

Written evidence submitted by Professor Jonathan Hardy

Submission to the DCMS Committee Enquiry on Influencer Culture

Professor Jonathan Hardy
University of the Arts London
May 2021

This submission is made by Jonathan Hardy, Professor of Communications and Media at the London College of Communication, part of the University of the Arts London. I am making this submission as an independent academic researcher with research and public policy interests in the practices and governance of branded content including influencer marketing. I was Principal Investigator for the AHRC funded Branded Content Research Network and I am co-ordinator for the Branded Content Research Hub <https://www.arts.ac.uk/colleges/london-college-of-communication/research-at-lcc/branded-content-research-hub>

I was an adviser and contributor to the Influencer Marketing Guidelines published by the Branded Content Marketing Association (BCMA 2021) in April 2021 <https://www.thebcma.info/landing-pages/bcma-influencer-marketing-guidelines.html>

This submission make summary points on some key governance issues I hope the Committee will consider, and adds an edited version of a report I prepared on Influencer Governance as an appendix. My submission addresses the following questions

- Is it right that influencers are predominantly associated with advertising and consumerism, and if not, what other roles to influencers fulfil online?
- How are tech companies encouraging or disrupting the activities of influencing?
- How aware are users of the arrangements between influencers and advertisers? Should policymakers, tech companies and influencers and advertisers themselves do more to ensure these arrangements are transparent?

Is it right that influencers are predominantly associated with advertising and consumerism, and if not, what other roles to influencers fulfil online?

The actors and practices described as influencers sit within broader categories of social communications. These communications range across the spectrum, from pro-

social to anti-social, independent to paid-for, and so 'influencers' can and do fulfil a wide range of roles. However the economic framework, economic incentives and opportunities structuring these digital communications shape the practices of influencer marketing. This refers to communications by influencers made on behalf of marketers in exchange for payment or other consideration. Influencer marketing is an emerging form of marketing that is poorly captured within existing regulations. While the principal attraction for marketers is the relationship of influencers with their audiences, this industry has also developed to take advantage of features that continue to render this a much less regulated space than traditional media and advertising. Many influencers are independent self-publishers and lack the training and support structures available to professional communicators working for legacy media or even digital native communications enterprises.

How are tech companies encouraging or disrupting the activities of influencing?

There is evidence of the capacity for technology to aid regulatory adherence and enforcement. For instance, Instagram offers brands the incentive of greater access to data analytics if they use its subheaders on posts to declare that they are sponsored. It is technically feasible for disclosure messaging to be added to programmatic native advertising, building on the existing protocols for the identification of components in advertising messages used within the automated buying and selling of advertising. Facebook's Instagram announced new measures in October 2020, in response to pressure from the Competition and Markets Authority, making it harder for adverts to be posted without labelling. Companies offer brands sophisticated tracking and disclosure tracking software and services. Regulators, such as the CMA and ASA are also using technology to track online rule breaches. These are important resources for governance that can be developed to contribute to addressing problems of non-compliance with rules on labelling and disclosure. Automatic detection of commercial communications could be linked to automatic penalties, for example. That has the potential to offer a much more effective system capable of tackling the widespread evasion of disclosure found today. However, such measures should not be introduced to target influencers without commensurate action against the marketers', marketing and talent agencies, and platforms, which sustain poor practices both in their treatment of influencers as well as readers and viewers. New governance arrangements also need to ensure the effective involvement of stakeholders, including civil society organisations and interests. It is not sufficient to limit attention to the labelling and disclosure of influencer marketing. It is also necessary to investigate the economic incentives within the business models and market environments of tech companies driving the promotion of influencer marketing, and all the problems arising, not merely awareness of marketing but the purposes, objects and social implications of that marketing and promotion.

In the United States, Commissioner Rohit Chopra of the Federal Trade Commission (FTC) has called for labelling and disclosure requirements for technology platforms (e.g. Instagram, YouTube, and TikTok) that facilitate or profit from influencer marketing (FTC 2020). Chopra (FTC 2020) proposes a shift from going after ‘small influencers’ to taking stronger enforcement action against advertisers and platforms:

When individual influencers are able to post about their interests to earn extra money on the side, this is not a cause for major concern. But when companies launder advertising by paying someone for a seemingly authentic endorsement or review, this is illegal payola.

Platforms and tech companies involved in the production or publication of marketing communications, including influencer marketing, should be legally responsible to ensure that marketing communications are recognisable as such. Platforms should be held accountable to ensure that marketing claims are ‘legal, decent, honest and truthful’ and comply with relevant UK law, statutory regulation (CMA, Ofcom, etc.) and self-regulatory codes (CAP-ASA, etc.)

How aware are users of the arrangements between influencers and advertisers? Should policymakers, tech companies and influencers and advertisers themselves do more to ensure these arrangements are transparent?

As the Committee notes in its enquiry call ‘[r]esearch showed that more than three-quarters of influencers “buried their disclosures within their posts”’. The research evidence indicates that a significant proportion of influencer marketing is not clearly labelled and disclosed in accordance with the relevant regulatory standards. There remain very significant problems, with unacceptably high levels of non-compliance. A 2018 study of 800 Instagram accounts found just over two-thirds disclosed monetary partnerships, but only 25 per cent did so in line with FTC recommendations for clear disclosure within the first three lines of a caption (Williams 2018). Another study found only 10 per cent of YouTube (0.5 million videos) and 7 per cent of Pinterest links (2.1 million) include a written disclosure of affiliate links, where influencers receive commission when viewers use links to purchase products (Mathur et al. 2018)

Comparative European research by Catalina Goanta and others found disclosure rates of around 10% for influencers disclosing affiliate marketing links (Pflücke 2020; Goanta and Ranchordás 2020). In the UK, influencer marketing firm Takumi conducted research in 2015, finding that merely 37 per cent of marketers admitted to adhering to the Committee on Advertising Practice (CAP) Code, while many said

they did not even know what the Code was (Audunsson 2016). A survey of 1,400 vloggers and bloggers conducted by CollectivEdge found that only 38 per cent of brand collaborations were disclosed to readers as an advertisement or sponsored post; 40 per cent of those who did not disclose reported they were confused about the requirement to disclose paid-for content on their blogs or social channels. Further, a third of influencers polled 'admitted that brands were asking them not to disclose paid content, which, in light of the fact that paid-for collaborations makes up 26 per cent of influencers' content, highlights a lack of awareness or willingness to play by the rules across a significant proportion of brands' (Murphy 2019). Global affiliate network www.Awin.com (Langford 2020) examined the top 100 posts on Instagram for each form of disclosure, including '#ad, which had the highest number of posts at 12.8 million, #advertisement (1.8m), #sponsored (3.3m), #gifted (1.8m) and #affiliate (744,000)'; '76% of the analysed posts hid the disclosure from view; i.e. their post was not in line with the ASA guidance' requiring prominent, up-front disclosure. The disclosure was hidden in the middle of posts in 59 per cent of cases, and at the end in 24 per cent, with only 5 per cent disclosing at the start of the post, as required, with 12 per cent hidden in comments sections.

In the US, the FTC has valuable rules, but a record of limited enforcement action. Since the new regulations were introduced in 2015 there have been only been 51 FTC cases and proceedings (2016-2020) concerning 'endorsements, influencers and reviews', the categories covered by the new rules. Of those cases, only seven involved undisclosed promotion by contracted influencers. Two of those involved cases major brands – Microsoft and Warner Brothers. In 2016, fashion retailer Lord & Taylor was fined for failing to disclose that it paid for an article in *Nylon* magazine , or that fifty influencers had been paid to post photos of a dress. Their posts had reached 11.4 million individual Instagram users over two days, leading to 328,000 brand engagements with Lord & Taylor's own Instagram handle. However, that early promise has not been sustained, with only a tiny number of enforcement actions.

Recommendations on disclosure

Principles for good practice:

- Advertising must be easily recognisable as such, regardless of method or channel
- Disclosure of a paid influencer marketing relationship should be obvious, conspicuous, prominent, upfront, timely and unambiguous.
- Disclosure should be readily apparent and should not require the need to click or scroll for more information
- Disclosure should be made whenever there is a contracted agreement

- Disclosure should be made whenever there is a material connection between an influencer and the referenced product or service.

Rules should state clearly the obligation that any content that is paid for, supplied by, produced or co-produced by, sponsored by, or subject to any material connection between, a third-party and the publisher, is clearly and prominently labelled so that the material connection is disclosed and the nature of the content is suitably identified and apparent to users who may encounter the material.

Source identification

The DCMS Committee has examined misinformation and political advertising, news publishing, audiovisual media, advertising regulation, the online harms agenda and now influencer marketing. There is a common theme that arises across all these communication policies issues: the identification of sources. The issue of source identification and disclosure is raised in policy areas of misinformation/disinformation, political advertising, in misleading trading (fake reviews, likes, testimonials, etc) as well as across commercial content and promotion (native advertising, sponsored content, influencer marketing, endorsements and testimonials). These matters are already converged in practices, such as the use of sponsored content, or influencer marketing, by state or para-state actors. It is not enough to establish provisions for the disclosure of certain types of source (paid or sponsored content) without addressing the broader issues of source identification and disclosure.

The various issues of source power, provenance and disclosure remain comparatively discrete in UK policy debates but they are becoming more integrated in both analysis and in policy and governance recommendations. The DCMS Committee has recommended stronger rules on identification for the provenance of political communications across all publishing and platform-publishing. The same arguments apply to commercial communications. The Cairncross Review (DCMS 2019) proposed a 'news quality obligation' should be imposed upon social media companies, requiring them to improve how users understand the origin of a news article and the trustworthiness of its source, a proposal under consideration by the UK Government (DCMS 2020). The standards for news publishers should at least as high as those that apply to social media influencers, many of whom self-publish and operate outside of the professional, institutional and governance arrangements found in news and periodical publishing. Yet, there are currently stronger obligations on influencers in the UK than are outlined in the Impress code, which states 10.1 'Publishers must clearly identify content that appears to be editorial but has been paid for, financially or through a reciprocal arrangement, by a third party'. For instance, the current guidance on influencer marketing produced by the

Competition and Markets Authority and Committee on Advertising Practice (CMA-CAP 2020: 4) states:

If you have any sort of commercial relationship with the brand, such as being paid to be an ambassador, or you're given products, gifts, services, trips, hotel stays etc. for free, this is all likely to qualify as 'a payment [or other reciprocal arrangement]'. There's nothing wrong with getting paid to create content, but you need to be upfront about this with your audience.

That level of disclosure for influencers, who may be 'amateur' and individual self-publishers, exceeds the practices of professional news and periodical publishers in the UK, where junkets, gifts, supplied goods and other 'reciprocal arrangements' are not consistently, clearly and explicitly disclosed. The IPSO code does not address the issue of paid or sponsored content at all.

The Online Harms White paper recognised the need for '[t]ools to provide users with more context about the content they view on platforms, including enhanced transparency about the origins of political and electoral adverts' (7.26). The need for information about the provenance of communications applies across political and commercial communications. A central principle is the right of access, to know the provenance of a public communication. *If a communication has been supplied by, paid for by, or subject to a transactional relationship with a third-party then users are entitled to have that information in a readily accessible form so that they can assess the provenance of the communication.* This principle must be upheld alongside the protection of the rights of journalists to protect their sources, and in accordance with the protection of human rights, including freedom of expression and privacy.

There are some indications of a more integrated approach to source identification developing, although it is still fragmentary. Within policymaking networks, sponsored content has been addressed in policy areas including the regulation of platforms, ad tech, data management and privacy, online harms, harmful advertising, digital literacy and misinformation. The EU High Level expert group on fake news (European Commission 2018: 32-33) recommended that sponsored content is 'clearly identifiable', that platforms 'should ensure that sponsored content, including political advertising, is appropriately distinguished from other content' and that 'Source transparency Indicators should be developed based on professional codes of conduct and users' expectations for what constitutes credible and trustworthy content, adjusted to cater for online journalistic practices. The EU Policy Department for Citizens' Rights and Constitutional Affairs' report *Disinformation and propaganda* (2019) includes among its recommendations that platform providers should be responsible 'for distinguishing sponsored content and ads from other content, identifying and disabling fake accounts, protecting the privacy of users, including those who are not members of their services'. The European consumer

organisation, BEUC, voted against the report, arguing that consumer exposure to disinformation needs to be addressed primarily at its source and in relation to the ad revenue practices of platforms. Nevertheless, this is indicative of a broader shift in policy discussion towards consideration of source identification that extends beyond branded content and includes action such as publisher kitemarking for agreed standards of source transparency as well as legal-regulatory or self-regulatory rule-making on disclosure and other aspects.

It is time to establish a code, or greater integration across regulatory codes, based on standards of transparency and disclosure suitable for 21st century media. The principle that users should be aware of the source of the content, and should be made aware of material interests relevant to their assessment of that content, stands for a wider class of material than commercial communications, and indeed for all public communications. The strengthening of disclosure requirements needs to be conducted within a media pluralism and human rights framework that strengthens safeguards for the protection of journalistic sources. International human rights law has established the importance of this protection for whistleblowers, for the protection of journalists, for safeguarding freedom of expression and disclosure of information. The bribery of journalists through payment by third-parties is recognised as a threat to media freedom and integrity worldwide so requirements to disclose sources is a tool in combatting corruption.

There are also additional considerations and obligations for identification and disclosure for content aimed at or reaching children. To address children's communication rights and protection, a good starting point is the principle set out in the European Commission (2016: 6) report that '[c]hildren should not be exposed to online marketing when it is likely that they will not understand the persuasive intent of the marketing practice'. The report for UNICEF (Nyst 2018: 28) recommends that '[a]ll advertising to children should be identified as such. Branded and immersive environments should be used with caution, and only under circumstances in which children understand that the content is advertising'.

Recommendation

Using the language of the US Federal Trade Commission, material connections between sources and public content should be evident or declared in both third-party and self-published content. Payment, or 'material connection' related to the published content, should be declared for all third-party content.

Protecting speech rights /communication rights

There needs to be an investigation of contractual relationships between marketers/agencies and influencers. It is important to ensure influencers are

released from contracts, outside of the activity/time period covered within them, to safeguard their rights to freedom of expression and the communication right of recipients – protecting influencer rights to exercise honest opinion outside of contracted promotion. For instance, in the BBC File on Four report, *Undue Influence* (BBC Radio 4 2021), an influencer repudiated her earlier endorsement of unsafe beauty treatment. Contract terms should not restrict post-campaign communications, such as an influencer wishing to criticise as unsafe cosmetic treatments they had previously endorsed.

The power relations between brands and influencers are usually weighted heavily towards brands, except for a small percentage of influencers whose popularity, reach, economic security and access to professional advice and services offers them sufficient counterbalancing power. There are risk that the contracts designed to serve brands and brand safety grant can exercise a chilling effect on the freedom of expression of influencers and shape what messages circulate in ways that can damage the communication rights of recipients and the wider public interest. There are risks that contracts drawn up to protect brand interests could extend control (similar to non-disclosure agreements, etc.) to prevent that honest opinion. This would be a form of commercial censorship, chilling freedom of expression. Therefore, it should only be acceptable to circumscribe contract terms appropriately and within a human rights framework that safeguards freedom of expression (and communication rights).

In the pre-digital era of mass media, the border between brand-controlled advertising and editorial was maintained in various ways, from formal regulation to the codes and practices institutionalised across professional media. That editorial-advertising border is under increasing pressure but the principle that brand control should not be unlimited is maintained across the regulatory landscape. Influencer marketing is nascent and the boundaries, not only for disclosure but for brand/sponsor control have not been established to protect the rights of communicators, users and wider public and social interests. There needs to be clearer protection for editorial independence, influencer's speech rights and the rights of recipients. The types of problems include brands threatening breach of contract (a risk to the future work on an influencer) in attempts to restrict comments made later or 'outside' of an influencer marketing contract. In addition, contractual agreements should only concern marketing statements that are subject to disclosure. There are many reasons for that but one is that brands may otherwise exercise control, including restricting communications from being made, in ways that lack transparency for those who follow the 'influencer'.

The new influencer marketing guidelines of the BCMA (2021: 9) recognises this in stating

‘Agreements should only concern marketing communications requiring disclosure and not other communications. The Brand may request a marketing communication be deleted where this is subject to the time-limited contractual terms specified in the agreement. This must be without detriment to influencers’ editorial independence and freedom of expression’.

Additional recommendations: education, training and research

Many influencers self-publish and operate outside of the professional, institutional and governance arrangements found in news and periodical publishing. Many of these cannot finance professional training, advice and services from their earnings as influencers. When they are approached by brands or agencies to take part in campaigns, their lack of knowledge and support can leave them vulnerable. Meeting these needs requires funding for information and training by CMA, ASA, industry bodies, education and training institutions.

There is an important role for Universities here to assist with knowledge exchange, training and the support for organisations and networks that support influencers. I am involved in such initiatives, including a recent event to bring together Black and minority ethnic organisations and networks working across creative media and marketing.

To reach effective and durable governance we need to understand why situation is as it is across range of institutions, actors and processes. This highlights the value and importance of research, and the need for funding from UKRI and others for humanities and social science research into practices, users and governance. I hope the DCMS will recommend that research support to help address the important and ongoing areas of concern this Enquiry is addressing.

References

Audunsson, S. (2016) ‘Takumi’s position on the CAP guidelines’, Takumi, 7 April.
<https://blog.takumi.com/takumi-s-position-on-the-cap-post-guidelines-cff3917aeb3>.

BBC Radio 4 (2021) ‘Undue Influence’, File on Four, 12 January.
<https://www.bbc.co.uk/programmes/m000r3pg>

Branded Content Marketing Association [BCMA] (2021) *Influencer Marketing Guidelines*, BCMA, April
<https://www.thebcma.info/landing-pages/bcma-influencer-marketing-guidelines.html>

DCMS (2020) *Government response to the Cairncross Review: a sustainable future for journalism*, 27 January. <https://www.gov.uk/government/publications/the-cairncross-review-a-sustainable-future-for-journalism/government-response-to-the-cairncross-review-a-sustainable-future-for-journalism>

— (2019) *The Cairncross Review: a sustainable future for journalism*, 12 February. <https://www.gov.uk/government/publications/the-cairncross-review-a-sustainable-future-for-journalism>

European Commission (2016) *Study on the impact of marketing through social media, online games and mobile applications on children's behaviour, Executive Summary*, Brussels: European Commission.

European Commission (2018) *Final report of the High Level Expert Group on Fake News and Online Disinformation*, Brussels: European Commission. <https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation>.

FTC (2020) 'Statement of Commissioner Rohit Chopra', 12 February. Washington, DC: FTC.

Goanta, C. and Ranchordás, S. (eds) (2020) *The Regulation of Social Media Influencers*. London: Edward Elgar.

Langford, R. (2020) 'Three quarters of Instagram influencers hide their advertisement disclosure in their posts', *netimperative*, 22 September. <http://www.netimperative.com/2020/09/22/three-quarters-of-instagram-influencers-hide-their-advertisement-disclosure-in-their-posts-2/>.

Mathur, A., Narayanan, A., and Chetty, M. (2018) 'Endorsements on social media: An empirical study of affiliate marketing disclosures on YouTube and Pinterest', *Proceedings of the ACM on Human-Computer Interaction* 119.

Murphy, D. (2019) 'Fat Media calls for action on influencer non-disclosure', *Mobile Marketing*, 8 February. <https://mobilemarketingmagazine.com/fat-media-calls-for-action-on-influencer-non-disclosure>.

Nyst, C. (2018) *Children and Digital Marketing: Rights, risks and responsibilities*, *United Nations Children's Fund* (UNICEF).

Pflücke, F. (2020) 'Making influencers honest: The role of social media platforms in regulating disclosures', in C. Goanta and S. Ranchordás (eds) *The Regulation of Social Media Influencers*. London: Edward Elgar.

Williams, R. (2018) 'Study: Just 25% of Instagram influencers are compliant with FTC rules', *Marketing Dive*, 14 March. <https://www.marketingdive.com/news/study-just-25-of-instagram-influencers-are-compliant-with-ftc-rules/519086/>.

Influencer Marketing Governance

Briefing Paper, 11 July 2020

Prof Jonathan Hardy, University of the Arts London

Overview

Various efforts have been made at national and supranational levels to formulate guidelines for Influencer Marketing (IM) . Such guidance is provided by a wide range of bodies with varying kinds of authority and enforcement powers. Depending on the nature of those powers, guidance includes a mix of mandatory requirements and recommendations. Some guidance sets out detailed rules for specific services, for platforms, media forms or formats, or for user devices used to access content.

This guide aims to provide a selective overview of IM governance, identify some of the main policy issues now and likely to emerge and advance some recommendations. This is an advance draft version (12 July) of the paper that will be available by September. This version is uncorrected and so should be used for guidance only and not cited.

Timeline

Year	United States	UK	Europe	Transnational/Rest of World
2009	Feb: FTC Guides Concerning the Use of Testimonials in Advertising			
2012				WOMMA Social Media Disclosure Guidelines.
2013	March: FTC guidance .com Disclosures: How to Make Effective Disclosures in Digital Advertising (updated version of 2010 guidance)			
2016	March: FTC Lord and Taylor settlement (FTC Charges L&T deceived consumers through paid articles and Instagram Posts by 50 influencers)	March: CMA guidance, Online endorsements: being open and honest with your audience April: CMA Online reviews and endorsements: information for businesses ; August: CMA enforcement , Social Chain, Non-disclosure of paid endorsements	Nov: Advertising Standards Authority for Ireland, guidance on Recognisability of Marketing Communications	ICPEN guidelines on online reviews and endorsements
2017	Sept: FTC guidance, The FTC’s Endorsement Guides: What People Are Asking			WOMMA, The Womma Guide To Influencer Marketing
2018		March: ASA call for evidence on online ad labelling		
		CMA-CAP guidance, ‘Influencer’s Guide to Making Clear that Ads are Ads’	EASA, Best Practice Recommendation On Influencer Marketing	(June Unilever commits to IM transparency standards)
		Aug: CMA investigation on social media non-disclosure by paid influencers	Oct: Belgian Advertising Council Influencer guidelines	

2019		Jan: CMA guidance, Social media endorsements: being transparent with your followers	Finland (KKV, consumer ombudsman). Influencer marketing in social media	
		CMA-CAP guidance	Netherlands. SRO. Social Media & Influencer Marketing code	
	May: Influencer Marketing Council, 'Fraud Best Practices and Guidelines'		March: Austrian Advertising Council adopts Influencer Marketing Rules	
		Sept: ASA report, <i>The labelling of influencer advertising</i>	France guidelines	
	Nov: FTC updates guidance, Disclosures 101 for Social Media Influencers			
2020	Feb: FTC consultation on its Guides Concerning the Use of Endorsements and Testimonials in Advertising	Feb: CMA-CAP updated guidance, ' Influencer's Guide to Making Clear that Ads are Ads '		
	March: FTC Fines Detox Tea Company \$1 Million Over Misleading Instagram Influencer Ads		March: Netherlands Authority for Consumers and Markets (ACM), 'Protection of Online Consumers'	
				July: Australian Influencer Marketing Council, Code of Practice

General Principles and Rules

- The consumer has the right to know when someone is trying to influence them for a commercial purpose.
- Advertising must be easily recognisable as such, regardless of method or channel
- Unfair or deceptive acts or practices are prohibited
- Disclosure of a paid influencer marketing relationship should be obvious, conspicuous, prominent, upfront, timely and unambiguous.
- Disclosure should be readily apparent and should not require the need to click or scroll for more information.
- 'endorsements must be honest and not misleading' (FTC 2017)

Mapping IM Governance

Key actors

- IM Talent representatives and managers
- Other service providers to the influencer marketing community
- Platforms (Platform owners, managers)
- Industry marketplaces that provide platforms that promote influencers

- Media publishers
- Advertising/marketing communications agencies
- Branded Content agencies
- PR agencies;
- Brands - advertisers engaging industry participants for influencer marketing
- Professional trade associations
- Trade unions
- Policy networks and stakeholders (inc. consumer, media, children, health, etc.)

IM Governance Issues

Selection, vetting, contracts and arrangements

Compliance

Training certification

What is promoted – marketing content

Ad content rules

Substantiation

Where - place/platform; context and adjacent content

How promoted

Disclosure (placement, timing, labelling, wording)

BRANDS/AGENCIES

- Transparency regarding influencer vetting practices;
- Brand safety considerations;
- IM legal-regulatory compliance
- Ensuring appropriate briefs and contracts;
- Importance of including content rights/IP within contracts; and
- Metrics and reporting transparency.

INFLUENCERS

IM legal-regulatory compliance

Contractual requirements (inc IP/content rights)

(Self) governance of values (authenticity, credibility, etc)

REGULATIONS AND GUIDANCE

ICC Code

The ICC code, which is at the basis of most national advertising codes, states that marketing communications:

“[...] should be clearly distinguishable as such, whatever their form and whatever the medium used.

When an advertisement, including so-called “native advertising”, appears in a medium containing news or editorial matter, it should be so presented that it is readily recognisable as an advertisement and where appropriate, labelled as such’ (ICC 2018: 10)

EASA

Best Practice Guidance on Influencer Marketing 2018

Summary of European rules (EASA 2018: 15; this section updated 2020)

UK

CMA enforces Consumer Protection from Unfair Trading Regulations 2008 (CPRs).

‘Consumer protection law...requires anyone endorsing a product or service on social media to disclose clearly and prominently when they have received any payment, benefit (such as a free gift) or any other incentive’ (Goodship 2019).

No set requirements for labelling; ‘Each social media platform is different and constantly changing, and individual influencers have diverse creative styles’. Disclosure must be ‘clear, prominent and upfront’, ‘viewers or followers must see and immediately understand the disclosure before they start to view or read [an IM] post. This applies regardless of the platform you post on or the device that your viewers or followers may use’.

Key differences between CMA and ASA: ‘Whereas ASA are focussed on adverts, the consumer protection law we enforce doesn’t distinguish between an advert – where the brand controls the outcome – and an editorial review, where the influencer has taken payment but created the content independently’ (Goodship 2019).

ASA-CAP. Effort to delimit self-regulation to advertising (marketing communications). Effort to maintain dual test of payment and control. CAP-CMA (2020: 10) ASA enforcement applies where a brand ‘1. ‘paid’ you in some way (same as CMA, doesn’t have to be money), AND 2. had some form of editorial ‘control’ over the content, including just final approval (different to the CMA, for whom the issue of control doesn’t matter).

On control ‘As a rule of thumb, if you weren’t completely free to do and say whatever you wanted whenever you wanted, then there could have been some level of editorial ‘control’ by the brand’ (CAP-CMA 2020: 10)

ASA seeks to maintain its advertising-only remit and its exclusion of PR, sponsorship, news and editorial. Also, mutual influencing of EASA rules on payment and control (see EASA 2018)

CMA-CAP guidance (2020) recognises that the ad/editorial distinction is usually not clear and so requires disclosure when it is not otherwise obvious from the context.

Most influencer marketing appears alongside organic/editorial content and is presented in a very similar style, so it usually isn’t immediately obvious to a consumer when something is or isn’t an ad from the context alone. Both you, the brand and any agents involved in creating or publishing the content are responsible for ensuring that it makes clear when it’s advertising or has a commercial message. Ultimately, if it’s not obvious from the context that something’s an ad, a clear and prominent disclosure is needed.

CAP-CMA (2020: 6)

No specific requirement for how to identify advertising, but ‘as an absolute minimum you should consider including a prominent label, such as ‘Ad’, upfront that makes it clear’ (CAP-CMA 2020: 6). Guidance states other labels are ‘riskier... and although it will always depend on the wider content and context, we usually recommend staying away.

- Supported by/Funded by
- In association with
- Thanks to [brand] for making this possible
- Just @ [mentioning the brand]
- Gifted
- Sponsorship/Sponsored

CAP-CMA Guidance (2020) Label must be ‘obvious’, ‘upfront’ ‘prominent’.

Should be ‘at the very beginning’ (recommendation) ‘Any label (or other means) you use to highlight advertising content needs to be upfront (before people click/engage), prominent (so people notice it), appropriate for the channel (what can you see and when?) and suitable for all potential devices (it needs to be clear on mobiles and apps too!).

Test - if you didn't already know about your relationship with a brand, would you be able to tell immediately and without a shadow of a doubt that a specific post you had made was, in fact, advertising?

ASA report, *Labelling of Influencer Advertising* published Sept 2019. 'Our findings dispel any argument that labels aren't needed, and re-emphasise the importance of influencers being upfront and clear with their followers about when they are advertising'

(<https://www.asa.org.uk/news/clarity-for-consumers-why-ad-is-essential-in-paid-influencer-posts.html>)

Ads should be disclosed and clearly labelled - with 'ad' or '#ad' used at a minimum.

United States

The Federal Trade Commission (FTC) views influencer endorsements as advertisements, which must follow advertising guidelines. Disclosure is only required where there is a material connection between the influencer and the referenced product/service. A material connection, for disclosure purposes, is any connection that might affect the weight or credibility that consumers give to the endorsement. This includes family relationships and friendships, but for those most relevant to IM it includes monetary payments or gift cards; employee or business relationship; arms-length business deals; free or discounted products or services; chance to win a significant prize or sweepstakes; chance to appear (or be paid to appear) in advertisements. Liability for non-disclosure extends to brands, ad agencies, marketing team, influencer, publisher.

Where there is a material connection, disclosure is always required except where 1) everybody viewing the post knows it's an ad (s) if it is so well-known that the influencer is a spokesperson for the product or company. As both conditions are difficult to determine, FTC recommends disclosure. Disclosure must be 'clear and conspicuous'. FTC permitted disclosure includes

- #ad or Ad:
- Advertisement
- Sponsored
- Promotion
- Paid ad
- Thanks [COMPANY NAME] for the free product
- Thanks [COMPANY NAME] for the gift of [NAME] product
- #[COMPANY NAME]Ambassador
- #[COMPANY NAME]Partner

Unacceptable forms of disclosure include

- #[COMPANY NAME]ad (such as #cirocad, where Ciroc is the name of the company)
- #sp
- #spon
- #ambassador
- #partner
- #collab
- Thank you [COMPANY NAME] (without specifically saying what they are thanking the company for)

Regulations: scope and selected issues

Endorsement

(US - FTC rules) 'An influencer is deemed to be endorsing a product any time they post something about a product that the audience may think conveys their opinions or beliefs about the product, even if the company or brand didn't direct the person to publish the post' (Truthinadvertising2020).

Advertising

IM adds new challenges and complexity to determining borders between advertising/non-advertising. These distinctions matter for different forms of governance, from advertising self-regulatory organisations (e.g. ASA, EASA and members; marketing coms and PR trade associations) to consumer protection/market regulators (CMA, FTC), to media/communications regulatory/governance agencies (IPSO, Impress).

Sponsorship

There are efforts to maintain distinctions between sponsorship and marketing communications. Both involve payment but differ in control. Distinctions between advertising and sponsorship are established in institutional and legal-regulatory arrangements, such as FCC communications regulation (Campbell and Grimm 2019). However, such distinctions are also under various pressures as new and hybrid practices develop and the terms used across industry and regulatory practices shifts.

Payment and Control

As rules develop that allow non-disclosure where the brand does not exercise 'control' there will be more contestation of 'control' in enforcement action and more effort/opportunities to evade control. The key risks remain that reliance on self-disclosure by interested parties is a barrier to (cost) effective regulatory action and a barrier to consumer-led action, since determination shifts from the observable content to the nature of deals and transactions between parties that are hidden from public view and indeed protected by commercial confidentiality.

Contractual relationship

AIMCO (2020: 7) 'Advertising disclosure is required when there is a Contracted Engagement':

A Contracted Engagement includes any verbal recording, email documentation, digital or other document that defines an engagement between an influencer and client/provider/brand. It includes: • Any transaction with financial payment; as well as • Value In-Kind, • Gifts and/or • Free products.

This also applies to any Affiliate Marketing engagements.

Issues: This will cover 'legitimate' marketing but enables, and incentivises, evasive 'undocumented' agreements to benefit marketers and influencers. The measure seeks to address the problem of distinguishing independent editorial from advertising, yet enables a defence of non-contracted engagement that will be difficult and costly to contest in regulatory enforcement. A complaint would have to be based on the possibility that undisclosed brand control over editorial might have occurred, but most complainants will have no access to the actual arrangements negotiated between brands, agencies and media. For SRO systems like the UK ASA that rely heavily on notification of code breaches via complaints, that will now be harder. There is a palpable risk that power shifts back to the parties to the transaction, away from regulators and public alike.

FTC rules describe 'material connections'. Is this formulation stronger and more encompassing than 'contracted engagement'? (legal expert opinion required)

FTC rules - endorsers must "clearly and conspicuously" disclose any "material connection" with the product being endorsed or its producer. A "material connection" between an endorser and the marketer of a product is any connection that might affect the weight or credibility consumers give the endorsement, including employment, business, family, or personal relationships, cash payments, or free products.

Substantiation

Core principles of advertising:

1. 'Advertising must be truthful and not misleading;
2. Advertisers must have evidence to back up their claims ("substantiation"); and

3. Advertisements cannot be unfair' (FTC (2013: 4)

IM must comply with advertising codes, yet the obligation for substantiation becomes more challenging, especially where influencer communications may fall outside any agreed ('controlled') communication. How are obligations for substantiation to be managed across IM?

'Expert' endorsement

Clearly endorsement concerns extend beyond IM to address a wider range of issues surrounding online user reviews and comments. The 'traditional' issues of endorsements made by notable figures (celebrities, 'experts' etc) in professional advertising or editorial are also transformed by the range of communications and their blurring/convergence today. The FTC rules on endorsement were originally drawn up in 1972 in the era of mass media and professional advertising, rules enacted as part of 1975 Federal Trade Commission Act ("FTC Act"), amended in 1980 and last amended in 2009.

The FTC guides define an expert endorser as someone who, as a result of experience, study or training, possesses knowledge of a particular subject that is superior to that generally acquired by ordinary individuals. [16 CFR 255.0\(d\)](#). An expert endorser's qualifications must, in fact, give him or her the expertise that he or she is represented as possessing with respect to the endorsement. [16 CFR 255.3\(a\)](#). Moreover, an expert endorsement must be supported by an actual exercise of expertise, and the expert's evaluation of the product must have been at least as extensive as someone with the same degree of expertise would normally need to conduct in order to support the conclusions presented. [16 CFR 255.3\(b\)](#).

Issues: How can and should these rules be updated for the current environment based around the 'democratisation' of communications capacity and reach, yet grappling with 'post-truth', anti-science (anti-vac etc.), and mobilisations of disinformation by state, para state and non-state actors for political/commercial purposes.

'Honest' opinion

'Endorsements must reflect the honest opinions, findings, beliefs, or experience of the Endorser' FTC 16 CFR Part 255, Guides Concerning the Use of Endorsements and Testimonials in Advertising.

'The most important principle is that an endorsement has to represent the accurate experience and opinion of the endorser:

- You can't talk about your experience with a product if you haven't tried it.
- If you were paid to try a product and you thought it was terrible, you can't say it's terrific.

You can't make claims about a product that would require proof the advertiser doesn't have. The Guides give the example of a blogger commissioned by an advertiser to review a new body lotion. Although the advertiser does not make any claims about the lotion's ability to cure skin conditions and the blogger does not ask the advertiser whether there is substantiation for the claim, she writes that the lotion cures eczema. The blogger is subject to liability for making claims without having a reasonable basis for those claims'. (FTC 2017)

Issues: How far is that requirement (criteria) included in regulations and guidance in other jurisdictions? What is the level of support and response to such obligations across key actors in IM?

Transnational enforcement and liability

FTC claims authority to act on international (see FTC 2017)

I'm a video blogger who lives in London. I create sponsored beauty videos on YouTube. The products that I promote are also sold in the U.S. Am I under any obligation to tell my

viewers that I have been paid to endorse products, considering that I'm not living in the U.S.?

To the extent it is reasonably foreseeable that your YouTube videos will be seen by and affect U.S. consumers, U.S. law would apply and a disclosure would be required. Also, the U.K. and many other countries have similar laws and policies, so you'll want to check those, too.

AIMCO (2020:7) 'If creating and posting influencer content in Australia about or to an overseas market, consideration must also be given to that country's legal requirements'

Issue: transnational reach of IM and application of national regulations.

Compliance procedures and training

CAP-CMA (2020: 9) 'Everyone involved in the chain (brands, marketers and influencers) should ensure that there are robust compliance processes in place that accurately reflect the requirements of the law'.

The UK and US guides both highlight the need for training and can be cited to support the case for professional training and certification.

FTC Guidance 2017

Advertisers need to have reasonable programs in place to train and monitor members of their network. The scope of the program depends on the risk that deceptive practices by network participants could cause consumer harm – either physical injury or financial loss. For example, a network devoted to the sale of health products may require more supervision than a network promoting, say, a new fashion line. Here are some elements every program should include:

1. Given an advertiser's responsibility for substantiating objective product claims, explain to members of your network what they can (and can't) say about the products – for example, a list of the health claims they can make for your products, along with instructions not to go beyond those claims;
2. Instruct members of the network on their responsibilities for disclosing their connections to you;
3. Periodically search for what your people are saying; and
4. Follow up if you find questionable practices.

It's unrealistic to expect you to be aware of every single statement made by a member of your network. But it's up to you to make a reasonable effort to know what participants in your network are saying. That said, it's unlikely that the activity of a rogue blogger would be the basis of a law enforcement action if your company has a reasonable training, monitoring, and compliance program in place.

[...] Delegating part of your promotional program to an outside entity doesn't relieve you of responsibility under the FTC Act.

My company recruits "influencers" for marketers who want them to endorse their products. We pay and direct the influencers. What are our responsibilities?

Like an advertiser, your company needs to have reasonable programs in place to train and monitor the influencers you pay and direct.

Disclosure

This is the focus of key issues discussed elsewhere in this report.

Level of compliance

Recognisability

Effectiveness

Technology and automated/semi-automated action (disclosure)

There are increasing demands for labelling and disclosure ‘requirements for technology platforms (e.g. Instagram, YouTube, and TikTok) that facilitate and either directly or indirectly profit from influencer marketing’ (Chopra FTC 2020)

AIMCO (2020) guidelines require:

‘Where advertising disclosure tools are available within the digital platform (eg Paid Partnership or Branded Content) and are used as part of the Contracted Engagement enabling clear, unambiguous disclosure is made then other disclosures outlined below may not be required’

Ad Tech governance and action (disclosure in metatags etc)

Emerging issues – to complete

Virtual Influencers

Voice intelligence industry and IM (audio disclosure rules)

POLICY ISSUES

Several policy concerns are converging. This makes it more likely that there will be further pressure for action on IM governance These policy areas are

- Disinformation/Misinformation
- Digital Communications Platforms and Governance (competition and markets; public service media; news publishers; tax; levies; platform governance)
- Data protection regulations
- Children and data rights/protection
- Online Harms
- Media/information literacy and education

Misinformation

The EU-level policy agenda to tackle misinformation incorporates analysis and recommendations on brand sponsored content. The separation between political communications and commercial communications, which has been a feature of UK policy discussion in recent year, has become more converged and integrated. For instance, the EU Policy Department for Citizens’ Rights and Constitutional Affairs’s report *Disinformation and propaganda – impact on the functioning of the rule of law in the EU and its Member States* (2019) includes among its recommendations:

Platform providers should not be responsible for third-party content; but they should be responsible for administering their platform rules: the transparency of their algorithms, ensuring that their algorithms have no viewpoint-based discrimination, for distinguishing sponsored content and ads from other content, identifying and disabling fake accounts, protecting the privacy of users, including those who are not members of their services.

FTC 2020 review

The FTC announced in February 2020 a review of its endorsement rules, supported 5-0 by the FTC Commissioners. One Commissioner Rohit Chopra issued a separate statement calling for the review to examine the case for stronger rules and enforcement. In doing so he stated:

Misinformation 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.

As well as the immediate issues for IM governance in the FTC review, the context is one of heightened attention to the management of misinformation in the lead up to the US Presidential Election in November. With intense scrutiny of social media platform's self-regulation, and action by governments and regulators worldwide, it can be expected that 'commercial' fake news will be included in this fast-developing policy landscape. In particular, there is growing concern about the use of influencer marketing for political marketing/persuasion, including the rapid growth of political advocacy on TikTok in recent months.

'There is a harmful dark side of this [IM] approach. Fake accounts, fake likes, fake followers, and fake reviews are now polluting the digital economy, making it difficult for families and small businesses looking for truthful information. Tech companies may have little incentive to address this misinformation. The FTC will need to be forward-looking to stop fraud from festering' (Chopra 2020). Chopra proposes a shift from admonishing 'small influencers' to taking stronger enforcement action against advertisers:

When individual influencers are able to post about their interests to earn extra money on the side, this is not a cause for major concern. But when companies launder advertising by paying someone for a seemingly authentic endorsement or review, this is illegal payola. If these companies are also pressuring influencers to post in ways that disguise that their review or endorsement is paid advertising, those advertisers especially need to be held accountable.

Online harms/Children

Disclosure and identification are key issues for industry/regulators but focus on these can detract from the issues of greatest public concern (which in turn influence politicians/policymakers). These are concerns about 'influence' and about the promotion of products, services that are unsuitable.

At issue is not just how IM is done 'responsibly', and with suitable disclosure, but about the capacity for 'irresponsibility' in a rapidly evolving and adapting promotional system where accountability and responsibility are harder to locate. The focus on creating conditions for 'good' influencer marketing is in tension with concerns and opposition that is not assuaged by, for instance, clear labelling or removal of claims that breach the CAP (or similar) codes. There are broader concerns about influence. These are most prominent in relation to 'influence' on children, but also in relation to goods and services on the borderlines between unsafe/unsuitable, especially in relation to health, nutrition, beauty, and in the impact and implications for mental health and well-being, (self)identity and lifestyle choices. One in five influencers cover lifestyle as their main topic, including fashion, beauty, travel, parenting and food and drink (Guthrie and Waddington 2019). These are always issues about the power and influence of communications and of popular culture. They are also issues about the actual and perceived influence of technology, that engage hopes, fears and investments across stakeholders, marked by differences of age, class, gender, race, education, disability, political and cultural values and lifestyles.

These 'content' issues (and 'expert' endorsement) are evident in the ASA November 2019 ruling on posts about 'weight loss gummies' featured on the Instagram pages of Team v24 and Georgia Harrison. The posts were clearly disclosed as a 'paid partnership', but the ASA objected to the absence of required nutritional information and found the diet product was promoted in an irresponsible manner. In another recent ruling, the ASA found that claims in the adverts (Instagram sponsored posts) for Boombod did not accurately reflect the relevant health claims and so breached the CAP Code.

Children

Mental Health and wellbeing

Food promotion and nutrition

(UK action – Kreps report; US - Food & Drug Administration (FDA) announced investigation into the impact of endorsers on consumers)

Data management, privacy, ‘surveillance capitalism, ‘platform power’

IM will be bound up with a much wider set of policy/governance issues that will each frame what is problematic behaviour in different ways and through different ‘lenses’.

IM Governance Recommendations

- Standardised identification for all marketing content on a specific platform.
- Common (cross-platform) identification where appropriate (as # requirements and other disclosure labels provide to a degree already)
- IM kite marking for quality standards/ code adherence/ (training certification)
- (Paid/organic) Clarifying disclosure rules for ‘non-contractual’ communications when there is or has been a contractual relationship. Identification is required to advise users when a branded good or service is mentioned by an influencer who has had a contractual financial relationship with the brand. This should apply for a period of [? two years] from the ending of the last such relationship. Disclosure is required, regardless of the time period, in any circumstance where the communication would otherwise be misleading.
- ‘Specifying the requirements that companies must adhere to in their contractual arrangements with influencers, including through sample terms that companies can include in contracts’ (Chopra 2020).

References

Campbell, C. and Grimm, P. (2019) ‘The Challenges Native Advertising Poses: Exploring Potential Federal Trade Commission Responses and Identifying Research Needs’, *Journal of Public Policy & Marketing*, 38(1) 110-123

EASA (2018/2020) *EASA Best Practice Recommendation On Influencer Marketing*.

EU Policy Department for Citizens’ Rights and Constitutional Affairs (2019) *Disinformation and propaganda – impact on the functioning of the rule of law in the EU and its Member States*, Brussels: European Parliament.

FTC (2017) The FTC’s Endorsement Guides: What People Are Asking. <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>

Goodship, P. (2019) ‘Influencer marketing: what you need to know’, [Blog] 30 April. Competition and Markets Authority. <https://competitionandmarkets.blog.gov.uk/2019/04/30/influencer-marketing-what-you-need-to-know/>

Guthrie, S. and Waddington. S. (2019) ***We’re all influencers now, FuturePProof***. <https://www.futureproofingcomms.co.uk/we-are-all-influencers-now>

ICC (2018) *ICC Advertising and Marketing Communications Code*, 2018 Edition.

Max, T. (2020) 'After Four Decades, FTC Announces Regulatory Review of The Endorsement Guides: What Does This Portend for Digital Advertisers and Social Media Platforms?', 18 February, Sheppard Mullin.
<https://www.coveringyourads.com/2020/02/articles/ftc-endorsement-guidelines/influencer-social-media/>

Tobin, J. (2018) 'Ignorance, Apathy Or Greed? Why Most Influencers Still Don't Comply With FTC Guidelines', 27 April
<https://www.forbes.com/sites/forbesagencycouncil/2018/04/27/ignorance-apathy-or-greed-why-most-influencers-still-dont-comply-with-ftc-guidelines/>