

Influencer Marketing on Social Media

Commercial or non-commercial content? - an influencer perspective

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Abstract

Social media marketing is constantly changing and evolving which requires brands to stay relevant with new technology and constant development for finding new ways to reach the consumers. The laws applicable on social media marketing are very complicated and a widely debated area, due the constant change in the market and technology have opened up many new ways for marketing that are different from traditional marketing.

Influencers are some of the most important players in social media marketing, one of many reasons why they are so important is the fact that they can be both opinion formers and marketing tools. The position influencer marketing has in society has created demarcation problems between freedom of press and speech and marketing laws. The fact that influencers are both opinion formers and marketing tools imply that they can publish content on their platforms that are commercial but also non-commercial, this raises many questions, but the most relevant question is what constitutes commercial content. Since non-commercial content is protected by the constitution of Sweden and can't be subject to applicable laws within marketing it is very important for brands and influencers to understand if the content is commercial or not.

Abbreviations

HD	Supreme Court
ICC	International Chamber of Commerce
KO	Consumer Representative
KV	Consumer Agency
MFL	The Swedish Marketing Law
NJA	New Legal Archive
RO	Advertising Representative
RON	Advertising Opinion Committee
SOU	The Government's Official Investigations
TF	The Constitution of Freedom of Press

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1 Introduction

1.1 Problematization

Nowadays, more and more brands choose to market their products or services via social media, it has become a big part of our everyday lives and a powerful marketing tool. Advertising through various social media platforms is a new and modern way of advertising compared to traditional media that previously dominated the advertising world. Marketing regarding a brand's products or services mediated by influencers is perceived as more credible than if the marketing comes directly from the brands.¹ Since influencers are independent individuals who publish both commercial and non-commercial material, the boundaries are blurred between the two. When these boundaries in this context become fluid, it can in practice be very difficult to determine which regulations a post is subject to.²

An influencer is a person who is paid to show or write about a brand's product or service on their digital platform and thus influence others to buy their products or services. Influencers' powerful position pushes for a demarcation of issues between freedom of press and speech and marketing thus what makes commercial material according to MFL and what is constitutionally protected is becoming increasingly vague. In an assessment of whether a positive content an influencer has published is commercial or non-commercial, the natural question becomes whether there is an explicit agreement between the parties. The assessment if there is an agreement in place between the company and the influencer is in many cases very hard to assess.

¹ SvJT 2015, s. 201

² SvJT 2015, s. 201

According to 1 § MFL aims “to promote the interests of consumers and the business community in connection with marketing of products and to counteract marketing that is unfair to consumers and brands” The law thus aims to ensure protection for both brands and consumers and to counteract unfair marketing. It can be considered to be in both the brands' and the consumer's interest to be able to define what constitutes commercial material, since influencer marketing has become very complex as the development of social media continues, it has created the problem of distinguishing influencers opinions and paid collaborations thus blurred out line between commercial and non commercial material.

Previous research has focused on how commercial and non-commercial content affects consumers' online privacy and how the content is perceived by consumers³ and how influencers should be transparent with all information they share.⁴ There is still a lack of research regarding the uncertainty if content is commercial or not and how the demarcation thus affects the influencer's right to press and speech.

1.2 Purpose, Research Question & Contribution

The purpose of this study is to explore how the blurred line between commercial and non-commercial material is perceived from an influencer perspective. Furthermore, the purpose of this study is to investigate and discuss the demarcation between marketing and freedom of speech and press, and the core of the study is the marketing channel influencer-marketing. In order to enable a discussion and analysis of the demarcation between the marketing and constitutional law, the underlying marketing

³ Caudill & Murphy, 2000.

⁴ Myers, 2016.

law will initially be examined. Furthermore, an analysis will be made for which cases an influencer's posts may be subject to review by the MFL and how it affects influencers right to speech and press. The issues will be discussed continuously through the essay since it is essential for understanding commercial and non-commercial material. However, I do not claim to contribute with concretely formulated laws, but instead intend to contribute with a deeper understanding of the issue from an influencer's perspective.

The research question can be summarized as:

- How does the blurred line of commercial and non-commercial content and the applicability of MFL affect influencers' right to freedom of press and speech? and how do influencers perceive these demarcation issues?

This thesis will contribute to showing important influencer perspectives on the research area. The findings will increase understanding from an influencer perspective about how the demarcation issue, the blurred lines of commercial and non-commercial content limits influencers regarding their freedom of press and speech.

1.3 Delimitations

The essay will, as explained above, address the demarcation problems of influencer marketing in social media. Due to space limitations, it is not possible to create a complete look of all aspects of all the laws that may be of interest to the issue. The focus will be on the demarcation problems between the constitutions and the Marketing law, as well as how posts are to be advertised in cases where they are considered to be of a commercial

nature, in order to provide an overall picture of the area. This essay will provide an overview of social media marketing, but this essay will only focus on influencer marketing and their role as a marketing channel via social media. This delimitation is partly due to a lack of space, but also to the fact that descriptions of other actors do not have greater relevance for the chosen topic.

2 Theoretical framework

This chapter will provide relevant theories and concepts related to the research field. The theories include definition of social media, influencers, and the legal background. Furthermore, theories about which factors that are essential for understanding the influence of influencers are discussed as well.

2.1 Social Media

Social media consists of communication channels where users can interact and communicate directly with each other and it has come to dominate how we use the internet.⁵ The rise of social media has not only changed how consumers interact with other users but also how we consume news and information.⁶ As consumers move much of their time towards social media, brands follow to stay relevant and to reach consumers through the different social media platforms.⁷

Many social media platforms offer marketers tremendous opportunities to define narrow audiences to reach exactly the right consumers with their marketing, which has led to a much greater social engagement among consumers.⁸ This social engagement provides a source of social influence that affects how marketing is perceived and how it spreads its reach and effectiveness. In the new digital landscape, it must be understood that social

⁵ Alves et al., 2016

⁶ Abidin, 2016.

⁷ eMarketer, 2015

⁸ Abidin, 2016.

media marketing is fundamentally different in nature from traditional alternatives.

The communication of users on social media is described as an extension of traditional oral communication.⁹ Consumers listen to friends and family when considering a decision, but with the development of the social media platforms, these influences have been able to grow to include many more people than those in our physical environment.

Consumers and brands are the main players in the market and both parties have realized the value of social media. Brands use digital marketing and influencers to send out their message and attract purchases but also to position themselves and consumers can access information, previous experiences and other information from other users online.¹⁰

The geographical aspect is also important because the distance between brands and consumers becomes smaller and thereby, they can reach the consumers all over the world and consumers can get valuable information about products available on the market in peace and quiet at home.

2.2 Influencers

Influencers are often referred to as a third-party individual that has a high social status and a strong social influence.¹¹ Influencers are prominent social media users who have created a dedicated following by crafting an authentic online persona.¹² Influencers have a deep psychological bond with their followers by sharing personal content that usually revolves

⁹ Mangold & Faulds, 2009.

¹⁰ Kembau & Mekel, 2014.

¹¹ Lu, Li, Liao, 2010.

¹² Sokolova & Kefi, 2020.

around their interests or lifestyle.¹³ Users on the different social media platforms often view influencers as attractive, authentic and similar to them.¹⁴ Thus creating a positive perception of the influencers by their followers and becoming highly effective in terms of creating the desired brand impact.¹⁵ Influencer marketing entails using the trust and connection that influencers created with their followers to lengthen the reach and impact of brands as well as them self on social media. This gives Influencer a lot of space to influence their followers within the niches they have chosen, e.g. fashion, beauty or cooking and for brands this is very desirable as the marketing gains higher authenticity and credibility thereby through less resistance to the commercial message.¹⁶

In a supreme court case, the court defined an influencer as “a influential influencer or opinion leader who has a network of followers on social media.” Furthermore, the court claimed that "it happens that an influencer creates content in his or her channels by recommending a product without receiving any compensation in the form of money or products" Influencers are thus individuals who have built a social network of people who follow them.¹⁷

Some suggest that the effect of influencers operates analogously to opinion leadership, in the sense that some individuals are able to talk about brands or issues in an easy-to-understand way that allows them to be explainers of brand benefits to other people.

¹³ Ki et al., 2020.

¹⁴ Sokolova & Kefi, 2020.

¹⁵ Lou & Yuan, 2020.

¹⁶ De Veirman, 2017.

¹⁷ De Veirman, 2017.

There are many different types of agreements between brands and influencers, in some cases there is an explicit cooperation between the parties or a so-called ambassadorship. Ambassadors receive regular payments for marketing the brands products or services and the fact that there is an underlying agreement simplifies the legal situation in many cases.

When there is an explicit agreement between the parties, it is relatively natural to attribute the posts to MFL and since the collaboration is often for a longer period of time, it becomes easier for the recipient to distinguish the marketing from other advertisement content from the influencer. In cases where there is no explicit agreement or ambassadorship, various sponsorships and compensation are usually paid to the influencer. These scenarios are more difficult to attribute to MFL because no explicit agreement exists.¹⁸ This is a problematic issue for influencer marketing, there is often hidden advertising in connection with the marketing and in some cases the advertising disclosure is too vague. Since Influencer marketing is a relatively new method of marketing, it is difficult to know what applies in practice, which leads to it being more difficult to do right.¹⁹

2.3 The Influence of Influencers

According to Forbes (2021) influencers can shape the attitude, opinions and the actions of their followers. This is due to their ability to participate in conversations and interact with their followers.²⁰ Influencers are content creators who act as opinion leaders to influence brands, products and users delivering their opinions to their followers.²¹ According to Huang &

¹⁸ SvJT 2015, p.202.

¹⁹ SOU 2018:1, p.194.

²⁰ Forbes, 2021.

²¹ Huang & Copeland, 2020.

Copeland, influencers with a specific audience are even more effective than celebrity endorsement. Influencers often create original appealing content rather than following the brands guidelines and the right influencer can help brands reach their target audience , build trust and drive participation.²² Furthermore influencers are seen as trustworthy according to Huang & Copeland, the words of influencers are much more credible to consumers compared to words coming directly from the brands. Furthermore, Influencers have a great influence on the consumers since the influencers are seen as mutual between the brand and the consumer.

2.4 Creating Content

Influencers can customize their content to make it more desirable for their followers.²³ Influencers are known to create and spread good content on their platforms.²⁴ The content is provided through recommendations, images, and other forms of content that encourages a consumer to purchase a product or service. ²⁵ The content that comes from an influencer is perceived as more favourable, trustworthy and personalized in comparison to traditional advertisement that comes directly from the companies.²⁶ The personalized content works as a persuader for the consumer who will adopt the content due to the fact that the consumer believes that their interest, attitude and opinions are similar to the influencer. ²⁷ Thus, it is essential that the content provided by the influencer is more personalized

²² Huang & Copeland, 2020.

²³ Song & Yoo, 2016.

²⁴ Liu et al., 2015.

²⁵ Forbes 2016.

²⁶ Walck et al., 2013.

²⁷ Kapitan & Silvera, 2015.

than information that comes from companies. so that the consumer feels that created content is directed to them personally.²⁸

2.5 Building Trust

Trust impacts the degree of influence between a consumer and an influencer, it is a perception of how much the consumer believes in the content that is posted by the influencer.²⁹ Trust is furthermore defined as a positive outcome of an action based on the opinion, shared information and actions made by other individuals. An Influencer that has built trust among their followers can influence their followers with recommendation more easily.³⁰ In order to keep the trust of the consumers, the influencer is required to keep their expertise in their area of content.³¹ Influencers who share recommendations about a certain category are seen as more trustworthy and credible. Building this trust can take a long time for influencers and one factor that can lower the level of trust is the disclosure of sponsored content.³² Thus influencers that post a larger amount of sponsored content decrease their credibility as a result.³³ By creating more personalized posts the influencer will receive stronger trust from the consumer, since consumers consider the content to be non-commercial and in that sense more desirable.³⁴

²⁸ Uzunoglu & Kip, 2014.

²⁹ Liu et al., 2015.

³⁰ Liu et al., 2015.

³¹ Liu et al., 2015.

³² Pfeuffer & Huh, 2019.

³³ Pfeuffer & Huh, 2019.

³⁴ Hsu, Lin & Chiang, 2013.

2.6 Sponsorship Disclosure

According to Eunjin et al, content created and introduced by influencers was received better by the consumers both regarding the consumer attitude and perceived brand attitude compared to if the content was presented by itself. But when the content disclosed sponsorship the influencer enhancement decreased.³⁵ Sponsored content is commercial content that in some cases can be integrated in non-commercial content. There is ample evidence that the advantage influencers have over traditional marketing decreases when the content relationship with the brand is disclosed. Furthermore, sponsored content results in negative brand attitudes and also lowers the credibility perception of the message.³⁶ Similarly De veirman and Hudders explained that sponsored content increased ad skepticism thus negative evaluations about the influencer.

³⁵ Eunjin et al., 2021.

³⁶ Wojdynski & Evans, 2016.

3 Legal Theoretical Framework

3.1 MFL

MFL contains a system of rules for brands actions regarding marketing. It is MFL that regulates all communication in the form of advertising messages for services and products between brands and consumers.³⁷

MFL is directed towards marketing that is aimed at Swedish audiences, the applicability of the law is decided according to the so-called effect principle this means that it does not matter where the sender of the marketing is, but it is the effect on Swedish audiences that is the decisive factor.³⁸ The current marketing law has been harmonized with the EU directive adopted in 2005 on unfair business practices applied by brands towards consumers.³⁹ The directive also established something called the blacklist. The blacklist contains 31 aggressive or misleading business practices that should in any case be considered unfair.⁴⁰

According to 1 § MFL, the law aims to promote the interests of competitors and the business community in connection with the marketing of products and to counteract marketing that is unfair to consumers and businesses. The law shall be applied to all marketing in accordance with 2 § MFL. Furthermore, the marketing concept is defined in 3 § MFL, advertising and other measures in business activities that are suitable for promoting the sale of access to a product, including a businesses actions,

³⁷ Hellstadius, p.13 ff.

³⁸ Hellstadius, p.14 ff.

³⁹ 2005/29/EG

⁴⁰ Nordell p.53.

omissions or any other measure or behavior before, during or after the sale or delivery of a product to a consumer or a business.

According to the large general clause in 5 § MFL, marketing must be in accordance with good marketing practice. Good marketing practice is regulated in 3 § MFL as accepted standards that aim to protect consumers and businesses in marketing. In addition, all advertising that contravenes 3 § MFL is improper if it significantly affects or is likely to affect the consumers ability to make an informed decision. This is a transaction test which means that marketing must have a certain scope to be covered by the law.⁴¹

3.2 Commercial or Non-commercial?

MFL is only applicable to content that is of a commercial nature, which means that the content creation has been carried out with a commercial purpose and commercial relationship to the object.⁴² As mentioned above, the purpose of marketing legislation is to protect consumers, business and the interest in well-functioning competition.⁴³ This purpose is maintained by the use of the sanctions offered by MFL to intervene against unfair marketing. This means that it is possible with the help of marketing legislation to put an end to marketing that is improper. On the other hand, there is both national and international protection for freedom of press and speech, which ensures everyone the opportunity to express thoughts and opinions in order to contribute to free opinion formation and news dissemination. Freedom of press and speech is primarily protected through the Swedish constitution, which are exclusive regulations for

⁴¹ Nordell s.62.

⁴² Prop 2007/08:115, p. 111 f.

⁴³ Bernitz, 2013, p.39 f.

content that falls within the regulations' protected areas. In addition to conveying a commercial message, marketing can also contribute to debates for opinion formation that fall within the protection areas of the constitutions. This means that freedom of press and speech and marketing are two areas that largely overlap.

3.3 Mixed Messages

A problem area that is recurring among social media is when content contains both commercial and non-commercial parts. This problem was put at the forefront in NJA 1977 p. 751, where HD took a position on a content creation that contained both information about the VIVO store chain and prompt consumers to shop at Konsum instead. The information about the company VIVO was of such a nature that it fell within the constitution's scope, while the latter part fell within MFL's scope. However, the information and the advertisement were presented together, which gave rise to the question of whether the entire content was to be regarded as an advertisement or to be protected by the constitution. HD argued that the question of whether the content in the advertising section fell within or outside the framework of constitution could be the subject of a divided opinion. Furthermore, they stated that in a situation with mixed messages, an assessment will always need to be made in the individual case. HD further stated in the case, that it is not possible to ensure that the content falls outside of MFL's scope by including opinion-forming information in an advertisement. It has also emerged that different parts of the content can be assessed separately.⁴⁴ This means that content that is posted

⁴⁴ SvJT 1980, p.33.

on a social media platform with different types of content is not to be considered a mixed message if it can be broken down.

Another case where mixed messages has been tried is NJA 2001 p. 319, the case concerned an advertisement for snus which had been banned according to MFL. This ruling underlined the fact that it is not possible to simply enter the scope of the constitution by including content that is opinion-forming.

3.4 Hidden Advertising & Product Placement

Hidden advertising is integrated into different types of content. It is much more difficult to identify than traditional advertising because they do not look like the advertising messages that consumers are used to. Hidden advertising can be described as material that brands pay for but is less clearly disclosed as advertising. Hidden advertising can be problematic from a consumer perspective as it is of great importance for the consumer to be able to distinguish commercial material from non-commercial. But it can also be problematic from an influencer perspective since they may not realize that their content includes hidden advertising.

According to 9 § MFL, all marketing must be created and presented so that it is clear that it is a question of marketing, in accordance with MFL it must also be clear who is responsible for the marketing, this is also stipulated in Article 9 of the ICC's basic rules.

Despite the regulations mentioned above, hidden advertising is occurring to an increasing extent, especially on social media. There are a number of different factors that are presumed to affect the increase in hidden marketing on social media. Social media marketing is a relatively new

marketing channel and many of the influencers who run their platforms on their own are relatively young.⁴⁵ As an Influencer, commenting or recommending a product or service that you like is not forbidden. If the influencer, on the other hand, has received any type of compensation for writing or talking about the product, it falls within the scope of MFL. The rules of MFL become applicable regardless of whether the compensation is in money or goods, it may nevertheless be the provision of a product or service. Furthermore, MFL applies regardless of whether it is the company that contacted the influencer or vice versa. A consumer who sees or reads a post must be able to immediately understand whether it is an advertisement or not, it is therefore not enough that the consumer can suspect that it is marketing.

Product placement is thus a marketing method that is often hidden advertising and it occurs through many different marketing channels.⁴⁶ Product placement is often perceived as hidden advertising because it is not obvious to consumers that the products that appear in, for example, a Youtube post have a commercial character.

Product placement often occurs in connection with influencer marketing because companies often pay for their products to be seen in the right context - a context that is not perceived as traditional advertising.⁴⁷ To identify product placements, you can use the rule of thumb that if a brand is clearly visible in a picture or clip, the company in question has paid for it to be there.

⁴⁵ SOU 2018:1, p.212.

⁴⁶ SOU 2018:1, p.194.

⁴⁷ SOU 2018:1, p.195.

3.5 Influencers as Legal Entities

Marketing is conducted according to MFL within the framework of a business activity, a business is defined according to 3 § MFL as a natural or legal person who works for purposes that are related to his own business activity. According to the preparatory work for MFL, natural persons acting in the name of the brands or on their behalf can also be seen as businesses.⁴⁸

The term is applied to all legal entities that professionally run an activity of an economic nature, both physical and legal entities. Furthermore, it is not required that the business is run for profit for it to be seen as a business.⁴⁹ 3 § MFL also defines the concept of consumer, a consumer is a physical person who buys mainly for purposes that end up outside of a business.

Influencers are physical individuals and can fall into both the category of business and consumer, thus their intention and the nature of the business becomes the decisive factor. In some cases, Influencers can act as representatives of their own companies, for example, their own social media platforms e.g Instagram accounts. However, this does not mean that all their content will fall in the business category, their posts can be both commercial and non-commercial. If there is a contractual basis behind the content that has been published by the influencer, then there should be no doubt that the influencer acts as a business and the post thus has a commercial character. If there is no explicit cooperation between the influencer and the company, it may be more difficult to assess whether the

⁴⁸ Prop 2007/08/155, s.66.

⁴⁹ Svensson m.fl., p.120

influencer acts as a business or not. The assessment should take place in the light of the purpose of the content and the nature of the activity.

3.6 Collaborations & Sponsored Posts

When an influencer speaks highly of a service or product, the question of potential marketing is raised, these contents are often based on collaboration between the influencer and the brand. Knowing what different types of collaborations there are between influencers and brands, how they differ and what characterizes them is necessary to be able to determine when a post may be subject to review according to MFL. The clearest form of cooperation is when there is an underlying agreement between the company and the influencer that sets out the framework for how the collaboration is going to plan out. Practice and investigative work have, however, shown that there are difficult-to-assess collaborative cases that fall outside the explicit agreement.⁵⁰ It can be discussed whether an explicit and underlying business agreement is required between the brand and the influencer in order for content to be the subject of MFL.⁵¹

As a general rule there should be an explicit agreement for the content to constitute as commercial content.⁵² It should also reasonably be possible for the influencer and the brand to enter into a concluding agreement with the same meaning as an explicit agreement through their actions, but this can only be relevant in exceptional cases.⁵³ In these cases, the decisive factor should be whether the influencer, through their repeated actions, gives the brand a legitimate reason to assume that a business agreement

⁵⁰ SOU 2018:1, p. 174

⁵¹ SvJT 2015 p. 202.

⁵² SvJT 2015 p. 208.

⁵³ SvJT 2015 p. 208.

exists.⁵⁴ In cases where there is an explicit agreement between the parties, content published by the influencer about the brand is to be considered a commercial post. In the absence of an explicit agreement, however, it is more difficult to claim that there is a link between the parties even though the influencer has published content that has commercial relations with a product or service. If there is no agreement, it may thus be considered within the influencer's freedom of press and speech to post positively about a brand on their own initiative without the content being classified as commercial material.⁵⁵

3.7 Ad-links & Gifts

Ad-links are a type of link that often leads to a brand's website, it is not uncommon for an influencer to include these links on their social media platform in connection with collaborations with the brands. There is usually compensation from the brand to the influencer based on how many clicks or number of completed purchases the link has generated via the influencer's social media. The presence of ad-links is usually a clear indicator that an influencer has a commercial interest in the production. For RON, the presence of an ad-link is a decisive factor in whether content constitutes commercial material or not.⁵⁶

Receiving gifts are very common among influencers, according to Hovstadius, a product that is sent to an influencer who then writes a positive post about the product without an agreement implies that a conclusive agreement has been entered into, however, Hovstadius believes that these cases are complicated and it is difficult to determine the influencer's intention

⁵⁴ SvJT 2015 p. 208 f.

⁵⁵ Bernitz m.fl., p. 185 f.

⁵⁶ RON 1707-148.

for the post.⁵⁷ Hovstadius further believes that it may be considered clear that a company, as a general rule, has a commercial interest in sending products to various influencers.⁵⁸ The motive for these mailings may be considered to be the hope that the product or service will appear in positive terms by the influencer on their social media. Hovstadius also stated that in the light of freedom of speech and freedom of press, marketing legislation should not be applicable to cases other than those that are flagrant, and that it is the intention of the influencers, which is difficult to assess.⁵⁹

⁵⁷ SvJT 2015 p.207.

⁵⁸ SvJT 2015 p.208.

⁵⁹ SvJT 2015 p.208.

4 Method

4.1 The Selection of Method

For the purpose of answering the research question, a qualitative study has been conducted, involving interviews with seven Swedish influencers. Bell et al describes the qualitative studies fitting in contexts where there is a need to acknowledge people by looking at the reality from their perspective. By viewing the influencers' perspectives, the author can interpret and understand the study subjects. As the research question aims to understand how the blurred line of commercial and non-commercial content and the applicability of MFL affect influencers' right to freedom of press and speech? and how the influencers perceive these demarcation issues, the understanding of reality from their perspective becomes very important. Thus, a qualitative approach is highly relevant for the purpose of answering the research question.

Furthermore, in-depth interviews were chosen for the purpose of answering the research question. In-depth interviews are often preferred when the study aims to understand personal experiences of the study objects. Personal in-depth interviews are also preferred by the study objects when talking about sensitive topics as the study objects feel more comfortable speaking the truth. Speaking about their reality and how they work with social media and brands can be a sensitive topic for the study objects and by conducting in-depth interviews the study objects get a platform to express their feeling, knowledge and opinions in an anonymous way⁶⁰.

⁶⁰ Bryman & Bell, 2015

In addition to the qualitative method a legal sociological method has been used in order to clarify the discourses that exist regarding how the demarcation problem affects influencers' right to freedom of press and freedom of expression.

4.2 Qualitative Methods from a Legal Sociological Perspective

The legal sociological method is a relatively young science that is related to societal development and societal needs. It is a compilation of societal causes and / or consequences and of legal facts.⁶¹ The legal sociological method contributes with an external approach to law. The sociological perspective can provide an understanding of law through the use of non-judicial theories and methods. It thus places law in relation to society and examines, among other things, the society and the social significance of law.⁶² For the purpose of this study a comprehensive theoretical review was performed to gain understanding of the legal background, influencer marketing and the research subject overall. The theoretical review consisted of constitutional text, precedents, preparatory work, customary law, government recommendations, the doctrine and literature on influencer marketing and social media. To examine how the demarcation problem is perceived in practice, empirical methods are required that can demonstrate this. By using qualitative research methods, in the form of interviews, it is possible to find and show different patterns than what is constituted by the Swedish law.⁶³ These methods also contribute to the material being versatile and detailed. By using interviews, we get a good insight to the

⁶¹ Hydén, 2002, p. 8.

⁶² Alexius- Borgström & Hollander, 2005, p. 130.

⁶³ Olsson & Sörensen, 2004, p. 78.

subject from an influencer perspective and their experiences around working with marketing on social media and applicable laws.

4.3 Selection of Study Subjects

The selection of study subjects was made with the purpose and research question in mind. When deciding the study subjects, the author was aiming to reach a diverse set of influencers. The author chose the influencers carefully to create a broad perspective and thus include different types of influencer industries such as fashion influencers, lifestyle influencer, finance influencer, food influencers and also including both male and female study subjects. The joint requirement for all the study subjects was 1. The influencer must receive sponsored material and gifts 2. The influencer must have at least 2000 followers. When choosing the influencers, the author also aimed to create a contrast between the study subjects, both regarding the above-mentioned type of influencers but also regarding the number of followers. The study subjects had between 2000 - 80 000 followers which created a good contrast to cover both small influencer followings and large influencer followings. There were no qualifications regarding their knowledge about the subject since the interview aimed to first understand the level of knowledge they have about the research area, understand how the demarcation issue affected them from their perspective and whether or not they have ever felt that this subject affected their freedom of press and speech.

4.4 Collection of Data and Interview Design

As mentioned in section 4.1 in-depth interviews were conducted using a semi-structured approach, this approach enabled the author to create a

general structure for the interview and at the same time give leeway to the study objects. By using a semi-structured approach, the author created an open conversation where the influencer felt comfortable which also enabled follow-up questions. Furthermore an “interview guide” was used by the author for guidance through the interview so that the core questions were answered, see appendix 1. The guide was based on the theoretical framework of the thesis.

All interviews lasted for 30 -50 minutes and during the first part of the interview the author attempted to convey a relaxed and friendly atmosphere so the study subjects would feel comfortable and also create a safe environment where the study subjects could share their answers without hesitation. To create this environment the author started by explaining and clarifying the research area to study subjects, why the interview is taking place and how the input will be used. The focus of the interviews was to understand the study subjects’ experiences regarding the demarcation issue and the semi-structured approach allowed the study subjects to bring up a broad range of issues and experiences.

All Influencers were contacted through Instagram direct message. When contacting the influencers, the purpose and the research area was explained. All the interviews were conducted through phone, this was partly due to the Covid-19 situation but also because most of the study subjects were very busy and a telephone interview was the best alternative.

In total 7 in-depth semi-structured interviews were held to gain detailed understanding on the influencer perspective. The interviews were conducted individually in Swedish and with approval from the study subjects all interviews were recorded and later transcribed and translated to english. This allowed the author to ask follow-up questions during the interview,

actively listen and carry the conversation forward without missing any important information. After each interview the author transcribed the recorded interviews, by transcribing the interviews the author could pinpoint all the key observations, issues and experiences that repeatedly appeared through the different interviews. Furthermore, all the documents from the authors transcription and translation were sent to the study subjects so they could go over their answers and make corrections if needed.

4.5 Criticism Against Qualitative Method

Criticism is sometimes directed at the qualitative method as some believe that it is subjective, difficult to replicate, hard to generalize and that there is a lack of transparency.⁶⁴ By using trustworthiness the author has evaluated the research for this study in the following section.

4.6 Trustworthiness

The author has been committed to achieving trustworthiness throughout the study. Trustworthiness can be divided into four subcategories: credibility, transferability, dependability and conformability. *Credibility* refers to how the author has presented the social reality through the results and if the description is accurate with the perception of reality of the study subjects.⁶⁵ It is important to note that there are many descriptions of a person's social reality and this may affect the credibility.⁶⁶ To eliminate the possible risks for this study, all study objects have been provided with a copy of the transcripts so that they could validate their answers and clear

⁶⁴ Bryman & Bell, 2015.

⁶⁵ Bryman & Bell, 2015.

⁶⁶ Bryman & Bell, 2015.

up any misinterpretations from the transcription. *Transferability* is the second sub-category, qualitative studies are often focused on a limited amount of study objects and transferability is thus considered harder to ascertain⁶⁷ As the study was conducted in Swedish and only including Swedish influencers the study has limited transferability to other geographical areas. All Participants were selected with defined criteria including amount of following, receiving sponsored material and having a professional social media account. The third sub-category, *dependability* is generally considered difficult to replicate for qualitative studies.⁶⁸ Dependability refers to keeping a transparent and consistent record of all material that is important for other individuals who would like to review the material. The author has made sure to save and share documents from the study to other individuals to further examine and comment on the quality of the used method for the study. Lastly a potential risk for qualitative studies is that the authors' personal values and beliefs may affect the work ie. *confirmability*.⁶⁹ The author was committed throughout the study to reduce personal bias and conduct the research in good faith so that the results aren't affected by the author's personal beliefs.

⁶⁷ Bryman & Bell, 2015.

⁶⁸ Bryman & Bell, 2015.

⁶⁹ Bryman & Bell, 2015.

5 Empirical Findings

This chapter presents the empirical findings of how the study subjects perceive and experience the research area. The interviews resulted in five different problem areas: sponsored content, brand ambassador, gifts, bi products & mixed content and Influencer brands.

5.1 Sponsored Content

The first problem area that appeared as a common denominator among all influencers and that is important to mention are sponsored posts. Within the framework of sponsored posts, there is usually an explicit agreement between the parties, usually a brand and the influencer. It is the influencer's responsibility to disclose the brand or its product in the content they post on their social media. Sponsorship is the clearest form of collaboration between a brand and an influencer, also the easiest to classify as commercial material. An example of this type of collaboration is that the influencer is paid in monetary value by the brand or in the form of products and services for the influencer in question to publish a certain number of posts on their social media accounts. In these posts, the influencer usually highlights the products in certain positive terms. All the influencers have at some point had a collaboration with a brand where they received payment in form of money or products to post about the brand. The influencers were all aware of their responsibilities to disclose the content when there is a specified sponsorship agreement in place. Thus awareness of the commercial nature of the content they created. Common for many of the influencers were that they completely relied on the brand to

provide them with information about how, when and what they should disclose and what content that falls under the scope of MFL.

Even though the influencers were aware of the commercial nature of sponsored content when there is an explicit agreement, all influencers pointed out that on several occasions these sponsored posts are just an oral agreement or a brief email and not an explicit agreement.

Furthermore, the influencers also pointed out that they received gifts that they post because they like the products and later the companies contacted them with information on how to create the content and that it was sponsored. Thus, it is difficult for the influencer to decide whether it is a sponsored post or not and this has led some of the influencers to now wait to create content for products they receive without knowing if it is a gift or sponsored material. Two of the respondents raised the fact that without an instruction they would not create content for any product so that there will be no risk of violation of the Marketing law.

Furthermore, all the influencers mentioned that sponsored content lacks integrity and credibility amongst their followers and are considered to be less valuable for their own reputation.

Five of the respondents mentioned that they do not have much knowledge of what actually constitutes sponsored posts, and that they almost always trust the companies and their knowledge. Majority of the respondents felt that their freedom of press and freedom of speech were restricted because of the uncertainty of what content will fall under the scope of MFL and be seen as commercial material and that they always have to think about what content they post and how they post it.

One example that was brought up by one of the respondents was “ If I received products six months ago that were sponsored at the time, but now I genuinely like the product, I won't post any content about the product since it can be misinterpreted as advertising, and that is a risk i'm not willing to take, so yes in that case I feel that my freedom of press and speech is restricted”

5.2 Gifts

The absolute biggest uncertainty for all of the respondents was the gifts they receive from various brands. Three of the influencers implied that they don't post content about products or services they receive as gifts since it may be seen as commercial material and they don't want to risk it falling under the scope of MFL. They believed that this did affect their freedom of press and speech since they can't speak freely about products since it might be seen as commercial content. When asking why they wouldn't just disclose the brands who sent the gifts in the content, they all answered that it would affect their credibility and trust.

The majority of the influencers didn't have the same perception regarding gifts. They did not see a problem with posting content about gifts they received and believed it was their right to be able to share a product if they liked it, even though it was a gift.

In practice, this is a difficult area to assess when influencers receive gifts in the form of products and services from brands without any demands, in a case RON the inserted ad-link was of importance for whether the

content was commercial material or not.⁷⁰ The connection to the brand became the decisive factor whether or not it was commercial or non-commercial, since the exposure for the company will be the same regardless if the link has an economic significance for influencers or not.

This is where the blurred line of commercial and non-commercial problem is put at the forefront and this is also confirmed by the dividing perceptions shown by the influencers. It is a very fine line drawn between creating positive content about products that the influencer likes and creating positive content that has a commercial character.

5.3 Brand Ambassador

Ambassadorship is the third problem area that was highlighted during the interviews and is a difficult area to assess in practice. Only four out of seven of the respondents have had or currently have ambassadorship. Despite the fact that there often are underlying agreements between the brand and the influencer, difficulties still arise in drawing the line for whether it's a commercial post or not.

Ambassadorship is a type of collaboration between a brand and an influencer, in these cases the influencer acts as an ambassador for a certain brand for a longer period, according to the respondents, it is usually a period of approximately six months. These commitments are usually long-term and involve more than just one or two content posts on the influencer's social media account. The meaning of ambassadorship can vary

⁷⁰ RON 1701-18.

from case to case, but in general, the concept means that the influencer creates content for a brand that appears in their social media accounts.⁷¹

Two of the four influencers that have had an ambassadorship said that they perceive ambassadorship as an underlying agreement between them and the brand for specific and decided content, even if they have an agreement, they will only disclose the brand in content that is decided in the agreement. Furthermore, they believed that it would be a limitation to their freedom of press and speech if all content they created where the brand is involved would be seen as commercial according to MFL. Thus, other content created for the brand that is not stated in the agreement they won't disclose any information about the brand and they don't regard the posts as commercial material.

The other two influencers believed that all content they created for the brand under the decided time frame is commercial and they always disclose the brand under that specific time. These influencers didn't believe their freedom of press and speech were affected just because they had to disclose the brand and it agreed that it should be seen as commercial according to MFL.

When describing the other influencers views to them one of the influencers said "This is the problem there isn't enough guidelines and there is a lack of knowledge between us and we don't know how to do it right, there needs to be clearer lines that take us into consideration and not only the brands and consumers"

The IAB Sweden's handbook on influencer marketing emphasizes that ambassadorship is purchased marketing and that it is a longer type of

⁷¹ SOU 2018:1, p.193.

collaboration. Of course, there may be periods when influencers of self-interest want to write about the brand, but there is probably a heavier interest in the brand doing well because the influencer receives some form of payment from them. All in all, there is much that suggests that positive statements from the influencer about the brand during an ambassadorship period should be considered as commercial material and thus disclosed in accordance with MFL. Ambassadorship is a clear situation where the demarcation issue affects the influencers and further guidelines and regulations are needed in the area.

5.4 Bi-products & Mixed Messages

Bi-products is the fourth problem area, bi-products are described as advertising collaborations which in the strict sense are not to be regarded as commercial, but in practice it can be considered as commercial. For example, as discussed above, that an influencer posts content during his or her ambassadorship and the post do not have an explicit underlying agreement, or that an influencer is paid for two posts but posts extra content where he or she speaks positively about the company despite that the brand only paid for two posts. But there are no direct guidelines for these scenarios which has resulted in mixed thought with the respondents, since some agree that they won't post content because they are not sure and some post because there is no explicit agreement for the content in question.

Mixed messages are a problem that is connected to bi-products, when content contains both commercial and non-commercial parts the influencers believed that they can use their platforms as opinion-leaders and at the same time include brands. One of the influencers said that “ When i

create a Youtube video, let's say daily vlog, products from my ambassadorship might be included in the video but i won't disclose them in the description of the video" this is very problematic since in HD underlined the fact that it is not possible to simply enter the scope of the constitution by including content that is opinion-forming.

5.5 Influencer Brands

Influencers are today powerful players in the business world who often run their own companies. Many of these influencers produce their own products and services, such as a beauty blogger who develops their own make-up brand or has their own make-up artist brand. The current question in this case is whether an influencer can display these products in their feed without it being considered to constitute commercial material.

In order to determine whether these contents are to be regarded as commercial material, the main question becomes whether influencers have a financial interest in displaying the product and therefore act as a business according to MFL. Within the framework of freedom of speech and the press, influencers should be able to show their own products or services in a post without it being considered to constitute commercial material. Two of the influencers meant that of course they post their own services but that they never really write sponsored posts because it's their own service and they should be allowed to use their own platform to express themselves and their services. This is not how it works in practice because it might become hidden marketing.

6 Analysis & Discussion

Having examined and analyzed the blurred lines between commercial material and non-commercial material that is constitutionally protected, I can emphasize that an explicit agreement between the influencer and the brand facilitates the decision. There is no doubt that the content will be subject to MFL if the content in question has an explicit agreement between the influencer and the brand. However, if there is an underlying agreement between the parties that does not indicate the exact post that should be disclosed e.g during a brand ambassador period, each post must be assessed separately even though there is an explicit agreement between the parties. The content that falls outside the scope of the MFL are non-commercial and they should not have a sales promotion purpose and thus be constitutionally protected. An assessment will always be required on a case-by-case basis, but a post with positive words from an influencer who has for example an ambassadorial position should constitute commercial material if it financially benefits any of the parties if you look at the theoretical background.

Problems arise when influencers don't have enough knowledge of what constitutes commercial material and thus fail to disclose their posts correctly. But it's not only the knowledge among the influencers that is low, this issue of what constitutes commercial material and non-commercial material for influencer marketing is hard to grasp for legislators, brands and consumers as well. Social media is changing rapidly with all the new technologies and the laws regarding what is actually considered as commercial content in different scenarios are not yet regulated and therefore

the line of commercial content and non-commercial in a practical view becomes a demarcation issue that affects all the parts involved.

The knowledge among the study subjects varies but in general they are very uncertain, a common factor for the study subjects was that they rely completely on the brand's knowledge. All of them have during their careers felt limited by the lack of knowledge and the unclear line of what is actually considered commercial content. The majority of the study subjects have refrained from posting about products they like. This is problematic since some influencers refrain from posting products that they have received as gifts, but they post gifts that they have received during an ambassadorship as regular posts and this indicates that there is a lot of industry practice in the subject that is being formed and that the regulators needs to take this into account.

Looking at the empirical findings we can see that the influencers were aware of the commercial nature of sponsored content when there is an explicit agreement but they pointed out that on several occasions these sponsored posts are just an oral agreement or a brief email and not an explicit agreement in some cases they are not even sure if its sponsored or just a gift. And looking at the theoretical background, influencers are content creators who act as opinion leaders as well, having a deep psychological bond with their followers by sharing personal content that usually revolves around their interests or lifestyle. With regards to both the empirical finding and the theoretical background brands should always clearly define the intention behind sending a product, making it clear for the influencer that it's a gift or sponsored post. This step will help to clear the line between commercial and non-commercial content for the influencers.

Gifts were a common problem amongst the influencers and a factor where the perception differs between them. Even gifts can become commercial based on the influencers intentions and based on their actions. None of the influencers believed that gifts should be commercial content and that it is their freedom of press and speech to post about a product or service if they genuinely liked it, even though they all believed this, there was still some influencers who wouldn't post these gifts thus restraining their freedom of press and speech.

Furthermore, influencer marketing entails leveraging the trust and connection that the influencers created with their followers to lengthen the reach and impact of brands on social media. But the trust and credibility decrease when there is brand disclosure in the content. This is something many of the influencers mentioned, they didn't want to create too many contents where they had to use disclosure(sponsored content) since their trust and credibility would decrease and since they didn't know what would fall under the scope of MFL they would rather not post in uncertain cases. This implies that their freedom of press and speech were affected even though they took the decision.

Lastly, some of the influencers stated they post their own services but that they never really write sponsored posts because it's their own service and they should be allowed to use their own platform to express themselves and their services. This is not how it works in practice because it might become hidden marketing. Looking at this from an outside perspective influencers are independent individual who act as both opinion leaders and marketers, we need to create clearer lines and industry practices where we separate the influencer as an individual from the influencers as a marketer, as an individual they should not be restrained from

their freedom of press and speech. When regular people that are not influencers post about their business activity, they will never fall under the scope of MFL and influencers should have the same rights as other individuals.

7 Conclusion & Contribution

7.1 Conclusion

This thesis aimed to understand how the blurred line of commercial and non-commercial content and the applicability of MFL affect influencers' right to freedom of press and speech? and how the influencers perceive these demarcation issues. The research question was motivated by the interest of understanding the impact the demarcation has on influencers and not only the consumers. Through a qualitative study with a legal sociological approach, influencers could be studied and analyzed thoroughly in the light of previous research so that a deeper understanding could be gained.

The main results of this study when looking at the theoretical review and the empirical findings is that it can be stated that MFL is only applicable in cases concerning a company's business activity where there is a commercial sales promotion. An agreement between the parties often simplifies the application of the MFL because it clarifies the relationship between the company and the influencer.⁷² That a post must be of a commercial nature and that there must be an explicit agreement between the parties is a good starting point for a legal assessment in accordance with MFL. However, it is possible to understand from the empirical studies that misunderstandings amongst the influencers still arise regarding the research area. This proves that in practice it is not easy to know when a post is commercial or non-commercial. The difference between commercial material and non-commercial material becomes increasingly vague when it happens on social media that contains mixed content or when the

⁷² SvJT 2015 s.202.

content doesn't have an underlying agreement. The commercial and non-commercial contents usually overlap, which complicates the application of MFL and the influencers right to freedom of press and speech. Common for many of the influencers were that they completely relied on the brand to provide them with information about how, when and what they should disclose and what content that falls under the scope of MFL and the influencers are struggling to understand what content is commercial and what content is protected by their freedom of press and speech .

7.2 Theoretical Contribution & Practical Implications

This study can be considered to be of academic value as it has how influencers freedom of right and speech is affected depending, by looking at commercial and non-commercial material and how this demarcation affects influencers. With that said, the theoretical contribution to the academic field is a description of how the blurred line of the legal area can impact influencers and social media content. The study has also resulted in many relevant insights for brands and legislators, so that the influencers' right of speech and press don't get overruled. The study proves that there is a lack of information and guidelines and knowledge regarding commercial and non-commercial content for influencers and social media platforms, which creates the demarcation issues and thus affect the influencers negatively. This paper hopes to bring some clarity regarding the research area and create further research in the future.

Practical implications of this study in the field of influencers is that the study could be used by brands who wish to engage or already are engaging in influencer marketing. As the number of influencers and social media

platforms are increasing, while traditional media is slowly fading⁷³, it is becoming substantially more important for brands to understand how it affects the influencers as individuals and investigate what type of content will be regarded as commercial during for example an ambassadorship.

7.3 Future Research

In this study the empirical findings have been conducted with 7 study subjects including influencers. Future research could examine if there is a different perception in other geographical areas. This study only had two male participants; it could be interesting to conduct interviews with a greater variance of influencers. Furthermore, the study subjects were all between the age of 23-30, future research could also be conducted by grouping influencers similar in age 15-25 and 30-40 to find similarities and differences depending on age. Moreover, future research could also conduct studies on different brands that engage in influencer marketing to examine how they work with influencer marketing and examine their responsibilities for the matter at hand.

⁷³ Meraz, 2009.

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Appendices

Examples of interview questions

Q1. How do you work with influencer marketing?

Q2. How do you work with sponsored material?

Q3. Are there always explicit agreements in place when working with brands?

Q3. Do you receive gifts from brands and is there any requirements from the brands in order to receive the gifts?

Q4. Does your credibility, everyday work etc. get affected by the regulations in place?

Q5. Do the current regulations affect how you form your posts?