

Arising Legal Concern in Endorsement Practices by Social Media Influencers in Malaysia: A Comparative Perspective

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Abstract: Many businesses, in their search for a more effective way in promoting their products or services have discovered that social media is an important communication channel in the digital marketing landscape. They are now recruiting the services of individuals termed as 'social media influencers' – individuals who have a significant following on social media – for marketing purposes. These so-called 'influencers' engage in products or services endorsements for marketers through the myriad of social media channels, often in exchange for money or free or discounted products or services. Marketers and influencers, however, should be concerned of the legal issues involved in the practices of using the social media for products or services endorsement. Employing content analysis of relevant literature and laws, this paper discusses the different types of 'influencers' and reviews selected social media influencers' marketing activities in Malaysia and explores the associated legal concerns. One major concern, is the lack of disclosure in these endorsement practices under marketing laws. Latest regulatory developments from the USA and UAE in dealing with influencer marketing are also examined and compared with the laws in Malaysia. The paper addresses the differences in the scope and coverage of the regulations and acknowledges that Malaysia needs to welcome changes in the laws of influencer marketing in the near future.

1 INTRODUCTION

Social networking using social media applications have become increasingly popular and important communication channels in our everyday lives. As of April 2018, Facebook for example, recorded about 2.2 billion monthly active users and about 1.4 billion daily active users (Smith & Anderson, 2018; Stout, 2018). As for YouTube, there are over 5 billion videos viewed every day, with daily active users of over 30 million people (Stout, 2018). Whilst Instagram, a social networking app made for sharing photos and videos, has now garnered over 500 million daily active users on their site after its launch 8 years ago (Stout, 2018).

The growth of these social media users has opened a new wave of marketing trend. Many business, including sole proprietors, in their search for a more effective way in promoting their products or services, have discovered that social media is not only a communication channel but has also become a much

savvier marketing tool in the digital landscape (Tuten & Solomon, 2017; Lipschultz, 2018). Several studies have shown that, marketers agree that promoting their products and services on social media is an effective marketing strategy in this era (Ashley & Tuten, 2015; Clark, Black, & Judson, 2017; Hudson, Li Huang, Roth, & Madden, 2016).

In the past, marketing focused only on four elements; product, price, platform and place (Brassington & Pettitt, 2005). However, with the advance of social media, it has now allowed for an added important element in marketing: people (Mangold & Faulds, 2009). Involving people here means a strategy which includes listening to and engaging with individuals who may be influential in coaxing customers, including potential customers towards a particular product or service through social media, hence the term 'Influencer Marketing' or as Joe Sinkwitz termed it as 'the digital version of mouth marketing' (Sinkwitz, 2016). Businesses are now recruiting the services of these individuals termed as 'social media influencers' to do their bids in

marketing their products or services (Barker, 2018; Glucksman, 2017; Khamis, Ang, & Welling, 2017).

Engaging these social media influencers for products or services endorsement, however, raises certain legal concerns. Although regulations may vary, social media influencers must adhere to certain disclosure rules regarding their advertising relationships with the businesses, including when the influencer receives a free product and/or compensation in exchange for his or her endorsement, testimonial or review (Boerman, Willemsen, & Van Der Aa, 2017; (Khamis, Ang, & Welling, 2017). How regulations dealt with such concerns vary from one jurisdiction to another which, will be discussed further in the paper. This paper highlights the types of ‘influencers’ and the endorsement practices of social media influencers in Malaysia and the legal issues involved.

2 METHODOLOGY

The paper studies the different types of social media influencers and their endorsement practices on selected social media channels and the associated legal concerns by comparing Malaysian laws with that of the USA and the UAE. Reviews of jurisdictions worldwide, shows that there are two different approaches in dealing with influencer marketing. These two jurisdictions, considered to be at the forefront of specifically regulating influencer marketing, are selected to demonstrate the differences in these regulatory approaches. The study employs content analysis of relevant literature and laws and regulations. The following Table 1 display the laws and regulations that have been analyzed in this study.

Table 1: Comparative Laws and Regulations.

Malaysia	USA	UAE
Consumer Protection Act 1999	Trade Commission Act	Consumer Protection Law (No.3) 2003
Consumer Protection (Electronic Trade Transaction) Regulation 2012	Federal Trade Commission Title 16 (Code of Federal Regulation Part 255) Guides Concerning The Use Of Endorsements	Federal Law No. 11 of 2016 on the regulation and powers of National Media Council (NMC)

	And Testimonials In Advertising	
Malaysian Code of Advertising Practice		Electronic Media Regulation
Communications and Multimedia Act 1998		
The Communications and Multimedia Content Forum of Malaysia		

3 SOCIAL MEDIA INFLUENCER ENDORSEMENT PRACTICES

Social media influencers are those individuals who have a significant following on social media accounts including Twitter, Instagram and Facebook (Smith, Kendall, &Knigh, 2018). These so-called ‘influencers’ are a new type of ‘third parties’ that the marketers engage with for products or services endorsements through the myriad of social media channels, often in exchange for money or free or discounted products or services. These ‘influencers’ are a select few people who have the power to affect a purchase decision of others because of their authority, popularity or relationship with their followers (Smith, Kendall, &Knigh, 2018).

Social media influencers can currently be categorized into a few groups of people with influence (Khamis, Ang, & Welling, 2017) including celebrities, industry experts, bloggers and micro influencers. Interestingly, unlike their more famous category of social media influencer, i.e. the celebrities which comes in the likes of artists, singers and actors, micro influencers are normal everyday people who have a considerably significant number of followers on social media (Khamis, Ang, & Welling, 2017). People follow them on social media because of factors which includes their sense of fashion and style, knowledge or maybe because of their specialist niche. For example, one local micro influencer, Khainina Khalil, a UiTM graduate in interior architecture has 86.9k followers on the photo sharing app, Instagram. She is being followed for her fashion sense and style and beauty tips. She caught attentions from many brands to advertise their products on her page. She also admits that 50% percent of her time, effort and attention is now focused on her job as a

social media influencer. Another local social media influencer on Instagram, FaizDickie, who started as a micro influencer, has now reached celebrity status with up to 613k followers on his account. Faiz, whose real name is MohdNasralFaiz started of his Instagram account uploading his parody videos or his comic-antic strips of trending local issues. His parodies and comic relief were well received that he garnered significant followers. He later moved on into paid review services for various products and services on his account.

On YouTube, these micro influencers are commonly active as video bloggers, also known as ‘vlogger’, who uses the medium to share with their subscribers about a range of things, which could be something of interest to them – their reviews of hotels and services or their favorite make-up line or products. A local vlogger, FarhanahFirdaus (or better yet known as Faafirds on her channel) concentrates on expressing her love for makeup, beauty and fashion. She currently has 67k subscribers on her channel and has an average of between 15k to 25k viewers for each of her videos. These micro influencers as social media influencer have a strong bond with their followers, and therefore their persuasive power or influence over their followers for products or services endorsements are currently highly sought after by marketers.

Traditionally, endorsement have been performed by celebrities using channels in the mass media since the late nineteenth century (Erdogan, 1999). However, millennial’s dependence on social media, means that they are no longer regularly exposed to conventional media, and therefore getting less influenced by traditional marketing strategy. This does not necessarily that mean endorsement practices are no longer relevant. It may not be the most effective in the traditional sense, but it has somehow found a better fit in the realms of social networking through these social media influencers. These social media influencers employed endorsement practices for marketers through various ways. They may review certain products or services by posting selected images or videos on their social media accounts in exchange for money, or free or discounted products or services. They may also be employed to set off certain contests or giveaways by marketers for certain products or services. They may be invited to attend certain products or services launch events sponsored by marketers and expected to share images or videos of the event which, inevitably create brand awareness.

Marketers, either brands or sole proprietors are now spending more money to pay the influencers to

endorse their products or services on social (Bloglovin’, 2017). According to a study by Bloglovin’, about 63 percent of brands have increased their budget for influencer marketing in 2017. From that study, they also found that 71 percent of marketers said influencer marketing raised significant awareness towards their brands through social media (Bloglovin’, 2017). The rise of influencer marketing also helps the brand to connect directly with the consumers and is the most effective way to attract their targeted audience (Glucksman, 2017). There are claims that these social media influencers have now become more powerful than traditional celebrities (Khamis, Ang, & Welling, 2017).

4 LEGAL CONCERNS AND COMPARATIVE REGULATORY DEVELOPMENTS

Research may have shown that influencer marketing is a successful way to endorse products and services in this digital era, but considering that this trend is a new phenomenon in the marketing field, including in Malaysia, marketers and influencers should be concerned of the legal ramifications involved in the practices of using the social media influencers for products or services endorsement. One of the most common legal issue is violation of endorsement practices under marketing laws – the lack for disclosure.

4.1 Disclosure

Unlike traditional marketing method, for example advertisements on television in which we recognize that celebrities are paid to promote certain products or services, such disclosure is almost absence in influencer marketing. Social media influencers must disclose their advertising relationships with the businesses, including when the influencer receives a free product and/or compensation in exchange for his or her endorsement, testimonial or review. Sufficiently disclosing the partnerships between marketers and influencers increases transparency and prevents consumers from feeling deceived about a product or service endorsed by the influencer.

Most local social media influencers reviewed for the study, do not demonstrate the realization that they have certain responsibilities to be honest to their follower when making endorsements for marketers. Some of them may even deceived their followers by

displaying in their reviews that they are regular users of the product or they frequent certain services, when this is far from the truth. The lack of disclosure of the partnerships between marketers and influencers confused consumers into believing that these social media influencers are making an honest review about certain product or services, whilst in fact there were merely endorsing them for marketeers. The lack of disclosure therefore, leads towards deceiving information and misleading followers and consumers when making their purchase decisions.

4.1.1 Malaysia

In Malaysia, there are currently no specific regulations that cover influencer marketing on social media. Generally, consumerism matters and its protection in the country are dealt with by the Consumer Protection Act 1999 (CPA). In 2007, an amendment widens the scope of the CPA to include electronic commerce transaction. The CPA provides protection of e-consumers against misleading and deceptive conduct, false representation and unfair practices. The protection to e-consumers has also been further strengthened by the passing of the Consumer Protection (Electronic Trade Transaction) Regulation 2012, which impose on online business suppliers and online marketplace operators to take certain steps to protect the interests of consumers. The regulation states that all the e-marketers have a duty to disclose all the relevant information that the e-consumers should know before buying the products. The 2012 Regulations apply to any person who operates a business through a website or an online marketplace for supplying goods or services (Online Business Supplier) and any person who provides an online marketplace (Online Marketplace Operator). An 'online marketplace' under the regulation refers to a website where goods or services are marketed by third parties for trade. However, this definition clearly does not cover goods or services marketed on social media channels.

In terms of marketing, legislations are mostly self-regulatory and introduced by the Advertising Standards Authority Malaysia (ASA). The ASA, as an independent body, is established in 1977 to provide independent security, self-regulatory system set up by the industry with a vision is to create Malaysian advertising free from any fraudulent conduct. The ASA administers the Malaysian Code of Advertising Practice (hereinafter the Code) to regulate its activities, which includes investigating complaints and copy advice, a service designed to help create an advertising campaign in accordance

with the requirements of the Code for advertising and marketing communication. Responsibility for observing the Code not only rest with the advertiser, but also applies to any advertising agency or medium involved in publication of the advertiser's message to the public. However, the Code is only applicable to "marketing communication or advertising wherever it may appear in the printed form." This meant that the Code is not applicable to goods or services marketed on social media channels.

Matters relating to content over the electronic networked in Malaysia are, however, administered by the Communication and Multimedia Content Forum of Malaysia (CMCF). The CMCF is introduced in compliance with the Communications and Multimedia Act 1998 in 2001 by the Malaysian Communications and Multimedia Content Code (MCMC). The MCMC is empowered by the Communications and Multimedia Act 1998 to establish an industry body responsible for the preparation of a Content Code facilitating industry self-regulation, the CMCF. It acts as a Society, with representation from all relevant parties, to govern content and address content related issues disseminated by way of electronic networked medium. The CMCF operates a Complaints Bureau that addresses grievances from consumers and industry members on matters relating to content over the electronic networked medium.

Part 3 of the Code provides guideline that applies to advertisements communicated electronically that includes testimonials and endorsements, however, the Code itself only applies to all content made available in the content industry by the "Application Service Providers". The Code defines 'Applications Service Provider' as a person who provides applications service; persons who provide functions such as voice services, data services, content-based services, electronic commerce and other transmission services. The Licensing Regulations 2001 do further provide a detailed list of those considered as Application Service Providers, but they do not include services provided through or by the social media channels. The absence of specific legislations on influencer marketing on social media in Malaysia, does not mean that traditional laws on marketing should not be applicable to marketing in social media. However, the reviewed legislations have clearly limited their scope and coverage of protection and lack detailed guideline in dealing with social media influencer. It is high time for Malaysia to acknowledge this growing concern in influencer marketing and its role in the social media and welcome changes in the laws in dealing with them. Lessons in doing so can be learnt from other

jurisdictions. The USA and the UAE, for example are two jurisdictions that have recently tackled influencer marketing. Review of both jurisdictions shows that, not only are they considered to be at the forefront of specifically regulating influencer marketing, but they have two different regulatory approaches.

4.1.2 USA

In the US, influencer marketing activities is specifically regulated by the Federal Trade Commission (FTC). The FTC is a bipartisan US federal agency, established on 26 September 1914 by the Federal Trade Commission Act of 1914 (FTC Act). The FTC's mission is to protect consumers and promote competition in the US. Since 2009, the FTC has insisted through its 'Guidelines Concerning the Use of Endorsements and Testimonials in Advertising' that when marketers use endorsement or testimonial, the relationship or material connection between the parties must be disclosed. The Guidelines are not regulations which comes with any civil penalties associated with them. But advertisers who failed to follow the guides, may be investigated by the FTC for unfair or deceptive practices under the Section 5 of the FTC Act.

In 2017, following the case against Lord & Taylor [Complaint at 3, Federal Trade Commission v. Lord & Taylor, LLC., (F.T.C. 2016) (No. C4576)], the FTC had updated its guidelines to give detailed instructions on proper social media endorsement practices. In the Lord & Taylor's case, the fashion retailer was claimed to have been engaged in deceptive commercial endorsement actions under the FTC Act by not disclosing that they have compensated several fashion influencers to endorse their dress on Instagram in 2015. The 2017 updates provided specific examples of illegal marketing practices and guidelines for social media marketing to avoid similar cases as the Lord & Taylor's case.

Initially the FTC guidelines were viewed as mere warnings because the FTC was not taking legal action against social media users who breach the guidelines. However, this notion changed in late 2017. On 7 September 2017 the FTC brought its first legal action against CSGOLotto, Inc., and its officers Trevor Martin and Thomas Cassell (In the Matter of CSGO Lotto, Inc., File No. 1623184 #00002). CSGOLotto stands for Counter-Strike Global Offensive Lotto, a market place for online-video game virtual item transactions. The complaint claimed that the officers violated Section 5(a) of the FTC Act by engaging in illegal marketing practices on social media platforms by paying other social media influencers to post on

their social media accounts about CSGOLotto. These social media influencers were also prohibited from giving any negative comments about CSGOLotto's website.

Following the CSGOLotto's case, the FTC further announced that 21 warning letters were sent to social media influencers, and a further 90 educational letters sent to the influencers and brands, reminding them that the influencers must clearly disclose the relationship with the brands in their posts. The actions by the FTC shows its desire in ensuring that social media influencers are deterred from engaging in illegal marketing practices and the effects from non-compliance may include legal action.

As influencer marketing become even more dominant in the social media landscape, the FTC recently (2018) updated its endorsement guidelines requiring social media influencers to disclose that they have a paid relationship with the companies or brands they promote so consumers are aware that it may not be a genuine endorsement and assess the social media posts credibly. The guidelines provide clear requirements on the means for the social media influencer to disclose the material connection with the brand, even if marketers gave free products to an influencer in hopes for a positive review from the influencer. If such material connection is not disclosed, the influencer can be held liable for deceptive social media endorsement.

The FTC guidelines show the FTC's intention to regulate illegal marketing practices on various social media platforms and ensures that the social media marketing ecosystem take adequate precautions against any possible legal actions from the FTC or consumers affected by their endorsements.

4.1.3 UAE

In the UAE marketing laws are not regulated by a single entity nor legislation. They are regulated by numerous laws including the Printing and Publication law, National Media Council (NMC) regulations, Cybercrime law and laws governing consumer protection and commercial activities. Section 4 of the UAE's Consumer Protection Law (No.3), 2003 specifically prohibits deceptive and unfair practices in general regardless of the medium that the marketers use. This means that any deceptive practices on social media platforms come under the purview of the Consumer Protection Law.

However, in March 2018, the UAE took a step forward, but somewhat different from the guideline approach in the USA, by announcing through its NMC that from June 2018 all influencers, creators and social media celebrities will need to secure a

media licence, under a new regulation. The media licence will be like those that magazines and newspapers acquire from the authorities in the UAE. It costs 15,000 AED annually. The NMC under Article 4 of the Federal Law No. 11 of 2016 on the regulation and powers of National Media Council is given the powers to draft the media policy of the UAE, including enacting media legislations and ensuring that they are implemented. The Electronic Media Regulation specifies that the licensing applies to anyone who does not already hold a trade license and those who accept paid collaborations, sponsored posts and/or brand deals in the UAE for creating promotional content to be shared with their followers. Those who failed to comply with the new regulations may be fined up to AED 5,000.

The regulation also stipulates that, apart from licensing, any media activities on social media platforms carried out for commercial purposes, shall meet the applicable advertising standards or criteria adopted by the council and the parties involved must be responsible for the content on such media. Social media influencers, blogs and personal web, including individuals and organisations that voluntarily promote work are not subject to the new regulation provided they are non-commercial in nature. How the UAE authorities will manage to differentiate the activities between commercial and non-commercial, especially when they involve micro influencers and enforced the new regulation remains to be seen.

5 CONCLUSIONS

Social media's role in influencer marketing will continue to grow, even in Malaysia. The use of social media and influencers for products or services endorsement creates better engagement and awareness for customers and it turns out to be a well utilised tool for marketing purposes. However, its usages raise some legal concerns. This article discussed one major legal issue associated with influencer marketing endorsement activities on social media – the lack of disclosure. Although, endorsement have been regulated by traditional marketing laws by many countries, including Malaysia, but only certain jurisdictions have provide a specific legal framework to regulate influencer marketing on the social media platform. Deceptive or false claims in marketing will lead to many social media marketers and influencers into liabilities. Non-disclosure of the material relationship between the influencers or endorsers and the marketers or brands leads to unfair influence on the consumers'

purchase decision and in turns is a form of deception under the law. Appropriate steps must be devised to avoid or mitigate this concern. Terms and conditions that specify upon which these influencers and marketers operate must be made clear. Regulations and legislations thus, play a big role in providing such guidance and ensuring compliance. Latest regulatory developments from the USA and UAE in dealing with influencer marketing shows two different approaches in their regulations, through guidelines and licensing, while Malaysia has yet to arrive at any specific rules nor guidelines. Malaysia needs to acknowledge the need for reform in the matter and welcome changes in the laws of influencer marketing soon. Lessons and experiences learnt from various jurisdictions worldwide, including the USA and the UAE on the development of the laws should be carefully considered.

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