

Written evidence submitted by Dr Hayleigh Boshier

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- Boshier H., Key Issues Around Copyright and Social Media: Ownership, Infringement and Liability (2020) 15(2) [JIPLP](#), 123–133.
- Boshier H., Legal Issues of Social Media and Influencer Marketing in Costello J. and Yesiloglu S. (eds) *Influencer Marketing: Concepts and Cases for Building Brand Communities and Engagement* ([Routledge](#), 2020).
- Boshier H., Law, Technology and Cognition ([Routledge](#), 2019).
- Boshier H., and Yesiloglu S., An Analysis of the Fundamental Tensions Between Copyright and Social Media: The Legal Implications of Sharing Images on Instagram (2018) [IRLCT](#), 164-186.
- Boshier H., (2019) Instagram Influencers: No, Having 30,000 Followers Does Not Make You a Celebrity, [The Conversation](#)
- Boshier H., (2018) 10 things you should know about Instagram Terms and Conditions, [The Conversation](#)

1. How would you define ‘influencers’ and ‘influencer culture’?

The question should be ‘what does an influencer do?’. It is more suitable to consider **influencer as an occupation**. The parameters of which are defined by the tasks that the influencer does. As such, the law will be able to capture the flexible and variable nature of the role and avoid inaccurate measures such as number of followers.¹ Framing influencers by occupation understands that **influencers are entrepreneurs** who are growing a business. Successful influencers who have built up their business often employ several other people such as a photographer, videographer, stylist, content creator and/or digital communications teams.

¹ Boshier H., Instagram influencers: No, Having 30,000 Followers Does Not Make You a Celebrity (2019) [The Conversation](#).

2. Has 'influencing' impacted popular culture? If so, how has society and/or culture changed because of this side of social media?

Influencers have had a huge impact on popular culture, across all social media platforms as well as in places that are not initially considered to fall within this remit. For example, influencers drive music culture (and revenue) through their sharing of playlists. **Playlists** earn revenue by creating playlists that directly impact the discovery of music and therefore the remuneration to artists and songwriters. However, the users and the artists are not informed of the playlists' earnings, or any benefits and deals which are made for certain songs to be on their playlist. This is currently an unregulated area that needs attention.²

Influencer culture also has a negative and tragic impact by contributing to mental and physical health disorders and even promoting eating disorders and adolescent suicide. **More needs to be done to protect social media users**, including influencers. Neuroscience explains that risk-taking increases between childhood and adolescence, as a result of changes around the time of puberty in the brain's socio-emotional system, leading to increased reward-seeking, especially in the presence of peers.³ Ample research demonstrates that education does not reduce unhealthy-risk taking in adolescence⁴ and therefore **preventative measures to limit opportunities for immature judgment that lead to harmful consequences are required.**

Currently, the Advertising Standards Agency (ASA) use monitoring software (Brandwatch) to identify and report adverts, such as weight loss medication, for removal. In their 2020 report they stated that they identified over *"150 advertisers promoting licensed injectable prescription-only medicines for weight loss on social media and we sent the Enforcement Notice to them, directly instructing them to remove their ads."*⁵ It is already illegal to advertise prescription-only medicines, and rule 12.18 of the CAP code states that marketeers are not allowed to use health professionals or celebrities to endorse medicines. Evidently, however, this bottom-up approach is ineffective, not least because **the law is inadequate to support meaningful enforcement and therefore does not provide deterrence.**⁶

The Committee is urged to recommend that the Government improvement the regulation and enforcement of harmful content shared by influencers. This is important because, although influencers are the people sharing the content, they can

² Also advocated by the author in [evidence](#) for the Economics of Music Streaming Inquiry.

³ Steinberg L., A Social Neuroscience Perspective on Adolescent Risk-Taking (2018) 28(1) *Developmental Review*, 78-106.

⁴ Steinberg L., Risk-taking in Adolescence: New Perspectives from Brain and Behavioral Science *Current (2007) 16 Directions in Psychological Science*, 55-59.

⁵ Advertising Standards Agency, Protecting Young and Vulnerable People Annual Report (2020).

⁶ For regulation to successfully deter illegal behaviour, three factors are required: First, they must be aware that their behaviour is illegal, second they must believe that they will be caught, and third, the punishment outweighs the benefit. Boshier H., *Law, Technology and Cognition* (Routledge, 2019)

be the young and vulnerable party in the relationship between the brand/advertiser and social media platform. As such, liability should be at the least be shared between the stakeholders and should be fixed in order that it **cannot be contractually overridden**. It would also seem appropriate to **focus much of the liability on the brand/advertiser** who has the resources, knowledge and control in the product or service being pushed by the influencer. While the **platforms should do more to educate their users and user technology to reduce harmful content**.

3. Is it right that influencers are predominantly associated with advertising and consumerism, and if not, what other roles to influencers fulfil online?

Influencer culture **mobilises positive social change**. Influencers use their platforms to connect with likeminded followers, raise awareness of social injustice and activate change. The power of social media activism, referred to as ‘hashtivism’, enables the global spread of meaningful messages and has the ability to galvanise people. For example, Gina Martin’s successful campaign to make ‘upskirting’ an offence under UK law began as a Facebook post. She explained, “*social media has become a crucial tool, helping activists to mobilise communities and bring about change.*”⁷

4. How are tech companies encouraging or disrupting the activities of influencing?

Social media platforms encourage the activities of influencers through their platform features and **self-regulation**.⁸ Using terms of service and platform policies,⁹ the social media sites set their own standards, that do not always necessarily equate to the legal standards. These policies are often governed by US law.

Social media companies encourage influencers and users to spend as much time as possible on their platform, benefiting directly through advertising revenues.¹⁰ The relationship between the platforms and their users should be defined as a fiduciary one. The Committee is encouraged to require the **platforms to take more responsibilities in safe-guarding influencers and users**.

5. How aware are users of the arrangements between influencers and advertisers? Should policymakers, tech companies, influencers and advertisers do more to ensure these arrangements are transparent?

Influencer culture **lacks transparency**, between the influencer and the brand, the platforms, and the users.

⁷ O’Malley K., Upskirting: 7 Lessons Activist Gina Martin Learned During Her Campaign to Make it a Criminal Offence (2019) [The Independent](#).

⁸ Boshier H., Key Issues Around Copyright and Social Media: Ownership, Infringement and Liability (2020) 15(2) *JIPLP*, 123–133.

⁹ Boshier H., 10 Things You Should Know About Instagram Terms and Conditions (2018) [The Conversation](#).

¹⁰ Boshier H., and Yesiloglu S., An Analysis of the Fundamental Tensions Between Copyright and Social Media: The Legal Implications of Sharing Images on Instagram (2018) *IRLCT*, 164-186.

1. Social media influencers are often unaware that influencers are regulated, even when they find out **the rules are vague, and enforcement is weak**.
2. The soft regulation of the ASA and CMA, whilst going some way to improve the situation is **unable to effectively regulate transparency**, not least because **organisations cannot agree** on what is sufficient transparency, which is further muddled by the fact that each country has a different level of acceptability.¹¹
3. There is currently **no requirement for influencers to be transparent about the editing** of their photographs, or indeed photographs that are not their own.
4. There are wholly **secret influencers**, where absolutely no information or data is provided, such as in the case of playlisters, mentioned above.
5. **Influencer contracts** are becoming increasingly common; between the influencer and the brand/advertiser, and between an influencer and an agency. There is **no transparency on standards or guidelines for influencer contracts with brands**. This makes it challenging for influencers, who are vulnerable to being unfairly exploited by the brand. Early influencers in particular are unlikely to think of, or be able to afford, legal advice on the contract. Likewise, there is **no transparency on standards or guidelines for influencer contracts with agencies**. Influencers are vulnerable to exploitation by agencies that prey on young influencers by taking a large amount of their income but provide little or no value. The Committee should therefore recommend to Government that brands/advertisers and agencies need to provide transparency for influencers and that minimum standards might be set for fair contract negotiations.

¹¹ E.g. Australia is more relaxed than that UK: Boshier H., Legal Issues of Social Media and Influencer Marketing in Costello J. and Yesiloglu S. (eds) *Influencer Marketing: Concepts and Cases for Building Brand Communities and Engagement* (Routledge, 2020).