



## Influencers and intellectual property (2020)

28<sup>th</sup> February 2020

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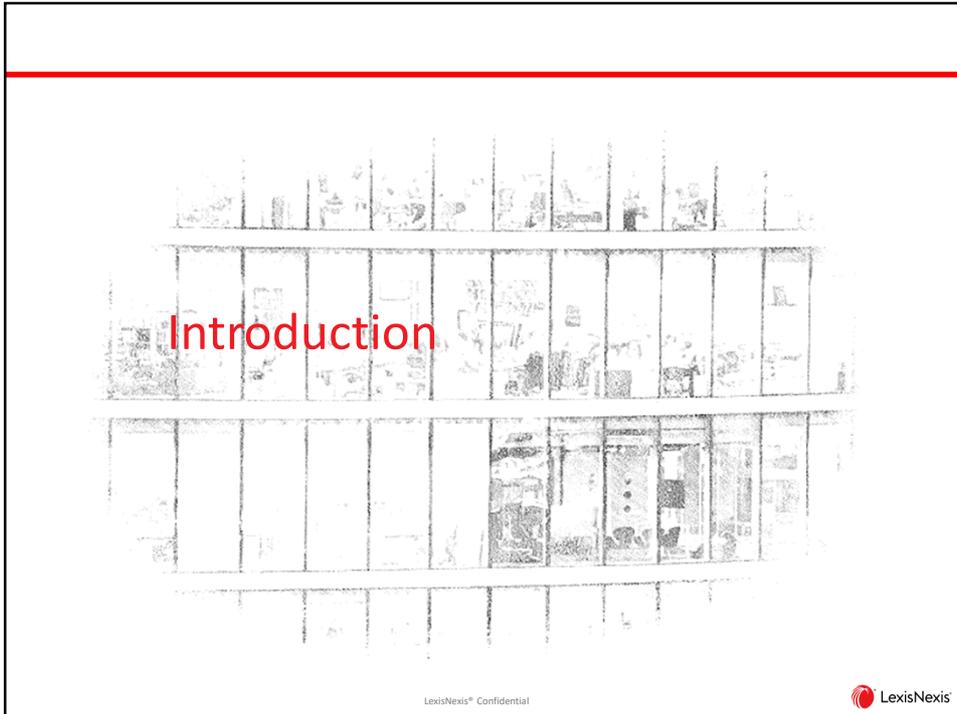
## Influencers and intellectual property (2020)

The law as stated during this webinar is up to date as of **27th February 2020**

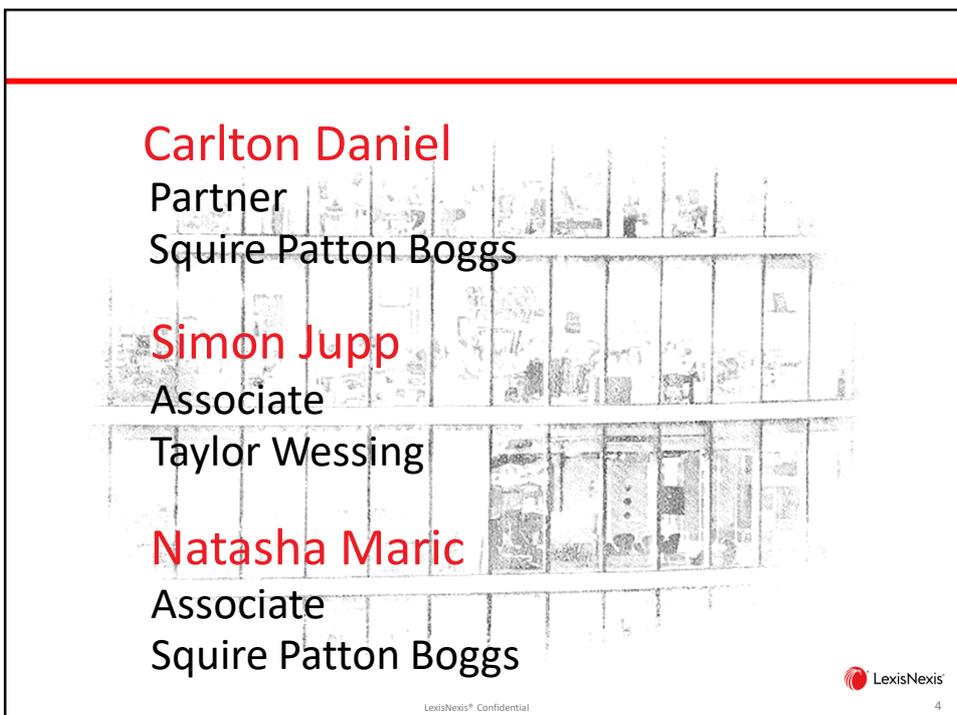
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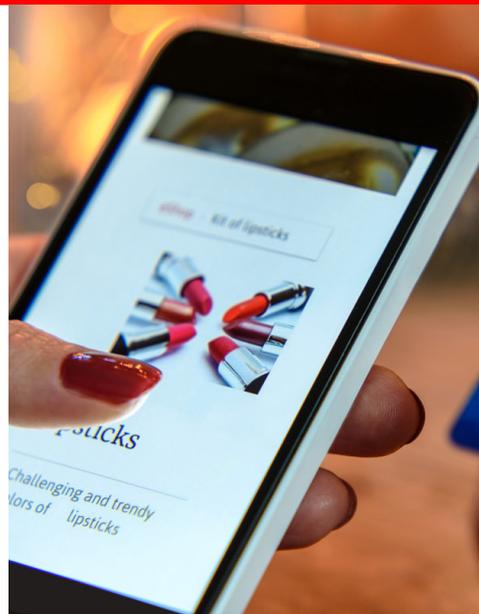
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## Influencers and Intellectual Property

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### Overview

- What is influencer marketing?
- UK advertising rules
- IP infringement risks
- Contracts with influencers:
  - Parties
  - Commercial terms
  - Intellectual property
  - Protecting the brand
  - Exclusivity



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## Influencer marketing

- What is influencer marketing?
  - Collaborative advertising targeting ready-made / engaged audience
  - Huge growth, upward trajectory expected to continue
- Categories of influencers:

Nano influencers	1k to 10k followers
Micro influencers	10k to 50k followers
Midi influencers	50k to 500k followers
Macro influencers	500k to 1m followers
Mega influencers	1m + followers

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## UK advertising rules

- Law
  - Consumer Protection from Unfair Trading Regulations 2008 (**CPRs**)
  - Administrative enforcement by the Competition & Markets Authority (CMA) / Trading Standards
- Regulation
  - UK Code of Non-Broadcast Advertising and Direct and Promotional Marketing (**CAP Code**)
  - Advertising Standards Authority (ASA)
- Influencer's Guide
  - ASA and CMA
  - 2<sup>nd</sup> Edition published 6 Feb 2020



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## Consumer Protection from Unfair Trading Regs 2008 (CPRs)

- Implement EU Directive 2005/29/EC
- Prohibits B2C unfair commercial practices – both material acts and omissions, aggressive practices and blacklisted practices
- Administrative enforcement by the CMA/Trading Standards
  - Power to take legal action to stop breaches of the law
- Certain breaches are criminal offences in the UK

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## CPRs Schedule 1 – the BLACKLIST

- Practices which are in all circumstances unfair
  - Para 11:
 

*Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial).*
  - Para 22:
 

*Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.*
- Para 11 is not criminal offence; but para 22 is.

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## CAP Code (non-broadcast)

- Administered by the ASA:
  - Rulings on whether marketing communications breach the Code
  - No financial penalties
  - Bad publicity, supervision, referrals to the CMA

### Recognition of marketing communications

- 2.1 *Marketing communications must be obviously identifiable as such*
- 2.3 *...marketing communications must make clear their commercial intent, if not obvious from context*
- 2.4 *Marketers and publishers must make clear that advertorials are marketing communications; for example, by hearing them "advertisement feature"*

### Misleading advertising

- 3.1 *Marketing communications must not materially mislead or be likely to do so*
- 3.3 *Marketing communications must not mislead the consumer by omitting material information. They must not mislead by hiding material information or presenting it in an unclear, unintelligible, ambiguous or untimely manner. Material information is information that the consumer needs to make informed decisions in relation to a product*
- 3.5 *Marketing communications must not materially mislead by omitting the identity of the marketer*

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## Influencer advertising: key requirements

- All ads must be obviously identifiable as marketing communications
- Consumers should be able to recognise that something is an ad, without having to click or otherwise interact with it
- They shouldn't have to work too hard to figure it out
- Both the influencer (acting as the 'publisher') and the brand are responsible for ensuring that advertorial content makes clear that it is advertising



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## What is an ad?

- Two-stage test
- A post by an influencer will qualify as an ad if the brand:
  - 'Paid' the influencer in some way; and
  - Had some form of editorial control, including just final approval
- Payment does not necessarily need to be financial, and could include some other reciprocal arrangement, such as freebies (whether requested or not)
- Ads are not limited to advertorial style materials. They may include links to websites, e.g. under a heading such as 'you may like these', where the brand has paid to have the link featured
- Even if you don't have any 'control' over the content, the CMA still expects influencers to disclose when they've received any form of monetary payment, loan, gift/freebie, incentive or commission.



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## How to make it clear that ads are ads

- The most straightforward way to make it clear that something is an ad is to include a label
- In particular, it needs to be:
  - Upfront – before people click/engage
  - Clear and prominent – so people notice it
  - Appropriate for the channel – what can you see and when?
  - Suitable for all potential devices – it needs to be clear on a mobile too
- Do not bury the label in a sea of hashtags where it can only be seen by clicking 'see more' or clicking to view the full post
- Specific requirements for videos

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## How to make it clear that ads are ads

<p>The following are generally acceptable terms that can be used to label ads (depending on the context and device)</p> <ul style="list-style-type: none"> <li>• Ad</li> <li>• Advert</li> <li>• Advertisement</li> <li>• Advertisement feature</li> </ul> <p>With or without a '#'</p>	<p>The below terms are not generally acceptable.</p> <ul style="list-style-type: none"> <li>• Spon/sp</li> <li>• Sponsorship / sponsored</li> <li>• Affiliate / aff</li> <li>• Gifted</li> <li>• Supported by / funded by</li> <li>• In association with</li> <li>• Thank to [brand] for making this possible</li> <li>• Just @ [mentioning the brand]</li> </ul>
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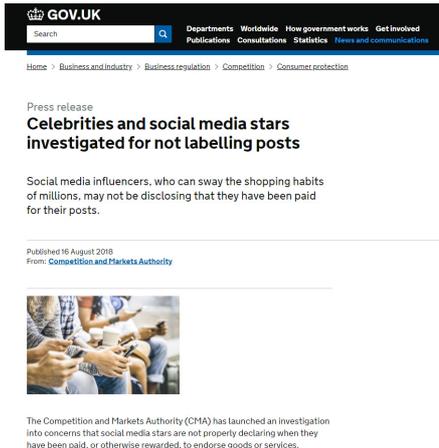
## CMA and influencer advertising

- August 2018 – celebrities and social media stars investigated for not labelling posts
  - Social media stars are not properly declaring when they have been paid, or otherwise rewarded, to endorse goods or services
  - CMA wrote to a range of celebrities and social media influencers to gather more information about their posts and the nature of the business agreements they have in place with brands

*"Social media stars can have a big influencer on what their followers do and buy"*

*"It is really important [consumers] are clearly told whether a celebrity is promoting a product because they have bought it themselves, or because they have been paid or thanked in some way by the brand"*

*George Lusty, senior director at the CMA*



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## CMA and influencer advertising

- January 2019 – celebrities pledge to clean up their act on social media
  - The CMA secured formal commitments from 16 celebrities to ensure they will now say clearly if they have been paid or received any gifts or loans of products which they endorse.
  - The influential celebrities include singers Ellie Goulding and Rita Ora, models Alexa Chung and Rosie Huntington-Whitely, actress Michelle Keegan and TV reality stars Millie Mackintosh and Megan McKenna

*"The enforcement action taken by the CMA has seen a number of social media stars pledge to be more transparent when posting online. It also sends a clear message to all influencers, brands and businesses that they must be open and clear with their followers. We will also continue our work to secure more improvement in this space"*

*Andrew Soscelli, Chief Executive of the CMA*



The Competition and Markets Authority (CMA) has secured formal commitments from 16 celebrities to ensure they will now say clearly if they have been paid or received any gifts or loans of products which they endorse.

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## ASA rulings



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### ASA rulings



PHOTO: @mollymaehague  
Instagram

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### ASA rulings



PHOTOS: @sheikhbeauty  
Instagram

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## ASA rulings



PHOTOS: ASA / PA / @marnie\_kyle Snapchat

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## Influencer advertising: other requirements

- Remember to consider all aspects of the code (and the law)
- Substantiation
- Restricted products/services:
  - Gambling
  - Alcohol
  - Food / supplements
- Prize draws / competitions
- Advertising to children



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## ASA remit – foreign media

- When does an ad fall within the scope of the UK rules?
- US
- Europe



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## IP infringement risks

- Copyright
- Passing off



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## Contracts with influencers: parties

- Influencer options:
  - Personal capacity
  - Influencer's personal service company (tax)
  - Influencer's talent agency
- Advertiser options:
  - Media/ad agency
  - Directly
  - Tripartite



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## Contracts with influencers: key commercial terms

- Description of the services / deliverables
  - Be clear and detailed
  - Typical services:
    - Social media activities
    - Other content creation
    - Events etc.
- Payment
  - None / affiliate
  - Staged payments
  - Expenses



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## Intellectual property – personality rights

- Influencer's 'personality rights' e.g. name, alias, voice, likeness etc.
- Must licence, cannot be assigned
- Consider: territory, media and term
- Options to extend



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## Intellectual property – deliverables

- Ownership of deliverables
  - If advertiser to own IP:
    - Assignment
    - Waiver of moral / performers' rights
  - If influencer to own IP:
    - Licence to advertiser
- Platform terms



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## Contracts with influencers: protecting the brand

- Reputation provisions:
  - Protect reputation of influencer and advertiser
  - Defamatory / derogatory statements
  - Bad behaviour
- Non-infringement warranties re IP
- Other standard warranties:
  - Service quality
  - Policies
  - Laws / rules
- Take down rights
- Termination rights
- Approvals

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## Contracts with influencers: exclusivity

- Exclusivity
- Non – compete



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## Summary

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- Collaborative marketing; huge growth
- #Ad
- Don't forget other ad requirements and avoid infringing third party IP
- Contracts with influencers:
  - Contracting party options
  - IP in deliverables and personality rights
  - Provisions to protect the brand
  - Consider exclusivity

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## Thank you for joining us!

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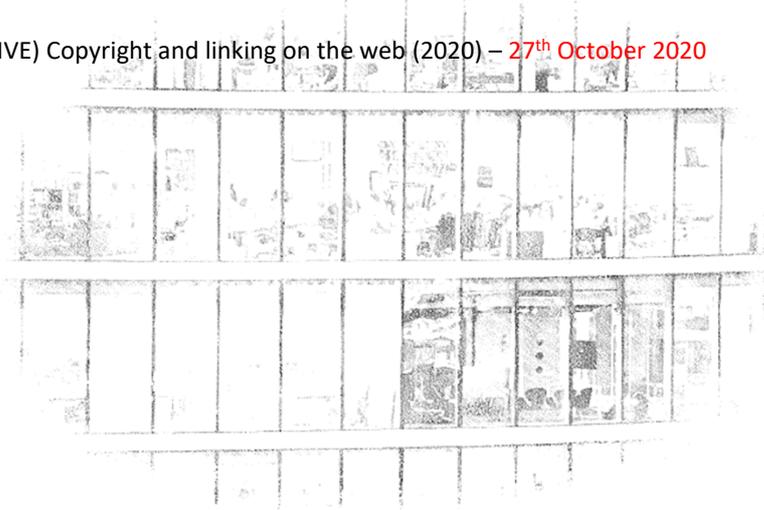
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## Upcoming Intellectual Property webinars

- Patent Licensing and FRAND (2020) – 10<sup>th</sup> March 2020
- (LIVE) Copyright and linking on the web (2020) – 27<sup>th</sup> October 2020



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- This webinar is designed to help solicitors meet requirements A2 (Maintain competence and legal knowledge) and A4 (Draw on detailed knowledge/understanding) of the SRA's Statement of solicitor competence. You may also use the quiz, which can be accessed via the "Take a quiz" link on the webinar details page, to reinforce your understanding of the webinar content. You should answer 7 out of 10 questions correctly and will have two attempts at the quiz.
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