

Influencers' recommendations on the Internet: effects of codes of conduct

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Abstract

Recommendations of goods and/or services on social networks are an increasingly widespread advertising tactic. Brands are aware of the power of persuasion that influencers in the digital world have on their followers. In this article, we analyze the particularities of this phenomenon and then focus on its regulation. Specifically, we refer to the suggestive role that self-regulation plays in this area. By virtue of the latter, codes of conduct in the influencer market are possible.

Key words

Self-regulation; communication; digital economy; marketing; advertising.

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1. Introduction

Digital media has had a far-reaching and significant impact on the communication strategies employed by companies. Traditional advertising has become saturated, and companies are turning to influencers, defined as content creators who have built a large following on social media platforms. In these latter spaces, influencers share their personal life, including their experiences and/or opinions (De Veirman, Cauberghe & Hudders, 2017). In short, an influencer is a person who has influence. The latter is the action and the effect of influencing. In other words, influence involves producing certain effects on other people. Although the trend has become popular with social networks, its roots go back a few centuries, starting with Josiah Wedgwood in the 1760s, who produced ceramics for the British royal family. Other important figures who further developed the concept appeared in the 19th and 20th centuries (Górecka, Strykowski & Biegun, 2019).

We are, therefore, faced with a diverse advertising strategy because brands position their commercial content so potential recipients voluntarily approach it. Brands also take advantage of the advertising opportunities driven by the proactivity of influencers (Martínez & Sánchez, 2012). An abundance of effects are possible thanks to the Internet and the reach of social networks. Notably, a large portion of influencers' target audience is millennials (Barton et al., 2012). This generation grew up with the Internet, in a reality where technological and geographical boundaries do not exist (Walrave et al., 2018). To date, Instagram has one of the largest audiences among social media. It's visual attractiveness and the more than two billion active users make it a powerful channel for influencer marketing. Instagram reaches a younger demographic population, millennials between 22 and 37 years old, who have a reputation of being easily bored and being drawn to visual and attractive messages rather than text.

There are professional or semiprofessional influencers with millions of followers. Generally, they actively engage in conversations, have a strong capacity for innovation, reflect confidence and security in their own person and have real experience with products and/or services in their area of interest (Uzunoglu & Misci, 2014). In their social network profiles, they feature certain photographs, videos or comments connected to the goods and/or services of brands with which they have entered into a certain commercial contract (Safko & Brake, 2009; Arrigo, 2018; Morra, 2018).

Brands themselves are committed to hiring influencers to reach their target audiences (Brown & Hayes, 2008; Turban et al., 2015; Vilajoana, Rom & Miotto, 2019). Influencer marketing aims to drive sales and increase product or brand awareness by word of mouth (Allard, 2007; Steinhart et al., 2014; Erkan & Evans, 2016).

Influencers have an enormous amount of credibility with their followers (Silva et al., 2019; Schaffer, 2020), and brands try to avoid commercial communication being presented as such. In other words, brands seek to advertise through objective content (Segarra & Hidalgo, 2018). Influencers generally advertise products and/or services of brands through recommendations, and their audience trusts them. Trust is a belief that motivates consumers to buy goods and/or services when suppliers are unknown or when there is questionable credibility regarding the quality of a good and/or service. Trust, among other things, allows creating long-term relationships with

customers and improves tolerance to price increases (Delgado-Ballester & Munuera-Aleman, 2001).

Consumers take extreme measures to avoid ads by using ad blockers (Essex, 2017). Influencer marketing is considered nonintrusive and more attractive than traditional online ads, such as pop-ups or banners. In the digital space, influencers have emerged as reliable and trustworthy sources (Freberg et al., 2011; Conick, 2018).

Brands are capitalizing on this type of advertising modality; brands are partnering with certain influencers to be included in their content. The brand offers some type of compensation—in-kind or monetary—to the influencer, outlining in the contract the content and advertising format in which the products and/or services must appear.

The contract that brands create with influencers must include a series of clauses. In short, the communication or the object must be precisely laid out, including the type of social network to be used. Second, it must state how the ads should be made, that is to say, explain in detail exactly how the ad should be served. Third, intellectual property rights must be addressed, and fourth, related to the above, image rights must be determined so that the influencer's name or image can be cited in the brand's ads. Finally, fifth, the possible exclusivity of the brand with the influencer should be determined.

In this article, we will first address the legal regulation, by virtue of general norms, of this novel advertising modality. Next, we will describe the work carried out in this field on self-regulation in the industry in Spain and in comparative law, where Anglo-Saxon countries, as we will see, are the reference paradigm. In the specific case of Spain, in the heart of Autocontrol is the Advertising Jury that, without being an organ of its own, performs work suggestive of extrajudicial dispute resolution in the marketing field. In regard to the problem arising on this suggestive issue, we can anticipate that in Spain, no specific regulation exists, although recently a specific code of conduct has been approved.

2. Advertising regulation of influencers

Advertising is commonplace in current society and has considerably increased in social and economic significance and presumably will continue to do so in the future. It plays a very important role, stimulating growth and innovation, promoting competitiveness, combatting conglomerate domination, and expanding the possibilities of consumer choice (Dittmar, 2012). To keep up, advertisers must secure a high level of trust on the part of the latter, which requires being truthful, legal, honest and loyal.

Bad advertising—which does not fulfill all or some of the mentioned characters—despite representing a minuscule portion compared to the whole, undermines consumer confidence, and in one way or another, threatens to end all advertising, which will generate substantial consequences. Therefore, for the benefit of all of society, so that the abovementioned extreme does not occur, it is necessary for advertising to be regulated. There are approaches that

complement legislation that are not mutually exclusive, namely, normative regulation (hetero-regulation) and self-regulation (industry disciplines itself).

The factual reality of the world in which we interact advances faster than the normative reality, creating a significant gap between the two. Currently, influencer marketing is not subject to specific control by state or community regulations. In any case, the generic norms presented in three great laws is applied: Law 34/1988 on General Advertising (LGP); Law 3/1991 on Unfair Competition (LCD); and Law 34/2002 on Information Society Services and Electronic Commerce (LSSI-CE).

The LGP refers to misleading advertising among the many forms of illicit advertising. Article 5 of the LCD considers misleading advertising “any behavior that contains false information or information that, although being truthful, by its content or presentation induces or may mislead its recipients, causing them to change their purchasing behavior”. Such a definition would indirectly include misleading advertising by omission, which is expanded upon in article 7. Although the credibility of influencers could be affected, some brands will insist on the need for some content not to be sponsored or warning that goods and/or services are promotional.

Covert advertising, a type of misleading omission, deserves special mention. As presented, covert advertising is likely to mislead its recipients because it conceals the commercial nature of the message. The deception is not in the content but how the message is presented because consumers and/or users do not consciously perceive the commercial nature of the message (Vilajoana, 2011). Thus, according to article 9 of the LGP, this type of advertising violates the principle of advertising identification required by both advertisers and the media, making it subject to the regulation outlined in article 26 of the LCD. It is clear that legislators understand that payment or compensation is critical to proving the concurrence of covert advertising. Remuneration can be monetary but also in-kind. The latter occurs when an influencer, by posting a certain message or review, receives a certain good or service for free. The concurrence of a commercial relationship can only be excluded when a gift includes messages explaining that the proof delivered does not imply any commitment on the part of the recipient.

Regarding the LSSI-CE, it is worth considering article 20. Such precept, in line with the principle of advertising identification, determines that “commercial communications made electronically must be clearly identifiable as such, and the natural or legal person in whose name they are made must also be clearly identifiable”. Such an article goes beyond traditional media because it includes any media outlet that enables electronic communication. These include, among others, the social networks Facebook, Instagram, Twitter, YouTube and Snapchat.

3. The necessary complement to self-regulation

Next, we analyze the assumptions that must concur in a system of self-regulation. Following that, the paradigmatic conflict resolution agency in advertising, the Advertising Jury, is studied.

3.1 Concurrence of self-regulation systems

Best practices documents (which include codes of conduct) are sometimes integrated into a system of self-regulation. For their concurrence, there must be two assumptions: on the one hand, the best practices document and, on the other, the control body, impartial and independent, responsible for ensuring its full compliance. The lack of any of the assumptions or their malfunctioning indicates that the system, in addition to being ineffective, is incomplete (López Jiménez & Dittmar, 2018).

On the one hand, best practices documents entail the establishment of certain guarantees that go beyond legislation, which is an inescapable requirement for a true best practices document (typically a code of conduct) because otherwise, the document would serve merely as a legislative compilation or a didactic explanation of the prevailing regulations.

On the other hand, the second assumption is that there is a control body to resolve disputes between participating companies and the consumers or users who undertake contracts or are provided goods and/or services, including activities aimed at the promotion-advertising interaction.

In addition to a priori verification (prior advice or copy advice), certain self-disciplinary systems allow for a posteriori examination of the eventual disputes that arise regarding the possible violation of a code of conduct. The latter is carried out by a control body that acts once the promotional campaign has been disseminated. In this case, the content of resolutions determine, where appropriate, the illegality of advertising regarding the infringement of one or more ethical standards presented in the articles of the codes of conduct; the control body then urges the advertiser to cease or modify the advertising. There is no objection when a control body speaks out against adhered entities, although the same cannot be said when referring to third parties not integrated into a self-discipline system (in which there is no obligation to comply with resolutions). Among the most paradigmatic extrajudicial systems is the Advertising Jury, which we will address below.

3.2 The Advertising Jury

Among the extrajudicial conflict resolution bodies that exist in Europe in terms of interactive advertising, there is one that constitutes a reference model: the Advertising Jury. The association in which the Advertising Jury is integrated, although without being a dependent body of it—as it enjoys full independence—is Autocontrol.

The Jury is formed, by virtue of the Statute of Autocontrol and the Regulatory Jury, by a president, three to six vice-presidents and nine to 20 members of indisputable impartiality. None of the members of the Jury can have any relationship whatsoever with member companies (there is a wide range of causes of abstention and recusal).

This body only intervenes when a dispute is raised and acts according to a procedure governed by the principles of equality of the parties, hearing and contradiction. Although it is true that the Jury has an administrative branch of Advertising Self-Control, it is not an organ of its own.

The Jury only deals with commercial advertising and thus does not cover political, institutional and religious advertising. It handles complaints related to advertising broadcast in Spain in the last 12 months, including not only cross-border advertising but also foreign broadcasts that have been strictly condemned by the corresponding national self-control body integrated in the European Advertising Standards Alliance (EASA), if there are indications that it will also be broadcast in Spain. Complaints of a commercial communications nature that have been resolved or are undergoing a judicial process or administrative procedure will not be handled.

The texts that serve as a basis for the decisions made by the Advertising Jury are not strictly legal norms because if they were, the Jury would risk interfering with jurisdictional function.

The resolution of conflicts, in the matter of interactive advertising, is based on the (general) code of advertising conduct as well as on the sectoral code in question. The norms contained in the sectoral code must be considered deontological or ethical, without prejudice to the fact that they contain, in addition to the applicable regulations, in certain cases, an improvement of the rights of potential consumers and/or users.

Both parties themselves, in their writings, as well as the decisions made by the Advertising Jury itself allude to previous resolutions of that body, serving as a basis for their judgment. In fact, the Jury, except for duly motivated exceptions, does not usually deviate from resolutions determined in other conflicts.

The technical authority and impartiality demonstrated by its resolutions, dictated by renowned jurists and reputable experts in the advertising sector, have generated high credibility and trust from its beginnings to the present. Whenever a matter submitted to the Advertising Jury subsequently reaches the Courts of Justice, the judicial decisions have substantially coincided with those previously issued by the Jury.

Regarding the active legitimation to appeal commercial communications to the Advertising Jury, there is a clear preeminence of consumer and user associations, public entities and individuals. In fact, this trend is sharply rising. According to an annual report by Autocontrol, in 2017, almost 70% of the cases resolved by the Advertising Jury originated as claims presented by individuals. Individuals fall within the realm of Autocontrol, which, as is known, stands alongside an entity that has a corporate brand.

Advertising in digital media is becoming increasingly popular. In response, advertising self-control is increasingly being implemented through intense verification activity. Of the more than 36,000 requests for copy advice formulated in 2018, 40% were related to electronic commercial communications, which, according to an Autocontrol report in 2019, represents an increase of 25%. In 2018, one in three decisions by the Jury dealt with digital media.

Copy advice is a voluntary, confidential service (without, therefore, contradiction), and usually nonbinding, for both the legal and ethical correctness of a campaign project or advertisement before being made public; the service can be requested by the advertiser, its agency or the media outlet where the advertisement will be broadcast. These advisory services are largely performed by technical branches independent of the juries that resolve disputes. The only entity that, in the case of Spain, provides such a service is Autocontrol through its Technical Branch. This branch is

composed of jurists and publicists who, once the copy advice is proposed, assess whether a particular advertisement that is in the process of being developed complies with the norms, regulations and ethics included in codes of conduct, and if applicable, the request must be resolved after negative advice.

3.3 Advertising self-control codes of conduct for influencers

Recently, a code of conduct for influencers was approved. In its articles, the legality of this commercial strategy is recognized as long as the regulations and the principle of advertising identification are observed. Specifically, in these cases, the use of indications such as “advertising”, “in collaboration with” or “sponsored by” is proposed, both in the initial publication of the content and when the influencer shares it. In contrast, the use of generic or unclear indications is discouraged, as well requiring users to click to access such advertising identification.

The code of conduct refers to commercial messages conveyed by influencers in exchange for monetary or in-kind considerations, for example, free delivery of the good and/or service, invitations to certain places and trips. The code states that mentions or advertising content are all mentions or content that are directed to the promotion of products and/or services and are disclosed in the framework of collaborations or reciprocal commitments with payment or other type of consideration or in those cases in which the advertiser exercises editorial control over the content. Content that is purely editorial in nature, or content disclosed by influencers who are speaking for themselves, is excluded.

The annex of the code of conduct provides a list of examples of recommended placements for the identification of the mention or advertising content, according to the platform or social network on which such mention is carried out.

Likewise, it defines what is meant by a typical consumer in the field of influencer advertising. In this sense, a typical consumer is defined as an active consumer who is knowledgeable about new information technologies, usually attentive and informed, with sufficient capacity to access and understand digital media and the autonomy to search for, discriminate and customize the contents of the network as they browse based on tastes or interests.

Regarding the recipients to whom the code of conduct applies, they are the partner companies of the Spanish Association of Advertisers and Autocontrol, as well as other voluntarily adhering companies (López Jiménez, Vargas Portillo & Dittmar, 2020). Adherence by influencers is also important. In the text of the code of conduct, adherents are obligated to include a reference regarding the influencer in those contracts that regulate the advertising actions of influencers.

Although this code of best practices will come into effect on January 1, 2021, for now, a general code of conduct in advertising self-control is applied that roughly integrates and develops advertising regulations. In this matter, various rules of the general code of conduct are applicable, such as norm 13, which includes the principle of authenticity. Under the latter, advertising will have to be identified as such regardless of the form or media outlet used. Likewise, norm 19, referring to the use of testimonies in the commercial sphere, could be applied in a complementary manner.

3.4 Scenario in the Anglo-Saxon context

In the foreign sphere, Anglo-Saxon countries play a prominent role in this area. Note that these countries have a recognized track record in the field.

In the United States, the Federal Trade Commission (FTC) bestows upon both the industry and the sponsors the duty to identify the commercial practices in which influencers intervene. In 2013, ahead of many other states, it published the guide *How to Make Effective Disclosures in Digital Advertising* in which various recommendations regarding influencers were incorporated.

In addition to incorporating certain suggestions in its guides, it sent informative messages to the industry and influencers so that in their communications, they would respect the principle of advertising identification. Communications should be faithful to the concurrence of trade agreements between brands and influencers. Thus, by way of example, in advertising communications, sponsorship should be explicitly displayed - the most common is to include the hashtags #Ad, #sponsor or the like. It is worth making a brief point about what a tag or hashtag is. The latter, which refers to a specific topic, consists of one or more words, preceded by the hash symbol (#).

There are very suggestive cases of covert advertising in which the FTC has had to intervene. Lord & Taylor financially compensated approximately 50 influencers so that in their Instagram posts (with certain requirements imposed by the brand), they would wear a Design Lab dress. The ads that did not specify that they were advertising or sponsored reached more than 11 million followers.

In the specific case of the United Kingdom, it should be noted that in January 2019, the Competition and Markets Authority published a guide to be read by influencers regarding respecting the rules of user protection, where, among other issues, it detailed the need to be transparent about the commercial relationship between brand and influencer. It is also worth mentioning the paradigmatic system of English self-regulation in advertising, such as the Advertising Standards Authority (ASA). The latter develops codes of conduct on the subject under the Committee on Advertising Practice (CAP). In September 2018, it published the guide "An influencer's guide to making clear that ads are ads". As highlighted in the articles of the latter, influencer marketing must be identified and is subject to advertising regulations and consumer protection regulations. Such approaches have been borrowed by European coordination entities in the field of self-regulation. We refer to the EASA, which, in December 2018, published a guide on best practices related to advertising in which influencers are mentioned (EASA Best Practice Recommendation on Influencer Marketing).

4. Judicial and extrajudicial dispute resolution on this matter

The recipients—consumers and/or users—of the commercial messages communicated by influencers deserve real and effective protection. There are different ways to make this a reality.

In the event that legal regulations are violated, courts of justice and administrative bodies with the power to sanction must intervene. In the case of self-regulating systems, any entities that have voluntarily adhered to codes of conduct can be sanctioned by an extrajudicial conflict resolution agency if they fail to comply with its articles. In the case of Autocontrol, it is the Advertising Jury.

In both judicial and extrajudicial matters, we find a notable absence of decisions on the matter. The Advertising Jury recently had the opportunity to rule on the extrajudicial sphere. In November 2019, an individual made a claim against certain advertising by an influencer on his Instagram profile. In her message, the influencer referred to the positive aspects of headphones. There was no criticism or comparison with other competitors. The communication, which focused on a single product, constituted a clear assumption of covert advertising that directly conflicted with rule 13 of the code of conduct of Advertising Self-Control. Although the influencer sought to give the impression that it was a mere opinion, the concurring circumstances showed that it was a commercial communication. Indeed, in the ad, it was not apparent that communication was a promotional activity. The influencer does not adhere to Advertising Self-Control; therefore, such resolution lacks binding force. The negative press surrounding this event quite likely affected the reputation or good name of the influencer. In any case, this resolution, operated by such a paradigmatic body, sets a precedent for future occasions.

To date, in the specific case of Spain, based on the LGP, the LCD or the LSSI-CE, no sanctions have been imposed on influencers—either judicially or administratively—as a result of broadcasting covert advertising.

5. Conclusions

Due to the growth of new technologies, the use of influencers has become popular in numerous advertising spaces. There are influencers in a wide range of topics—such as sports, music, video games, lifestyle, gastronomy, fashion, cars and electronics—and territorial areas. An influencer, as we have seen, is someone who is admired, followed and listened to by a large number of people on social networks. During lockdown due to the COVID-19 health crisis, published content by influencers increased in order to maintain relationships with followers.

For many years, influencers have acted as they like on social networks without clear rules regarding the way in which they should distinguish content sponsored by brands from content that is not, i.e., content that can be regarded as mere opinions. Advertising that uses influencers must observe the regulations on the matter. In addition, in the event that the company or influencers have voluntarily adhered to a code of conduct on the subject, they must observe its articles. Both establish the need for influencer marketing to respect the general principle of advertising identification. In this way, there will be no covert advertising that, as has been shown, is an advertising practice prohibited by regulations and self-regulation instruments.

Both brands and influencers must act ethically in their practices. Both must be aware of the harm they can cause; therefore, they must observe the rights of consumers and/or users.

Without prejudice to the fact that regulations on this matter are necessary, we must highlight the complementary work, not substitute work, that self-regulatory bodies can perform regarding this matter.

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