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Place it so it's hard to miss: advertising regulation and transparency in influencers' endorsements on social media

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Introduction

Advertisers often seek to engage in their campaigns likeable, credible, often aspirational figures with whom potential consumers choose to connect.¹ The idea of effective endorsers is not, however, new. Advertisers have been typically employing different types of individuals to attract consumers' attention: celebrities (e.g., for jewellery and perfumes), experts (e.g., for vacuum cleaners) and consumers themselves (e.g., for confectionery products).² As marketing resources increasingly shift to digital campaigns on social media or video-sharing platforms like Instagram and TikTok, the faces used by marketers have evolved too. Advertisers may choose to collaborate with 'influencers', namely personalities deemed to have some measure of clout in a certain realm and have garnered on their respective social media publishing channels audiences who are frequently consumers. Agencies increasingly seek to harness influencers' power in social networks, build hype around products or services and ultimately convert views or 'likes' into purchases.³

Over the course of recent years, the strategic use of influencers as a marketing tactic, usually referred to as influencer marketing (IM), has gained popularity. IM evidently arose from the decreasing effectiveness of traditional forms of persuasive brand communication and a consequent realisation that online user-generated content (UGC) is more powerful in forming consumer brand preferences and behavioural responses.⁴ The global value of IM is estimated to have more than doubled between 2019 and 2021, growing from 6.5 billion to 13.8 billion US dollars in these three years alone.⁵ However, IM adds complex dimensions to modern advertising practices and poses new regulatory challenges. There has been, in particular, a growing concern that much of IM's success is not because the content is inherently better but because the commercial nature of the message is obfuscated, with followers being consequently unable to tell whether they are exposed to organic, independent content or content for which influencers were compensated for or otherwise incentivised. This is worrying because covert advertising displaces consumers' choice to consciously engage in a commercial conversation, affects the weight of credibility they give the information it conveys and prevents followers from resisting or filtering out a persuasion attempt. Lack of adequate disclosure of the commercial relationship between the influencer and a brand undermines consumption choices and reinforces the common criticism that advertising manipulates consumers.⁶ At the time of writing, the UK Parliament's cross-party Digital, Culture, Media and

¹ Charles Atkin and Martin Block, 'Effectiveness of Celebrity Endorsers' (1983) 23 *Journal of Advertising Research* 57; Karen Page Winterich, Manish Gangwar and Rajdeep Grewal, 'When Celebrities Count: Power Distance Beliefs and Celebrity Endorsements' (2018) 82(3) *Journal of Marketing* 70.

² Hershey Friedman and Linda Weiser Friedman, 'Endorser Effectiveness by Product Type' (1979) 19(5) *Journal of Advertising Research* 63.

³ Liselot Hudders, Steffi De Jans and Marijke De Veirman, 'The Commercialization of Social Media Stars: A Literature Review and Conceptual Framework on the Strategic Use of Social Media Influencers' (2021) 40(3) *International Journal of Advertising* 327.

⁴ Daniel Carter, 'Hustle and Brand: The Sociotechnical Shaping of Influence' (2016) 2(3) *Social Media + Society* 2056305116666305; Jonas Colliander and Micael Dahlén, 'Following the Fashionable Friend: The Power of Social Media: Weighing Publicity Effectiveness of Blogs versus Online Magazines' (2011) 51(1) *Journal of Advertising Research* 313.

⁵ Statista, *Global Influencer Marketing Value 2016-2021* (Statista Research Department, 12 February 2021) <<https://www.statista.com/statistics/1092819/global-influencer-market-size/#statisticContainer>> accessed 26 May 2021.

⁶ Theodor Adorno and Max Horkheimer, 'The Culture Industry: Enlightenment as Mass Deception' in Juliet Schor and Douglas Holt (eds), *The Consumer Society Reader* (The New Press 2000) 3-19.

Sport Committee has its sight set on influencers. The Select Committee announced in late March 2021 an inquiry to examine the broader impact of the phenomenon of influencer culture.⁷

IM has motivated an increasing body of literature with a multidimensional look at this exponentially growing marketing tool,⁸ predominantly from a marketing perspective but also from other fields like psychology, social sciences, consumer research and business studies. However, there has been little academic research on the self-regulatory issues relating to disclosure requirements as a result of the cover nature of some influencers' content.⁹ This article addresses this gap and develops an analytical framework for understanding the effectiveness of the current UK self-regulatory approach to ad recognition on social media and its limitations. Drawing upon an adapted version of Stern's Revised Communication Model for Advertising,¹⁰ it first explores the complex interplay of the different elements within the advertising communication system and conceptualises influencers' synergistic role in it. The article then moves on to examine some of the challenges inherent in controlling disguised advertising practices on social media, conceived as any form of commercial communication that blends in with other user-published content and presents itself as non-commercial. The analysis subsequently delves into the practice of the Advertising Standards Authority (ASA), the UK's independent regulator of advertising across all media, in relation to the lack of adequate disclosures in influencers' posts on social media. The article systematically analyses for the first time the regulator's adjudications concerning recognition of commercial communications in IM. In particular, it examines formal rulings issued by the Authority over the course of the five-year period from August 2017 to August 2021.¹¹ The article questions whether advertorial notions, which underpin the ASA's reasoning, can be usefully extended to the analysis of undisclosed or disguised IM. It suggests that we need a more nuanced view of the status of incentivised influencer posts on social media. We fail to fully understand how IM works and how it should be regulated if we effectively approach it as nothing more than a paid advertorial. Proceeding from this analysis, certain recommendations for practitioners in this field are formulated, particularly in respect of when and how disclosures are required in order to ensure compliance with the relevant advertising rules and who is responsible in the event of a breach in this context.

IM and the traditional advertising communication model

Stern's Revised Communication Model for Advertising is premised on the ideas originally developed in 1948 by political scientist and communication theorist Harold Lasswell.¹² In its most basic form, Lasswell's traditional construct distinguishes between three elements in the

⁷ UK Parliament, Digital, Culture, Media and Sport Committee, Influencer Culture Enquiry <<https://committees.parliament.uk/work/1126/influencer-culture/>> accessed 6 May 2021.

⁸ Demetris Vrontis and Ors, 'Social Media Influencer Marketing: A Systematic Review, Integrative Framework and Future Research Agenda' (2021) 45(4) *International Journal of Consumer Studies* 617.

⁹ See the important contribution of Catalina Coanta and Sofia Ranchordás (eds), *The Regulation of Social Media Influencers* (Edward Elgar Publishing 2020). This edited volume covers a wide range of issues from consumer protection to labour and speech law at a wider European level, but there is very little on the UK (self-)regulatory model in it.

¹⁰ Barbara Stern, 'A Revised Communication Model for Advertising: Multiple Dimensions of the Source, the Message, and the Recipient' (1994) 23 *Journal of Advertising* 5.

¹¹ It was not possible to review adjudications for a longer period prior to the time of writing, as the ASA's website contains their published rulings from the past five years only. I manually filtered the ASA database to retrieve a body of rulings that engaged all the rules of the non-broadcast advertising code on recognition of marketing communications (Section 2, CAP Code). The search produced 66 rulings. I subsequently excluded from the results 33 adjudications which did not specifically relate to influencer marketing (e.g., rulings concerning direct mailing, circulars, television, website contents etc.). However, some of the excluded rulings have been included in the discussion for contextual purposes.

¹² Harold D. Lasswell Reading: Lasswell, H.D. (1948) "The Structure and Function of Communication in Society", in Bryson, L. (ed), *The Communication of Ideas*, New York: Harper and Brothers', *Reading Media Theory* (2nd edn, Routledge 2012).

communication process, i.e., sender (source), message and receiver (audience), on which many marketing models are based. It proposes that communication occurs when a particular source delivers a message to a receiver through a selected channel to achieve a desired effect. Later models developed Lasswell's theory by removing its linearity to portray communication as a more interactive and dynamic encoding-decoding process between the source of a message and its audience.¹³ These updated models are still built around the three core components (source, message, receiver) which remain relevant in contemporary marketing and marketing research in particular.¹⁴ Stern's revised model expands the traditional triad by factoring in the specificities of marketing communications. It conceives advertisers, their promotional text and consumers as multidimensional participants in a complex interactive process.¹⁵ But, do influencers disrupt it and if so, in what way?

The source

Stern distinguishes between different sources in advertising communication, comprising (a) the sponsor as the financial source, i.e., usually the brand which commissions the ad, and bears the financial and legal responsibility for its content; (b) the author as the creative source, i.e., the advertising agency with creative responsibility over a collective production; and (c) the persona, i.e., the spokesperson such as a celebrity who transmits the message in the ad as a conduit of the information provided by the sponsor and author. Endorsements of this kind are a popular marketing tactic with which marketers aim to trigger consumers' intent to purchase the endorsed product or service by transferring a repository of positive characteristics of a well-known figure onto the brand.¹⁶

In the context of IM, digital influencers as personas have achieved the status of micro-celebrities by performing self-promotion practices to a large follower base online.¹⁷ Their centrality in a social network creates a greater than average reach through electronic word-of-mouth (eWOM) without having to sift through platforms' intricate customer segmentation options: although they are not necessarily recognised for their skill or talent, influencers are distinguished as online experts (albeit in a relatively small field) whose endorsement activities are deemed to be more effective in marketing campaigns because consumers tend to find them more relatable and trustworthy than traditional celebrities.¹⁸ Successful influencers have, however, transgressed into the more conventional celebrity domains by pursuing careers in commercial television, and vice versa, many celebrities whose fame originated outside social media platforms have taken up roles as influencers in their endorsement operations. These tactics gradually merge into a singular unified model and are increasingly embraced by advertisers. Nevertheless, the traditional alliance between sponsors and personas remains as a core ingredient of many marketing techniques.

The distinction between the remaining dimensions of the source (author and persona) is less straightforward and gradually fades as the emergence of social media platforms marks a paradigm shift in marketing communications, empowering digital personas to distribute their own UGC and interact with consumers. Authorship can thus be shared between advertising agencies and personas, who tend to be more actively involved in the creation of marketing campaigns. As the analysis of the ASA rulings will show, influencers are often given a degree

¹³ Philip Kotler, *Marketing Management* (11th ed, Prentice Hall 2003).

¹⁴ Sreedhar Madhavaram, Vishag Badrinarayanan and Robert McDonald, 'Integrated Marketing Communication (IMC) and Brand Identity as Critical Components of Brand Equity Strategy: A Conceptual Framework and Research Propositions' (2005) 34(4) *Journal of Advertising* 69.

¹⁵ Stern (n 10).

¹⁶ Atkin and Block (n 1).

¹⁷ Elmira Djafarova and Oxana Trofimenko, "'Instafamous' – Credibility and Self-Presentation of Micro-Celebrities on Social Media' (2019) 22(10) *Information, Communication & Society* 1432.

¹⁸ Alexander Schouten, Loes Janssen and Maegan Verspaget, 'Celebrity vs. Influencer Endorsements in Advertising: The Role of Identification, Credibility, and Product-Endorser Fit' (2020) 39(2) *International Journal of Advertising* 258.

of creative control in developing and disseminating commercial messages on their own media channels under the sponsor's general endorsement instructions (e.g., how frequently new content should be posted etc.). Although sponsors' key agency in the creation and maintenance of their image has not been completely removed, their power to tightly control the perception of their products or services as well as the content, frequency and timing of the information shared on social media has been eroded.

The multidimensionality of the source is also evident in the marketing literature and the industry which discern different categories of influencers as message authors primarily with reference to shared elements such as reliance on social networks, follower volume and engagement rate (i.e., indicators showing the extent to which other people propagate their content, like retweets etc.) and monetary requirements for collaboration:¹⁹ the highest-ranking category of mega-influencers, with more than a million followers, can reach a very diverse audience with various topics of interest. This makes them suitable for top of the funnel campaigns. Macro-influencers' follower count usually exceeds 100,000. They have often gained fame through their online activities (e.g., vlogging) and can be useful when targeting certain types of customers (e.g., young men). Micro-influencers have a comparatively smaller following (between 10,000 and 100,000) but they score higher in terms of their persuasive impact compared to macro-influencers. This is partly because the sprawling audiences of macro-level accounts offer less targeting capabilities. Micro-influencers are also perceived to be knowledgeable in a niche topic or well-regarded in a specific industry (e.g., automotive or beauty industry). Brands in the hospitality industry, for instance, can expect to reap more benefits from a micro-influencer who built a sizeable following through travel blogging. Nano-influencers are a relatively new breed in the field. They are at the bottom tier, as they tend to have a lesser count of nearly 10,000 followers, but they enjoy the newcomers' authenticity. They are considerably less costly, as they may be more open to partnerships in building and promoting their profile. As the members of their followership tend to be less distant, they demonstrate higher levels of engagement and can be suitable for promoting local businesses with low budgets or even testing new products. Differentiating between these categories is not an exact science, especially because new types of influencers constantly emerge. For instance, the growing visibility of age-defying personas in social media has given rise to 'granfluencers', suggesting that the world of beauty and fashion is no longer the preserve of young people.²⁰

From a regulatory standpoint, the ASA does not appear to adopt a similar classification of digital personas, but its practice demonstrates signs of the tacit acknowledgement that the boundaries between celebrities and influencers blur. The regulator has held that rule 12.18 of its non-broadcast code, which prohibits the use of celebrities in endorsing medicines, was engaged in the case of a parenting and lifestyle micro-influencer (known as 'ThisMamaLife') who made recommendations on Instagram about tablets treating insomnia. At the time of the assessment, the influencer had a comparatively low number of followers (32,000) in contrast to other eminent celebrities, but this was counteracted by the fact that she was 'popular with, and had the attention of, a significant number of people'²¹ who chose to follow her. There is nothing in this rare ruling, however, to suggest that the ASA purports to be an arbiter of which influencer qualifies as a celebrity (and vice versa) for the purposes of its rules, using the number of followers as a normative benchmark. Instead, the regulator defines an influencer as 'anyone who has been paid by a brand to advertise a product on their own social media,

¹⁹ Colin Campbell and Justine Rapp Farrell, 'More than Meets the Eye: The Functional Components Underlying Influencer Marketing' (2020) 63(4) *Business Horizons* 469.

²⁰ Priya Elan, 'Rise of "granfluencers": viral stars model grandson's punk styles' *The Guardian* (2 April 2021) 25.

²¹ ASA Ruling on Sanofi UK IAW ThisMamaLife (3 July 2019) <<https://www.asa.org.uk/rulings/sanofi-uk-A19-557609.html>> accessed 10 June 2021.

because of their social media influence'.²² So, while the source of a persona's popularity, the industry in which they operate and their reach do not appear to constitute criteria by which the ASA measures whether an individual can be considered an influencer, the regulator's practice (discussed later) places more emphasis on a persona's capacity to monetize their content creations and how their agreement with the party whose product they promote is built.

The message

Influencers serve the role of message creators by producing text (e.g., on blogs), images (e.g., on Instagram) and videos, pre-recorded (e.g., on YouTube) or live-streamed (e.g., on Twitch). In Stern's model, a message consists of discourse which deploys the persona in different ways to elicit various recipient responses. So, an advertising message can use *autobiography* (e.g., the use of the first person 'I' to reveal personal experiences of a product used); a *third person narrative* (e.g., storytelling to an audience which gathers information to make sense of nutrition labels and healthy eating habits) and a *dramatic enactment* (e.g., where the visual sequence communicates the experiences of the ad characters to a vicariously participating viewing audience). Although storytelling and dramatic enactment can make a message appealing, it is the autobiographical elements that help an influencer inject in their content authentic self-expression and unpolished beliefs, which are often perceived by their followers as their intrinsic motivation that partly contributes to their success.²³

Contemporary communication platforms have diversified the ways the message is activated and given rise to a wide range of endorsement formats.²⁴ Influencer endorsements, which mainly occur when a brand uses their opinion for promotional purposes,²⁵ can range from highly prominent to very subtle placements of commercial content. Influencers may expressly associate their status with a named product and increase its experiential value through different online forums which allow greater vividness.²⁶ Control over the content of the marketing message lies sometimes in influencers' hands as they are often deemed to know best what kind of tone their followers resonate with and what drives better engagement. However, it remains entirely possible that a campaign brief requires an influencer to submit a potential post, or send a request, for approval to the business partner before posting.²⁷ Some more distinguished endorsement genres have recently emerged, which can be strategically deployed to serve specific functions, such as in cases of online interactions on brand-related topics, whereby an influencer initiates a conversation and keeps it running as a panel moderator.²⁸ Brands may also allow an influencer to take over their social media account for a specified timeframe, during which the influencer creates content and posts on the brand's behalf, thereby merging the two brands together to leverage each other's power of attraction.

The recipient

The third component in Stern's advertising model is the targeted market of ads. Brands, as sponsors, aim to tighten their relationships with consumers and harvest value for themselves

²² ASA CAP, Recognising Ads: Social Media and Influencer Marketing (31 July 2020) <<https://www.asa.org.uk/advice-online/recognising-ads-social-media.html>> accessed 1 August 2021.

²³ Christine Kowalczyk and Kathryn Ponders, 'Transforming Celebrities through Social Media: The Role of Authenticity and Emotional Attachment' (2016) 25(4) *Journal of Product & Brand Management* 345.

²⁴ Thaysa Costa Do Nascimento, Roberta Dias Campos and Maribel Suarez, 'Experimenting, Partnering and Bonding: A Framework for the Digital Influencer-Brand Endorsement Relationship' (2020) 36 (11-12) *Journal of Marketing Management* 1009, 1013.

²⁵ Lars Bergkvist and Kris Qiang Zhou, 'Celebrity Endorsements: A Literature Review and Research Agenda' (2016) 35(4) *International Journal of Advertising* 642.

²⁶ Hudders, Jans and Veirman (n 3) 338.

²⁷ Aron Levin, 'The Art and Science of Creativity' in Aron Levin, *Influencer Marketing for Brands* (Apress 2020) 66.

²⁸ Nadja Enke and Nils Borchers, 'Social Media Influencers in Strategic Communication: A Conceptual Framework for Strategic Social Media Influencer Communication' (2019) 13(4) *International Journal of Strategic Communication* 261.

by promoting virtual engagement,²⁹ in a way which is not too dissimilar from the interdependence and closeness cultivated via frequent face-to-face social interactions.³⁰ The emotional attachment that forms between influencers (as personas) and recipients helps the former attract and maintain a follower base. This relational bond can be attributed to influencers' persona-driven characteristics and content curation abilities. Their power to sway their followers and accept their suggestions or worldviews rests on the balancing act of two seemingly contradicting characteristics: on the one hand, being relatable and attainable, like ordinary consumers (a trait that contributes to a sense of equality and forms the basis of trustworthiness in influencers' expertise) and, on the other hand, aspirational with superior (not too 'normal') celebrity-like status.³¹ Favourable audience perceptions can also be partly explained by influencers' supposed authenticity and attractiveness, which in turn improve the impact of their endorsements.³² There is also the informational value of influencer-generated messages and their ability to curate visually pleasing or entertaining content that positively affects recipients' trust in influencers' promotions.³³

Thus, overall, the major drivers behind audiences' attachment to influencers are the desire to fulfil their need for relatedness (i.e., to feel socially connected to others who are similar to themselves), their need for ideality (i.e., to become an ideal self that is represented by an influencer) and a desire to enhance their feelings of competence by being exposed to influencers' content as a source of information about product choices. The extent to which these needs are fulfilled affects the intensity of the bond developed between influencers and their followers, which in turn transfers to their endorsements and positively influences their audience to acquire the products they recommend.³⁴ Importantly, Stern highlights the role of recipients not as passive vessels for storing impersonal mass messages but rather as active participants in an interpretation process who interact with the source, fill in gaps and draw inferences about the specific product attributes or the sponsor's intent.³⁵ However, influencers share messages with recipients who may not always be digitally literate to competently filter marketing content. Indeed, the emergence of social media influencers as an extension of word-of-mouth campaigns has given rise to growing concerns over promotional content that is insufficiently distinguishable from their usual posts featuring their social lives and the consequent lack of awareness of its commercial nature on behalf of their followers. Having explored how influencers fit in the traditional advertising communication model and what needs recipients hope to fulfil by following them, the next section moves on to examine the role of advertising regulation in safeguarding audiences against undisclosed or disguised promotional practices.

IM as a disguised marketing practice

The diffusion of social networking platforms ushered new ways of blending advertising messages with interactive content. Promotional text can be presented under the mask of UGC

²⁹ Constance Porter and Naveen Donthu, 'Cultivating trust and harvesting value in virtual communities' (2008) 54(1) *Management Science* 113.

³⁰ Irwin Altman and Dalmas Taylor, *Social penetration: The development of interpersonal relationships* (Holt, Rinehart and Winston 1973).

³¹ Anne Martensen, Sofia Brockenhuus-Schack and Anastasia Lauritsen Zahid, 'How Citizen Influencers Persuade Their Followers' (2018) 22(3) *Journal of Fashion Marketing and Management* 335.

³² Essi Pöyry and Ors, 'A Call for Authenticity: Audience Responses to Social Media Influencer Endorsements in Strategic Communication' (2019) 13(4) *International Journal of Strategic Communication* 336, 348.

³³ Chen Lou and Shupeí Yuan, 'Influencer Marketing: How Message Value and Credibility Affect Consumer Trust of Branded Content on Social Media' (2019) 19(1) *Journal of Interactive Advertising* 58.

³⁴ Chung-Wha (Chloe) Ki and Ors, 'Influencer Marketing: Social Media Influencers as Human Brands Attaching to Followers and Yielding Positive Marketing Results by Fulfilling Needs' (2020) 55 *Journal of Retailing and Consumer Services* 102133.

³⁵ Margaret Campbell, 'When Attention-Getting Advertising Tactics Elicit Consumer Inferences of Manipulative Intent: The Importance of Balancing Benefits and Investments' (1995) 4(3) *Journal of Consumer Psychology* 225; Stern (n 10) 13.

either when its content shares the characteristics of non-commercial users' content (e.g., an image of an individual in an everyday setting consuming a product without including any specifications to enable users to identify the message as promotional) or when it adopts the format of non-commercial content (e.g., a recurrent promotional post appearing on a users' Twitter feed within a stream of naturally-occurring reflections on non-commercial users' everyday experiences).

Influencer marketing, specifically, can be likened to native (or 'in-feed') advertising: native advertising mimics UGC by integrating ads into the natural content flow of a newsfeed (which represents the content experience of most social media networks) to increase interaction (e.g., the sporadically appearing 'Sponsored Story' on Instagram). However, native advertising is predominantly developed by sponsors (brands) themselves, not influencers, and extends to cover the integration of Content Recommendation Engines which serve ad panels appearing under headings such as 'More from around the web' or 'You may also like'. Such content discovery tools may function as deceptive 'door openers' to induce consumers to view ads, where the net impression conveyed does not clearly distinguish between links to editorial pages and paid-for links to ads. The use of influencers can lead to a stronger return on investment for marketers compared to native advertising. IM presents even fewer of the characteristics of direct and clearly recognisable promotions. Influencer endorsements are published by individuals, not brands, and are often seamlessly woven into the daily narratives posted on their social media accounts. As such, they are more likely to be perceived as credible eWOM since relatable influencers oftentimes represent the fellow consumers of products or services.

A consequence of this context-driven approach shared by influencer and native advertising is that neither of the two seem inconsistent with the overall media habitat within which they are consumed. As they do not tend to be spatially separated from UGC, it is harder for followers to identify their commercial nature and intent. One possible explanation for such tactics is that explicit disclosures of paid content are likely to activate target audiences' self-defence mechanism known as persuasion knowledge, i.e., consumers' consciousness that content with which they are confronted is a persuasion goal-directed message.³⁶ As a result, the message may be seen as influenced by a brand, thereby negatively affecting recipients' credibility perception and indirectly decreasing intentions to engage in brand-related eWOM.³⁷ Thus, mandates for conspicuous disclosures that aim to protect recipients (many of whom are consumers) seem to be at odds with the desires of modern marketing departments. So, how is this tension picked up and managed from a regulatory perspective?

Regulatory bodies have moved fairly quickly to adapt to this rapidly changing marketing environment by mobilising their pre-existing rules, by issuing guidelines and investigating influencers for non-compliance. The UK Code of Non-Broadcast Advertising and Direct and Promotional Marketing (CAP Code), which is enforced by the ASA, covers IM content. It requires that marketing communications must be 'obviously identifiable as such'³⁸ and must 'make clear their commercial intent, if that is not obvious from the context'.³⁹ These rules apply irrespective of the medium or targeted audience. In its first monitoring report (published in March 2021), the ASA revealed a 'disappointing overall rate of compliance'⁴⁰ with its rules requiring ads on social media to be clearly signposted as such and noted that it continues to

³⁶ Marian Friestad and Peter Wright, 'The Persuasion Knowledge Model: How People Cope with Persuasion Attempts' (1994) 21(1) *Journal of Consumer Research* 1.

³⁷ Sophie Boerman, Lotte Willemsen and Eva Van Der Aa, "'This Post Is Sponsored': Effects of Sponsorship Disclosure on Persuasion Knowledge and Electronic Word of Mouth in the Context of Facebook' (2017) 38 *Journal of Interactive Marketing* 82.

³⁸ CAP Code, Rule 2.1. The UK Code of Broadcast Advertising (BCAP Code) includes equivalent provisions.

³⁹ *Ibid*, Rule 2.3.

⁴⁰ ASA, *Influencer Monitoring Report* (18 March 2021) 3 <<https://www.asa.org.uk/resource/influencer-monitoring-report-march-2021.html>> accessed 20 March 2021.

see 'far too many incidences of non-disclosure, which threaten to bring this marketing discipline into disrepute and breed distrust in consumers'.⁴¹ Although the ASA's rules on appropriate ad disclosure apply to all types of media where influencers choose to advertise, the regulator's assessment focused on Instagram because the majority of complaints so far tend to be raised in relation to this particular platform. The ASA found that only 35% of the Instagram Stories classified as ads for the purposes of this exercise (2,014 out of 5,732) were obviously identifiable as such. Particularly low rates of compliance were found in sectors such as beauty, food and fitness, clothing, jewellery and accessories.

The Competition and Markets Authority (CMA), the UK's primary competition and consumer authority, works alongside the ASA in this area. The key piece of consumer protection legislation relevant to the CMA's investigations is the Consumer Protection from Unfair Trading Regulations 2008 (CPRs),⁴² which apply to commercial relationships and related material in a wider arena than the CAP Code's remit. The CPRs contain specific prohibitions (e.g., misleading actions or omissions that cause or are likely to cause the average consumer to take a different decision)⁴³ which aim to ensure that consumers get from traders in a clear and timely fashion the information they need to make informed decisions relating to products. Although questions arise as to whether digital influencers fall within the normal definition of 'traders' under the CPRs,⁴⁴ all parties involved, including businesses and influencers as users, are responsible under the CMA guidelines for ensuring that the posts concerned contain clear disclosures.⁴⁵ Early in 2019, after a consumer enforcement investigation into misleading online endorsements, the CMA reported that several celebrities with large online followings committed to improving disclosures in their social media posts.⁴⁶ Although the regulator has not made a finding yet on whether the practices of a social media platform have breached consumer protection law, it obtained in October 2020 formal voluntary undertakings from Facebook to improve its conduct in promoting prominent disclosure of incentivised endorsements to Instagram users.⁴⁷

These undertakings show that social media platforms bear some responsibility for ensuring that advertising regulations and consumer protection laws are complied with. This is also reflected in the video-sharing platforms' (VSPs) obligations in relation to transparency in advertising under Part 4B of the Communications Act 2003,⁴⁸ which transposed the 2018 revisions to the Audio-visual Media Services Directive.⁴⁹ The Act captures advertising under the term 'audio-visual commercial content'⁵⁰ which is sufficiently wide to include not only conventional advertising but also various forms of promotion, including IM. Under the Act's requirements, the application of which is at the time of writing consulted upon by the UK's

⁴¹ Ibid, 4.

⁴² The Regulations implement the Unfair Commercial Practices Directive (2005/29/EC) (UCPD) into UK law.

⁴³ CPRs, Regs 5 and 6.

⁴⁴ Christine Riefa and Laura Clausen, 'Towards Fairness in Digital Influencers' Marketing Practices' (2019) 8(2) *Journal of European Consumer and Market Law* 64.

⁴⁵ CMA, *Social Media Endorsements: Being Transparent with Your Followers* (23 January 2019)

<<https://www.gov.uk/government/publications/social-media-endorsements-guide-for-influencers/social-media-endorsements-being-transparent-with-your-followers>> accessed 29 August 2021.

⁴⁶ CMA, *Celebrities pledge to clean up their act on social media* (23 January 2019)

<<https://www.gov.uk/government/news/celebrities-pledge-to-clean-up-their-act-on-social-media>> accessed 15 June 2021.

⁴⁷ CMA, *Instagram to tackle hidden advertising after CMA action* (16 October 2020)

<<https://www.gov.uk/government/news/instagram-to-tackle-hidden-advertising-after-cma-action>> accessed 15 June 2021.

⁴⁸ For the definition of VSP services, see s 368S.

⁴⁹ AVMS Directive (EU) 2018/1808, amending Directive 2010/13/EU. For a more detailed discussion of influencer commercial communications from the perspective of the AVMS, see Madeleine de Cock Buning in 'Life after the European AVMS Directive: social media influencers through the looking-glass' in Coanta and Ranchordás (n 9).

⁵⁰ Communications Act 2003, s 368Z13.

communications regulator (Ofcom),⁵¹ VSP providers must make available a functionality for users who upload content to declare the presence of advertising as far as they know or can be reasonably expected to know; and include in their terms and conditions a requirement that users who upload content make use of that functionality, as applicable. VSP providers must clearly inform users that a video contains advertising where they have knowledge of this, or its presence has been declared by the uploader using the functionality provided.⁵² These regulatory requirements represent, however, a temporary framework. They will be in place until the shape of the future online regulation in the UK becomes clearer.⁵³ The provisions under Part 4B are arguably aimed more towards addressing the systemic constraints limiting consumer awareness of commercial practices and complement the existing self-regulatory advertising regime which is more content-oriented and is overseen by the ASA.

IM and the ASA's practice

The examination of the ASA's rulings concerning IM on social media shows that the main device through which the regulator checks influencers' compliance with its rules on ad recognition is the advertorial (or advertisement feature). But what is an advertorial and how is it regulated outside the context of IM?

Ad recognition: advertisement features generally

The advertorial, which has its origins in press,⁵⁴ promotes a product or service (or certain elements thereof) in the form of an article, the style, tone and narrative of which are designed to resemble informative journalistic content that fits with its surrounding context without making it readily identifiable that it is a paid advertisement. As such, it can be seen as a different type of native-style advertising. The collapse of the dividing border between ordinary reporting and advertising, partly attributed to plummeting news revenues,⁵⁵ has recently raised concerns about advertorials as the chameleons of the media industry and generally the shape of future journalism: 'in its slyest manifestation, an advert masquerading as a story cheats a reader into thinking they are getting objective facts when the message has been covertly skewed.'⁵⁶

The Independent Press Monitor (IMPRESS), which is the first formally approved self-regulator of the press in the UK,⁵⁷ includes media-specific provisions in its Standards Code requiring disclosures of advertiser-bought articles in order to safeguard the integrity of independent editorial content. Clause 10.1, specifically, states that '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'; in other words, authors of news articles must own up to where there is a commercial agenda that might have influenced the perspective of the published content, including its tone and choice of facts. For the purposes of the IMPRESS Code, so long

⁵¹ Ofcom, *Consultation: Proposals for the Regulation of Advertising on Video-Sharing Platforms* (26 May 2021) <<https://www.ofcom.org.uk/consultations-and-statements/category-1/regulation-of-advertising-on-vsp>> accessed 1 August 2021.

⁵² Communications Act 2003, s 368Z, s 368Z1 and Sch 15A, paras 4 and 5.

⁵³ The VSP requirements will be superseded by the Online Safety Bill when it comes into force. At the time of writing, the Bill is set to undergo parliamentary scrutiny; see UK Parliament, Draft Online Safety Bill (Joint Committee) <<https://committees.parliament.uk/committee/534/draft-online-safety-bill-joint-committee>> accessed 4 August 2021.

⁵⁴ For a brief history of the advertorial, see Clyde Brown, Herbert Waltzer and Miriam Waltzer, 'Daring to Be Heard: Advertorials by Organized Interests on the Op-Ed Page of The New York Times, 1985-1998' (2001) 18(1) *Political Communication* 23, 27.

⁵⁵ Dame Frances Cairncross, *The Cairncross Review: A Sustainable Future for Journalism* (12 February 2019) <<https://www.gov.uk/government/publications/the-cairncross-review-a-sustainable-future-for-journalism>> accessed 30 July 2021.

⁵⁶ Martin Hickman (IMPRESS Board Member), 'Native advertising: business beats news' *IMPRESS* (3 March 2016) <<https://impress.press/news/native-advertising-business-beats-news.html>> accessed 19 July 2021.

⁵⁷ IMPRESS successfully fought off a High Court challenge over its status in 2017; *The Queen on the Application of NMA v PRP* [2017] EWHC 2527.

as a payment has been made, or an in-kind arrangement exists (e.g., where a holiday company pays for the Mayan Riviera luxury diving school classes of a journalist who reviews that company), content is deemed commercial and must always be clearly labelled in news media, irrespective of the degree of editorial control exerted by a sponsor (or other third party).⁵⁸ This provision is not subject to any public interest exceptions. The Editors' Code of Practice, which is adopted by the non-Leveson compliant Independent Press Standards Organisation (IPSO),⁵⁹ does not contain equivalent transparency provisions but addresses this matter to some extent under its Clause 13 on financial journalism which requires, among others, specific external disclosures of 'significant financial interests' (or conflicts of interest) from the originating writer of an article when making investment recommendations to readers.⁶⁰ The Code's more general Clause 1 on Accuracy holds relevance too in ensuring that recommendations to buy, sell or hold financial products are presented transparently in the interests of good practice and with reference to reliable sources. Adjudications engaging both regulators' rules on transparency of commercial content are rare.⁶¹

The ASA defines advertorials as 'advertisement features, announcements or promotions, the content of which is controlled by the marketer, not the publisher, that are disseminated in exchange for a payment or other reciprocal arrangement'.⁶² An example is an online shopping agent, who promotes itself as offering impartial advice about different educational providers, but publishes on its website a piece creating the impression that it is an independent article with information about the Graduate Diploma in Law (GDL) when it is actually an ad for a specific GDL provider.⁶³ Due to their close resemblance to editorial content, the CAP Code expressly requires in Rule 2.4 that 'marketers and publishers must make clear that advertorials are marketing communications; for example, by heading them "advertisement feature".' The ASA's definition is media-neutral and applies to ads in traditional media settings (e.g., a long-form article that is not plainly distinguishable from ordinary editorial content) as well as new digital media (e.g., posts by social media influencers, bloggers, vloggers). If an influencer has received a form of payment (more on this below) and the advertiser has any kind of editorial control over the content of their social media post, it is likely to fit this definition.

It is notable that editorial content that a brand has paid to be associated with but over which the publisher, not the marketer, has full editorial control is excluded from the remit of the CAP Code. Such content may, however, be subject to other regulatory or industry standards, e.g., the IMPRESS Standards Code. Moreover, when a sponsor gives a publisher, including an influencer, a payment to generate a post (on social media, blog, vlog etc.), that content also engages consumer protection law, meaning that the material may also be brought within the remit of the CMA, which is more likely to intervene where breaches may harm consumers' collective interests (as seen earlier). The CMA guidance states, in particular, that 'if someone who publishes content accepts payment to endorse something, they need to make sure that

⁵⁸ The IMPRESS Standards Code <<https://www.impress.press/standards/#standards-code>> accessed 22 July 2021.

⁵⁹ IPSO covers some major press publishers but has not achieved recognition within the meaning of the 2013 Royal Charter on the Self-Regulation of the Press.

⁶⁰ *The Handbook to the Editors' Code of Practice* (Editors' Code of Practice Committee 2021) 119.

⁶¹ At the time of writing, no ruling involving Clause 10 on Transparency has been made public by IMPRESS. Since IPSO was set up in 2014, only one ruling directly related to Clause 13 (concerning a journalist's alleged undisclosed financial interests in a community-run solar farm that was reported upon), but the regulator found no breach of its Code. Four more complaints indirectly relied on Clause 13 (among other issues) but IPSO did not uphold them or found that the terms of its provisions were not engaged.

⁶² The Scope of the CAP Code, Part III, subsection K

<https://www.asa.org.uk/type/non_broadcast/code_folder/scope-of-the-code.html> accessed 12 June 2021.

⁶³ ASA Ruling on The University of Law Ltd and Marketing VF Ltd (16 November 2016)

<<https://www.asa.org.uk/rulings/the-university-of-law-ltd-and-marketing-vf-ltd-a16-346902.html>> accessed 10 June 2021; see also ASA Ruling on DSG Retail Ltd IAW Reach Plc (17 April 2019)

<<https://www.asa.org.uk/rulings/dsg-retail-ltd-in-association-w-reach-plc.html>> accessed 10 June 2021.

the content is clearly identifiable as being paid-for.⁶⁴ Whilst there is a significant overlap between the ASA and CMA rules on transparency,⁶⁵ one key difference between them is that the latter do not distinguish between types of endorsements and it is immaterial for the CMA who is 'in control' of the published content. If, however, commercial content is marketer-controlled (or as will be seen later, jointly controlled by a publisher and a marketer), then the ASA can take action too, not just in terms of labelling, but also in relation to the content and placement of an ad.

Commercial content tends to be more clearly flagged within traditional media (and their equivalent websites) compared to online platforms where ads are blended with UGC. This is usually achieved through conventional ad spaces, like dedicated box ads and classified ads, or image-based custom web banners. The ASA's recent practice shows that the ineffectiveness of disclosures in relation to print media and other online publications (e.g., a marketer's own website) is usually attributed to presentational factors, like visual elements and contextual signposts, which can create ambiguity as to the precise nature of the content. These include:

- use of headlines, subheadings and body text adopting the appearance of a typical news article⁶⁶ or the style of a local news bulletin;⁶⁷
- a smaller size of body font of an ad compared to the surrounding text;⁶⁸
- the placement of vague labels in light grey text on a white background likely to be overlooked by webpage visitors,⁶⁹ and
- design choices such as the absence of a line indicating a switch in the nature of the content (e.g., a space-break),⁷⁰ signposts positioned at the very bottom of a webpage likely to be missed by consumers⁷¹ or even the placement of misleading banners, like 'BREAKING NEWS', at the top of a webpage leading readers to believe that the content was a news story⁷² (or other informative message)⁷³ rather than marketing.

The ASA can be more tolerant (and thus might not require additional indicators) where the promotional material does not match the regular publishing style and there is nothing to imply

⁶⁴ CMA, Online endorsements: being open and honest with your audience (4 March 2016)

<<https://www.gov.uk/government/publications/online-reviews-and-endorsements-advice-for-businesses/online-endorsements-being-open-and-honest-with-your-audience>> accessed 15 June 2021.

⁶⁵ CMA, Social Media Endorsements (n 45).

⁶⁶ ASA Ruling on Unvilla Ltd t/a Consol (6 November 2019) <<https://www.asa.org.uk/rulings/unvilla-ltd-A19-562360.html>> accessed 10 June 2021.

⁶⁷ ASA Ruling on Gladman Developments Ltd (28 November 2018) <<https://www.asa.org.uk/rulings/gladman-developments-ltd-a18-455224.html>> accessed 10 June 2021.

⁶⁸ ASA Ruling on Sophora Media Ltd t/a Swoggi (22 February 2017) <<https://www.asa.org.uk/rulings/sophora-media-ltd-a16-348838.html>> accessed 10 June 2021; ASA Ruling on The University of Law Ltd and Marketing VF Ltd (n 63). A similar approach is taken in the context of direct mailing; see e.g., ASA Ruling on Bluecrest Health Screening Ltd (4 February 2019) <<https://www.asa.org.uk/rulings/bluecrest-health-screening-ltd-a18-1.html>> accessed 10 June 2021.

⁶⁹ ASA Ruling on ASDA Stores Ltd and MGN Ltd (20 December 2017) <<https://www.asa.org.uk/rulings/asda-stores-ltd-a17-397891.html>> accessed 10 June 2021.

⁷⁰ Ibid.

⁷¹ ASA Ruling on Bonne Terre Ltd t/a Sky Bingo (2 August 2017) <<https://www.asa.org.uk/rulings/bonne-terre-ltd-a17-383721.html>> accessed 10 June 2021; see also ASA Ruling on Marcândi Ltd t/a Madbid (22 February 2017) <<https://www.asa.org.uk/rulings/marcandi-ltd-a16-348837.html>> accessed 10 June 2021.

⁷² ASA Ruling on Shadowhawk Tactical LLC (21 December 2016) <<https://www.asa.org.uk/rulings/Shadowhawk-Tactical-LLC-A16-357512.html>> accessed 10 June 2021; ASA Ruling on Bonne Terre Ltd t/a Sky Bingo (n 71). Cf. ASA Ruling on Lynden Ltd t/a Find Your PPI (12 June 2019) <<https://www.asa.org.uk/rulings/lynden-ltd-a19-565770.html>> accessed 10 June 2021.

⁷³ In other similar cases, consumers were led to believe that they were in receipt of a formal compliance warning or other informative message; see ASA Ruling on BT Solar Ltd (19 June 2019) <<https://www.asa.org.uk/rulings/bt-solar-ltd-a19-549757.html>> accessed 10 June 2021; ASA Ruling on Smart Pension Ltd (13 September 2017) <<https://www.asa.org.uk/rulings/smart-pension-ltd-a17-384624.html>> accessed 10 June 2017. Such cases could also trigger Rule 4.2 of the CAP Code which requires that marketing communications must not cause fear or distress without justifiable reason. For a relevant example, see ASA Ruling on Bluecrest Health Screening Ltd (n 68), involving direct mailing about a 'health screening invitation' (not an appointment), the tone of which was found to play on people's fears.

that anybody other than the advertiser had paid for and written it. This can be the case where ads are significantly different in their general ‘look and feel’ from the publisher’s standard editorial content and is conceivably impossible to overlook the promotional text label. So, the overall presentation of a webpage can make the line between an advertisement feature and the publisher’s own editorial content sufficiently clear.⁷⁴ However, aside from the surrounding context, the use of clear labelling is equally important. Terms like ‘Sponsored content’,⁷⁵ ‘in association with [brand name]’⁷⁶ or ‘[Marketer] Partnership’,⁷⁷ when they appear as a feature of an article may serve to at least imply a financial connection with a marketer, but it is unlikely they will be considered acceptable because they are deemed unintelligible, and they fail to clearly convey the commercial nature of the content to consumers. Other labels that have been ruled insufficient by the ASA include ‘Brand Publisher’⁷⁸ and ‘Promotion’.⁷⁹ The next section examines the ASA’s approach to appropriate disclosures in influencer ads, as advertising is increasingly moving from traditional channels, like newspapers and magazines, to social media.

Ad recognition: IM on social media

From the ASA’s definition, it becomes evident that two core elements must be present before influencer content qualifies as advertorial for the purposes of the CAP Code. These can be summarised as payment (or other reciprocal arrangement) and control. The analysis of the regulator’s rulings demonstrates that, in assessing compliance with its rules, the ASA’s decision-making is typically structured around a three-step process: the first step considers whether a form of payment was made to the influencer; the second examines the degree of control the marketer has over the influencer content and the third explores whether the advertorial content is clearly delineated from editorial content as a marketing communication. The findings expand Stern’s source-message-recipient schema by adding new IM variables in the multi-faceted message production process and highlight the salience of transparency in mediating Stern’s autobiographical genuineness, the lack of which may dilute an influencer’s power. Each of these steps are examined in turn:

a) Payment

The presence of a payment or other reciprocal arrangement is a prerequisite before an influencer’s advertorial is brought within scope. The regulator must be satisfied that the content was produced as part of a financial agreement between the marketer and the influencer,⁸⁰ or that the content was created and disseminated in exchange for any form of monetary payment (e.g., a footwear design royalty associated with a collaboration).⁸¹ Money does not need to have exchanged hands in order for this requirement to be fulfilled. Any reward or mutually beneficial agreement (e.g., ‘freebies’, i.e., a product or service given for

⁷⁴ ASA Ruling on Department for Work and Pensions IAW Associated Newspapers (6 November 2019) <<https://www.asa.org.uk/rulings/department-for-work-and-pensions-G19-1021769.html>> accessed 10 June 2021; ASA Ruling on Unvilla Ltd t/a Consol (n 66).

⁷⁵ ASA Ruling on Marcândi Ltd t/a Madbid (n 71).

⁷⁶ ASA Ruling on Michelin Tyre plc and Telegraph Media Group Ltd (30 December 2015) <<https://www.asa.org.uk/rulings/michelin-tyre-plc-telegraph-media-group-ltd-a15-311916.html>> accessed 10 June 2021; ASA Ruling on DSG Retail Ltd IAW Reach Plc (n 63).

⁷⁷ ASA Ruling on ASDA Stores Ltd and MGN Ltd (n 69).

⁷⁸ ASA Ruling on Henkel Ltd t/a Dylon (13 January 2021) <<https://www.asa.org.uk/rulings/Henkel-Ltd-A15-315653.html>> accessed 10 June 2021.

⁷⁹ ASA Ruling on No. 1 Watson Street (24 May 2021) <<https://www.asa.org.uk/rulings/no-1-watson-street-a16-367673.html>> accessed 10 June 2021.

⁸⁰ See e.g., ASA Ruling on Wahoo Fitness Ltd (7 March 2018) <<https://www.asa.org.uk/rulings/wahoo-fitness-uk-ltd-a17-1.html>> accessed 10 June 2021; ASA Ruling on Daniel Wellington AB IAW Louise Thompson (25 July 2018) <<https://www.asa.org.uk/rulings/daniel-wellington-ab-a18-449659.html>> accessed 10 June 2021.

⁸¹ ASA Ruling on Zoe de Pass t/a Dress Like A Mum (20 November 2019) <<https://www.asa.org.uk/rulings/zoe-de-pass.html>> accessed 10 June 2021.

free,⁸² or a loan of a product, a donation in an influencer's name or other 'perks') can amount to a reciprocal arrangement which could affect an influencer's opinion of the product.

Moreover, the mere existence of a commercial partnership or relationship between a brand and an influencer who was contracted to act in a promotional capacity for the brand at the time the ad appeared is deemed a form of indirect payment.⁸³ This can also be the case where an influencer posts as a 'brand advocate', 'brand citizen' or 'brand ambassador'⁸⁴ for a specific amount of time in order to pull people towards a brand and cultivate loyalty by posting content regularly and participating in photoshoots and press days.⁸⁵ A commercial relationship also exists (and thus indirect payment) where an influencer has a commercial interest in the brand about which they post (e.g., because they are owners of, or investors in, the company).⁸⁶ The same applies where an influencer had not been directly paid for an ad but their post was an extension of, or otherwise linked to, their promotional activity in the context of their 'ambassador' agreement (e.g., their post featured the same hashtags or promotional codes as other posts that were previously stipulated in that agreement).⁸⁷ Payment at the time the complained of post appeared is not always determinative in concluding that it was an ad feature. Even where it is claimed that a commercial relationship had ceased to exist when the ad was placed, the ASA is prepared to take a wide and more practical perspective when ascertaining the presence of such a relationship. In the absence of any express terms on how an influencer's social media posts are limited, the regulator is likely to draw inferences from other peripheral evidence, including whether the influencer featured on a brand's website or even media reports covering an influencer's social media activity as a brand ambassador during the time the relationship was alleged to have ceased or been paused.⁸⁸ Thus, where the nature and limits of an influencer's obligations are not clearly defined in a contracted engagement, brands will find it difficult to mitigate the impact of a breach by merely arguing that the post complained of was not advertising because they had not specifically paid for it.

⁸² ASA Ruling on Conviits Ltd IAW Stephanie Davis (3 January 2018) <<https://www.asa.org.uk/rulings/conviits-ltd-a17-396044.html>> accessed 10 June 2021.

⁸³ ASA Ruling on Prettylittlething.com Ltd (7 April 2021) <<https://www.asa.org.uk/rulings/prettylittlething-com-ltd-a20-1082593-prettylittlething-com-ltd.html>> accessed 10 June 2021; ASA Ruling on Genus UK Ltd t/a Select Fashion (31 March 2021) <<https://www.asa.org.uk/rulings/genus-uk-ltd-g21-1092765-genus--uk--ltd.html>> accessed 10 June 2021; ASA Ruling on Boohoo.com UK Ltd IAW Luke Mabbott (10 February 2021) <<https://www.asa.org.uk/rulings/boohoo-com-uk-ltd-in-association-with-luke-mabbott.html>> accessed 10 June 2021; ASA Ruling on The White Star Key Group t/a Skinny Caffe IAW Jemma Lucy (31 July 2019) <<https://www.asa.org.uk/rulings/the-white-star-key-group-ltd-G19-1019812.html>> accessed 10 June 2021.

⁸⁴ In ASA Ruling on Emma Louise Connolly (18 August 2021) <<https://www.asa.org.uk/rulings/emma-louise-connolly-g21-1114838-emma-louise-connolly.html>> accessed 18 August 2021, the regulator expressly acknowledged that posts made under such relationships fell within the remit of the CAP Code. See also ASA Ruling on SkinnyJab Ltd t/a Skinny Jab (7 October 2020) <<https://www.asa.org.uk/rulings/skinnyjab-ltd-a20-1064725-skinnyjab-ltd.html>> accessed 10 June 2021; ASA Ruling on Prettylittlething.com Ltd (8 January 2020) <<https://www.asa.org.uk/rulings/prettylittlething-dot-com-ltd-A19-1035979.html>> accessed 10 June 2021; ASA Ruling on Cocoa Brown IAW Olivia Buckland (7 August 2019) <<https://www.asa.org.uk/rulings/cocoa-brown-A19-561238.html>> accessed 10 June 2021; ASA Ruling on Platinum Gaming Ltd t/a Unibet IAW Nicky Henderson t/a Unibet (7 November 2018) <<https://www.asa.org.uk/rulings/platinum-gaming-ltd-a17-406450.html>> accessed 10 June 2021; ASA Ruling on Warpaint Cosmetics (2014) Ltd t/a W7 IAW Olivia Buckland t/a W7 (3 October 2018) <<https://www.asa.org.uk/rulings/warpaint-cosmetics--2014--ltd-a18-451516.html>> accessed 10 June 2021; ASA Ruling on Daniel Wellington AB IAW Louise Thompson (n 80).

⁸⁵ ASA Ruling on Warpaint Cosmetics (2014) Ltd t/a W7 IAW Olivia Buckland t/a W7 (n 84).

⁸⁶ ASA Ruling on Emma Louise Connolly (n 84); ASA Ruling on JST Nutrition Ltd (19 May 2021) <<https://www.asa.org.uk/rulings/jst-nutrition-ltd-a21-1092793-jst-nutrition-ltd.html>> accessed 10 June 2021.

⁸⁷ ASA Ruling on Emma Louise Connolly (n 84); ASA Ruling on Brooks Brothers Ltd (18 September 2019) <<https://www.asa.org.uk/rulings/brooks-brothers-uk-ltd-A19-565992.html>> accessed 10 June 2021; ASA Ruling on Jemella Ltd t/a GHD (4 November 2020) <<https://www.asa.org.uk/rulings/jemella-ltd-a20-1068055-jemella-ltd.html>> accessed 10 June 2021; ASA Ruling on Diamond Whites IAW Marnie Simpson (25 October 2017) <<https://www.asa.org.uk/rulings/diamond-whites-a17-394908.html>> accessed 10 June 2021.

⁸⁸ ASA Ruling on SkinnyJab Ltd t/a Skinny Jab (n 84).

b) Control

The editorial control exerted by the marketer is the second factor considered. Take the example of an eyewear company which offers an influencer an all-inclusive trip to Zanzibar to create promotional content for their coming summer campaign, whereby it is agreed that the influencer would publish (at regular intervals throughout a specified period) ten posts which would need to be submitted for approval prior to posting and in return, the influencer would have access to a photographer during the trip and receive additional monetary compensation from the company, in addition to three pairs of glasses for free. Even if payment is not in cash, this agreement would count as a 'reciprocal arrangement' and the approved (prior to publication) marketing materials comprising copies of the photographs (or slideshow reels of photos and videos such as Stories or Fleets) would fall within the CAP Code.

The precise degree of editorial control required is uncertain, but several patterns can be discerned from the ASA's practice as benchmarks likely to be considered evidence that control over the content of the promotion was in place: First, the marketer dictates or provides at *pre-production stage* key messaging to the influencer in the form of product images;⁸⁹ content concepts or a brief detailing the content of any resulting posts;⁹⁰ restrictions about what other brands cannot be posted about;⁹¹ required talking points⁹² (including details of key product features⁹³ or directions not to refer to competitors, e.g., by means of comparisons or a ban on tagging other brands);⁹⁴ post instructions⁹⁵ (including requirements to: publish a minimum number of posts⁹⁶ across an influencer's social media networks with certain frequency,⁹⁷ feature an influencer 'unboxing' the product,⁹⁸ use particular hashtags,⁹⁹ slogans, video and captioning guidelines); and links to the products on the marketer's website with a personalised discount code.¹⁰⁰ Second, editorial control is maintained in the form of the right to veto the content if the marketer is unsatisfied with its quality *at post-production but pre-publication stage*.¹⁰¹ Whilst a contractual provision for a brand to manage an influencer's social media account (or run it on behalf of them), with the influencer supporting and approving as necessary, is likely to constitute editorial control,¹⁰² a mere review by the marketer of the description of the technical details of the product prior to posting is not.¹⁰³ Third, even if the marketer does not have final editorial or other approval, in practice they will be deemed to have control of the content if they simply reserve a right (even if they do not exercise it) to

⁸⁹ This is supported by ASA Ruling on ASDA Stores Ltd and MGN Ltd (n 69), which although not relevant to IM, it did engage Rule 2.4 partly for this reason.

⁹⁰ ASA Ruling on Misssguided Ltd (14 April 2021) <<https://www.asa.org.uk/rulings/misssguided-ltd-g21-1099580-misssguided-ltd.html>> accessed 10 June 2021; ASA Ruling on Platinum Gaming Ltd t/a Unibet IAW Nicky Henderson t/a Unibet (n 84); ASA Ruling on Wahoo Fitness Ltd (n 80).

⁹¹ ASA Ruling on Daniel Wellington AB IAW Louise Thompson (n 80).

⁹² ASA Ruling on The White Star Key Group t/a Skinny Caffe IAW Jemma Lucy (n 83).

⁹³ ASA Ruling on ASA Ruling on Ashteck Media Ltd t/a Ashteck Media (2 June 2021) <<https://www.asa.org.uk/rulings/ashteck-media-ltd-g21-1099879-ashteck-media-ltd.html>> accessed 10 June 2021; ASA Ruling on Wahoo Fitness Ltd (n 80).

⁹⁴ ASA Ruling on Brooks Brothers Ltd (n 87).

⁹⁵ ASA Ruling on PrettyLittleThing.com Ltd (7 April 2021, n 83).

⁹⁶ ASA Ruling on Gemella Ltd t/a GHD (n 87); ASA Ruling on Genus UK Ltd t/a Select Fashion (n 83).

⁹⁷ ASA Ruling on Brooks Brothers Ltd (n 87); ASA Ruling on Platinum Gaming Ltd t/a Unibet IAW Nicky Henderson t/a Unibet (n 84).

⁹⁸ ASA Ruling on Wahoo Fitness Ltd (n 80).

⁹⁹ ASA Ruling on Brooks Brothers Ltd (n 87).

¹⁰⁰ ASA Ruling on Daniel Wellington AB IAW Louise Thompson (n 80).

¹⁰¹ ASA Ruling on Genus UK Ltd t/a Select Fashion (n 83); ASA Ruling on Wahoo Fitness Ltd (n 80); ASA Ruling on Convits Ltd IAW Stephanie Davis (n 82).

¹⁰² ASA Ruling on Platinum Gaming Ltd t/a Unibet IAW Nicky Henderson t/a Unibet (n 84).

¹⁰³ ASA Ruling on Wahoo Fitness Ltd (n 80).

request for a copy of the marketing material to be amended or entirely withdrawn *after it was posted*.¹⁰⁴

Moreover, it would seem that a general requirement for an influencer to promote the brand on social media in a positive light throughout the duration of a commercial relationship would amount to editorial control.¹⁰⁵ This would in effect restrict aspects of an influencer's creative input, giving a marketer sufficient control over the content of their posts to be considered advertorials. The position is somewhat less clear when the published content deviates marginally from that provided to the influencer by the marketer in specific terms or from abstract guidance stipulated in the agreement. A marketer who does not object for an extended period of time after becoming aware that an influencer has departed from the given guidelines may be deemed to have implicitly acquiesced to the published content, thereby indirectly maintaining editorial control. Editorial control could also be inferred where a brand retains intellectual property rights over the content at hand. Thus, to the extent that there is a formal or informal agreement in place that effectively restricts aspects of the influencer's input into their social media content, the brand would be deemed to ultimately have sufficient control over the content in question to be considered an advertorial post. This approach is sufficiently broad to capture any direct or indirect brand involvement at a pre- and post-publication stage.

Even where there is no pre-existing express or implied agreement between an influencer and a brand, or none is provided for the ASA's consideration, the regulator appears keen to interpret editorial control expansively, similar to the element of payment. In its ruling on PrettyLittleThing.com, the tagging of the brand's Instagram account in a post featuring the influencer wearing one of its products (in addition to the existence of a brand ambassador agreement with the company) was deemed sufficient to meet the requirement of control over the post for it to fall within the advertorial definition, even though the post did not arise from the influencer's contractual obligations but was alleged by the brand to be genuinely independent ('organic') content.¹⁰⁶

The ASA also seems to embrace a more pragmatic stance when determining the element of control by examining whether the overall actions of the parties involved establish that the posts were marketing communications for the purposes of the Code. For example, in its ruling on Engage Clothing, the regulator acknowledged that sending gifts to an influencer, without prior communication, but in the hope that he might choose to post about them, would not have gone so far as to amount to editorial control (and thus an advertorial). However, the ASA considered in this case the prior communication between the parties, in which it was implicit that T-shirts were sent by the brand to the influencer on the premise that he would publish something positive about it on the day they were to be released for sale. As such, the expectation to post went beyond a mere hope and crossed the threshold of an implicit agreement with the influencer to endorse their products. This was sufficient to constitute exercising a degree of editorial control over the posts by the brand.¹⁰⁷ A similar approach was taken in the ruling on Diamond Whites, where an influencer's Snapchat post was deemed to form part of a cosmetic brand's wider promotional activity, and thus fell within the Code's

¹⁰⁴ ASA Ruling on Boohoo.com UK Ltd IAW Luke Mabbott (n 83); ASA Ruling on Convits Ltd IAW Stephanie Davis (n 82).

¹⁰⁵ ASA Ruling on Warpaint Cosmetics (2014) Ltd t/a W7 IAW Olivia Buckland t/a W7 (n 84).

¹⁰⁶ ASA Ruling on Prettylittlething.com Ltd (8 January 2020, n 84); see also ASA Ruling on Vanity Planet IAW Louise Thompson (12 September 2018) <<https://www.asa.org.uk/rulings/vanity-planet-a18-450748.html>> accessed 10 June 2021.

¹⁰⁷ ASA Ruling on Engage Clothing Ltd (21 July 2021) <<https://www.asa.org.uk/rulings/engage-clothing-ltd-a21-1101925-engage-clothing-ltd.html>> accessed 21 July 2021; a similar approach was taken in ASA Ruling on Diamond Whites IAW Marnie Simpson (n 87).

remit, even though no evidence was offered to clarify the commercial relationship between the brand and the influencer.¹⁰⁸

The position is less clear in respect of content initiated by an influencer who tags a brand's handle in their content without having received any form of compensation. Where such a message is unprompted by a brand and is not retweeted, 'liked' or otherwise incorporated and adopted into that brand's own social media, it is unlikely to fall within the remit of the CAP Code.¹⁰⁹ Also, in the absence of payment or other reciprocal arrangement, such a user is unlikely to be deemed an influencer by the ASA, as seen earlier.¹¹⁰ Including a brand's Twitter handle or Instagram username in a message has been held to be sufficient to identify the content as commercial (without any additional disclosures) only in the limited circumstances where it was posted by an A-list persona (namely, footballer Wayne Rooney) and it was reasonably expected by his followers to understand from the overall effect of the post he had partnered with a world-renowned sports brand.¹¹¹

Although a seemingly spontaneous post including a handle such as '@[brand name]' or a tag would not necessarily be considered to contain any obvious indications of a commercial relationship or directly call to action (and would not actively cause the post to appear on the advertiser's own profile), this mention can nevertheless be seen as going beyond merely generating organic content and straying into the area of a promotional activity: influencers may engage in tagging (or other similar conduct like the strategic use of topical hashtags), a practice sometimes referred to as 'hustling',¹¹² either because they wish to position themselves in relation to brands and benefit from their prestige or they need to create an attractive image that speaks to brand affinity and can be financially exploited. The same applies to less prominent influencers who are still consumers themselves and have limited ways of attracting any financial benefits but strive to gain as much exposure and build as many networking bridges as they can. Such conduct, however, is not without consequences. It arguably creates a false or misleading impression to followers that an influencer is associated with or endorses a brand, it informs potential customers of the availability of certain products or services and indirectly increases brand awareness. Considering the drivers of followers' attachment to influencers, discussed earlier, and the intense relational bonding established with the recipients of their messages,¹¹³ such practices can create incentives for followers to engage with a brand and positively affect their purchasing attitudes. It can be seen therefore that the requirement for payment represents a relatively narrow conception of influencer practices and can prove problematic because it may exclude from the ASA's (and the CMA's) remit nano-influencers or some micro-influencers who operate in a smaller scale yet are highly effective endorsers.¹¹⁴ Their undisclosed content can escape scrutiny and as a result occupies a regulatory blind spot that is untenable as a matter of policy.

The uncertainty in this respect is arguably compounded by the lack of a precise meaning and fixed interpretation of the term 'advertising' or 'marketing communication' in the CAP Code.¹¹⁵

¹⁰⁸ ASA Ruling on Diamond Whites IAW Marnie Simpson (n 87).

¹⁰⁹ ASA Ruling on STYLIDEAS Ltd (6 May 2020) <<https://www.asa.org.uk/rulings/stylideas-ltd-a19-1046547-stylideas-ltd.html>> accessed 10 June 2021.

¹¹⁰ ASA CAP, Recognising Ads (n 22).

¹¹¹ ASA Ruling on Nike (UK) Ltd (4 September 2013) <<https://www.asa.org.uk/rulings/Nike-UK-Ltd-A13-229986.html>> accessed 12 June 2021.

¹¹² Carter (n 4).

¹¹³ Ki and Others (n 34).

¹¹⁴ Hudders, Jans and Veirman (n 3) 334.

¹¹⁵ ASA, Remit: General (4 September 2019) <<https://www.asa.org.uk/advice-online/remit-general.html>> accessed 2 August 2021. There seems to be no shared understanding of the meaning of term 'advertising'. Rather, there are multiple definitions with differing scope depending on the regime where they are found, e.g., s 2(1) of the Business Protection from Misleading Marketing Regulations 2008 (in relation to advertising that misleads traders), Art. 1(a)(i) of the Directive 2010/13/EU of the European Parliament and of the Council (Audiovisual Media Services Directive) with its definition of television advertising etc.

Nevertheless, bringing activity such as hustling within the ASA's remit might not be utterly alien to the regulator's practice. Some support for this position may be found in the regulator's ruling on Unleashed PR Ltd, which concerned an ambiguous influencer post that contained the name of the product (which is not too dissimilar from tagging a brand) and the terms 'coming soon', with no additional disclosures and without providing any links to the brand's website (presumably because the product at issue was not available to purchase at the time the post was published). Although the post originally aimed to spark intrigue and engender discussion, it was nevertheless held to implicitly amount to a promotional activity that fell within the ASA's remit and thus needed to have been readily recognisable as such.¹¹⁶ It may also be fitting to invoke the spirit of the Code in similar cases.¹¹⁷

c) Adequate labelling

After having examined the elements of payment and control, the ASA considers whether labelling requirements have been adhered to. The way in which marketing communications are disclosed has a significant bearing on their compliance with the CAP Code. The analysis of the ASA rulings shows that not only the absence of disclosures but also the properties and placing of the disclosure labels largely affect followers' awareness of influencers' branded posts. This raises three important issues: when disclosures should occur; what needs to be disclosed; and what amounts to appropriate signposting.

In compliance with the CAP Code, disclosure requirements apply when influencers post about their own products or services run by themselves. Relationships with brands, including any past relationships within a reasonable period, must be disclosed too, though it is uncertain what types of relationships precisely. The ASA's rulings currently focus predominantly on the transparency of commercial relationships between brands and influencers and place less emphasis on the broader spectrum of potential underlying connections with a brand. Its practice would benefit from clarifying that influencers' incentivised content must disclose the presence of any *material* – not just a commercial – relationship with a message sponsor. Material should be taken to mean not only a financial but also a personal, family and/or employment relationship. This would introduce more clarity to the application of its rules and give followers and consumers more awareness to better weigh the value of influencers' endorsements. Also, the overall context in which a post appears is important. When an influencer's account is visible to the general public, their posts can be viewed in isolation from their profile and posts they publish may appear in search results. Whilst an influencer's captive audience may already be familiar with an existing commercial relationship with a brand based on previous posts, such a relationship might not become obvious to users who are not their followers but nevertheless accessed an undisclosed incentivised post following a search.¹¹⁸

Influencers are expected to make it sufficiently clear where editorial material ends and where advertorial material begins. There are no prescriptive checklists as such but useful yardsticks, nonetheless, especially because social media continue to evolve. The nature of an advertorial post needs to be disclosed in a prominent, easy to understand and noticeable manner by labelling it with a suitable identifier prior to the point of engagement and at the time it is encountered (i.e., at the start of a static post or before clicking through to or playing the content and not half-way through or after selecting it). Endorsements in still images should ideally be superimposed so that followers can notice and read. In videos or live streams, it is reasonable to also expect influencers to verbally highlight and repeat periodically endorsements, as the inclusion of on-screen text can be missed. The best format to effectively decrease the likelihood that consumers will misunderstand the commercial nature of a post

¹¹⁶ ASA Ruling on Unleashed PR Ltd t/a I Spy Eyes IAW Marnie Simpson t/a I Spy Eyes (25 October 2017) <<https://www.asa.org.uk/rulings/unleashed-pr-ltd-a17-395923.html>> accessed 10 June 2021.

¹¹⁷ CAP Code, Rule 1.2.

¹¹⁸ ASA Ruling on Missguided Ltd (n 90); ASA Ruling on Unleashed PR Ltd t/a I Spy Eyes IAW Marnie Simpson t/a I Spy Eyes (n 116).

is 'Ad', 'Advert', 'Advertisement Feature' (with or without a '#'), combined with a platform's own disclosure mechanisms (e.g., Instagram's 'Paid Partnership' tool).

Use of different labels cannot be entirely ruled out: depending on the wider context, consumers may reasonably understand terms such as 'Brought to You by [X]', 'Sponsored by [Y]' or 'Promoted by [Z]' to mean that an advertiser funded or 'underwrote' the content. Such labelling can be risky though because it is open to varied interpretations and does not explicitly call the content what it is. Moreover, tagging a brand (in text, still or moving images), the inclusion of discount codes (without additional labelling) and disclosures couched in nebulous language (e.g., a post ending with the words 'Thanks for letting me share about a company I love!') do not go far enough to signal an influencer's branded content.¹¹⁹ Also, unfamiliar abbreviations like 'sp' or 'spon', industry jargon and stand-alone terms like 'swipe-up' (which calls to action for purchase),¹²⁰ 'ambassador' and 'brand citizen' (including their equivalents hashtags),¹²¹ or burying these into a sea of hashtags, are not likely adequate to convey that content is advertising without any additional upfront disclosure.

In addition, advertisers and influencers ought to be conscious of the different viewing settings (and other technical quirks) across various devices and platforms. Description boxes accompanying videos are not immediately visible when viewing content on a tablet, mobile browser or app, nor are they always available when selecting a video from playlists. A statement like 'Thanks to Wahoo Fitness for the products used in this video' placed in the description box that was not immediately visible beneath a YouTube video has been held insufficient to make clear that the videos were ads.¹²² Thus, including a suitable label in the title of the video or in the thumbnail is likely to ensure that viewers know that the content is an advertorial. Furthermore, referring users to the 'bio' field, i.e., the description area on a user's Instagram profile which can include a statement that an influencer is a brand ambassador, has been ruled to be insufficiently prominent.¹²³ Individuals who do not follow an influencer may be able to view an infringing post in isolation through search results without having seen a disclosure statement in that influencer's profile. Also, when ad content appears across consecutive Instagram Stories, each Story must be individually identified as an ad. That is, the identifier needs to be displayed prominently on the first post in the series and on all subsequent posts.¹²⁴ The obligation to appropriately label static posts extends to corresponding posts on other functions of the same platform.¹²⁵ It follows that where longer- or shorter-form videos, like Instagram Reels or IGTV, are shared to draw attention to a static 'new post' that contains an ad, inconsistent disclosures or discrepancies across different features are likely to breach the CAP Code.

Finally, similar to native advertising in print media and their digital outputs, concerns arise in respect of illegible ad labels blended into the content's background, especially when they

¹¹⁹ ASA Ruling on Coco Shine IAW Aliyah Maria Bee (27 June 2018) <<https://www.asa.org.uk/rulings/coco-shine-a18-444165.html>> accessed 10 June 2021; ASA Ruling on Person(s) Unknown (4 August 2021)

<<https://www.asa.org.uk/rulings/person-s--unknown-a21-1101809-person-s--unknown.html>> accessed 4 August 2021; ASA Ruling on Genus UK Ltd t/a Select Fashion (n 83); ASA Ruling on SkinnyJab Ltd t/a Skinny Jab (n 84); ASA Ruling on Prettylittlething.com Ltd (8 January 2020, n 84); ASA Ruling on The White Star Key Group t/a Skinny Caffè IAW Jemma Lucy (n 83); ASA Ruling on Warpaint Cosmetics (2014) Ltd t/a W7 IAW Olivia Buckland t/a W7 (n 84); ASA Ruling on Vanity Planet IAW Louise Thompson (n 106); ASA Ruling on Daniel Wellington AB IAW Louise Thompson (n 80); ASA Ruling on Convits Ltd IAW Stephanie Davis (n 82).

¹²⁰ When users 'swipe up', they are directed to the marketer's website without leaving the Instagram app; ASA Ruling on Diamond Whites IAW Marnie Simpson (n 87).

¹²¹ ASA Ruling on Cocoa Brown IAW Olivia Buckland (n 84).

¹²² ASA Ruling on Wahoo Fitness Ltd (n 80).

¹²³ ASA Ruling on Prettylittlething.com Ltd (8 January 2020, n 84); ASA Ruling on Cocoa Brown IAW Olivia Buckland (n 84); ASA Ruling on Warpaint Cosmetics (2014) Ltd t/a W7 IAW Olivia Buckland t/a W7 (n 84); ASA Ruling on Platinum Gaming Ltd t/a Unibet IAW Nicky Henderson t/a Unibet (n 84).

¹²⁴ ASA Ruling on BPerfect Ltd (21 July 2021) <<https://www.asa.org.uk/rulings/bperfect-ltd-g21-1110608-bperfect-ltd.html>> accessed 21 July 2021.

¹²⁵ ASA Ruling on Vanity Planet IAW Louise Thompson (n 106).

appear in fleeting content formed by stringing together visual glimpses of influencers' daily lives (e.g., Instagram Stories or Snaps). The style, placement, and poor visibility of labelling (e.g., labels hidden in crowded posts, low contrast level between text and background,¹²⁶ the '#ad' label in small white fonts on a light grey background¹²⁷) can affect people's ability to identify an ad.¹²⁸

Affiliate marketing

A separate strand that emerged from the examination of the ASA's rulings related to cases where the influencer posted links to (or personalised 'promo-codes' for) the marketer's website and was compensated by a business when a consumer made a purchase. This advertising model is known as 'affiliate marketing' (AfM), i.e., a low-cost pay-for-performance marketing which outsources the act of selling across a vast online network by relying on third-party publishers like influencers to generate traffic to a company's website. A variable pre-agreed percentage usually per sale procured (less frequently per click) serves to incentivise the persona to find new tactics to promote a brand on their own social media profiles, potentially leaving the brand and advertiser (the traditional author of the marketing message) with less input or no creative control over the finished post. Where AfM does not squarely fit the advertorial definition, the ASA's practice shows that the CAP Code still applies to this promotional model where influencers' posts are directly connected with the supply of goods,¹²⁹ i.e., they include links appearing alongside exhortations encouraging consumers to buy products provided by brands which are deemed direct beneficiaries of the marketing material through the affiliate scheme.¹³⁰ In other words, so far as AfM is concerned, the ASA sees influencers in this arena as secondary advertisers who equally need to ensure compliance with its rules.

Whilst the commercial intent of affiliate links might be more readily discernible in more traditional media formats (e.g., 'cashback' or voucher websites as referral sources for availing an offer), the commercial relationship of a persona to the linked products may be less obviously identifiable where, for example, an affiliate's ad differs only in immaterial respects from the usual style of the predominantly non-commercial content in their respective media channels (e.g., wellness or beauty tutorials). Even though there may be some differences between advertorial content and AfM in terms of the underlying relationships, the transparency requirement applies to the latter too. Followers' level of familiarity with the meaning of the label 'affiliate' tends to be low;¹³¹ hence a standalone label 'affiliate' (and abbreviations like 'aff' or '#aff') has been held to be insufficient to differentiate an ad from

¹²⁶ ASA Ruling on ASA Ruling on Sportswift Ltd t/a Card Factory (6 May 2020)

<<https://www.asa.org.uk/rulings/sportswift-ltd-q20-1058968-sportswift-ltd.html>> accessed 10 June 2021

¹²⁷ ASA Ruling on Emma Louise Connolly (n 84).

¹²⁸ In one of its rulings, the ASA noted that influencer Chet Johnson encouraged his followers to purchase tickets for the advertiser's competitions using an ad label that appeared in text that was 'so small that it would have been easily missed by most consumers'; see ASA Ruling on North Wests Competitions Ltd (14 April 2021)

<<https://www.asa.org.uk/rulings/north-wests-competitions-ltd-a21-1092370-north-wests-competitions-ltd.html>> accessed 10 June 2021.

¹²⁹ ASA Ruling on Zoe de Pass t/a Dress Like A Mum (n 81) (concerning an Instagram post with a link to the waiting list which consumers could be added to in order to purchase shoes designed by the influencer); ASA Ruling on Matalan Retail Ltd IAW TL Blog Ltd (30 October 2019) <<https://www.asa.org.uk/rulings/matalan-retail-ltd-A19-1020138.html>> accessed 10 June 2021; ASA Ruling on Pepper Deals Ltd (18 March 2020) <<https://www.asa.org.uk/rulings/pepper-deals-ltd-a19-1034186-pepper-deals-ltd.html>> accessed 10 June 2021; ASA Ruling on ASA Ruling on Sportswift Ltd t/a Card Factory (n 126); ASA Ruling on BPerfect Ltd (n 124); ASA Ruling on STYLIDEAS Ltd (n 109); ASA Ruling on Diamond Whites IAW Marnie Simpson (n 87); ASA Ruling on Unleashed PR Ltd t/a I Spy Eyes IAW Marnie Simpson t/a I Spy Eyes (n 116).

¹³⁰ ASA Ruling on North Wests Competitions Ltd (n 128); ASA Ruling on Asos.com Ltd (22 April 2020) <<https://www.asa.org.uk/rulings/asos-com-ltd-a19-1025856-asos-com-ltd.html>> accessed 10 June 2021; ASA Ruling on Person(s) Unknown t/a TBM Enterprises and Thebettingman (18 November 2020) <<https://www.asa.org.uk/rulings/person-s--unknown-a20-1066758-thebettingman.html>> accessed 10 June 2021.

¹³¹ ASA, Research on the Labelling of Influencer Advertising (5 September 2019) 6 <<https://www.asa.org.uk/resource/labelling-of-influencer-advertising.html>> accessed 3 August 2021.

other content on a social media platform.¹³² Moreover, disclaimers in small print at the bottom of a post or beneath the description of the deal,¹³³ a pop-up appearing sporadically and an insufficiently prominent 'About us' or an FAQ section stating the blog featured affiliate links are unlikely to be sufficient to distinguish such links from editorial content to readers who encounter the material.¹³⁴ By analogy, disclosures are also likely to be missed if they appear anywhere that requires a user to click to 'view more'.¹³⁵

Responsibility

Generally, the primary responsibility for observing the Code falls on marketers. However, others involved in the chain of preparing or publishing marketing communications, like agencies, publishers and other service suppliers also have an obligation to abide by the ASA's rules.¹³⁶ As regards advertorial content, including IM, it is evident from all the rulings examined that responsibility for the clear identification of the promotion and its content rests equally with the party that publishes the content (influencer/persona), the marketer or brand they cooperate with (sponsor) and at times the agency (author), where one is involved. This is different from native advertising, the format, availability and disclosures of which fall directly under the responsibility of the online social media providers who can automatically index and place them as marketing content on their platforms. If a complaint is upheld, the brand and the influencer are named jointly in any subsequently published ASA ruling. This element of joint responsibility for failure to comply with the regulator's code is another way in which IM alters the established workings of Stern's Revised Communication Model for Advertising. Regulatory responsibility is no longer the domain of the sponsorial decision-maker but extends to the digital persona as a co-author of the ad. The influencer thus joins brands and traditional authors of advertising messages in their position as marketplace gatekeepers who collectively shape the cultural tradition of advertising by deciding what enters it and what is excluded from it.¹³⁷

Written agreements containing influencers' express obligations to properly label ads are always preferable, but they do not seem to offer guaranteed immunity from censure for brands. In a recent ruling, the ASA considered that a model promoting the fashion brand Calzedonia on Instagram and the brand itself shared responsibility for ensuring that promotional activity on the influencer's account was compliant with the CAP Code, even though the ambassador agreement in place explicitly provided that all posts had to be identified as advertising.¹³⁸ This suggests that brands need to take more steps to ensure compliance, e.g., by proactively monitoring posts. Finally, relying on affiliates does not mean that the brand itself relinquishes responsibility for the promotion of its product or services either. Both affiliates and brands retain responsible for ensuring that AfM complies with the requirement of transparency under the Code.

Enforcement and sanctions

Influencers' repeated non-compliance with disclosure requirements is now promoted on a dedicated section on the ASA's website.¹³⁹ This sanction might, however, be seen as doing too little, too late. Even if the advertiser is ultimately asked to withdraw a post, by the time this happens the ad has already had a chance to make an impact with followers, who may not have understood the message for what it was at the time. Although the ASA does not have

¹³² ASA Ruling on Asos.com Ltd (n 130); ASA Ruling on Diamond Whites IAW Marnie Simpson (n 87).

¹³³ ASA Ruling on Pepper Deals Ltd (n 129).

¹³⁴ ASA Ruling on Matalan Retail Ltd IAW TL Blog Ltd (n 129).

¹³⁵ ASA Ruling on Zoe de Pass t/a Dress Like A Mum (n 81); see also ASA Ruling on Wahoo Fitness Ltd (n 80).

¹³⁶ CAP Code, Rule 1.8.

¹³⁷ Stern (n 10) 11.

¹³⁸ ASA Ruling on Emma Louise Connolly (n 84).

¹³⁹ ASA, Non-compliant social media influencers <<https://www.asa.org.uk/codes-and-rulings/non-compliant-social-media-influencers.html>> accessed 9 August 2021.

substantial enforcement powers against brands and influencers who have fallen foul of advertising standards, adverse publicity is nevertheless one of the most persuasive sanctions in its arsenal. The new digitally curated wall of shame can be detrimental to influencers' reputation if they are seen to be flouting the rules designed to protect consumers. Negative media coverage is likely to elicit reluctance on advertisers' part to be associated, or embark on new commercial arrangements, with them. The success of this deterrent measure, and how seriously it will be taken, remains to be seen. Enforcement actions may need to be intensified by involving more actively businesses whose products are being promoted and social media providers as compliance enablers. Repeated failures to disclose commercial intent could be accompanied by stricter sanctions such as a (temporary or permanent) social media account suspension which can create a risk of loss of revenue for non-compliant influencers.¹⁴⁰ This could be facilitated by establishing special communication channels between the ASA and social media platforms to notify non-compliant content. In October 2020, Instagram committed to implementing a new two-way communication system which is anticipated to promote bilateral information exchange between the platform and businesses: on the one hand, automated technology will enable the platform itself to spot posts incorrectly identified as not containing incentivised endorsements and report them to businesses being advertised, and on the other hand, businesses will be able to monitor how their products are being promoted and request the prompt removal of posts from the platform, where appropriate.¹⁴¹ The feasibility and effectiveness of developing a reporting tool enabling users to report suspected inadequately labelled or unlabelled incentivised content should also be explored.

Conclusion

As IM on social media continues to grow, so does the concern over the lack of transparency towards followers and consumers about endorsed products or services. This is an important area to research because the absence of a full disclosure of the underlying relationships between an influencer and the message sponsor can affect the credibility of an endorsement to the followers' detriment. Although historically not without its criticisms,¹⁴² the comparatively more light-handed self-regulatory framework in non-broadcast advertising and its adapting capabilities are a vital component of the regulatory arsenal pertaining to disguised IM. Yet, there has been little academic consideration of the ASA's practice in this area. This article addressed this gap.

This is the first study to offer a comprehensive empirical analysis of the ASA's rulings concerning ad recognition in influencers' social media content. The expansive interpretation of the elements of the advertorial, which constitutes the foundation of the regulator's investigation into complaints concerning IM disclosures, suggests that the ASA is attuned to the more contemporary status of the source of a commercial message as a multifaceted construct, including the complex mesh of communication paths between participants in IM. The examination of the Authority's rulings shows that brands engaging influencers can be held responsible for non-compliant posts in a wide array of situations, not just when they have directly paid for a post or have some level of editorial control over it.

However, the article interrogated the limitations of the advertorial framework which is built on traditions of regulation developed for earlier communication ecologies. It queried whether

¹⁴⁰ Under the Enterprise Act 2002, Part 8 and Enterprise and Regulatory Reform Act 2013, criminal penalties for breaches of applicable consumer protection laws (enforced by the CMA) are also possible where breaches are sufficiently serious, and a conviction ought to be pursued to protect the general public and provide wider deterrence.

¹⁴¹ Undertakings to the CMA (pursuant to s 219 of the Enterprise Act 2002) relating to the CPRs (1 October 2020) <https://assets.publishing.service.gov.uk/media/5f882329e90e07415e7f36cb/Facebook_Undertakings_-_pdf> accessed 15 June 2021.

¹⁴² Health and Consumer Protection DG, *Self-Regulation in the EU Advertising Sector* (European Commission 2006) 26 <<http://www.ort.hu/wp-content/uploads/2018/09/self-regulation-in-the-eu-advertising-sector-the-madelin-report.pdf>> accessed 28 July 2021.

the notion of the advertorial is sufficiently attentive to the intricacies and nuances of the influencer culture. Although the advertorial may offer a convenient carriage for connecting influencers with existing ASA rules, the regulator's approach may not be optimal in the context of IM. Modern influencer practices do not always fit the common advertorial definition, which is unlikely to encompass a set of behaviours such as nano- and micro-influencers' (self-)promotion acts, the effect of which can be more pronounced on followers' decision-making. It cannot thus be discounted that the ASA's current practice reflects a tendency for more subtle acts of promotion to be left untouched.

The analysis also advanced our theoretical understanding of how the complex interactions that typify the well-established advertising communication schema have evolved in light of the proliferation of social media IM. As seen from revisiting Stern's model, the division of labour between the sponsor, author and persona as cumulative components of the source of a marketing message is no longer clear-cut. Influencers, as modern-day personas, blur the boundaries between message sponsors and authors. They bear creative responsibility and at times financial responsibility where they act as the generative source of a post without brand funding. But, as the analysis of the ASA's rulings illustrates, Stern's model can be adjusted further to take account of digital personas' joint regulatory responsibility with the sponsors for ensuring that the promotional activity they carry out is compliant with the CAP Code. Moreover, by exploring and categorising the different forms of control exercised by marketers on influencers' promotional content, this article contributed some new evidence on the specific practices that constitute endorsement relationships or 'brand ambassador' agreements, about which very little is known in the context of IM.¹⁴³

Beyond its importance for academics, the present research bears significance for practitioners in the area of advertising, including marketing managers. Language clarity and the visibility of prominent visual and verbal cues in audio-visual content emerge from the analysis of the ASA's rulings as the two overarching principles that should drive transparency of IM on social media. In summary, disclosures of connections with a brand must: (a) stand out from other usual posts and be unambiguous, using clear terms; (b) **be** upfront, before followers engage; (c) **be** reasonably noticeable to followers, taking into account those who might be new to a platform or new subscribers; (d) **be** inseparable from the content, travelling with a post when shared; and (e) **be** contextually appropriate for all potential devices, without assuming that followers will be able to discern endorsements based on past disclosures.

¹⁴³ Nascimento, Campos and Suarez (n 24) 1012.