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"Compliance and Social Media: What You Need to Know About Influencer Content"

Engaging influencers and content creators (creators) to promote a company's brand has become a commonplace marketing technique, and often a highly effective way to reach new audiences. However, there are new and growing risks in doing so if the creator is not mindful of third-party intellectual property (IP) rights. In short, companies are now being named in a growing wave of lawsuits in connection with the infringing activities of their creators.

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Over the past few years, a number of lawsuits have been filed by music publishers such as Sony Music Entertainment, BMG, and Universal Music Group against brands such as DSW and Bang Energy. Outside of these lawsuits, many more demand letters are sent and out-of-court settlements reached. The music owners allege that companies have secondary liability for unlicensed use of music by their creators. In most situations, a creator is an outside contractor with a large amount of creative control over their social media posts, and it is often assumed the creator would be solely responsible for such posts. However, secondary liability may stem from the company's role in the creation of such posts and benefiting or profiting from them.

The ease of posting third-party content, such as music and photos, on social media makes copyright infringement a common occurrence. If one were to browse YouTube, Facebook, or Instagram, they are very likely to see a post that uses music without permission. Many individuals posting content may think they have adequate licenses, but they don't read the fine print that such licenses may be for non-commercial uses only. Because of this, many individuals and businesses, including creators, don't appreciate the risks of engaging in such activities. While much of this goes unchecked, music owners are waking up to the opportunities in bringing claims against companies with deeper pockets than their creators. While there are often defenses to such claims, it is relatively simple to assert such claims if the music is used without permission. In other words, this is a new type of nuisance suit in a still-developing area of law.

While it may be difficult to control a creator's behavior, companies should consider taking the following preventative measures when engaging influencers and creators to protect themselves from such claims:

- Implement a Creator Agreement: A clear agreement that establishes guardrails and shifts liabilities to creators should be put in place. Bear in mind if litigation were to arise, these agreements may be closely scrutinized. Such agreements should consider the following types of provisions:
    - Establish ownership of content and/or a sufficient license for the company to repost content for its own purposes, including parameters for post duration.
    - Requirements that the creator must adhere to a company's brand book and product/service claims requirements.
    - The ability for the company to approve and request removal of content. Be mindful that supervision and approval may be a double-edged sword if litigation arises, especially if a company has the right to remove infringing content and fails to do so.
    - Warranties from the creator that it won't post infringing content, has obtained all necessary permissions, and will comply with all applicable laws and regulations, including Federal Trade Commission (FTC) guidelines for influencers.
    - An indemnity from the creator if the company is named in an infringement suit. Ultimately, such indemnity may have little value if the creator doesn't have the financial ability to defend such claims, but it is typically prudent to include.
    - A product/service category exclusivity provision. Generally, a company would not want to see creators promoting a competitor's products, at least during the term of the engagement and for a limited period of time thereafter.
    - Insurance requirements where the creator must maintain certain coverages, including copyright infringement, and name the company as additional insured.
- Influencer Agencies: Consider engaging an agency that manages and takes a large portion of the responsibility for creator relationships. Such agencies often maintain a portfolio of reputable creators that they manage. While this can be more expensive than working directly with a creator, the indemnity provision with a larger agency would likely have more weight and can also allow a company to take a significant workload off its marketing staff.
- Insurance: Maintain insurance which adequately covers IP claims, including claims that arise from its creators' activities.
- It is generally best to work only with reputable and savvy creators and to check their history before engagement. Regardless, it may be prudent to provide FTC-posted influencer guidelines and try to find out if they are fluent in such requirements. A creator should never assume that third-party music is free.
- Monitor Posts. Actively monitor creator posts and activities and request the removal of any posts pursuant to your Agreement that utilize unlicensed music or other content.

While the legal landscape is still being developed in this area, it is important for companies to be aware of these risks and considerations when engaging creators.

If you have questions or would like more information, please contact Doug Cherry or a member of Shumaker's Intellectual Property team.

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