might now face a risk of intellectual property right infringement as new court cases arise.¹³

In August 2021, the U.S. District Court for the Central District of California faced the issue of whether an influencer would be liable for trademark infringement if they were paid to promote a trademark-infringing brand’s product and name.¹⁴ The petitioner, Petunia, filed suit alleging Rodan & Fields and Molly Sims, influencer, committed direct trademark infringement and engaged in false advertising.¹⁵ Petunia owns the trademark for “BROW BOOST” in connection with its “Billion Dollar Brows” products and claims that Sims infringed by including “Brow Defining Boost” in her paid blog post for Rodan & Fields.¹⁶

In order to succeed in a trademark infringement case, discussed in Part II of this comment, many elements must be met. Part II will discuss the history of the Lanham Act and its importance in protecting trademarks. Part III will examine the ways in which influencers can be held liable for trademark infringement and how they can protect themselves from liability.

II. Trademark Infringement

In 1946, Congress passed the Lanham Act, otherwise known as the Trademark Act (“Act”), to govern trademarks, service marks, and Unfair Competition.¹⁷ The Act provides a national system of trademark registration as well as federal protection for distinctive marks that are used in commerce.¹⁸ Federal protection is provided for unregistered marks and permits a civil cause of action for false advertising claims.¹⁹ A trademark is defined as “any word, name, symbol, or device, or any combination thereof . . . used by [any] person . . . 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.”²⁰

A. Trademark protection requirements

There are two application requirements for a mark to be eligible for trademark protection.²¹ First, the trademark, in connection with goods, must be used in commerce or registered with a

¹¹ *Id.*

¹² *Id.*

¹³ Megan Bannigan, et al., *Infringing Influencers? Federal Judge Says Sponsored Blogger Can Face Trademark Infringement Liability*, IPWATCHDOG (Aug. 17, 2021), <https://www.ipwatchdog.com/2021/08/17/infringing-influencers-federal-judge-says-sponsored-blogger-can-face-trademark-infringement-liability/id=136816/>.

¹⁴ *Petunia Products, Inc. v. Rodan & Fields, LLC, et al.*, No. SACV 21-00630-CJC, 2021 WL 6286486 (C.D. Cal. filed Aug. 6, 2021).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ The Lanham (Trademark) Act, 15 U.S.C. §§ 1051-1127 (1946).

¹⁸ 15 U.S.C. § 1051.

¹⁹ 15 U.S.C. § 1125(a).

²⁰ 15 U.S.C. § 1127.

²¹ 15 U.S.C. § 1051.

bona fide intention to be used in commerce.²² According to the Act, a trademark is used in commerce when the trademark “is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto . . . and the goods are sold or transported in commerce.”²³ A trademark is also used in commerce when it is used or displayed in “the sale or advertising of services and the services are rendered in commerce.”²⁴ The Supreme Court has stated that the “in commerce” requirement should be construed liberally, as the Lanham Act confers broad jurisdictional powers upon the courts of the United States.²⁵

As technology has evolved, the courts have defined the term “in commerce” when it comes to using trademarks on the internet, and have found that even HTML codes constitute a use “in commerce.”²⁶ Hidden metatags are pieces of information that are incorporated into the HTML of a website, and assist search engines with identifying websites in order to inform the consumer viewing the page about the site and information contained therein.²⁷ Although the Supreme Court has not reached a conclusion whether, under the Lanham Act, this activity constitutes “in commerce,” the Ninth Circuit has held this activity meets the standard.²⁸ The Ninth Circuit explained that using a trademark in an HTML code to ensure that a website appears on a higher list of search results for related products qualifies as a use “in commerce,” for purposes of infringement.²⁹

The second element is straight to the point and requires the mark be distinctive and have a capacity to be identified and distinguished as emanating from one source or producer.³⁰ The Lanham Act offers a remedy for trademark infringement for either registered or unregistered marks.³¹ Infringement of a registered mark includes the use of “any reproduction, counterfeit, copy, or colorable imitation” in order to sell or advertise goods or services which would likely cause confusion, mistake, or deceit.³² If the plaintiff is the owner of an unregistered trademark, they are still able to state a claim under the Lanham Act’s “likelihood of confusion” prong.³³ This standard prohibits the use of a mark in a way which would likely confuse or deceive the public of the nature or origin of a product or service.³⁴

To establish a violation and prevail on a claim of trademark infringement, the plaintiff must establish that they are the owner of a registered and valid mark that is entitled to protection and that the mark has been infringed.³⁵ When a trademark is unregistered, the burden is on the plaintiff

²² 15 U.S.C. § 1127.

²³ *Id.*

²⁴ *Id.*

²⁵ *Steele v. Bulova Watch Co.*, 344 U.S. 280, 284-85 (1952).

²⁶ *Roseville Fullerton Burton Holdings, LLC v. SoCal Wheels, Inc.*, 2016 U.S. Dist. LEXIS 186049, at *19-22.

²⁷ *Are HTML Metatags Important?*, BRIGHTEDGE, <https://www.brightedge.com/glossary/are-meta-tags-important> (last visited Mar. 21, 2022).

²⁸ *Roseville Fullerton v. SoCal Wheels, Inc.*, 2016 U.S. Dist. LEXIS 186049, at *19-23.

²⁹ *Id.*

³⁰ *See* 15 U.S.C. § 1052.

³¹ *See* 15 U.S.C. § 1114.

³² *Id.*

³³ *See* 15 U.S.C. §1125(a)(1) (explaining that a cause of action exists for owners of a trademark that is falsely used by another when likely to cause “confusion,” “mistake,” or deception).

³⁴ *Id.*

³⁵ *Id.*

to establish it is entitled to protection under the Act and that it has been used “in commerce” to designate particular goods or services.³⁶

A plaintiff who is able to prevail on a trademark infringement case is entitled to recover damages as any profits received by the defendants as a result of the use of the mark, actual damages suffered, and the cost of the lawsuit.³⁷ In exceptional cases, the court may award attorney’s fees to the plaintiff, damages equal to three times the defendant’s profits for the intentional use of a counterfeit mark, and even an order to destroy infringing materials.³⁸

III. Trademark Infringement and Influencer Implication

As trademark infringement has become more prevalent online and on social media, the courts have looked toward holding influencers liable for trademark infringement.³⁹ The ruling in the *Petunia* case may make a drastic change in the way influencer marketing is conducted.⁴⁰ The Court held Molly Sims, an influencer, liable for using a trademark in commercial use.⁴¹ Although Sims argued this would stifle “legitimate commentary” if they considered a blog post to be commercial use, the Court found the post reflected more than mere commentary due to a few facts that they found to be convincing.⁴² The Court made it clear that there is no First Amendment protection for commentary or non-commercial speech when it is a paid advertisement.⁴³

The Court classified Sims’ post as one of commercial use. Some of the reasons include the fact that it was a paid advertisement; the blog post contained links to purchase the allegedly infringing product; and, at no time did the website contain paid advertisements from another commercial entity.⁴⁴ Further, the plaintiff pled that Molly Sims’ blog post was likely to cause confusion as to the source of the product as the product was stated to be a “brow defining boost” while the plaintiff’s trademark was for “brow boost.”⁴⁵ When determining if a use is likely to confuse the public, the Court considered eight factors:⁴⁶

- (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.⁴⁷

³⁶ *Id.*; § 1125(a)(3).

³⁷ 15 U.S.C.S. § 1117(a) (2021).

³⁸ *Id.*; 15 U.S.C.S. § 1118 (2021).

³⁹ Bannigan, et al., *supra* note 13.

⁴⁰ *Id.*

⁴¹ *Petunia*, 2021 WL 6286486.

⁴² *Id.* at *5.

⁴³ *See id.* at *6.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348 (9th Cir. 1979).

The Court found that there was a likelihood of confusion based on Sims' blog post as not only was the name similar to the trademark but also was in active competition with the plaintiff's product and was marketed through similar channels as those used by the plaintiff.⁴⁸ Although the Court found Sims to be liable for the likelihood of confusion on promoting an allegedly infringing product, the plaintiff also brought a claim of contributory infringement.⁴⁹ Contributory infringement is when an infringer "intentionally induced" the primary infringer to infringe or continued to supply an infringing product with knowledge that the infringer is mislabeling the particular product.⁵⁰ However, when a defendant supplies a favorable product review, the court will consider "the extent of control exercised by the defendant over the third party's means of infringement."⁵¹

Therefore, it is possible for an influencer to be liable for contributory infringement as well—if they meet those elements. The Court, in the *Petunia* case, concluded that there are no allegations that Sims intended to induce infringement with the blog post or that she had any knowledge of the alleged infringement.⁵² Molly Sims was held liable for the likelihood to confuse by using the allegedly infringing product in her blog post, as well as for commercial use because there were links to the Rodan & Fields website to purchase the allegedly infringing product.⁵³

In the past, employees have typically only been held personally liable for trademark infringement when they are knowingly and actively responsible for the infringement.⁵⁴ However, the *Petunia* case opens a legal pathway for more litigation that will hold influencers liable even if they had no knowledge of the alleged trademark infringement.

IV. Influencers and Their Liability for Trademark Infringement

Generally, when it comes to employee trademark liability, employees are typically held liable by the court if they "actively caused the infringement as a moving, conscious force," as such, an influencer too could be held liable should they be classified as an employee of the brand.⁵⁵ Classifying an influencer as an independent contractor could be one way to escape liability as an employee; however, a few states, including California, have changed the way employees are classified.⁵⁶ The California Supreme Court now applies a test to determine whether workers are employees or independent contractors for the purposes of the Industrial Welfare Commission wage orders.⁵⁷

⁴⁸ *Petunia*, 2021 WL 6286486.

⁴⁹ *Id.*

⁵⁰ *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 795 (9th Cir. 2007).

⁵¹ *Gibson Brands, Inc. v. Viacom Int'l, Inc.*, 640 F. App'x 677, 678 (9th Cir. 2016).

⁵² *Petunia*, 2021 WL 6286486.

⁵³ *Id.*

⁵⁴ *Bannigan, et al.*, *supra* note 13.

⁵⁵ *See Chanel, Inc. v. Italian Activewear of Fla., Inc.*, 931 F.2d 1472 (11th Cir. 1991).

⁵⁶ Heather E. Horn, *California Employers Beware: 3 Things to Consider When Hiring Independent Contractors*, THE GRINDSTONE (April 8, 2021), <https://lewisbrisbois.com/blog/category/labor-employment/california-employers-beware-3-things-to-consider-when-hiring-independent-contractors>.

⁵⁷ *Id.*; *Industrial Welfare Commission (IWC)*, CAL. DEP'T OF INDUS. REL., <https://www.dir.ca.gov/iwc/iwc.html> (last visited May 1, 2022) ("The Industrial Welfare Commission was established to regulate wages, hours and working conditions in California.").

In order for an employer to prove that the worker was an independent contractor, the employer must show that the worker was “free from control of the hiring entity” in their work, performed work “outside the usual course of the hiring entity’s business,” and “engaged in an independently established trade, occupation, or business.”⁵⁸ Influencers could be held liable as employees of the brand for trademark infringement if they are not classified as independent contractors.⁵⁹ Unless an employee has knowingly and actively participated and is responsible for the infringement, they are typically not held personally liable for trademark infringement by their employers.⁶⁰

In recent cases, courts have held there are particular actions relating to social media advertisements that could result in liability for trademark infringement.⁶¹ These cases have shown that paid endorsers could be held liable for the words they say.⁶² One action that has come up in these cases has been the use of hashtags that contain a registered trademark when promoting a product.⁶³

In certain circumstances, “hashtagging” a trademarked name or product on a post is likely to deceive consumers and provide grounds for potential trademark infringement.⁶⁴ In *Chanel, Inc., v. WGACA, LLC*, WGACA was a global purveyor of authentic luxury goods that sold top brands like Chanel products; however, they were not affiliated with Chanel.⁶⁵ Social media posts and the posts of influencers wearing or carrying Chanel products all contained the hashtag “#WGACACHANEL.”⁶⁶ Chanel claimed that using their trademarked name in a hashtag in connection with the defendant’s name was an infringement and an attempt on the brand to create an impression that WGACA was affiliated with Chanel.⁶⁷ The court relied on case law finding hashtags to be an infringement on a plaintiff’s trademark and found WGACA liable.⁶⁸

In *Fraternity Collection, LLC., v. Fagnoli*, Fagnoli was a former employee of Fraternity Collection who used hashtags with Fraternity Collection’s trademark on her social media accounts to promote her designs.⁶⁹ The hashtags used were #fratcollection and #fraternitycollection. The plaintiff alleged that the use caused consumer confusion and, as such, was a trademark infringement.⁷⁰ *Fraternity* stands for the proposition that even the use of hashtags—which many

⁵⁸ *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County*, 416 P.3d 1 (Cal. 2018).

⁵⁹ Horn, *supra* note 56.

⁶⁰ *Fraternity Collection, LLC v. Fagnoli*, No. 3:13-CV-664-CWR-FKB (S.D. Miss. Filed Mar. 31, 2015).

⁶¹ *Chanel, Inc., v. WGACA, LLC*, No. 18-2253, 2018 WL 4440507 (S.D. N.Y. Sept. 14, 2018); *Fraternity Collection, LLC v. Fagnoli*, No. 3:13-CV-664-CWR-FKB (S.D. Miss. Filed Mar. 31, 2015).

⁶² Bannigan, et al., *supra* note 13 (informing that the words endorsers choose to say on behalf of would-be infringers could hold them potentially liable).

⁶³ See *Hashtag with Caution – Or You May Get #Sued*, VENABLE LLP (Apr. 2016), <https://www.venable.com/insights/publications/2016/04/hashtag-with-caution-or-you-may-get-sued>.

⁶⁴ Bannigan, et al., *supra* note 13.

⁶⁵ *Chanel, Inc., v. WGACA, LLC*, No. 18-2253, 2018 WL 4440507 (S.D. N.Y. Sept. 14, 2018).

⁶⁶ See *id.*

⁶⁷ *Id.*

⁶⁸ *Id.*; see *Weight Watchers Int’l, Inc. v. Luigino’s, Inc.* 423 F.3d 137, 144 (2d Cir. 2005) (determining that use of the term “Points” was likely to confuse customers); see also *Pub. Impact, LLC v. Boston Consulting Grp., Inc.*, 169 F. Supp. 3d 278, 294-95 (D. Mass. 2016) (deciding that the use of hashtag #publicimpact infringed on the “Public Impact” trademark).

⁶⁹ *Fraternity Collection, LLC v. Fagnoli*, No. 3:13-CV-664-CWR-FKB (S.D. Miss. Filed Mar. 31, 2015).

⁷⁰ *Id.*

influencers rely on to connect their content to a specific topic or boost engagement—can be enough to support liability for trademark infringement if they contain a registered trademark.⁷¹

V. Influencer Intellectual Property Regulation

As influencer marketing has taken over social media, the Federal Trade Commission (“FTC”) has been actively working to improve disclosures in social media endorsements and now imposes fines for brands that do not follow their guidelines.⁷² After reviewing numerous social media posts made by celebrities or influencers, the FTC sent out more than ninety letters reminding influencers and brands that influencers should disclose their relationship with brands when endorsing their products.⁷³ These letters addressed how brands and influencers should be disclosing their relationships in an advertisement and how they should disclose any material connection above the “more” button on the bottom of a post caption.⁷⁴ For example, when using multiple tags, hashtags, or links, they should not be placed at the end of a post as it would not be conspicuous to identify a relationship.⁷⁵

In 2021, the FTC sent letters to over 700 advertisers to make them aware they could now face civil penalties up to \$43,792 per violation if any of their endorsements or online reviews are deceptive.⁷⁶ The FTC has created a guide for the use of endorsements and testimonials in advertising.⁷⁷ When endorsing a product through social media advertisements, the message should clarify that there is a “material connection” or relationship with the brand.⁷⁸ This relationship includes personal, family, or employment relationships, such as the brand paying or giving away free or discounted products or services for the advertisement.⁷⁹

When it comes to making disclosures on social media advertisements, this burden is not just placed on the brand but on the influencer too.⁸⁰ Everyone that is involved in a partnership is responsible for complying with the FTC disclosure requirements and making sure they are present in the endorsement.⁸¹ The failure to follow the guidelines could lead to liability for both promoters

⁷¹ Karin Olafson, *How to Use Hashtags in 2021: A Quick and Simple Guide for Every Network*, HOOTSUITE (June 16, 2021), <https://blog.hootsuite.com/how-to-use-hashtags/>.

⁷² Heather Angelina Dunn & Carissa L. Bouwer, *Brands and Influencers in the Spotlight as FTC focuses on civil penalties for deceptive advertising*, DLA PIPER (Nov. 4, 2021), <https://www.dlapiper.com/en/us/insights/publications/2021/11/brands-and-influencers-in-the-spotlight-as-ftc-focuses-on-civil-penalties-for-deceptive-advertising/>.

⁷³ *FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship*, FTC (April 19, 2017), <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose>.

⁷⁴ *Id.* (explaining that when viewing an Instagram post on a mobile device, if the caption is longer than three sentences, the consumer must click the “more” button to view the entirety of the post).

⁷⁵ *Id.*

⁷⁶ Dunn & Bouwer, *supra* note 72.

⁷⁷ *Disclosures 101 for Social Media Influencers*, FTC (Nov. 2019), https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf.

⁷⁸ FED. TRADE COMM’N, GUIDES CONCERNING THE USE OF ENDORSEMENTS AND TESTIMONIALS IN ADVERTISING, <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf>.

⁷⁹ *Id.*

⁸⁰ Alex OConnor, *A Simple Guide to FTC Disclosures*, MAVRCK, (Dec. 17, 2020) <https://www.mavrck.co/influencer-marketing-ftc-disclosures-guide/>.

⁸¹ *Id.*

and influencers. Although the guide does not hold the force of the law, it will help influencers stay within the law by providing these disclosures.⁸² Further, the FTC provides that companies that are engaging in influencer marketing are responsible for informing their contractors of the guidelines, which is a great win as influencers will be made aware of their responsibilities.⁸³

Following the publication of their guidelines, the FTC took matters into its own hands by filing its first-ever complaint against individual social media influencers: Trevor Martin and Thomas Cassell.⁸⁴ Trevor “TmarTn” Martin and Thomas “Syndicate” Cassell were two influencers endorsing an online gambling service called “CSGO Lotto,” however, they failed to disclose that they jointly owned the company.⁸⁵ This case sent a message to influencers that their connections to the brands they endorse should be disclosed so “consumers can make informed purchasing decisions” and stay out of legal suits.⁸⁶

While the world of influencer liability is still relatively new, it is continuing to expand into many legal risks and concerns that influencers may face.⁸⁷ Not only is there the possibility of trademark infringement by using a trademarked name in a blog post or even on a hashtag, but there is also the potential to violate current FTC regulations and many more that might be promulgated.⁸⁸

An influencer’s main source of liability comes from the contract signed with the brand for the paid advertisement.⁸⁹ This not only outlines the terms of the employment, but also provides the foundation for the type of post the influencer will publish for the brand.⁹⁰ The influencer contract should also provide the FTC guideline on disclosures and how the influencer should issue their disclosures on social media.⁹¹ As the brand is responsible for the influencers’ reviews about their products or services, it is to their benefit to provide for the disclosure requirements in the contracts.⁹²

VI. Conclusion

As the *Petunia* case has revealed, influencer marketing can create exposure to legal liability for intellectual property infringement on not just the brand, but the influencers themselves, even if

⁸² Paolo Zialcita, *FTC Issues Rules of Disclosure of Ads By Social Media Influencers*, NPR, (Nov. 5, 2019) <https://www.npr.org/2019/11/05/776488326/ftc-issues-rules-for-disclosure-of-ads-by-social-media-influencers>.

⁸³ *Id.*

⁸⁴ *CSGO Lotto Owners Settle FTC’s First-Ever Complaint Against Individual Social Media Influencers*, FTC (Sept. 7, 2017), <https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against>.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Timothy Shields, *The Legal Risks That Social Media Influencers Encounter*, KELLY KRONENBERG (Mar. 16, 2021), <https://www.kelleykronenberg.com/category/blog/technology-data-privacy-and-social-media/the-legal-risks-that-social-media-influencers-encounter/>.

⁸⁸ *Id.*

⁸⁹ Veronika Balbuzanova, *Triple Threat: Range of Legal Liability for Influencers*, JOHNSON DALAL (Oct. 18, 2019), <https://patentandtrademarklaw.com/view-post/triple-threat-range-of-legal-liability-for-influencers>.

⁹⁰ *Id.*

⁹¹ *New FTC Guidance: How to Avoid Legal Problems with Influencer Marketing*, HILFER LAW (Nov. 26, 2019), <https://kbhilferlaw.com/how-to-avoid-legal-problems-with-influencer-marketing/>.

⁹² *Id.* (providing a disclosure requirement would benefit the company by making the influencer aware of their potential liability should they infringe on any trademarks).

they have no knowledge of the infringement.⁹³ The case communicated just how meticulous brands and influencers must be with their sponsored content and how they must make sure none of their content contains infringing materials, whether it be a slogan or even a hashtag. To prevent liability on both parties, brands should provide adequate disclosure to the influencers they hire and educate them on the possibilities of liability while fulfilling their contractual duties. This will put influencers on notice of their potential liability and make them aware that the words and hashtags used should be honest and accurate, as to not infringe on any intellectual property rights. Influencers should follow practices such as: using the copyright symbol, monitoring content for unauthorized intellectual property use, and avoiding the use of branded names or trademarks without express permission.⁹⁴ Social media advertising has a considerable impact on society and as such it has created many regulations in the space which brands, as well as influencers, must follow to avoid intellectual property liability.⁹⁵

⁹³ See *Petunia Products, Inc. v. Rodan & Fields, LLC*, No. SACV 21-00630-CJC, 2021 WL 6286486 (C.D. Cal. filed Aug. 6, 2021).

⁹⁴ *Social Media Influencers and Intellectual Property Rights*, KASHISH WORLD, (last visited, May 9, 2022), <https://www.kashishworld.com/blog/social-media-influencers-and-intellectual-property-rights/>.

⁹⁵ Gregory L. Cohen, *Tech Transactions & Data Privacy 2022 report: #Compliance: Legal Pitfalls in Social Media Influencer Marketing*, NATIONAL LAW REVIEW (Feb. 11, 2022), <https://www.natlawreview.com/article/tech-transactions-data-privacy-2022-report-compliance-legal-pitfalls-social-media#:~:text=Currently%2C%20social%20media%20influencer%20marketing,Sec.>