



Could You Run This Ad?

A Roundtable on Advertising Claims, IP Rights, and Real-World Risk



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VENABLE LLP

Transforming Ideas into Successful Campaigns



Contracting and Licensing



Collaborative Brand Agreements



Influencers and the Digital Age



Mitigating Litigation Risk

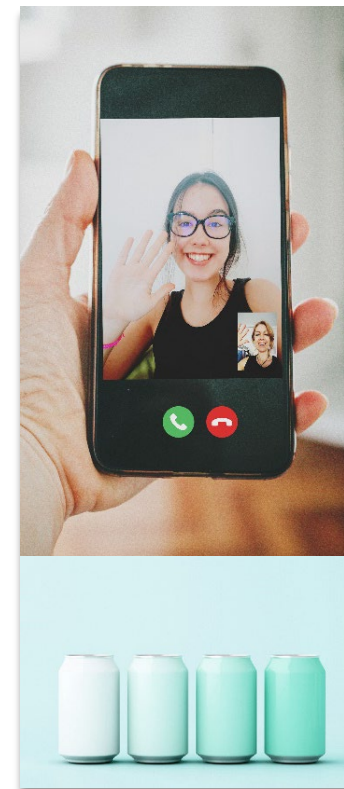
Influenced in All the Wrong Ways

Poppzy, a plant-based wellness soda brand, hires influencer **SaraSoda** to post a “taste test” video with a new line of vitamin sodas. Under a brief contract signed by her talent agent INFLNCE, Sara must be “honest” and not mislead viewers. She will receive free products and compensation tied to views and sales through an affiliate link. The agreement does not address messaging guidelines, brand use restrictions, or disclosure requirements, but Sara has worked with many brands in the past.

Sara’s video immediately goes viral. In the video she coughs, nearly choking, while drinking the soda and sarcastically says, “Delicious, five stars.” The caption reads: *“Sure, it’ll make me lose weight, but at what cost? Love the new flavors #Poppzy.”* The video sparks a viral “Poppzy challenge” in which teens rapidly chug the soda; several report stomach pain and throats burning. Online users begin calling Sara “Poppzy Girl,” and she adopts the nickname in later posts unrelated to the Poppzy campaign.

The next day, SaraSoda posts a video reviewing a barbecue brand’s meat products. In the video, she is seen drinking a Poppzy soda between bites. Poppzy is a vegan company and is infuriated that SaraSoda would post a video of Sara eating meat, let alone show Poppzy products next to meat. Poppzy demands Sara take down the post.

Poppzy now refuses to pay SaraSoda and wants to seek damages for tarnishing Poppzy’s brand and intellectual property. Sara demands payment from her agent. Regulators are now investigating Poppzy for SaraSoda’s weight loss claims and inadequate sponsorship disclosures.

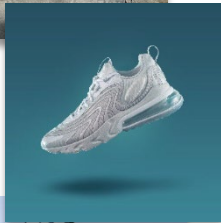
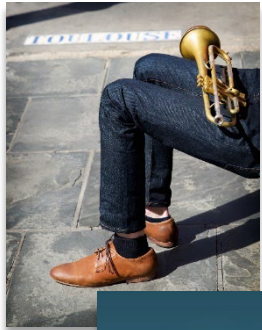


Writing Strategic Influencer Agreements

1. **Parties:** Who are the parties to the contract? Influencer? Agency?
2. **Services/Deliverables:** Number, type, frequency of posts, timeline, and contract term?
3. **Compensation and Payment Schedule:** Free product, lump sum, or conditional payments?
4. **Exclusivity:** Category, competition, time?
5. **Approval Rights and Procedure:** Will Brand review/approve the content before it's posted?
6. **IP Ownership:** Who owns what? Can SaraSoda call herself "Poppy Girl"?
7. **Use Rights:** Who can do what with the content? Who can force the influencer to take content down?
8. **Morals clause:** What unsavory actions must the influencer avoid associating with the Brand?
9. **Non-disparagement clause:** How to square non-disparagement with honesty?
10. **Indemnity clause:** When is the Brand liable for the influencer's statements? When can the Brand make the influencer pay for legal and reputational damages?



Brand Collaboration



Harmony House Music Co. and Apex Athletics collaborate on a new “court-to-concert” sneaker called the **Fusion Flights**. Each company grants the other a non-exclusive license to use its trademarks.

- Apex manufactures the sneakers (featuring Harmony House’s logo), and Harmony House sells the shoes online and in-store, along with Apex-branded instrument accessories.
- The agreement does not address royalties, compensation, indemnification, or liability.
- The joint ad campaign features exaggerated scenes of musicians becoming pro athletes and athletes becoming concert pianists, using the slogans “**Keep Soaring**” and “**Crafted for Greatness.**”

The shoes are moderately successful for Apex, but Harmony House’s overall sales surge. Without Apex’s permission, Harmony House begins running ads using Apex’s well-known slogan, “**Rise Above,**” and offers “Rise Above” music lessons. Harmony House also starts discussions with another athletic brand, **Summit Streetwear**, about a separate co-branded product line.

A teenager buys the Fusion Flights, believing the shoes will help him become more athletic. During basketball tryouts, the shoe’s sole detaches, and he is injured. He sues both companies for false advertising, product defects, and personal injury. During the lawsuit, Apex learns about Harmony House’s unauthorized use of its slogan. Apex also receives an FTC inquiry. Meanwhile, a national beer brewery sends a cease-and-desist letter claiming the campaign infringes its trademark on the “Crafted for Greatness” slogan.

Collaboration X Regulation



- **Intellectual Property:**
 - What is the scope of the license?
 - Who is authorized to make what?
 - When does the license expire?
 - Who “owns” the new products?
- **Contract Law:**
 - How are Brands paid?
 - Who is liable for the production and sale of the product?
 - Is the agreement exclusive, or can a Brand enter similar deals with competitors?
- **Advertising Law:**
 - Who is responsible for substantiating advertising claims?
 - Who is liable for misrepresentations?
- **Antitrust Concerns:**
 - Can competitors run a joint marketing campaign?
 - Can Brands require a non-compete or exclusivity clause?

Clearance and Licensing for Advertising

Harvest Bites, a national snack company, wants to use the hit song “Mixed Feelings (feat. Aria)” by pop star Nova Lux in a commercial for its new gourmet popcorn line, “Flavor Fusion.”

The proposed ad would include:

- Instrumental portions of the song
- The original recording of the lyric, “Girl, let’s mix it up!”
- Use of the distinctive color scheme and typography associated with Nova Lux’s new album

Harvest Bites does not plan to hire Nova Lux or Aria to appear in the commercial but is considering using lookalike actors who strongly resemble them. If the campaign is successful, Harvest Bites plans to release limited-edition packaging inspired by the album’s branding.

Harvest Bites wants to launch the ad quickly and pay as few fees as possible. Nova Lux and Aria are signed to different record labels and managers. The song has multiple credited writers and producers.



IP Clearance and Licensing Issues

- **Intellectual Property:** What types of intellectual property are being licensed?
 - **Music Rights:** Have you obtained composition and recording licenses? From whom?
 - **Scope of License:** What is the ad’s geographic reach? What mediums will the ad run on? Will the music sample be used in multiple ads?
 - **Trade Dress / “Signature Aesthetic”:** Are stylistic choices (font, colors, imagery) so distinctive that the Brand should obtain a license before using? How large is the risk of customer confusion?
 - **Naked License Risk:** Does the licensor maintain control and supervision over trademark use?
 - **Non-License:** Does the use fall under fair use immunity, so that a license is not necessary?
 - **Right of Publicity:** Does the use profit from a celebrity’s identity without compensation?
- **Approvals and Control:** Who has approval rights over the use—artist, manager, or record label?
- **False Endorsement:** Does the campaign imply an official collaboration or artist endorsement?
- **Deal Structure:** How is each party paid, and who is liable if the campaign must be pulled?
- **Advertising Law:** Who substantiates claims and who is liable for misrepresentations?
- **Recordkeeping:** Are records of clearance and negotiation maintained?



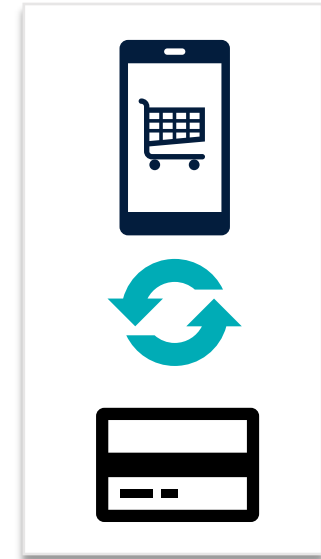
Contract Acceptance and Clickwrap Woes

- PerkPal, a rewards app, partners with apparel retailer Clear & Harbour to offer users a same-day 30% discount after watching a sponsored video. PerkPal hires Gūdad Media, an ad agency, to develop the mobile campaign videos that users watch.
- To create a PerkPal account, users must check a box stating: *“I agree to the Terms of Use (includes arbitration).”* The phrase “Terms of Use” is hyperlinked, but users are not required to open it before proceeding. On some mobile screens, the disclosure text wraps onto a second line.
- PerkPal stores a record that the checkbox was selected but does not preserve what the user’s screen looked like at the time of assent. As soon as a new PerkPal user finishes creating their account, a button appears saying “Claim Discount.” Once the button is clicked, Clear & Harbour’s online store opens in the user’s primary browser, with the promotion applied in the cart. The hyperlink automatically adds a “PerkPal Pro” subscription for \$5 to the cart.
- Clear & Harbour prominently displays its guest checkout option to reduce drop-off and cart abandonment. The checkout page includes small gray links to Clear & Harbour’s Terms of Use and Privacy Policy but does not state that clicking “Place Order” constitutes agreement to those terms. Below the cart summary is a gray box that says “PerkPal Pros receive an extra 10% off and save up to \$180 extra a year.” The web page does not explain that PerkPal Pro is an automatically renewing subscription that caps the monthly discount amount at \$20.
- Consumers later file a class action under state consumer protection laws and the Restore Online Shoppers’ Confidence Act (ROSCA). PerkPal moves to compel arbitration based on its app terms. Clear & Harbour supports the motion, relying on its hyperlinked website terms. Plaintiffs argue there was no clear and informed assent to either company’s arbitration provisions or the PerkPal Pro membership.



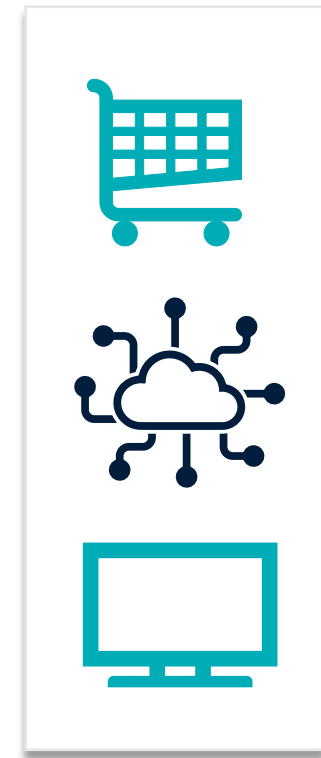
Avoiding Clickwrap Pitfalls

- **Assent and contract formation:**
 - Was the consumer given reasonably clear notice and a clear act of acceptance tied to the terms?
 - What does the consumer believe they are agreeing to? Is that accurate?
- **“Clickwrap” in name only:**
 - Did the user see or reasonably understand what terms they are bound to by checking the box?
 - Can the company prove what the user saw?
- **Terms link not opened:**
 - Does the system preserve the terms as presented?
 - Can the company verify that the consumer clicked the hyperlink to the terms?
- **Guest checkout for one-time purchase:**
 - Does the guest checkout flow adequately explain that the user is bound by the retailer’s terms?
 - Does the consumer agree to any specific data, membership, or dispute resolution policies by checking out?
- **Checkout terms as hyperlinks:**
 - Does the consumer know that clicking the purchase button binds them to terms that affect their legal rights?
- **Multiple agreements in one purchase path:**
 - If the user accepts multiple companies’ terms in one purchase flow, which terms control? Which company is liable?



Advertising Wrapped Up in Clickwrap

- **Privacy Policies and Cookies:**
 - Did users consent to the collection of their data for use in targeted advertising?
 - Is the clickwrap or browsewrap privacy policy enforceable?
- **Subscriptions and Automatic Renewals:**
 - Is a clickwrap notice of material subscription terms sufficient?
 - May a website hyperlink to material subscription terms?
 - What terms must be highlighted in the main checkout flow?
- **Copyright and Trademarks:**
 - Do the terms and conditions limit the user's intellectual property rights?
 - Is this limitation disclosed to the user? When and how did the user consent to the limitation?
- **Arbitration and Class Action Waivers:**
 - Before reaching the merits of an advertising case, can the company prove the user consented to arbitration?
 - Does the arbitration disclosure satisfy the “clear and conspicuous” standard for automatic renewal disclosures?



Questions?



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