# Who owns the content that influencers post?

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Influencer marketing has become one of the most successful trends in marketing over the past few years. In 2018, 81% of marketers reported that using influencers to bolster their marketing plans was an effective strategy. But as the influencer marketing wave becomes increasingly more popular, the emerging nature of the industry is causing a variety of legal issues; as a result, businesses are being advised to draw up iron-clad contracts with Instagram influencers.

In early 2019, Legacy – a Melbourne café – entered into an influencer agreement with Chole Roberts. Roberts is a fitness influencer with 210,000+ followers on Instagram and can earn a reported USD 1,200 per sponsored post. The owner of the café, Con Katsiogiannis, engaged Roberts for a series of Instagram advertisements, but over the course of their relationship a disagreement broke out over the fees. Katsiogiannis took issue with the posts about his café when they were archived by Roberts. Archived posts are not visible on Instagram; however, the account holder can re-upload them.

Roberts claimed that 90% of the views on her posts occurred within the first week of posting and that archiving posts was a method to prevent a large number of old posts from building up on her page. This belief holds some merit as a recent study found that 49% of consumers expect content on a daily basis from the influencers they follow. There was no written contract between the two parties outlining their business relationship, but rather, a series of verbal agreements, which meant there was no contract specifying how long Roberts would

display each post. Roberts argued that she was entitled to be paid for the posts she later hid. This resulted in a dispute over Roberts claiming USD 2,500 that was adjudicated by the Victorian Civil and Administrative Tribunal("VCAT").

The VCAT deputy president reached the conclusion that "in a general sense", Katsogiannis did not lose value when the old posts were archived. However, it was unclear whether the influencer was permitted to delete posts at any time, and pursuantly VCAT ruled that the cafe owner (Katsogiannis) pay the influencer (Roberts) two-thirds of the USD 2,500 that being claimed by Roberts.

Sophie Light-Wilkinson, the VP of marketing EMEA at Bazaarvoice, voiced her opinion on the matter stating:

*"This latest debate asks questions around who owns the content ultimately paid for by advertisers but created by influencers. The simple answer is that these conundrums should be answered by the details of any contracts drawn up between brands and internet personalities. After all, brands need to ensure some rules safeguard their public identity from content that is either too materialistic or misrepresents real-life."*

Therefore, if the influencer does delete the posts and the relationship with the entity paying for the sponsorship was not agreed upon contractually, then the influencer is not in breach of any regulations. In Roberts' case, because there was no contract in place, the VCAT ruled that Roberts could archive the posts, however, could not decide who the posts belonged to. With that being said, this brings about the issue of moral rights versus economic rights and leads us into copyright territory.

The concept of moral rights relies on the connection between a person and their creation, as moral rights constitute the right of the creator to protect the integrity and ownership of their work and to maintain the "indestructible creational

bond" that exists between their personality and their creation. The term economic rights refer to the exclusive right of the right holder to authorize or prohibit the reproduction, distribution, exportation or importation, or other exploitative activities. Moral rights cannot be relinquished, whereas economic rights can be. Therefore, when an influencer publishes a sponsored post, the moral rights remain with the influencer perpetually, however, if the influencer is paid for the post, they have relinquished their economic rights to the post.

The Berne Convention for the Protection of Literary and Artistic Works is the fundamental body of work for copyright law. As of September 2020, there are 179 nations that are signatories to the Convention – these signatories have all adopted the text of the convention to create their own respective copyright laws (albeit the application of the law varies from state to state).

In the UAE, moral rights are covered under Article 5 of Federal Law No. 7/2002 (the Copyright law), however, economic rights are not referenced as they fall under contractual obligations which are stipulated under UAE Federal Law No. 5/1985 (the Civil Code).

In the circumstance of influencers in the UAE, the moral and economic rights of the post/content belong to the influencer; if the post is a sponsored post and the influencer gets paid by an entity for publishing the post, the influencer has transferred the economic rights of the post to the said entity upon payment. If there is no agreement in place that outlines the specifications for the post (i.e. the type of post or the length for which the post remains visible on the influencer's account) then the influencer may unilaterally decide what to do with the post.

The influencer and the entity must also take into account that in the UAE, the influencer is required to have an influencer

license in order to be permitted to monetize their social presence; if the influencer does not have an influencer license and is subsequently paid by the entity for their posts, they may be fined AED 5,000 by the National Media Council for each post they make without a license, and both the influencer and the entity will be in violation of UAE laws.

Entities seeking the services of influencers must ensure that the influencer has the required licenses – pursuant to UAE laws – that will allow them to advertise their product. For example, if it is an entity that specializes in cosmetics seeking the influencer services, they must ensure that the influencer has obtained prior approval from the Ministry of Health for the advertising of their products.

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