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Social Media Influencers Could Become the Targets of Trademark Infringement Lawsuits

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Petunia Products, Inc. owns the BROW BOOST ® trademark, under which it sells a “Billion Dollar Brows” eyebrow primer and conditioner. Petunia recently asserted trademark infringement claims against a skin care products company, which Petunia alleges infringed on its BROW BOOST mark in connection with the name of its product that competes with Petunia’s product, and by using the hashtag #BROWBOOST on social media to promote its product. Petunia claims that the competing product’s name creates consumer confusion.

What separates this lawsuit from a routine trademark dispute is that, in addition to suing the manufacturer of the competing product, Petunia also asserted claims for trademark infringement, false advertising, and unfair business practices against a prominent fashion model and influencer, Molly Sims, who sponsored the allegedly infringing product on her social media. This is noteworthy, as brands have historically launched legal battles against each other for claims of intellectual property infringement—not the celebrities or social media influencers who sponsor the products. If the influencer is well known or wealthy, asserting claims against an influencer could provide the claimant with another potential source from which to collect monetary damages. Or it could simply turn the influencer and his or her followers against the brand that engaged that influencer to sponsor the product. It is conceivable that the influencer may do whatever it takes to get out the lawsuit as quickly and quietly as possible. Was roping the influencer into this litigation merely a legal tactic to gain leverage against a potentially infringing brand, or is the influencer potentially liable for the alleged infringement?

In response to Petunia’s lawsuit, Sims filed a motion with the court to dismiss the claim against her for direct infringement. She argued that liability for trademark infringement should not extend to third parties that sponsor a product without confirming whether it violates trademark rights. Specifically, she argued that her sponsoring the product could not be infringement because it was not a commercial use of the mark, which is required for trademark infringement. She claimed that it was merely advertising. Sims also moved to dismiss the claims for contributory trademark infringement, false advertising, and unfair business practices.

On August 6, 2021, the District Court for the Central District of California refused to dismiss the claims against Sims, holding that she may have some degree of legal liability for directly participating in the alleged infringement. The court determined that Sims’ post was a paid advertisement, and thus, “crossed from protected consumer commentary to commercial use.” Following the court’s ruling, the direct infringement claim alleged against her can now proceed.

It may be too early to tell whether adding influencers as defendants in lawsuits will become the norm. But this potential shift could carry with it a number of implications for both influencers and brands. It may force influencers to perform more due diligence on the products or brands they are agreeing to endorse. It may require influencers to insist on strong indemnity provisions in their sponsorship agreements. Or it may even encourage them to explore whether this type of liability may be subject to and covered by business insurance. In any event, the rapid growth of using social media influencers to endorse branded projects opens up the potential for legal obstacles to both brands and influencers.



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