

**Legal made easy**



**social media**  
*i n f l u e n c e r*

QUICK REFERENCE GUIDE FOR INFLUENCERS  
BROUGHT TO YOU BY CHARLES MILNES & COMPANY





*“How you communicate  
and influence others often  
★ matters more than the idea  
you are pitching”*



Aliza Licht – Leave Your Mark

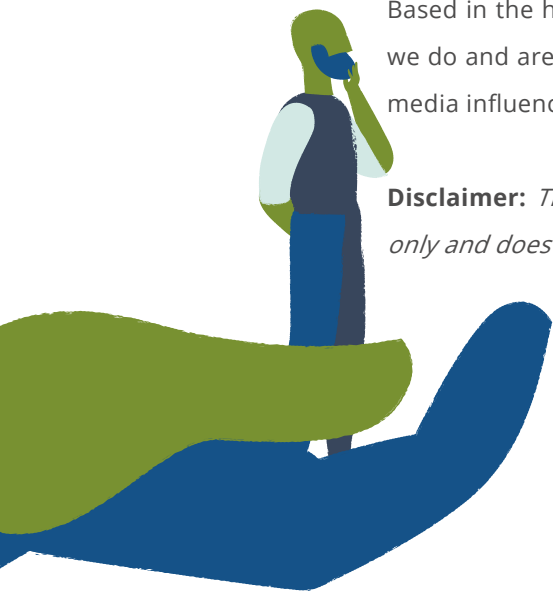
## Who are Charles Milnes?

We are a well known specialist insurance broking firm working with digital, online, media and production businesses run by creative and innovative people.

We bring 20 years' experience and exceptional value to every client.

Based in the heart of creative London, we are passionate about what we do and are proud to work with some of the most successful social media influencers in the business.

**Disclaimer:** *This guide is intended for general information purposes only and does not constitute legal advice.*





## Essential tips for successful influencers

To be successful and grow in a digital world, influencer activity needs to comply with media and industry regulation and stay within the law.

Alongside our new influencer insurance package, we have worked with the law firm, Lewis Silkin, to produce an indispensable and no nonsense guide to the current legal and regulatory landscape.

### Sections

#### 1

**Disclosure** - how to identify and label promotional content

#### 2

**Intellectual Property** – understanding IP - including do's and don'ts

#### 3

**Defamation/Libel** – how to understand and avoid libel claims

# Section 1

## *disclosure*

Introduction

Identifying

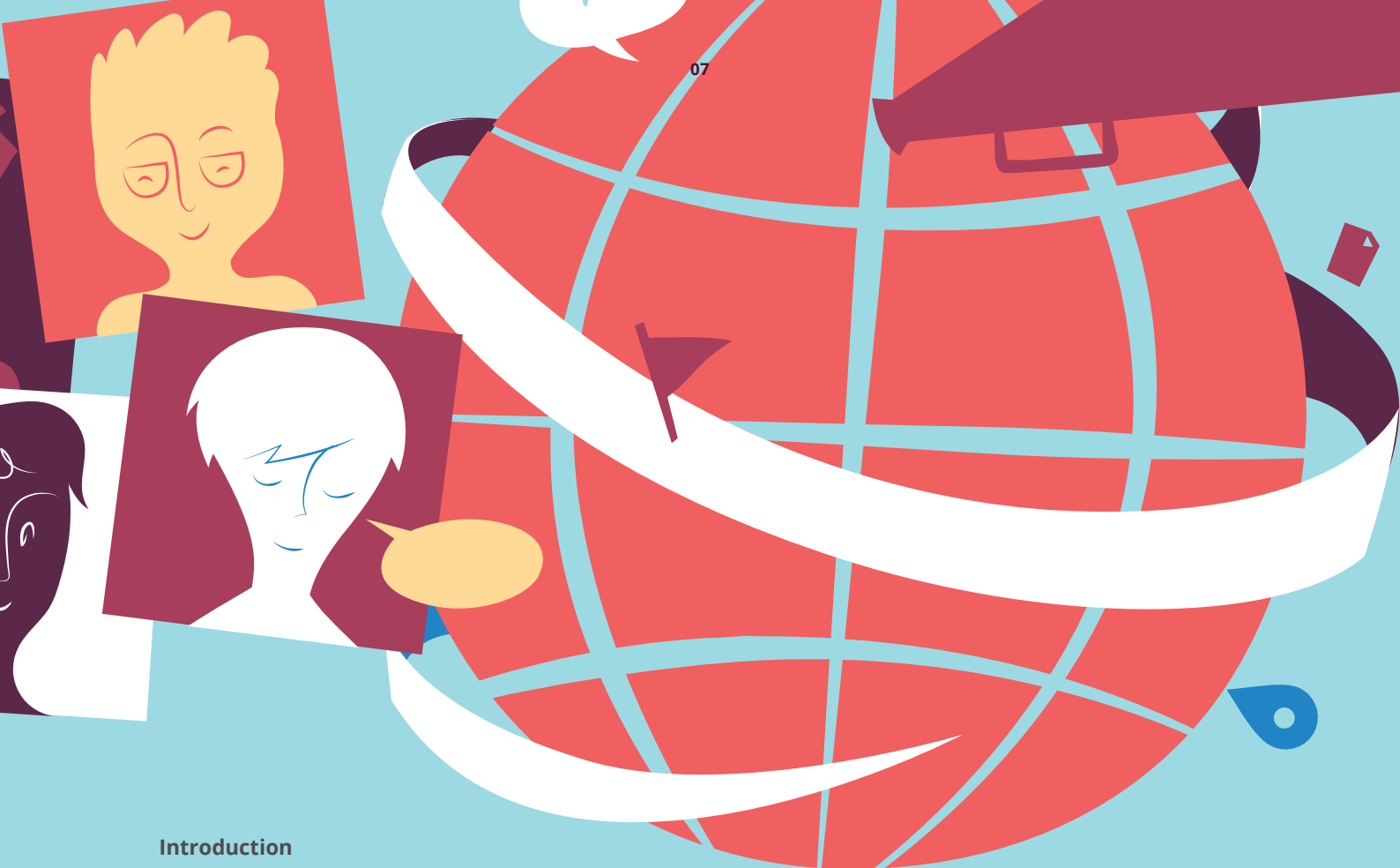
Promotional Content

Labelling Promotional Content

Summary

Useful Resources





## Introduction

It is important that you recognise when the content you create for brands will be considered as if it is “advertising” under English law, even if it doesn’t feel like traditional advertising to you. Many types of influencer marketing need to comply with the relevant advertising and consumer protection rules. Because your online profile is based on authenticity and trust, it’s important that you disclose when you are being rewarded to promote a product or brand to ensure your audience isn’t misled and you maintain their trust.

### Identifying Promotional Content

Commercial relationships with brands can provide an important income stream for influencers. They can also help you to create interesting and engaging content for your audience. But when engaging in influencer marketing, it is crucial

that you are transparent with your audience and properly identify any commercial relationship with a brand through the use of an appropriate label. If you are approached by a brand to create some content for them, when does this become “promotional content” that has to be labelled?

The golden rule is that if they are paying you and the brand has some degree of editorial control or approval over the content you produce, then this is considered to be “advertising” by the Advertising Standards Authority (“ASA”) in the UK.

#### *Payment and Editorial Control*

The concept of ‘payment’ is wider than just monetary payment and a better word to keep in mind is ‘reward’. If you are receiving anything from a brand in exchange for mentioning them, such as free products, event access, or promotion of your online presence then this will be considered as ‘payment’. If you are rewarded to mention a

brand within your content and if the brand has a level of editorial control over the content you produce, it will become 'promotional content' and you will need to disclose this to your viewers. Editorial control has a very broad meaning and doesn't just mean that the brand has the final editorial decision. Editorial control in this context could mean a brand giving you a script or a direction on what to include, or a brand giving you a contract with do's and don'ts (e.g. 'produce a vlog of an unboxing' or instructions to mention a particular website, promotion, challenge, hashtag or slogan).

If a brand pays you to produce content but does not control the content (i.e. you retain complete editorial control over the content and can say what you like about it), then you will still need to disclose the fact that you have been paid by the brand somewhere within the content, but the labels you need to use are slightly less prescriptive as it falls outside of the ASA remit.



## Labelling Promotional Content

It is essential to correctly label promotional content and disclose commercial relationships to your audience early on, and often you need to disclose this relationship before viewers engage with the content.

**Own Channel Publication** - If brand pays you to produce a vlog presented on your own channel promoting its brand or product and the brand has editorial control over the post, it must be labelled as an Advert. You can do this by including the word or hashtag 'Ad' 'Advertisement' or 'Advertising Promotion' somewhere in the title of the video. It isn't sufficient to include the information in the vlog description if the user has to click on a link to read the description (as is the case on YouTube) because the user has to be made clearly aware of the promotional content before they engage. The ASA recommends as good practice that the vlogger also verbally discloses the commercial relationship at the start of the video, although if the vlog has been properly labelled as advertising content in the title this isn't essential.

With other types of social media posts (such as Facebook) it is advisable to include the label at the top of the post. Including #Ad or #Advert

is usually considered acceptable in a Facebook post, Instagram post, Snap or Tweet, ideally at the beginning. If the disclosure comes at the end of a long paragraph of text (after the user has had to scroll down) then this is unlikely to be sufficient. Labels such as "brought to you by" , "thanks to [brand]", "sponsored" or #spon are NOT sufficient to disclose your commercial relationship with brands when you are being paid to create influencer marketing.

Some platforms (such as Instagram) have developed their own labels and tools (such as "Paid Partnership"), which you are encouraged to use by the relevant platforms. However, the ASA has not yet confirmed whether it supports these labels as being sufficient to disclose the commercial relationship, and we are likely to find out whether the ASA supports these labels in the coming months.

**Brand Channel Publication** – If a brand pays you to produce content which will only be published on the Brand's own channel, a label will usually not be required because the promotional nature of the content will be obvious to the user from the context it appears.

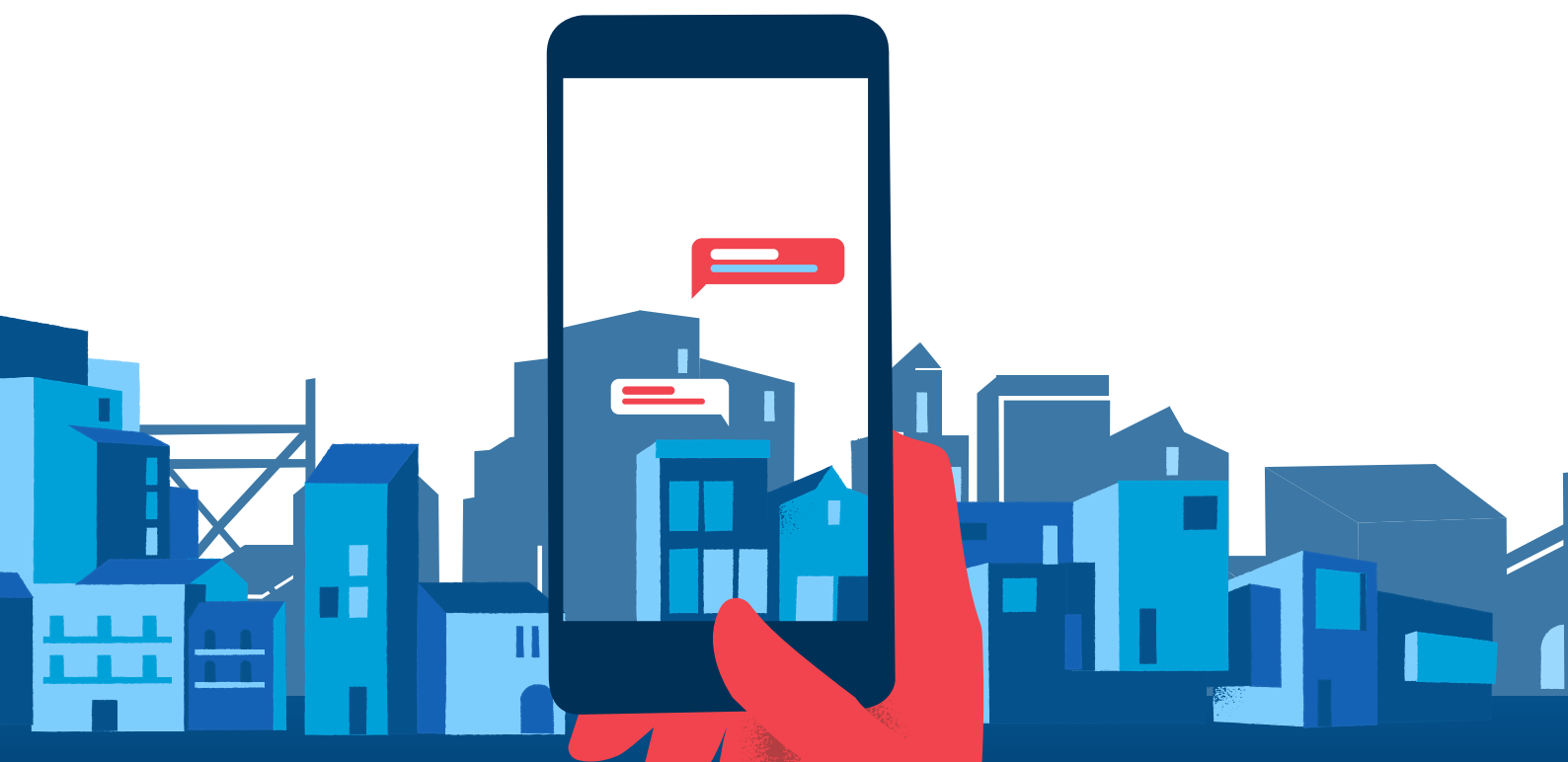
**Commercial Breaks within Vlogs** - If most of a vlog is controlled by you and presented in your usual style, but you devote a section of the content to discuss a particular product (and you have been paid to refer to this product) then it probably isn't essential to label the whole video as #ad or similar. You do need to identify the specific section of the content as an advert though, either by holding up a sign, using an on-screen label or simply saying that you've been paid to talk about the next product. The ASA recommends including the words 'Includes promotional content' in the title or description.

**Product Placement** - If a brand has provided

you with a 'prop' to use within a video and is rewarding you to use it, this is product placement and it should be disclosed to the audience. How you disclose this can be tailored to your style. For example, you could use an on-screen label saying 'Product Placement' or 'Ad'. Or you could do so verbally e.g. 'These hair curlers have been provided by [Brandname] who paid me to talk about them and want you to know that...'.

**Mentioning or selling your own products** -

Promoting your own products in your content is still considered advertising. You may need to use appropriate disclosures such as #ad to make it clear that it is an advert.



# Summary

- Commercial relationships always need to be made clear to your audience
- Properly identifying promotional content maintains your user's trust and keeps you within the law
- How and where you disclose commercial relationships depends on the content and the context
- The safest label to use is #ad or "Advert" , and to make sure this is visible before the user engages with the content

## Useful Resources

ASA Vlogger Guide - <https://bit.ly/2PlrVw9>

ASA Twitter Policy - <https://bit.ly/2O5baQV>

Advertising Codes - <https://bit.ly/2B2h0Qk>

Competition and Markets Authority Online Endorsement 60 Second Guide - <https://bit.ly/2OONeqf>

# Section 2

*intellectual property*



## Introduction

Outline of what it is and what can go wrong

“But everyone does it!”

So how can you safely use content that is protected by IP rights?

Permission / License

Defences to IP infringement

Summary – Do’s & Don’ts





## Introduction

When creating content, influencers may want to include photos, images, music, branded clothes and other materials that have been created by other people. But using someone else's intellectual property or 'IP' without the correct permissions can lead to being sued for considerable sums of money for infringement. Disputes and allegations of misuse of another person's IP can be damaging to your reputation and credibility as well as being disruptive to your business. There have been many well publicised instances of celebrities, artists and influencers having their otherwise impeccable images tarnished by allegations of 'ripping off' the work of others. Many platforms, including YouTube, also have policies about IP misuse and may apply sanctions against content which does not comply, including removal of the content or muting of the audio. Repeated strikes may result in removal from the platform.

Online IP is a particularly complicated area

carrying global risks. Each country has its own laws about IP protection. The laws that apply in the UK have significant differences to those that apply in the United States for example. Owners of IP usually have the right to pursue claims in their own countries' courts. In addition, the legal residence of the upload platform and the physical location of the servers on which the content is stored on can also determine the legal jurisdiction in which claims are pursued.

IP is also the subject of a number of common (and dangerous but hard to kill off) myths, for example the myth that content found on the internet is not subject to copyright or that 'royalty free' means 'free from royalties'.

IP protection is also a two-way street for influencers, because the content you create is also protected by IP rights. You wouldn't want someone else to profit from your work without crediting you as the author ; why shouldn't you treat the IP of others as you would want your own work to be respected ?

## **Outline of what it is and what can go wrong**

There are many different types of IP. In this guide we focus on the two main types of IP most relevant to online content; copyright and trade marks.

Copyright subsists in all original literary, dramatic, musical and artistic works. It covers books, photos, drawings, film and tv recordings, musical compositions and recordings as well as web content, software and databases. In the UK, copyright protection is automatic, meaning there is no need to register it to obtain the protection. The copyright owner is the author of the work, for example the writer, photographer, designer or performer. Often there will be several different copyright holders in a single work e.g. in a pop song, the lyricist, the composer, the featured artist/singer, the musicians and the producer will all be copyright holders. Copyright protects the work from being used by others without the copyright holder's permission. Using or

reproducing a substantial part of a copyright work without permission will be an infringement unless the use falls into one of the copyright exceptions recognised by law.

Trademarks protect logos, names (product, company, brand), product shapes and jingles. Trade marks protect the value of brand recognition and reputation ('goodwill') that a product or service has built up. Trade marks generally have to be registered to gain protection, although not always. A trade mark is infringed by unauthorised use, as defined by law and in some instances, infringement amounts to a criminal offence. Trade marks protect traders by preventing others 'ripping off' the goodwill they have built up in a particular product or brand and protect consumers by ensuring goods or services bearing the trade mark are genuine.

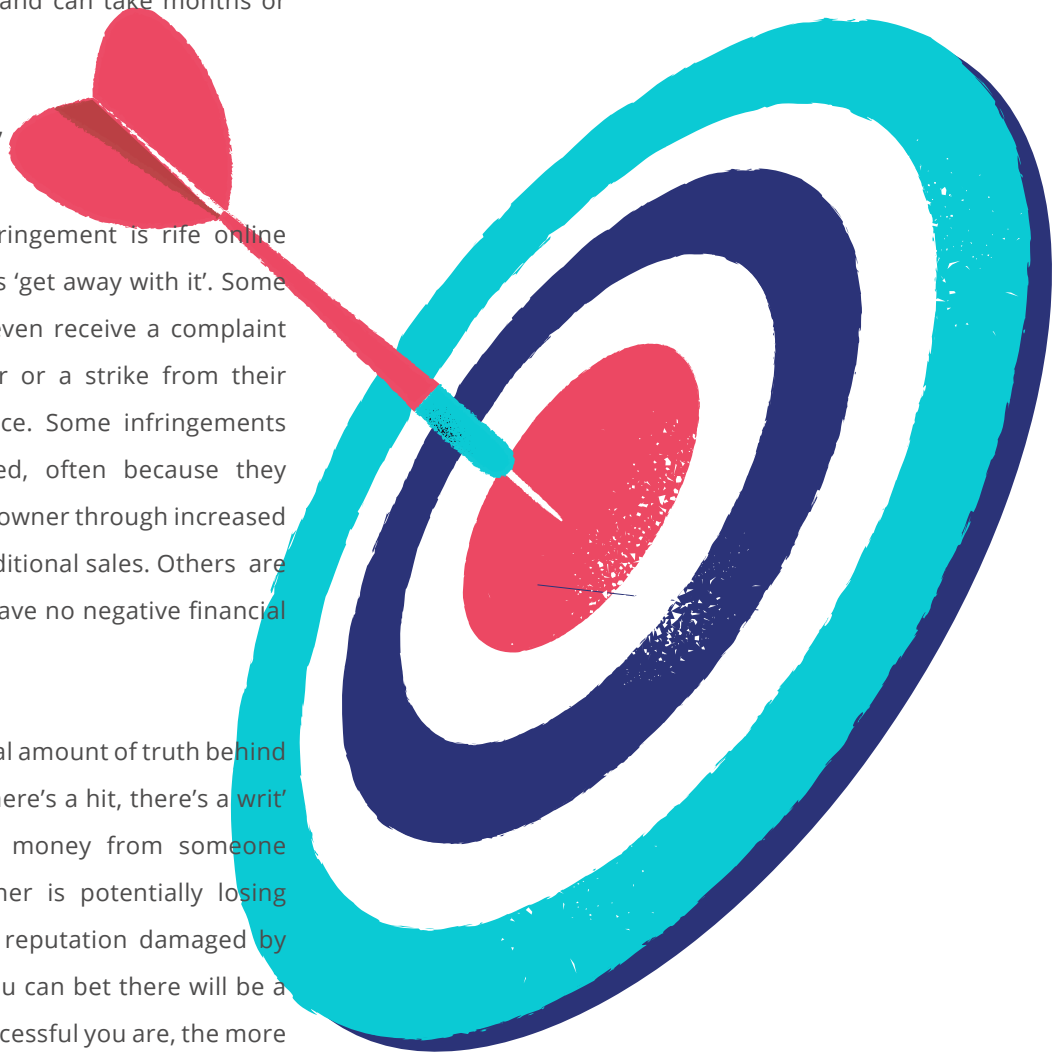
The penalties for infringing IP are different depending on the type of IP and the nature of the infringement. The most significant risks for

an online influencer who include protected IP in their content without permission are having to remove the infringing content, being barred from an online platform and/or having to pay financial damages to the wronged party. Disputes are extremely stressful and can take months or even years to resolve.

**“But everyone does it!”**

It’s undeniable that infringement is rife online and that many infringers ‘get away with it’. Some people perhaps never even receive a complaint from a copyright owner or a strike from their online platform of choice. Some infringements are effectively condoned, often because they ultimately benefit the IP owner through increased brand recognition or additional sales. Others are ignored, because they have no negative financial impact on the IP owner

However, there’s an equal amount of truth behind the old phrase ‘where there’s a hit, there’s a writ’ – i.e. if you’re making money from someone else’s IP or the IP owner is potentially losing income or having their reputation damaged by an unauthorised use, you can bet there will be a complaint. The more successful you are, the more followers you have and the greater your online influence, the greater the risk of a complaint.



## So how can you safely use content that is protected by IP rights?

### Linking and Framing

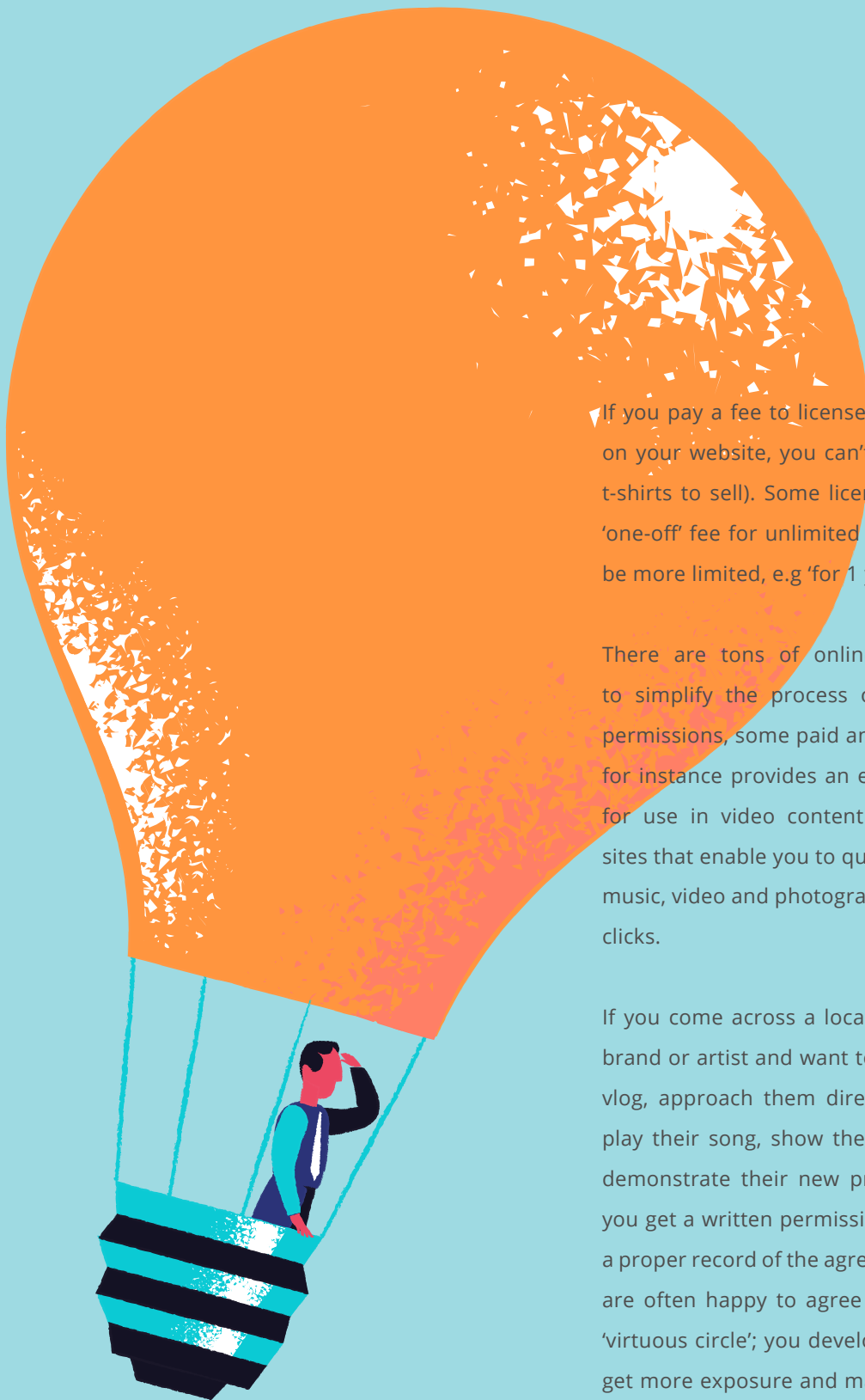
Most IP protections pre-date the internet and a number of court cases have been necessary to determine how IP protection applies online and what activity amounts to infringement in the digital world.

You do not infringe UK copyright by providing or including links to copyright protected works elsewhere on the internet, provided that the content linked to is not behind a paywall. If the page you link to contains trademarked material, you must also take care to avoid creating any implication that you are connected to, or endorsed by, that company or brand if that is not the case. You should also check the terms and conditions of the website linked to, in order to ensure they don't prohibit the type of linking you wish to use. Many website expressly authorise

linking, providing you follow specific guidelines. It is advisable to link only to reputable websites (e.g. a band's own website, a legal download site or a brand's own product pages) as this protects the integrity of your search rankings, reduces the risk of a claim and means your viewers are less likely to follow 'dead links' to more sketchy websites that may have been removed since you linked to them.

### Permission / License

You don't infringe IP rights if you use the content in accordance with an express permission, usually called a license. You can obtain licenses either directly from the rights owner (e.g. a photographer) or via a content library (e.g. Shutterstock). You may have to pay a fee to license material and you may only be able to use the copyright content in a specified manner (e.g.



If you pay a fee to license a photograph for use on your website, you can't print the image onto t-shirts to sell). Some license fees are paid as a 'one-off' fee for unlimited use whilst others may be more limited, e.g 'for 1 year online only'.

There are tons of online resources available to simplify the process of getting the correct permissions, some paid and some free. YouTube for instance provides an extensive music library for use in video content and there are many sites that enable you to quickly and easily license music, video and photographs, often in just a few clicks.

If you come across a local or little-known band, brand or artist and want to feature them in your vlog, approach them directly for permission to play their song, show their video or artwork or demonstrate their new product (always ensure you get a written permission to ensure you have a proper record of the agreement). Smaller artists are often happy to agree and you can create a 'virtuous circle'; you develop a new contact, they get more exposure and may repay the favour by promoting your content to their fans, potentially extending your following.



## Defences to IP infringement

There are some defences to IP infringements which are discussed below.

Although trade marks may not be used without permission, this does not prevent you using a trademarked term to actually identify that product, brand or company that you are discussing. So for instance you can say you are testing the Lancôme product 'Teint Idole' in your beauty video without infringing either of the trademarked terms ('Teint Idole' or 'Lancôme'). If you are actually applying the product it's ok to show the packaging and the product on screen as you're using it as well, even though the logos on the packaging will also be trademarks. However, this exception wouldn't enable you to copy the product logo and flash that up on screen, or suggest that you are endorsed by the brand if you are not.

You may reproduce all or part of a copyright work without permission if the purpose of doing so is for 'quotation, critique or review' providing that the work is

- a) publicly available and;
- b) the source of the work (usually the author/artist) is properly acknowledged, and;
- c) the quoted material is supplemented by topical discussion or assessment and;
- d) the extent of the material quoted or reproduced is no more than is necessary for the particular review.

For example, you could read lyrics of a song for the purpose of explaining what you think they mean or refer to (e.g. Who is 'Becky with the Good Hair'), to discuss their personal impact on you, or to discuss the evolution of the writing style of the lyricist.

However, this defence of fair dealing is difficult to apply if you are commercializing the content in any way (which may be the case if you were obtaining advertising revenue on the content)

You may also reproduce a copyright work (except a photograph) or part of it to report on current news or events providing that the source is clearly and correctly acknowledged and the extent of the material reproduced is no more than is necessary for the purpose of the news story.

## **Incidental inclusion**

A copyright work is not infringed if its inclusion in your work is genuinely 'incidental'. For example if you are filming a vlog outdoors and there is a billboard advert in the background, capturing that in your content is not copyright infringement. If you happen to be wearing a t-shirt that includes a copyright work or a trade mark, generally speaking, that should not cause a problem. However, if you were rewarded by the clothes brand for wearing the item, or the content you are filming is 'promotional', the rules would be different, and you would likely need to disclose the commercial relationship and/or have permission to include the third party IP in advertising (see our Guide to Promotional Activity for more information)

## **Out of Copyright works**

The duration of Copyright protection differs depending on the type of work, but doesn't last forever. Often it lasts for 70 years from the date of death of the author. Reading a piece of Shakespeare or playing a composition by Mozart

on a piano in your vlog won't infringe copyright. However be careful on relying on this as a defence with works that you think are « out of copyright », as a modern recording of a piece of classical music will still have 'live' copyrights in the orchestra's performance of the piece.

## **Parody**

A relatively recent change to the law now means a parody, caricature or pastiche of a copyright work is not an infringement. For the parody exception to apply, the audience must be able to identify the original work as the underlying source of the parody work, but there is no requirement that the new work be 'funny' or comical. An example of a parody would be rewriting the words to a pop song to satirise current political events or turning a well known photograph into a meme by adding text. There are limits though, and the parody defence does not currently apply to trademarks. The parody must not damage the original copyright holder economically, nor bring the original copyright holder into disrepute.



# Summary

## Do's & Don'ts

1. Don't use other people's works without permission, or without being sure that you have a defence.
2. If you are relying on a copyright exception, make sure you have researched it properly and are complying with any requirements (such as crediting the author).
3. Do provide link to works elsewhere on the internet to enhance your content, but make sure the source linked to is credible and does not violate the linked to website's terms and conditions.
4. Don't be afraid to approach other copyright holders for permissions where necessary. You could increase your following and make a new contact.
5. Don't use materials if you have asked for permission and the copyright or trade mark owner has refused.

## External Resources

The UK Intellectual Property Office (Free IP guides, Trade Mark search) - <https://www.ipo.gov.uk>

The British Library IP Centre - IP guides and advice on how to protect your own IP - <https://www.bl.uk/business-and-ip-centre>

Lewis Silkin Passle Blog - Interesting articles about current IP and Entertainment news - <http://adlaw.lew-issilkin.net>

YouTube Copyright Guidelines - <https://www.youtube.com/intl/en-GB/yt/about/copyright/#support-and-troubleshooting>

YouTube Music Library Service - <https://m.youtube.com/musicpremium>

# Section 3

## *defamation and reputation management*

Introduction

Defamation

Privacy issues

Avoiding backlash

Summary do's and don'ts

Useful resources

Defamation and reputation management



## Introduction

Online commentary comes with risks, both legal and reputational. As an online influencer, sharing your views and reviewing products is almost certainly your stock-in-trade, so it's important to have an understanding of legal issues that can trip you up.

This guide will help you to identify some of the particular risks to be aware of when sharing content, including defamation and privacy. The number of Defamation claims relating to social media content has increased exponentially in recent years, coinciding with the recognition that online influencers can be at least as powerful in directing consumer behaviour as traditional marketing. The consequences of saying the wrong thing can be serious, particularly if you post something that unfairly damages the reputation of a third party. Once you post content online, you lose a lot of control over it (content can be shared or screen-grabbed and recirculated without your knowledge or permission) but you remain legally

responsible for any damage that it causes. The wider the publication, the greater the damage that is likely to be caused. Even a one-line Tweet can be considered libellous and result in tens of thousands of pounds in damages.

## Defamation

A defamatory statement is one which is false and causes damage to a person's (or business') reputation or otherwise causes them or it harm, particularly financial harm.

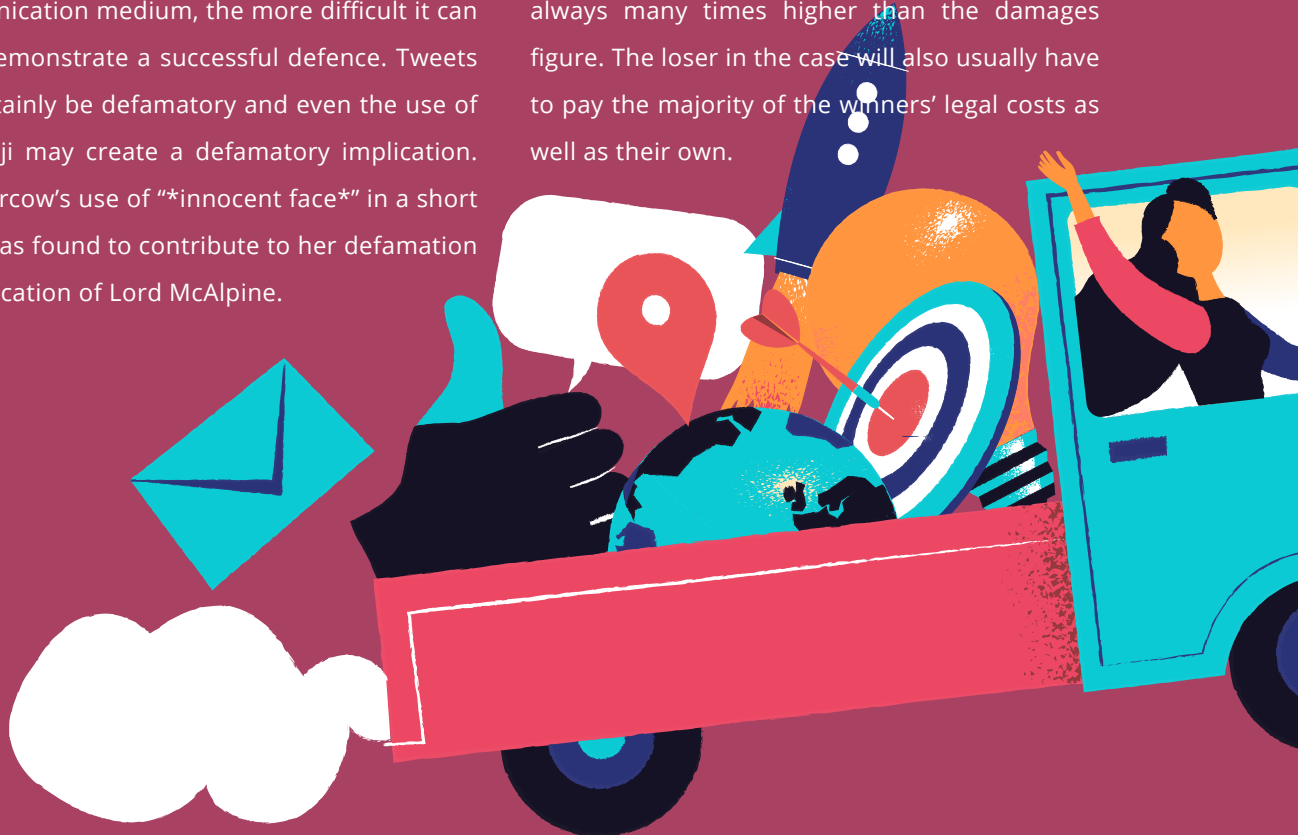
Defamation covers both libel (defamation in a permanently recorded form) and slander (spoken defamation). Efforts to have tweets and other social media postings treated as slander instead of libel have all failed.

A defamed party has the right to legal redress, including an apology and retraction/correction and payment of damages, often running in the tens of thousands of pounds and sometimes even higher.

To be defamatory the statement must be false (expressly or by implication), must identify a legal person (an individual, organisation or business) and cause 'serious harm' to the reputation of the claimant. For a business to be defamed it must prove that it suffered serious financial loss as a result of the defamation, whilst an individual merely needs to demonstrate that the statement was likely to lower them in the estimation of right-minded members of society. You don't even need to have written the statement yourself to defame someone; sharing or repeating someone else's defamatory comment can also amount to a secondary defamation if your action brings the statement to a wider audience.

A statement need not be long to be defamatory (e.g. "X is a drug user") and the shorter the communication medium, the more difficult it can be to demonstrate a successful defence. Tweets can certainly be defamatory and even the use of an emoji may create a defamatory implication. Sally Berrow's use of "*\*innocent face\**" in a short tweet was found to contribute to her defamation by implication of Lord McAlpine.

Accidentally misidentifying someone by name or social media handle can also be defamatory, as Katie Hopkins found when she mistakenly implied that poverty campaigner and food blogger Jack Monroe had vandalised a war memorial. Hopkins had meant to accuse someone else, but mistakenly used Monroe's twitter handle and refused to correct her error. This proved costly when Hopkins' somewhat questionable defence that Twitter 'was like the Wild West' failed, and she was ordered to pay damages of £26,000 to Monroe, along with legal costs (the legal costs would likely dwarf the damages payment and almost certainly ran in the hundreds of thousands of pounds). Whilst damages figures in libel court cases tend to be widely reported because they are public, it's worth bearing in mind that the legal costs of defending a defamation case are always many times higher than the damages figure. The loser in the case will also usually have to pay the majority of the winners' legal costs as well as their own.



There are a number of defences to a defamation claim, including demonstrating that the alleged libel was either 'substantially true' or was expressed as an honestly held opinion rather than as a false statement of fact, often referred to as 'fair comment'. A defendant may also be able to demonstrate that the claimant had no reputation worthy of protection. Or they may be able to demonstrate that they truly believed the statement was accurate. Accurate reporting of statements made in open court and Parliament are also effectively exempt from being considered defamatory.

### Privacy issues

Whilst defamatory statements tend to be false, publishing information which is true, but private can also be legally problematic. Even celebrities whose lives are lived in the public eye are entitled to a private life. What constitutes private information depends on the particular circumstances, but may include personal details such as contact details, medical information, sexual orientation or political views. There is a substantial qualitative difference between saying

you saw X Celeb having a meal in a Soho restaurant last night and stating that you saw Y celebrity leaving an Alcoholics Anonymous meetings at Camden Community Centre. Whilst the former is unlikely to be private, the latter would be in almost all circumstances. So be careful with your celebrity scoops and err on the side of caution if you might reveal something about someone that they have a right to keep to themselves.

### Avoiding backlash

A fairly common situation that gets many bloggers and vloggers into hot water is threatening (or implying) to give another business bad publicity or negative reviews unless the blogger receives freebies or kickbacks from them. Making such a threat could easily amount to blackmail, which is a criminal offence.

Giving a fake or malicious review of a business that has refused to give you a freebie may also be legally problematic and could easily damage your reputation far more than theirs if you are exposed.



# Summary

*do's and don'ts*



- Do differentiate between airing an honest opinion and making a factual statement (which may be defamatory if false).
- Don't mindlessly share a post that may be defamatory if you aren't able to check the underlying facts for yourself.
- Don't ever threaten to give a bad review if a business doesn't give you freebies or kickbacks.
- Don't deliberately or carelessly mislead your audience.

## Useful Resources

Lewis Silkin Guide to Defamation and Privacy: <http://www.lewissilkin.com/api/download/downloadattachment?id=498fe0f0-fe4f-43d9-8153-812d349d8b5d>

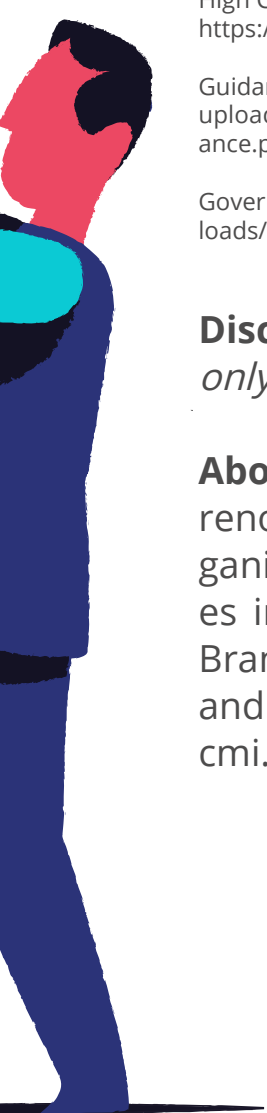
High Court Guide to Twitter (annex to the Monroe v Hopkins judgment): <https://www.judiciary.uk/judgments/judgment-monroe-v-hopkins/>

Guidance on the Consumer Protection Regulations: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/721872/misleading-aggressive-commercial-practices-guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721872/misleading-aggressive-commercial-practices-guidance.pdf)

Government guidance about online defamation: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/269138/defamation-guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/269138/defamation-guidance.pdf)

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**About Lewis Silkin LLP:** Lewis Silkin LLP is a commercial law firm renowned for its work with creative, innovative & brand-focused organisations. Its Creators, Makers and Innovators Department advises individuals and companies across the creative sector, including Brand Ambassadors, Production Companies, Advertising Agencies and Global Brands. For more information visit [www.lewissilkin.com/cmi](http://www.lewissilkin.com/cmi).



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