

INFLUENCER CONTRACT GUIDE

- **Trade Description**
- **Consumer Protection**
- **Intellectual Property**
- **Artificial Intelligence**
- **Data Protection**
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INTRODUCTION

Influencer Contracts (written or unwritten) have become an essential tool to help organisations access various classifications of audiences in terms of age group, social class, ethnical background, locations, entertainment preferences, among others. Influencer services have tremendously outshone the traditional role of media houses in delivering targeted and interactive advertisements whether in terms of prime-time news, favourite television shows, section of newspapers, among others. While some traditional media houses (TMH) have secured an element of credibility, therefore, outshining some influencers, there are influencers that have built a positive reputation that most of their consumers will associate or are likely associate with what is being promoted by the influencer.

As these glamorous and hopeful engagements take place between/among the influencer, the organisation and the agent, there are pertinent issues that need to be addressed at the forefront to ensure that the outcome of the relationship causes unprecedented liabilities. These liabilities arise from topic issues such as **Artificial Intelligence, Consumer Protection, Data Protection, Intellectual Property, Tax, and Trade Description.**

In this Influencer Contract Guide, O'Bang Law will share useful information concerning the areas that an organisation needs to consider when interacting with influencers marketing their goods or services (products) whether at local market or cross-border level.

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TRADE DESCRIPTION

The Trade Description Act, CAP 505 (TDA), though a dated law, entails key provisions that may impact the Influencer Contracts in terms of communication to the public more so when read together with the Consumer Protection Act, CAP 501, and the Competition Act, CAP 504. However, this does not mean that TDA cannot stand on its own for the purpose of influencing engagements touching on Influencer Contracts.

The reason this law is being raised is because some influencers are marketing products without disclosing that they are solely interacting with that product as a means of marketing. These are usually paid partnerships, sponsorship, ad or promotion – these engagements may include monetary value or non-monetary value (free access to products) towards the influencer.

What is advertisement and trade?

The TDA defines **advertisement** to include a catalogue, circular and price list, and defines **trade** to include business and profession.

Generally, instances where the term “includes” is used, the definition of the word under that provision is considered unlimited; therefore, it creates room for a body with authority to determine a dispute touching on that provision to expand on its definition.

TDA further provides as follows:

a trade description or statement published in any newspaper, book or periodical, or in any film or sound or television broadcast, shall not be deemed to be a trade description applied or statement made in the course of a trade unless it is or forms part of an advertisement.

In appreciation of the term “includes” as adopted by the TDA, it means that once an influencer touches on catalogue, circular and price list, there is an element of trade description, which in best practice, there is a need to do disclosure of the same.

What are some of the key factors touching on trade description?

TDA defines trade description to factor in any information presented in any manner, whether directly or indirectly, touching on any goods or parts of goods.

One of the unique factors on what amounts to a trade description is that a particular good and results thereof were tested *[by any person]*. This provision may create huge legal risks to the influencer and beneficiary of the influencer's services.

What risks are in place and how best to avoid those risks?

TDA provides a general penalty not exceeding KES. 2 million or imprisonment for a period not exceeding five (5) years or both.

The definition adopted by the TDA towards what amounts to an advertisement entails the conjunction “and” that limits the application of TDA towards influencers more so those that do not proceed to use catalogue, circular and price list.

Considering that as per TDA the influencers action may not be classified as a trade description or amount to an advertisement, this is likely to be useful to the recipient of the influencer's services since the information being relayed may seem more organic but on the other hand, it may be a huge risk for the influencer and the beneficiary of the influencer's services.

It is essential that for Influencer Contracts, the parties involved should clearly determine the working terms and conditions beyond the need for a particular content to be created since there are other regulatory factors that may govern the influencer-brand contractual relationship.

If an influencer has secured a contract to advertise a product that the influencer has never previously used to determine the functionality of the item, it means that the influencer will be

engaging in false trade description not to mention the beneficiary of the influencer services will equally be willingly misleading the public or consumer of that trade description.

Therefore, it is advisable for parties engaging through an Influencer Contract to clearly use terms such as “Paid Partnership” “ad” “promotion” or “Sponsored” to avoid exposing themselves to various regulatory risks.

CONSUMER WELFARE

Consumer Welfare is a regulatory aspect that arises from the Competition Act (CA). The CA prohibits a person from engaging in **false or misleading representations**.

Once an influencer initiates the process of promoting the product, there are grey areas that may appear since an influencer will create an impression that having used a particular product, a consumer experiencing a near or similar circumstance or need may presume the need for such goods or services, or the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy upon using that particular product.

It is common that most influencers hardly engage with certain products for purposes of establishing the reliability of that product. Therefore, in most cases, it is safe to disclose certain limitations to distance oneself from liability.

Similar to the proposal under TDA, it is advisable for parties engaging through an Influencer Contract to clearly use terms such as “Paid Partnership” or “Sponsored” to avoid exposing themselves to various regulatory risks.

CA provides a general penalty not exceeding KES. 10 million or imprisonment for a period not exceeding five (5) years or both.

CONSUMER PROTECTION

There are various regulations that advance the interests of a consumer based on various

sectors. However, in general, the Consumer Protection Act, CAP 501 (CPA), provides for comprehensive regulatory framework on issues affecting a consumer's relationship with various persons.

Our focus is limited to influencer conduct that may turn harmful to the influencer and the beneficiary of the services of the influencer. One of the key factors is the issuance of unconscionable representation to a consumer whereby the influencer's statement of opinion is misleading and the consumer is likely to rely on it to his or her detriment.

A reasonable example is where an influencer openly states that a particular session of their audio / visual of a particular product is not sponsored or marketing activity yet in reality it is a sponsored or marketing activity. Such a remark may also be counter productive to the beneficiary if the beneficiary is interested in using that content for a particular period.

Other related activities that may lead to false misrepresentation includes communicating by withholding material facts resulting in deceiving or representation that misrepresents the communication with the consumer.

It is evident that for most influencer content the influencer has a huge degree of liberty to dictate the words used and presented, it will be best for the beneficiary to provide clearer guidelines and adopt well drafted and harmless provisions. Furthermore, as stated under TDA and CA, it is essential to use phrases such as “sponsored” or “paid partnership.”

CPA provides a general penalty not exceeding KES. 1 million or imprisonment for a period not exceeding three (3) years or both.

INTELLECTUAL PROPERTY

Influencer Contracts touch on various types of intellectual property (IP) and related rights that must be well captured to ensure that one of the

entities is not caught unawares when disputes arise concerning intellectual property rights (IPR).

In Kenya, the common laws/regulations on IPR include the Constitution of Kenya, Anti-Counterfeit Act, Copyright Act, Industrial Property Act, Seed and Plant Varieties Act, Trade Marks Act, among others. Some of the key issues that arise touching on IP touch on some of these laws. Below are some of the topical factors:

Moral Rights of an Author

The Copyright Act limits a person from relinquishing moral rights. This is not on monetary aspects but in terms of authorship and how the output creating the moral right can be modified.

Image Rights

The influencer usually has image rights towards that content that the influencer appears in. However, through contractual terms, the influencer can waive the image rights through release agreements.

There are instances where a beneficiary of the service has secured image rights contracts with various public figures, and in certain cases may allow incorporating a particular public figure's image.

Copyright

The influencer or a third party that is helping the influencer in recording the content may have rights to the recording. There is a need for clarity on the production model and ownership of various rights.

Image Rights & Copyright

In one piece of recording or photograph, one person may have image rights while another may have copyrights. It is therefore essential that an Influencer Contract is well structured to ensure the beneficiary is not sued for any breach of image right or copyright infringement.

Trademark

Trademarks are crucial during the engagement between the influencer and a beneficiary. A common issue is that the beneficiary's trademark must come out clearly and should be the only trademark that is visible but remain organic (not forced) – even where the whole concept is based on product placement.

There are instances when one may experience a tort of passing off, which means any person who is not the proprietor of the trade mark or a registered user thereof, uses a mark identical with or so nearly resembling it as to be likely to deceive or cause confusion in the course of trade or in connection with the provision of any services in respect of which it is registered.

In influencer contracts scenario, the tort of passing off could occur if an influencer misrepresents themselves or their endorsements in a way that creates confusion among consumers about the association between the influencer and a brand.

An example may be based on False Endorsement. An influencer may falsely imply or explicitly claim that they are endorsed by a particular brand when, in fact, they are not officially affiliated with that brand. To break it down further, an influencer might use the brand's logo or tagline in their social media posts without authorization, giving the impression that they have a formal relationship with the brand.

Mechanical Rights

There is usually an element towards mechanical rights when a person opts to sing a song that they do not own or secured the relevant rights. This may happen innocently when an influencer is trying to capture attention – the innocence does not obliterate a person from the possible legal risks.

It is important to mention that even if the influencer is a recording artist (whether as an indie artists or label artist), this does not authorise the influencer to utilise their material

unless approved by the beneficiary of the services.

Synchronisation Rights

Synchronisation rights are available through layering a song against a particular recording. This is common where a song is playing in the background of a particular content or plays in various break sessions. Using a song for synchronisation without the relevant rights may lead to content takedowns and there may be unintended lawsuits to the influencer and beneficiaries.

It is important to mention that even if the influencer is a recording artist (whether as an indie artists or label artist), this does not authorise the influencer to utilise their material unless approved by the beneficiary of the services.

Synchronisation rights proved to be a challenge to some companies that hired influencers when ByteDance LTD dba TikTok and Universal Music Group (UMG) had not agreed to the best way forward concerning their contractual relationship. This resulted in many video files being muted. Also, there are limitations on how TikTok's Commercial Music Catalogue can be used. META also has similar limitations and guidelines for its solutions.

IP or IPR Post Engagement

There are unique factors that occur during and post the assignment phase that need to be clearly assessed and have provision to address such events. Some of the events include, retaining content on website or social media, circulated information but no longer in circulation, third party actors, content repurposing, ownership of various IPRs post assignment.

It is essential to look into various aspects of these post engagements to ensure that there are no exposures that may result in costly disputes.

The IP or IPR issues relate with other key topics such as trade description and consumer protection.

ARTIFICIAL INTELLIGENCE

Artificial Intelligence (AI) is becoming an essential tool for various Influencer related roles. In certain sectors, it seems to reduce the possibility of IP related risks and in certain instances, it creates uncertainty resulting from data that is not well curated to address a particular need.

Kenya has shown immense interest in regulating AI as per Kenya Bureau of Standards (KEBS) proposed guidelines. However, in contractual sense, even where a marketing agency adopts the use of AI, there are certain products that will be deemed misleading if the use of AI images is used. In that case, there is a need to balance the interest on when to or not to use AI.

There is a proposed legislation that touches on AI: Robotics and Artificial Intelligence (AI) Society Bill, 2023.

The regulatory framework in Kenya that may interact with AI include the Constitution of Kenya, DPA, Computer Misuse and Cybercrimes Act, Defamation Act, Copyright Act, among others.

AI Generated Content

In a normal commercial transaction, cautious organisations have issued cautions touching on possible products viewed online to having a different colour due to various factual factors like screen resolution, light settings, environment at the time of viewing, optical issues, video/photo editing options, among others. However, for AI generated data, it may create a rift in terms of certain products that require actual human interaction.

Other challenges that AI has caused is the usability; thus, will AI be used for actual content creation or guidance to content creation. If an influencer heavily relies on AI resulting in making the information inorganic, it may seem somewhat

like a challenge as to why the beneficiary hired the influencer.

It is best for parties to an Influencer Contract to determine whether the use of AI is acceptable and, if so, to what extent and the relevant disclosures that are required must be made.

AI Virtual Influencers

Some organisations have embraced the use of computer-generated characters that have total resemblance of a human being, not to mention acting like one. There might be a combination of technological solutions such as Computer-Generated Imagery (CGI) motion capture and at times AI. Visible factors concerning AI includes Perfect Target Audience Fit, Unageing Characters and Content Control.

DATA PROTECTION

Data Protection oriented laws have been in place in various sectors and regions across the world for several years; however, the conversation concerning data protection had a higher worldwide traction on or about six months to the application of the General Data Protection Regulation (EU) 2016/679 (GDPR), May 25, 2018, when most entities were rushing to comply with the GDPR.

Ever since, countries, states and regions have taken measures to enhance data rights of the data subjects, which has popularly been referred to as giving data subjects the power to control how their data is collected and processed. There are various conversations on whether entities are keen on complying with data protection laws per the regulators desire to ensure compliance with the relevant data laws.

Data laws are unique sector specific laws that require a data specialist (regulatory aspects in terms of laws, and one that is knowledgeable in terms of technical expertise). The former will consider the matrix level compliance in relation to what the law provides whilst the latter is more into the capabilities of the information

communication technology infrastructure that is in place.

In Kenya, there is a regulatory framework known as Data Protection Act, 2019 (DPA), that addresses data subject rights. The DPA is beefed up by four subsidiary legislations.

A keen assessment of the DPA and its subsidiary legislations evidences that it applies to Influencer Contracts in various levels depending on the agreement signed between the Influencer and the Contracting Entity.

Key issues to consider include when as the beneficiary of the services, you require the influencer to collect certain information or whereby the beneficiary requires access to the influencer's social media accounts for purposes of managing certain content related engagement.

There is a need for certain disclosures to be made to ensure that data collection and processing is done as per the law. Furthermore, it is essential to strategically structure it to ensure that the beneficiary is considered as the data controller as compared to a processor.

Disputes

The Office of the Data Protection Commissioner (ODPC) implements the provisions of the DPA and its subsidiary legislation for breaches occurring post enactment of the Data Protection Act – the DPA is applied prospectively. However, if a case was filed at the High Court before January 2021 when the subsidiary legislation came into effect, the High Court will still have proper jurisdiction.

Under this Guide, while addressing IP, there was mention of image rights constituting personal data. If the Influencer Contract is not well drafted, it opens several loopholes that an influencer may use to come after the beneficiary of the services post engagement under the DPA. The applicable penalties can go to a maximum of KES. 5 million or one percent (1%) of the gross revenue of an entity (whichever is less).

Data Breaches

A Data Controller or Processor is a term that applies to both a human being and a corporate entity. Therefore, the DPA mainly focuses on the activities that a person engages in to determine whether the DPA applies to the person as a Data Controller or Processor.

Data breaches are expected in instances where the Influencer Contracts are handled by agencies or generally when an individual influencer's systems are accessed without the influencers authorisation. This might be through social engineering, reckless handling of gadgets / equipment's, security keys, among others. DPA applies to any person that is handling data for any person that is in Kenya (whether a citizen or not).

In the event a Data Processor experiences data breach(es), and becomes aware of the same, the Data Processor will inform the Data Controller without delay, and where reasonably practicable, within 48 hours.

The Data Controller has an obligation to notify the ODPC of a data breach without delay within seventy-two hours of becoming aware of data breach. There are instances where the Data Controller may delay issuing a notification due to unavoidable circumstances and, if that is the case, the Data Controller will have to provide such reasons to reduce the possibility of being penalised.

Generally, a data subject ought to be notified once there is awareness of a data breach; however, there are other factors such as ongoing investigations, deployment of security safeguards, among others.

TAX

The Government is keen on exploring the possible opportunities on taxing internet related opportunities such as content creation.

The Finance Act, 2023, made several changes to Kenya's Income Tax (Cap 470), and in particular to

Influencers and Brands, introduced withholding tax of 5% for residents and 20% for non-residents on digital content monetisation effective July 01, 2023. Digital content monetisation means offering for payment entertainment, social, literal, artistic, educational or any other material electronically through any medium or channel, in the following forms:

- a. Advertisement on websites, social media platforms or similar networks by partnering with brands including endorsements from sellers of such brands;
- b. Sponsorship where a brand owner pays a content creator for content creation and promotion;
- c. Affiliate marketing where the content creator earns a commission whenever the audience of the content creator clicks on the product displayed;
- d. Subscription services where the audience pays a periodic fee to access the content and support the content creator, including exclusive membership programs;
- e. Offering for use a logo, brand or catchphrase associated with the content creator merchandise sales eBooks, course or software;
- f. Membership programmes for exclusive content including early access;
- g. Licensing the content including photographs, music or other businesses or individuals for use in the user's own projects; or
- h. Commission or Fees earned from crowd funding.

However, for entities that work as intermediaries between an influencer and brands securing influencer services, the tax structure tends to be different compared to instances when the brand directly engages an influencer.

ABOUT US

We are a highly recommended full-service business law firm based in Nairobi, Kenya with independent partner law firms in Egypt, Ghana, Mauritius, Morocco, Nigeria, South Africa, and Uganda. We are members of ALFA International, a premier network of independent law firms in more than 60 countries and with over 10,000 lawyers.

LAW FIRM RANKING

ITR World Tax 2024.

ITR World Tax 2023.

Leaders League (Highly Recommended Business Law, Law Firm) 2022.

Leaders League (Highly Recommended Business Law, Law Firm) 2022.

Leaders League (Highly Recommended Business Law, Law Firm) 2022.

MEA Business Awards (Best M&A Law Firm in Kenya) 2023.

LAW FIRM SHORTLISTING

African Legal Awards (IP Team of the Year), 2023.

African Legal Awards (Competition and Regulatory Team of the Year), 2022.

African Legal Awards (CSR, Diversity, Transformation and Economic Empowerment Award), 2022.

African Legal Awards (IP Team of the Year), 2021.

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IP Stars rates Jack Ong'anya as Notable IP Practitioners, 2024.

IP Stars rates Ombo Malumbe as Notable IP Practitioners, 2024.

Leaders League ranked Jack Ong'anya as a Highly Recommended Business Lawyer, 2022, 2023 & 2024.

Leaders League ranked Jackline Akello as a Highly Recommended Business Lawyer, 2022, 2023 & 2024.

Leaders in Law, ranked Ombo Malumbe as a Corporate Legal Strategy Expert of the Year in Kenya, 2022.

PUBLICATIONS

Chambers & Partners Corporate Tax, Kenya, 2024.

ICGL Gaming Laws, Kenya, 2024.

ICGL Gaming Laws, Kenya, 2023.