

Online Advertising and Digital Marketing Law: How Influencers Can Impact the E-Commerce Market and its Legal Implications in Indonesia

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Abstract

In 2022, Indonesian influencers have been accused of false advertising in promoting binary option applications through social media platforms such as Instagram and TikTok. Influencers use various promotional methods to promote brands, one of which is uploading content through social media platforms to be marketed to their followers. However, online advertising and consumer protection are subject to various legal issues that influencers must navigate to ensure compliance with relevant laws and regulations. Influencers must ensure that their advertisements are honest and undisputed. Influencers must ensure that the uploaded content is truthful and not misleading, and must be able to support any claims made in their content. Failure to do so may result in legal action from consumer protection commissions or government agencies including law enforcement officials. In this paper, a legal understanding of the process of using influencers can introduce legal requirements for influencers to comply with related regulations, official guidelines, and influencer agreements. Such explicit and/or implicit provisions to be fulfilled in the influencer agreement for example representations and warranties for the authenticity of the content created by influencers. In this paper, this study will use a systematic method to solve research problems through qualitative method and data collection using a statutory approach, a conceptual approach, interpretation of the data collected, and drawing conclusions about the research data. The data in this paper analyzes legal issues regarding influencer responsibilities in digital marketing and consumer protection laws, oversight from regulatory bodies and law enforcement officials in supervising social media endorsements, and mandatory clauses in influencer agreements. The study highlights that while influencer marketing drives substantial economic activity, it also poses various legal challenges that must be addressed to protect consumer rights and maintain market integrity. Key legal issues shall include the need for clear disclosure of sponsored content and protection against misleading advertisements.

Keywords: Online Advertising; Digital Marketing; Consumer Protection; Advertiser; Influencer.

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Introduction

The importance of studying online advertising and digital marketing law, especially in the context of influencer marketing, cannot be overstated. Influencers have the power to influence consumer preferences and purchasing decisions, thereby driving significant economic activity. Preliminary data shows that influencer marketing spending in Indonesia is experiencing a tremendous increase, with the market size projected to grow. In Indonesia, advertising spending in the Influencer Advertising market is estimated to

reach US\$225.00 million by 2024. Average ad spend per internet user in the Influencer Advertising market is estimated at US\$0.82 by 2024.¹

Current technological advances have created the digital age, widespread use of the internet, and other powerful new technologies are having a dramatic impact on the buyers and marketers who serve them.² Influencer marketing is becoming an essential key to successful digital marketing.³ This leads some brands and advertising agencies to select and incentivize social media influencers to engage their followers and consumer trust by leveraging their way of communication and unique resources to promote their offerings.⁴ In recent years, social media influencers have become an increasingly important part of the advertising industry especially for online advertising and digital marketing.

Online influencers including celebrities present their reviews and endorsement through social media networks platforms such Instagram, Tiktok, Twitter, Youtube, and Facebook in a way of personal endorsement. This practice gained so much attention since Influencer MarketingHub, estimated brands are spending \$16.4 billion on influencer marketing during 2022.⁵ The number is catalyzed by social media consumption on short video formats on Tiktok, Facebook, and Youtube with Instagram as the preferred social media channel that is to grow to be worth \$21.1 Billion in 2023.⁶

Influencers can have a significant impact on the market, particularly in fashion and lifestyle industries. Influencer marketing is based, in particular, on the confidence of consumers acquired by influencers and/or opinion leaders.⁷ Consumer perceptions of a

¹ Statista "Influencer Advertising - Indonesia", available online <https://www.statista.com/outlook/amo/advertising/influencer-advertising/indonesia> accessed 25 May 2024.

² Kotler, Philip., & Gery Armstrong. (2006). *Prinsip-prinsip Pemasaran*, 2006). [237].

³ Dylan Duke, "How Influencer Marketing Can Change Your Digital Marketing Trajectory" *available online* <https://www.forbes.com/sites/forbesbusinesscouncil/2022/12/08/how-influencer-marketing-can-change-your-digital-marketing-trajectory/?sh=7258e2d976f8> accessed 25 March 2023.

⁴ Fine F. Leung, Flora F. Gu, Robert W. Palmatier, "Online Influencer Marketing" (2022) 50 *Journal of the Academy of Marketing Science* [226-251].

⁵ Jacinda Santora, "Key Influencer Marketing Statistics to Drive Your Strategy in 2023" available online <https://influencermarketinghub.com/influencer-marketing-statistics/> accessed on 25 March 2023.

⁶ Werner Geysler, "The State of Influencer Marketing 2023 : Benchmark Report" available online <https://influencermarketinghub.com/influencer-marketing-benchmark-report/> accessed on 25 March 2023

⁷ Stefan Zak and Maria Hasprova, *The role of influencers in the consumer decision-making process*, University of Economics in Bratislava, Dolnozemska cesta 1, 852 35, Slovak Republic, p.2.

product are very influential in shaping consumer decisions in buying products.⁸ Many brand owners choose social media endorsement activities through influencers because influencers and/or key opinion leaders will affect products that are better known to consumers. In addition, influencers act as facilitators in providing information about some products.⁹

Most influencers use their influence to promote products and services to their followers. At present, influencer marketing is an important tool for influencing buying behavior and can be defined as the process of exploring, identifying, supporting, and engaging consumers who engage in high-impact conversations. It is an important form of online advertising, in which the advertisers target a sub-population of influential people, instead of the entire base of potential buyers.¹⁰ However, the use of influencers in advertising can also have legal implications and challenges related to regulatory framework governing advertising and marketing activities on digital platforms. In advertising, a distinction can be made between the person who bears financial and legal responsibility for the message and the person communicating the brand's message (Stern, 1994).¹¹

In many jurisdictions, as compiled by the International Council for Ad Self-Regulation (ICAS) has issued advertising standards as guidelines to ensure any paid content is clearly labeled and consumers should be identified when a post by an influencer is an advertisement.¹² This self-regulatory body inspires its member including the European Union, this form of marketing – the influencers' social media contributions – is regarded as a form of advertising when (1) influencers receive a compensation (in the form of free products or financial payment) and (2) influencers have control over the

⁸ Ni Putu Gita Padmayani, I Nyoman Putu Budiarta, Ni Made Puspasutari Ujiantil, 'Perlindungan Hukum terhadap Konsumen bagi Pengguna Kosmetik Ilegal yang Diiklankan Influencer di Media Sosial.' (2022) 3 Jurnal Preferensi Hukum [312-317].

⁹ *ibid.*

¹⁰ Stefan Zak and Maria Hasprova, The role of influencers in the consumer decision-making process, University of Economics in Bratislava, Dolnozemska cesta 1, 852 35, Slovak Republic, p.2.

¹¹ Stern, B. (1994). 'A revised model for advertising: multiple dimensions of the source, the message, and the recipient' (1994). 23. J. Advert. 23, [5-16]. doi: 10.1080/00913367.1994.10673438/

¹² ICAS, "Guidelines For Social Media Influencers" available online <https://icas.global/advertising-self-regulation/icc-marketing-code/> accessed on 25 March 2023 .

content, which also includes simple final approval of the post or general instructions regarding the post. This definition of influencer marketing can be found in the guidelines of some advertising self-regulatory bodies, for example European Advertising Standard Alliance (EASA).¹³

One of the key legal implications of influencer advertising is the need for transparency and disclosure to avoid deceptive or unfair advertising practices. In many jurisdictions, influencers must disclose any relationship they have with the brands they promote. Failure to do so may result in legal action from consumers or regulatory bodies. Regulatory bodies and consumers in Indonesia may take legal action against influencers who engage in deceptive or unfair advertising practices. For instance, the Financial Services Authority (hereinafter referred to as "OJK") has issued regulations related to strengthening regulations regarding consumer and public protection in the financial services sector.¹⁴

In Indonesia, there have been several cases of false advertising in 2022, such as Indra Kenz and Doni Salmanan, the influencers of platforms that make efforts to recommend certain stocks by inviting the public through social media platforms to buy or sell shares.¹⁵ In this case the influencer has endorsed the binary options application in the form of trading. The legality of binary options is not recognized in Indonesia because according to the OJK the way binary options work is not in accordance with investment standards, the OJK sees the Binary Option Scheme as an illegal form of investment.¹⁶ In this case, legal responsibility of an influencer who promotes the binary options application should be accounted for from the applicable laws and regulations but not limited to the criminal law.

¹³ EASA (2018). EASA best practice recommendation on influencer marketing. Available at: https://www.easa-alliance.org/sites/default/files/EASA_BEST%20PRACTICE%20RECOMMENDATION%20ON%20INFLUENCER%20MARKETING_2.pdf (Accessed March 24, 2023).

¹⁴ Financial Services Authority Regulation (POJK) Number 6/POJK.07/2022.

¹⁵ Elza Astari Retaduari "Menilik Fenomena Influencer dan Artis yang Jadi Afiliator Seperti Indra Kenz" available online <https://nasional.kompas.com/read/2022/03/08/18003281/menilik-fenomena-influencer-dan-artis-yang-jadi-afiliator-trading-seperti> accessed on 25 March 2023.

¹⁶ Tri Nadya S Paranna and Christian Andersen, 'Pertanggungjawaban Hukum Influencer dan/ atau Afiliator atas Kegiatan Pompom Saham dan/ atau Mempromosikan Trading Berbentuk Binary Option' (2022), 1 Aurelia: Jurnal Penelitian dan Pengabdian Masyarakat Indonesia [70].

Furthermore, in the context of the Indonesian Civil Code (*Bürgerlijk Wetboek, BW*), Binary options are considered void according to Article 1320 of the Indonesian Civil Code for several critical reasons such as a lawful cause (*een geoorloofde oorzaak*). Binary options can be classified as a form of gambling¹⁷ due to their high-risk nature and reliance on chance rather than skill or knowledge. Gambling activities, if unregulated, are often considered illegal or immoral under Indonesian law.¹⁸ Therefore, the reasons behind binary options trading may be considered unlawful, violating the requirements of lawful reasons.¹⁹

Digital marketing law encompasses a wide range of legal issues related to online advertising with influencers. This paper selected some cases by looking at examples of influencer activity that are most prominent in Indonesia and some cases from other jurisdictions as a comparison, then the study mostly drew evidence for these cases. For each of these cases, through legal analysis on how influencers affect e-commerce and social media platforms in Indonesia. Despite its effectiveness, the regulatory landscape remains fragmented. This research uses a qualitative research method that combines doctrinal legal analysis with empirical data collection. Doctrinal analysis involves a thorough examination of existing laws, regulations, and legal precedents related to online advertising and digital marketing.

This will lead to analyze on some specific issues on : (i) Digital marketers must comply with Indonesia consumer protection laws,²⁰ including laws related to false and deceptive advertising, unfair business practices, and online scams, (ii) Regulatory bodies and law enforcement officials may become involved with influencers who engage in fraudulent or deceptive advertising practices that harm consumers. In such cases, law enforcement agencies should investigate and take legal actions against the influencer, and (iii) Most advertising agencies or brands and influencers will enter into an influencer agreement where the influencer is required to comply with several clauses

¹⁷ Lestari, R. I., and Arifin, Z. (2022). Godaan Praktik Binary Option Berkedok Investasi dan Trading. 7 *Jurnal Ius Constituendum* [19-31].

¹⁸ Pujiani, R. S., Putri, N. M., & Aksan, M. A. (2023). Binary Option: Legality in the Perspective of National and Islamic Law as a Manifestation of Continuous Legal Reform. 3 *Semarang State University Undergraduate Law and Society Review* [71-90].

¹⁹ Indonesian Civil Code (*Burgerlijk Wetboek*).

²⁰ Law Number 8 of 1999 concerning Consumer Protection.

in the agreement to protect both the advertiser, the brand, and the consumer.

Influencers' Responsibilities in Digital Marketing Law and Consumer Protection

Digital marketers must comply with consumer protection laws, including laws related to false and deceptive advertising, unfair business practices, and online scams. Research shows that influencers who endorse can be equated with advertising businesses²¹ so there is a need for special rules governing advertising, including influencers must be able to substantiate any claims made in their ads. Pursuant to Article 28F of the Constitution Republic of Indonesia of 1945²² and article 4 letter (c) of Law Number 8 of 1999 concerning Consumer Protection states that consumers have the right to obtain correct, clear and honest information on the condition and warranty of the goods and/or services.²³ Influencers in promoting some brands must also disclose any material connections or relationships they have with brands they are promoting including rules related to the use of endorsements and testimonials in advertising. To indicate a content is a paid post, the Australian Association of National Advertisers (AANA) issued the Code of Ethics and The Australian Influencer Marketing Council (AIMCO) Code of Practice regarding hashtags with the recommendation such as #Adtag #Advertisement; #Advertisement; #PaidPartnership, #PaidPromotion; or #Sponsored.²⁴

Online advertising and consumer protection are subject to various legal issues and regulations that businesses and advertisers must be aware of and comply with in order to protect consumers from false advertising. To address these legal and ethical concerns, many jurisdictions have implemented regulations and guidelines for influencer advertising. These regulations and guidelines may require influencers to disclose their relationships with brands, provide substantiation for any claims made in their advertising, and comply with other advertising and consumer protection laws.

²¹ Carissa, Tiffani, and Akhmad Edhy Aruman. "Pengaruh Sales Promotion Dan Influencer Marketing Terhadap Minat Membeli Dalam Mobile Legends." (2019) 7 LONTAR: Jurnal Ilmu Komunikasi [45-55].

²² The Constitution Republic of Indonesia of 1945.

²³ Law Number 8 of 1999 concerning Consumer Protection.

²⁴ Mark Lazarus, "The Legal Side Of Influencer Marketing : A Must Read", available online <https://lazaruslegal.com.au/legal-side-of-influencer-marketing-a-must-read/#:~:text=Protection%20of%20Influencer%27s%20Information%20and%20Image&text=Businesses%20must%20obtain%20the%20influencer%27s,that%20they%20are%20not%20exploited> accessed 25 March 2023.

There are also concerns about the potential for influencer advertising to undermine traditional advertising and marketing channels. Furthermore, with regards to legal protection for consumers of products advertised by influencers on social media and compensation in accordance with Article 1365 of the Indonesian Civil Code (Burgerlijke Wetboek) which states a party who commits an illegal act which causes damage to another party shall be obliged to compensate therefore.²⁵ Influencers and/or advertisers may be reported by consumers for false advertising and seek compensation. Influencers' responsibilities for false advertising and losses suffered by consumers due to endorsement of a product advertised on social media can not only be in accordance with Consumer Protection Law, but also pursuant to Article 1365 Civil Code through lawsuits against the law.²⁶

Moreover, the Influencer's responsibility is also to follow social media guidelines and comply with the platform they use, so that the influencer at least complies with the terms and conditions that apply on that platform. For example, on the TikTok platform, according to its community guidelines, TikTok prohibits all gambling activities, even for the entertainment of its users.²⁷ In terms of paid advertising, advertisers must through the following process and TikTok compliance: eligibility of the promoted product or services, ad creative (caption or text, images or visual content, audio content, and any other content that forms part of the ad creative that would be published to target audience), targeted region and age group, consistency between an ad creative and the landing page, and functionality and eligibility of landing page.²⁸ While some TikTok ads may take longer than usual to complete the review process, most ads are reviewed within 24 hours. Once the ad is approved and published, the influencer will receive a notification. If an ad is rejected, the influencer must revise the content or it will not be uploaded to the social media app.

²⁵ Indonesian Civil Code (Burgerlijk Wetboek), Indonesian Civil Code (Promulgated by publication of April 39 1847 S.NO.23).

²⁶ I Putu Gita Padmayani, I Nyoman Putu Budiarta, Ni Made Puspasutari Ujiantil, 'Perlindungan Hukum terhadap Konsumen bagi Pengguna Kosmetik Ilegal yang Diiklankan Influencer di Media Sosial', p.6.

²⁷ TikTok, Community Guidelines on Regulated Commercial Activities.

²⁸ TikTok, Advertising Policies.

In addition to these legal challenges, there are also concerns about the impact of influencer advertising on consumer behavior and the marketplace (particularly e-commerce) as a whole. Critics argue that influencer advertising can create unrealistic expectations and promote unhealthy or unsustainable consumer behavior. In summary, the use of social media influencers in advertising can have significant legal implications and challenges. Influencers can build trust with their followers by promoting ethical and responsible digital marketing practices because in many ways, influencers play a critical role in digital marketing and they must ensure that their advertising is transparent, truthful, and compliant with relevant advertising and consumer protection laws.

Oversight from Regulatory Bodies and Law Enforcement Officials in Supervising social Media Endorsements

Not only consumers, but also regulatory bodies and law enforcement officials may take legal action against influencers who engage in deceptive or unfair advertising practices. As such, Influencers must follow the policies of the social media platforms they use. They must not engage in spamming, harassment, or other inappropriate behavior that violates platform policies. Another legal challenge related to influencer marketing is the need for substantiation, influencers must be able to substantiate any claims made in their advertising, and must not make false or misleading claims. Apart from applicable regulations, there are recommendations from the Indonesian Advertising Council (DPI). These recommendations regarding good advertising were compiled into a guidebook namely *Etika Pariwisata Indonesia*.²⁹

Influencers who make unsubstantiated claims or engage in deceptive advertising practices may face legal action from consumers or regulatory bodies. For instance, the consumer protection law prohibits deceptive and unfair advertising practices, such as false or misleading statements, and requires businesses to disclose material information about their products and services. Consumer Protection Agency in Indonesia who believe that an advertisement is false or misleading may file a complaint with a regulatory body

²⁹ Dewan Periklanan Indonesia. (2020). *Etika Pariwisata Indonesia*. Jakarta: Dewan Periklanan Indonesia

or take legal action against the influencer or the brand. Regulatory bodies are government agencies responsible for enforcing laws and regulations related to advertising, consumer protection, and other areas.

Moreover, the use of influencers to carry out endorsements can provide an opportunity for the Indonesian Broadcasting Commission (hereinafter referred to as KPI) and Association of Advertising Agencies (PPPI) to oversee the actions of influencers or at least it is hoped that there will be a supervisory agency that oversees endorsement actions carried out by influencers so that not many consumers are harmed. KPI has several times given sanctions to advertisements that are not in accordance with laws and regulation.³⁰ The KPI has issued warnings and reprimands to several television stations due to the potential to cause a ban on advertising ethics.

According to *Etika Pariwara Indonesia*, the guidelines put forward by Indonesian Advertising Council (DPI), this independent institution recommends that influencers may not use personal social media to display commercial advertisements, unless they have previously clearly stated that there is an element of commercial advertising (paid endorsement).³¹ Furthermore, based on the recommendations, digital advertising effectiveness must be measured using a matrix quantitative through tools and platforms that is independent, transparent and accurate. The content of the message and the format of the advertisement must be made in such a way that the audience (or followers) can easily differentiate between the content of the advertisement and elements of satire or parody, as well as news, caricatures or fiction.³²

In advertising procedures in Indonesia there are general principles, namely: (i) advertising must be honest, responsible and not contrary to applicable law, (ii) advertisements may not offend and antagonize the dignity of religion, morals, customs, culture, and ethnicity, so that advertisements are imbued with the principle of fair competition.³³ Another regulatory body such as Financial Services Authority through

³⁰ Fitria Azizah, Fakultas Hukum Universitas Surabaya, 'Influencer Pelaku Endorsement berdasarkan Undang-Undang Nomor 8 Tahun 1999 tentang Perlindungan Konsumen' (2021) 18 Al Qodiri: Jurnal Pendidikan, Sosial dan Keagamaan Terakreditasi Kemenristekdikti [578].

³¹ Dewan Periklanan Indonesia. (2020). *Etika Pariwara Indonesia*.

³² *ibid.*

³³ *ibid.*

its regulations (POJK),³⁴ POJK requires websites and online services that are directed towards financial services to obtain licenses from financial services authorities.³⁵ Meanwhile, the National Food and Drug Supervisory Agency (Badan Pengawas Obat dan Makanan, well known as BPOM) Act regulates cosmetics commercials and requires businesses to provide accurate information on cosmetic products.

In terms of creating content to promote binary options in Indonesia, the influencers concerned are suspected of committing online gambling crimes and/or spreading fake news through electronic media and/or fraud. fraudulent acts and/or the criminal act of money laundering. The influencer is charged with Article 45 paragraph 2 in conjunction with Article 27 paragraph 2 and/or Article 45 paragraph 1 in conjunction with Article 28 paragraph 1 of the Electronic Transaction Information Law (ITE). Subsidiary of Article 3 and/or Article 5 and/or Article 10 of Law Number 8 of 2010 concerning the prevention and eradication of the criminal act of money laundering (TPPU).³⁶ As a result of being involved in a platform fraud case, Indra Kenz's assets will be confiscated by Indonesian Police investigators.³⁷

In addition to applicable laws and regulations in Indonesia, there may also be another compliance with industry-specific codes of conduct that businesses and advertisers must follow. For example, some countries have their own consumer protection laws that go beyond the Indonesian standards, such as In the United States, Influencers must comply with the Federal Trade Commission (FTC) guidelines related to advertising and endorsements. The FTC has issued guidelines for influencers to ensure compliance with advertising and consumer protection laws as Endorsement Guides (6 C.F.R. § 255). Influencers should clearly disclose their relationships with the brands they are promoting, and ensure that their endorsements are honest and not misleading.³⁸

³⁴ Financial Services Authority Regulation (POJK) Number 6/POJK.07/2022.

³⁵ *ibid.*

³⁶ Elza Astari Retaduari, 'Pasal-pasal yang Menjerat Indra Kenz Terkait Binomo, dari Soal Judi Online Sampai Pencucian Uang' <<https://nasional.kompas.com/read/2022/03/07/20330641/pasal-pasal-yang-menjerat-indra-kenz-terkait-binomo-dari-soal-judi-online>>, accessed on 25 March 2023.

³⁷ *ibid.*

³⁸ The Federal Trade Commission (FTC).

For instance, The FTC could regulate by notifying ‘content is ads’ to make it easier for competent authorities to carry out content verification as happened to Kim Kardashian in 2015 who uploaded a post in partnership with the drug Diclegis to treat nausea and vomiting in pregnant women. In her post, Kim heeds the FTC rules to state that content is a paid partnership. Later it became known that the product was reprimanded by the American Food and Drug Association (FDA) because the post did not convey that Diclegis has not been studied in women with hyperemesis gravidarum. The FDA issued a warning to Duchesnay Inc. as the drug producer Diclegis which endorsed Kim to immediately carry out a comprehensive plan of action to disseminate truthful, non-misleading, and complete corrective messages which were then corrected in Kim’s corrective ads post.³⁹ According to the FTC, both endorser and advertisers have a legal responsibility to ensure that their advertisements are honest, truthful, and not misleading, and they must be able to substantiate any claims made in their ads. This legal requirement is often referred to as the “substantiation” or “evidence” rule. In handling such influencer cases, US regulatory authority focused more on the accountability of marketers or endorsers as the one who is liable for the social media content issued by advertiser itself as the most efficient way to enforce the FTC Endorsement Guidelines.⁴⁰

Furthermore, the FTC may monitor influencer activities to ensure compliance with relevant laws and regulations. Violations of the FTC rules can result in legal action, including fines and penalties. The substantiation rule requires that advertisers have a reasonable basis for any claims they make in their advertisements, including express and implied claims. The level of evidence required to substantiate a claim depends on the type of claim being made and the context in which it is being used. For example, if an influencer claims that their cosmetic product can cure a specific condition, they must have scientific evidence to support that claim. Similarly, if an advertiser claims that their product is halal, they must have evidence to support that claim.

³⁹ Thomas Sullivan, “FDA Sends Warning Letter to Duchesnay Inc. Over Social Media Posts From Kim Kardashian” (Policymed) <https://www.policymed.com/2015/08/fda-sends-warning-letter-to-duchesnay-inc-over-social-media-posts-from-kim-kardashian.html> accessed 25 March 2023.

⁴⁰ Tamany Vinson Bentz and Carolina Veltri, ‘The Indirect Regulation of Influencer Advertising’ (2020) 75 Food and Drug Law Journal [194].

Failure to comply with the substantiation rule can result in legal action from consumers or regulatory bodies, including law enforcement officials. Influencers may face fines, penalties, or other sanctions for making false or misleading claims in their advertisements. In summary, the substantiation rule is a key legal requirement that influencers must comply with when creating and publishing advertisements.

Influencers must have a reasonable basis for any claims they make in their ads, and must be able to substantiate those claims with appropriate evidence. Influencers including his/her representatives who fail to comply with the substantiation rule may face legal action and other penalties. Therefore, law enforcement officials may also take action against influencers who violate laws and regulations related to advertising and consumer protection. In some cases, criminal charges may be brought against influencers who engage in fraudulent or deceptive advertising practices.

Mandatory Clauses in Influencer Agreement

It is important to note that the specific clauses included in influencer agreement may vary depending on the nature of the collaboration and the preferences of the parties involved. When entering into an Agreement with influencers, brand owners, and/or advertising agencies should include clauses that address legal requirements and obligations such as intellectual property, content ownership, and indemnification. With regards to content creation, Influencers should provide representations and warranties that the content they create is authentic, and does not infringe on the intellectual property rights of others.

Influencers who create original content, such as photographs, videos, and written works, are subject to copyright protection; they must ensure that they have the necessary rights to use third-party content and protect their own copyright when creating original content. Brand owners and advertising agencies working with influencers must also be aware of copyright laws and ensure that they have the necessary rights to use content created by influencers in their marketing campaigns.

According to Article 16 paragraph (2) (e), a copyright may be transferred, either in

whole or in part by written agreement.⁴¹ This can be done by obtaining licenses or permits from the influencer or ensuring that the influencer grants them the rights required in the influencer agreement. In Indonesia, mostly the influencer agreement should specify who owns the content created by the influencer. Brand owners and advertisers including advertising agencies may wish to include clauses that grant them a license to use the content for promotional purposes within a specific campaign period.

To avoid early termination prior to the campaign period, the influencer agreement should specify the conditions under which the agreement may be terminated by either party. This can include termination for breach of contract, non-performance, or other reasons made by influencers. Contracts often include a termination clause, which allows a party to terminate its duties under certain conditions⁴² According to Black's law dictionary (11th ed. 2019), "cancellation clause" or "termination clause" as "[a] contractual provision allowing one or both parties to annul their obligations under certain conditions."⁴³ Courts regularly enforce these termination clauses. There is nothing inherently wrong when parties agree ex ante on ways to end their contractual relationship ex post. However, in some cases, termination without explanation contracts may be required. These clauses uniformly allow parties to terminate the agreement without detailing the reasons that led to their decision. Specifically, termination without explanation mechanisms differ in three major aspects: (i) cause, (ii) notice, and (iii) contestability.⁴⁴

One of the most important clauses is indemnification. Indemnification is required since the influencer agreement should include clauses that indemnify the brand and advertising agency against any claims or damages arising from the influencer's activities. In deciding whether damages from "any and all claims" include the right of the compensated to recover damages for his own negligent act, jurisprudence in various jurisdictions has led to the evolution of majority and minority views. The majority view can best be stated as follows: An indemnity contract shall not be construed to indemnify

⁴¹ Law Number 28 of 2014 on Copyrights.

⁴² Julie M. Philippe, 'French and American Approaches to Contract Formation and Enforceability: A Comparative Perspective' (2005) 12 *TULSA J. COMPAR. & INT'L L.* [357, 385].

⁴³ Bryan A. Garner, *Black's Law Dictionary* 11th edition. Thomson West, 2019.

⁴⁴ Uri Benoliel and Shmuel I. Becher, 'Termination without Explanation Contracts' (2022) 3 *University of Illinois Law Review* [1062-1063].

the indemnified person for damages resulting from his negligent act where the intent is not expressed in express terms.⁴⁵

Influencer Agreement must also include disclaimer where influencers must disclose any material connections between influencers as endorsers and the advertised product or service, such as payments or free products. Influencers must also ensure that any claims made in endorsements or testimonials are substantiated and not misleading. Mandated disclosures are a pillar of the information paradigm and constitute a widespread policy technique in the consumer protection framework.⁴⁶

There is no set formula for a clear and conspicuous disclosure; it depends on the information that must be provided and the nature of the advertisement. Influencers have the flexibility to be creative in designing their ads, as long as necessary information is communicated effectively and the overall message conveyed to consumers is not misleading.

To evaluate whether a particular disclosure is clear and conspicuous such as :

- (i) the placement of the disclosure in the advertisement and its proximity to the claim it is qualifying,
- (ii) the prominence of the disclosure,
- (iii) whether the disclosure is unavoidable,
- (iv) the extent to which items in other parts of the advertisement might distract attention from the disclosure,
- (v) whether the disclosure needs to be repeated several times in order to be effectively communicated, or because consumers may enter the site at different locations or travel through the site on paths that cause them to miss the disclosure,
- (vi) whether disclosures in audio messages are presented in an adequate volume and cadence and visual disclosures appear for a sufficient duration, and
- (vii) whether the language of the disclosure is understandable to the intended audience.⁴⁷

Legal actions against influencers may arise for a variety of reasons from false advertising to intellectual property infringement. To legitimately use influencers on social

⁴⁵ Charles M. Pisano, 'Judicial Interpretation of Indemnity Clauses' (1987) 48 Louisiana Law Review Volume [170].

⁴⁶ R. Ducato, 'One Hashtag to Rule Them All? Mandated Disclosures and Design Duties in Influencer Marketing Practices', CRIDES Working Paper Series no. 4/2019; to be published in Ranchordás, S. and Goanta, C. (Eds), *The Regulation of Social Media Influencers*, 2019, Edward Elgar Publishing, p.6.

⁴⁷ Federal Trade Commission, *.com Disclosures: How to Make Effective Disclosures in Digital Advertising*, March 2013, p.7.

media platforms, advertising agencies and brands should ensure that influencers clearly disclose any relationships they have with the brands they are promoting. Influencers should clearly indicate that they are promoting a product or service, and should not mislead their followers into thinking that their promotion is an organic endorsement.

Brand owners and advertising agencies should monitor the activities of influencers to ensure that they are complying with relevant laws and regulations. This can include monitoring the content of influencers' social media posts, as well as any claims or endorsements made in their advertising in the form of campaign reports. By monitoring influencer activity, brand owners and advertising agencies can help promote ethical and responsible digital marketing practices and protect consumer interests. It is important to ensure that influencers comply with relevant laws and regulations to maintain consumer confidence and protect brand reputation.

Conclusion

Therefore, online advertising and digital marketing law are closely correlated, and both are concerned with the legal and regulatory framework governing advertising and marketing activities on digital platforms. Influencers can have a significant impact on the e-commerce market by increasing brand awareness, building brand loyalty, and providing valuable feedback. By leveraging the power of influencer marketing, brands can reach new audiences and drive growth in the e-commerce market through influencers and key opinion leaders in Indonesia.

To legitimately use influencers on social media platforms, brand owners as advertisers and advertising agencies that use influencers must ensure that influencers are transparent, honest, and comply with relevant advertising and consumer protection laws in Indonesia. This can be achieved through disclosure, transparency, substantiation, influencer guidelines, compliance monitoring, and legal advice from legal experts. It is important for brand owners, advertising agencies, and influencers to stay up-to-date with the latest legal developments and ensure that their online advertising and consumer protection practices are compliant with all applicable laws and regulations in Indonesia.

Regulatory bodies and law enforcement officials can also take action against influencers who violate laws and regulations regarding advertising, consumer protection and criminal law, particularly in the case of binary options. In this matter, criminal charges may be brought against influencers who engage in fraudulent or deceptive advertising practices such as influencers who promoted binary options in Indonesia.

To ensure compliance with relevant laws and regulations, influencer agreements should address legal requirements and influencers' obligations including clauses related to content creation, authenticity and accuracy of content, disclosure, intellectual property ownership, FTC compliance (as required if brand endorsement or use of social media platforms originating in the United States and/or other regulations of some jurisdiction stated to do so or in Indonesia applied *Etika Pariwara Indonesia*), payment terms, termination, confidentiality, and compliance with applicable laws and regulations such as cosmetics products from National Food and Drug Supervisory Agency (BPOM).

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