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# Advertising & Marketing 2021

## Mexico: Law & Practice

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## Mexico: Trends & Developments

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## Law and Practice

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## 1. LEGAL/REGULATORY FRAMEWORK

### 1.1 Source of Regulations

Unfortunately, in Mexico there is no specific Law that regulates advertising and marketing practices on a day-to-day basis. Nevertheless, there are many pieces of legislation which may encompass advertising and marketing, depending on the case, such as:

- the Federal Consumer Protection Law;
- the General Health Law;
- the Industrial Property and Copyrights Law;
- the Civil Code;
- the Criminal Code;
- the Mexican Data Protection Act;
- the Mexican Norm for e-commerce NMX-COE-001-SCFI-2018; and
- the rules for advertising derived from the Health Act.

### 1.2 Regulatory Authorities

As mentioned in **1.1 Sources of Regulations**, in Mexico there is no specific authority that regulates laws governing advertising and marketing practices. That being said, depending on the case, we as lawyers have to deal with the same with a specific authority. Below is a list of the regulators that could deal with cases related to advertising and marketing issues in Mexico.

- The Consumer Protection Agency (PROFECO), which is in charge of regulating B2C schemes and arbitrating between consumers and product/service providers; procedures are of an administrative nature.
- The Mexican Industrial Property Agency (IMPI), which is in charge of industrial property filing and intellectual property litigation from an economic/industrial perspective; procedures are of an administrative nature.
- The Mexican FDA (COFEPRIS), which is in charge of regulating and protecting the popu-

lation from health risks – all products that are somehow related to sanitary and health fields, are a matter of interest for this entity, so as to ensure safety, efficacy, and security to humans; procedures are of administrative nature.

- The Attorney's General Office (FGR), which is in charge of investigating and prosecuting crimes of federal level; procedures are of a criminal nature.
- The Federal Civil Tribunals, which is in charge of disputes and litigations of a civil nature.
- The Federal Institute for Access to Public Information and Data Protection (INAI), which is in charge of data protection procedures and complaints – it regulates the relationship between data holders and those that manage such data; procedures are of an administrative nature.
- The Advertising Consultive Council, which emanates from the government health entity, composed to deal with advertising related to industries such as:
  - (a) health services;
  - (b) food, food supplements and non-alcoholic beverages;
  - (c) infant formula;
  - (d) alcoholic beverages and tobacco;
  - (e) health supplies, drugs, herbal remedies, medical equipment, and surgical and healing supplies;
  - (f) hygiene products;
  - (g) cleaning products;
  - (h) perfumes, lotions, cosmetics and beauty products;
  - (i) pesticides, plant nutrients and toxic or dangerous substances; and
  - (j) biotechnological goods.

### 1.3 Scope of Liability

The scope for deceptive advertising is limited depending on the case. Unfortunately, the Mexican jurisdiction is underdeveloped regarding these types of matter and cases are usually seen

casuistically. For example, if there is a misleading advertising issue, this can be seen before the Mexican Consumer Protection Agency (PROFECO); but if there is unlawful competition in the matter or a third party's trade mark is discredited, it can be addressed to the Mexican Industrial Property Agency (IMPI). In Mexico, these kinds of cases must be analysed and prosecuted before the authority it is believed can provide the best approach to the case. Either way, those government entities are empowered to sanction individuals or companies. Shareholders will only be held liable if their individual participation in the illegal conduct can be proved.

Third parties who provide services to an advertiser, are generally not liable for deceptive advertising. However, the parties may agree that the service provided is held responsible for the contents of the publicity and therefore, it could be possible to pursue civil actions to obtain damages for any penalties imposed by the authorities.

Concerning criminal matters, there is a short list of felonies for which a company can be held responsible as such, addressing the case against its legal representative.

### **1.4 Self-Regulation**

In Mexico there is a non-binding self-regulatory association, the Self-regulation and Advertising Ethics Council A.C (CONAR). CONAR's mission is to exercise advertising self-regulation among its affiliates and establish the legal framework throughout the industry to promote fair competition and defend each Mexican consumer by ensuring that they receive accurate and timely advice through responsible advertising. CONAR is often used many times to "educate" Mexican authorities regarding day-to-day cases that are related to advertising matters.

### **1.5 Private Right of Action**

There are two proceedings available before the Mexican Consumer Protection Agency (PROFECO), in which private parties may challenge advertising practices.

- Complaint – any individual may file a complaint denouncing the existence of unlawful advertising practices; this complaint may lead to an investigation and to penalties against the advertiser.
- Arbitration – in this case, the parties seek to conciliate before the authority, with the purpose of reaching an agreement to solve the matter; terms of agreement usually include a reimbursement of any sums paid by the consumer, indemnification for damages caused by the unlawful practice, or granting of additional goods or services.

If there is not an agreement between the parties, the consumer may file a civil action to obtain any damages from the advertiser that may have been caused by the unlawful advertising.

### **1.6 Regulated Industries**

There are some special rules that apply to specific types of products. For instance, the rules for advertising derived from the Health Act, provide specific guidelines and limitations for advertising on various categories of sensitive goods (see the bullet point on the Advertising Consultative Council in **1.2 Regulatory Authorities** for a list of such goods). For some of them, a special authorisation is required to advertise the product; for other industries, a notice given to the authority is enough. Moreover, when the pandemic began to affect Mexico, social media (and advertising on it) grew rapidly. The actions of social media users, especially influencers, gave rise to many cases that were prosecuted by our advertising competent authorities due to misleading advertising, unlawful competition and lack of publicity permits (regulatory).

## 1.7 Regulatory Trends

Please refer to **1.6 Regulated Industries**.

## 1.8 Impact of the COVID-19 Pandemic

The pandemic has clearly been an eye opener for the advertising industry. Advertising on social media platforms has been exploding since the pandemic started. One of the key elements of advertising on social media platforms are brands using influencers and this has been a “trending topic” throughout COVID-19. The massive use and growth of influencers and social media have put a lot of pressure on the system of advertising and marketing regulation in Mexico, highlighting the urgent need for further regulation. Private industry participation is key in this regulation; otherwise, the government’s unilateral work may cause things to be done without the benefit of a thorough legal and technical advertising perspective.

So far, no new laws have been proposed to the Mexican Congress, but only means to regulate and limit the practice of contracting advertising, and the role of media agencies with advertisers, through the new Act on Transparency and Lawful Practices in the Advertising Industry.

## 1.9 Political Climate

While many would wish this were not the case, the new administration is trying to modify the advertising industry and a clear example is the new Law on Transparency and Lawful Practices in the Advertising Industry, which is briefly detailed in **1.8 Impact of the COVID-19 Pandemic**.

## 2. ADVERTISING CLAIMS

### 2.1 General Standards

According to the Federal Consumer Protection Law, misleading advertising or abusive information is understood to be that which refers

to characteristics or information related to any good, product or service that may not be true, or that could mislead or confuse the consumer by the inaccurate, false, exaggerated, partial, artificial, or tendentious way in which it is presented.

### 2.2 Actionable Advertising Claims

In principle, all advertising claims are subject to regulation. The Federal Consumer Protection Law (FCPL) states that advertising must be truthful; subject to substantiation, clear; and lacking texts, dialogue, sounds, images, trade marks, denominations of origin or other descriptions that induce or may induce error or confusion, due to their misleading or abusive nature.

Claims that may not be objectively measured might be acceptable and not subject to substantiation, provided that they do not violate the legal principles mentioned above.

Implied claims will be analysed on a case-by-case basis to determine if they comply with the principles of the FCPL mentioned above, and empirical evidence is frequently used as a means for their substantiation.

### 2.3 Claim Substantiation

Empirical evidence is frequently used for substantiating advertising claims and the specific type of substantiation will depend on the nature of the claim.

For example, if a claim states that liquid soap kills 99% of bacteria, a laboratory study will be an acceptable means to substantiate that claim. If another claim states that eight out of ten individuals prefer hamburgers from Restaurant “X”, then a survey which follows scientific criteria will be an acceptable means for substantiating this claim.

## 2.4 Testing

A first aspect to consider, is determining whether the product or service shown in the ad is regulated by a mandatory technical standard or not. If the answer is yes, testing must be based on the rules, methods and procedures established in the applicable technical standard. If the answer is no, there will be more flexibility on the testing to be conducted, although it will be important that this testing be based on scientific standards.

## 2.5 Clinical Studies

The Federal Consumer Protection Law does not specifically mention human clinical studies as the basis for certain types of claims. However, whether human clinical studies are indeed an adequate means for substantiating the claim will depend on the type of claim involved. The characteristics and requirements of the human clinical studies will be determined, if applicable, by a mandatory technical standard or otherwise must be based on scientific standards.

## 2.6 Regulated Claims

As a general rule, all types of claims are subject to the generic principles of advertising established in the Federal Consumer Protection Law – ie, advertising must be truthful; subject to substantiation; clear; and lacking text, dialogue, sounds, images, trade marks, denominations of origin or other descriptions that induce or may induce error or confusion, due to their misleading or abusive nature.

# 3. COMPARATIVE ADVERTISING

## 3.1 General Requirements

The Federal Consumer Protection Law allows for the public comparison between products or services, as long as the information is not false, misleading, or abusive; or presented in an inac-

curate, false, exaggerated, partial, artificial, or tendentious way. In the same vein, the Industrial Property Law (LFPPI) excludes the lawful comparison between products or services from being considered as potentially trade mark discrediting, as long as it is done with informative purposes.

In addition, the Federal Consumer Protection Law gave powers to PROFECO to issue guidelines for comparative advertising, with the purpose of avoiding said comparative advertising inducing consumers into error or confusion. Up to this moment (September 2021), PROFECO has only issued one set of Guidelines dealing exclusively with the procedure and requirements for the comparison of prices of identical goods or services which are commercialised by different providers. These guidelines were published back in 2009.

## 3.2 Comparative Advertising Standards

There are some specific requirements that must be taken into account with regard to comparative advertising claims in addition to the ones applicable to general advertising claims. In this sense, the Federal Consumer Protection Law states that the information or advertising that compares products or services, from the same brand or from different brands, shall not be misleading or abusive as said terms are defined in the law (see **2.1 General Standards**).

With regard to the comparison of prices of goods or services, the specific requirements established in the Federal Consumer Protection Agency's 2009 Guidelines must be observed. These requirements include that:

- the goods or services must be identical;
- the prices must be supported with the proof of purchase or with a certification issued by a notary public/commercial notary public; and

- the documents mentioned above must include the identity of the provider with whom the comparison is made and its domicile.

Comparative information will be valid for five days counted from the date of purchase or the date of certification of a notary public/commercial notary public.

### 3.3 Challenging Comparative Claims

The Federal Consumer Protection Law allows any individual or company to denounce a violation of that law before PROFECO, for example if an ad violates the principles established in said law (eg, that all advertising shall be truthful and not misleading). PROFECO will initiate an investigation of the denouncement and if it considers that the ad violates the law, it may order its suspension and may also impose a fine on the advertiser.

The Advertising Self-Regulation and Ethics Council (CONAR) also has a procedure to settle disputes between its members or between parties that, without being members, agree to submit themselves to CONAR's procedure regarding advertising claims.

Comparative advertising is not as frequent in Mexico as it is in some other countries (eg, the USA). The most common practice in Mexico is a price comparison which can be seen directly by consumers in supermarkets, and which is a useful means for them to be sure that they are paying a lower price than the one available in other establishments.

## 4. SOCIAL/DIGITAL MEDIA

### 4.1 General Requirements

Unfortunately, there are no specific rules or regulations that apply to social media in Mexico. To enforce the same, it would be necessary to

use the basic rules of Mexican advertising legal enforcement as explained in **1. Legal/Regulatory Framework**.

### 4.2 Key Legal Issues

The lack of legislation is a major challenge for marketers advertising in social media.

### 4.3 Liability

There are no strong precedents on advertiser liability that indicate a settled position on this issue. There are divergent opinions on the level of responsibility that social media and site administrators hold for the content posted on their platforms by third parties (users). The use of various best practices adopted, such as removal of content procedures and “notice & take down” techniques, immediate reaction from the site administrators to remove problematic ad content, or policies to suspend user accounts that do not comply with the terms and conditions of the site – may protect those social network or advertisers' administrators from legal responsibility under a safe harbour regime. The foregoing will only apply if the social network or advertiser did not directly participate in the illegal act.

### 4.4 Disclosures

As there are no specific rules or regulations that apply to social media in our jurisdiction, the same rules that apply to traditional media advertising would also apply to marketing through social media. It would mostly depend on the nature of the product or service, rather than the channel of disclosure.

### 4.5 Platform Requirements

There are no regulations specifically addressed to the use of social media platforms in force. However, if any of these social media platforms involve activities related to e-commerce or marketplaces operations (eg, Facebook), there are specific regulations for this activity in particular; mostly, for the sellers, rather than the users.



In addition, it shall be analysed if there are other activities of the platform that could imply the application of regulations of another nature – eg, money reward programmes based on number of views or likes when the performer/user is a minor.

#### **4.6 Native Advertising**

There are no special rules regarding “native advertising”, other than complying with the regulations for regular publicity.

## **5. INFLUENCER CAMPAIGNS**

### **5.1 Trends**

Due to the pandemic, the use of influencer campaigns has been a “trending topic” for trade marks and brands all over the Mexican market. Due to the lack of legislation, the benefits of marketing using influencers is being taken advantage of. For example, the Mexican Health Law prohibits medical professionals from publicising on any type of platform without a permit issued by the Mexican FDA. Due to the time of issuance of the permit and because these campaigns are time sensitive, brands instead use influencers in the maternal product space (eg, to promote milk formula in the different platforms). This is one of the examples of how the lack of legislation permits brands to utilise different strategies that permit a new way of marketing products.

### **5.2 Special Rules/Regulations on Influencer Marketing Campaigns**

Unfortunately, as mentioned in **4.1 General Requirements**, there is neither legislation nor any guidelines specifically established to regulate the use of influencer campaigns in the Mexican jurisdiction.

### **5.3 Advertiser Liability**

Due to the lack of legislation regarding influencers in our jurisdiction, everything related to the activity of the same emanates from a private contract between the influencer, the brands and sometimes the agencies.

## **6. PRIVACY AND ADVERTISING**

### **6.1 Email Marketing**

The use of any personal data must be done with the verifiable consent of the data owner and, in order to obtain such consent, it is necessary to notify the type of data processing through a privacy notice which must be available to the data owner prior to such processing. Where the personal/contact data has been obtained indirectly, the privacy notice must be made available to data holders in their first contact with the data controller, which means in the very first marketing email.

The privacy notice used in marketing emails is a short version and must contain at least (i) the controller’s name and address and (ii) the purposes and means to access and consult the full version of the privacy notice. If after receiving/reviewing the above-mentioned information, the data holder does not oppose the processing of their personal data for marketing purposes, then the company can continue to send them emails, but for those who do not wish to receive these types of communications, it is highly recommended to use opt-out mechanisms which should be enabled in every email sent.

For violations of privacy or data security law, the law provides a list of actions that are grounds for sanction. Fines range from 100 to 320,000 times the current minimum daily wage (approximately USD5.38). In the case of recurring infringements, an additional fine may be imposed and may be



doubled when the case involves sensitive data. Sanctions may be imposed without prejudice to any civil or criminal liability that could arise.

## 6.2 Telemarketing

As in many of the existing legal privacy legal frameworks, opposition is one of the rights considered in privacy and data protection regulation in Mexico. This right is mainly focused on non-core purposes and as marketing is always considered as being for secondary purposes, the data owner can exercise this right at any moment and the data controller must act accordingly in order to comply with the local regulation; otherwise, one of the sanctions mentioned in **6.1 Email Marketing**, may be imposed.

Telemarketing is aligned with privacy regulation if:

- a short version of the privacy notice is available at the beginning of the call;
- there is a consent from data owner; and
- an opt-out mechanism or an unsubscribe list is enabled.

## 6.3 Text Messaging

As mentioned, the use of personal data is allowed for secondary purposes (in this case through text messaging) if a data holder grants their consent after having been informed about the personal data processing and does not object to the use of their data for the informed purposes. Unsubscribe lists and opt-out mechanisms must be enabled too.

Non-compliance with these requirements could lead to sanctions considered in the Mexican privacy legal framework.

## 6.4 Targeted/Interest-Based Advertising

Although most targeted/interest-based advertising currently depends on the use of artificial intelligence (AI), cookies, and similar technologies,

the local legal frame only considers informing the data owner of the use of this type of technology (if any) and the way to disable it as a statutory requirement. As the rest of the elements of data processing, this information must be part of the privacy notice.

Fortunately, awareness of privacy and data protection is rising and the use of tools/mechanisms for easy customisation of this type of technology is increasing.

## 6.5 Marketing to Children

Unfortunately, the local privacy legal framework does not consider special rules/requirements for the processing of children's personal data. Thus, the criteria for processing the data of this community are the same as the one applied to adults' data processing.

Notwithstanding the above, Mexican privacy law considers children to be a "special" sector, and it establishes that data processing must be carried out without the use of misleading or fraudulent means. Thus, any abusive use of children's data shall be prosecuted and punished, and potentially increases the sanctions that may be imposed by the authority.

Having said this, it is highly recommended that the privacy notice be consented to using a checkbox as well as the implementation of plugins for age verification.

# 7. SWEEPSTAKES AND OTHER CONSUMER PROMOTIONS

## 7.1 Sweepstakes

If the sweepstakes or chance-based contests are to be carried out within the Mexican territory (eg, if the draw will take place in Mexico), there will be a need to obtain a prior permit from the

Ministry of the Interior (*Secretaría de Gobernación*).

Consumers may be required or requested to make a purchase in order to participate, but in this type of promotion, the organiser must file a notice before PROFECO at least 72 hours prior to the start of the relevant promotion.

## 7.2 Contests of Skill

Mexican law makes a distinction between contests of skill and games of chance. In accordance with the applicable legal framework, games of chance are based upon randomness and the result of the game is totally outside the player's control. A game of skill, on the other hand, implies that the result is not based upon randomness and that the player's skills will determine the outcome of the game.

## 7.3 Regulatory Bodies

The organiser of a game of chance to be carried out in Mexico (eg, if the draw will take place in Mexico) must obtain a prior permit from the Ministry of the Interior (*Secretaría de Gobernación*). This procedure may take from four to six weeks to be concluded. The authority will analyse on a case-by-case basis the mechanics of the game to ensure its fairness. The organiser will be asked to hire a bond to guarantee the payment of the prizes.

In case that the game of chance includes a purchase requirement, the organiser must additionally file a notice before PROFECO, at least 72 hours prior to the start of the game of chance.

Contests of skill do not require a permit from the Ministry of the Interior (*Secretaría de Gobernación*). Nevertheless, if these contests include a purchase requirement, the organiser must file a notice before the PROFECO, at least 72 hours prior to the start of the contest.

## 7.4 Loyalty Programmes

Although there are no special laws or regulations that apply to loyalty programmes, the general provisions of the Federal Consumer Protection Law (FCPL) are applicable. In this sense, whatever terms and conditions that are presented by the good/service providers to the consumer, those terms and conditions must be honoured. Non-compliance in this regard will be deemed as a violation of the FCPL.

## 7.5 Free and Reduced-Price Offers

In the case of offers, the Federal Consumer Protection Law (FCPL) establishes the following specific rules.

- Advertising of offers must include the conditions, as well as the term or available quantity, of the offered goods/services.
- The available quantity of the offered goods/services will be subject to verification, if and when required by PROFECO.
- If there is no information on the offer's term or available goods/services, it will be presumed that they are indefinite, up until the moment that the offer is publicly finalised through the same means of communication in which it was advertised.
- Each and every consumer that complies with the applicable requirements for the offer, will have the right to acquire the applicable goods/services during the term of the offer or as long as there is availability of the relevant goods/services.
- There is a prohibition of carrying out offers in which the advertised monetary value of the good/service is clearly superior to the one normally available in the market.
- If the offering party does not comply with its offer, the consumer may opt for:
  - (a) requesting compliance;
  - (b) accepting another equivalent good/service; or
  - (c) terminating the contract.

In all three of the above cases the consumer will have the right to receive a monetary payment representing the difference between the price in which the good/service in the offer was offered and its regular price. In addition, the consumer will have the right to monetary compensation equivalent to 20% of the price paid by the former.

## 7.6 Automatic Renewal/Continuous Service Offers

The Federal Consumer Protection Law (FCPL) and its Regulations establish that automatic renewal/continuous service offers, under which a marketer can continue to ship and bill for products and services on a recurring basis until the consumer cancels, may be carried out, provided that the consumer has previously authorised the charges or that said charges derive from a related contract. If these requirements are not met, the above-mentioned offers would violate the FCPL and its Regulations.

## 8. SPORTS BETTING/ GAMBLING

### 8.1 Legality/Regulatory Framework

In Mexico, sports betting and other forms of gambling are in all cases subject to heavy regulation under the Federal Law on Betting and Gambling (FLBG), and its Regulations.

Companies intending to engage in the business of sports betting and gambling require a prior permit from the Ministry of the Interior (*Secretaría de Gobernación*).

The above-mentioned permits may only be granted to companies incorporated under the Mexican laws (although foreign investors may be shareholders of said Mexican companies).

The permits' term may last from one to 25 years. The permits may be renewed for subsequent terms of 15 years each, as long as the permit holder is in full compliance with the terms and conditions established in the permit and the obligations established in the FLBG and its Regulations.

Consumers of sports betting and other forms of gambling may only be individuals of legal age (18 and above).

### 8.2 Gambling Advertising Regulation

The Regulations of the Federal Law on Betting and Gambling establish some specific rules that apply to the advertising and marketing of sports betting and gambling.

- This type of advertising may only be published/broadcasted once that the Ministry of the Interior (*Secretaría de Gobernación*) has granted the permit for the operation of the relevant company.
- Advertising must be clear and precise in order to avoid inducing the public into error, or misleading or confusing them with regard to the services to be rendered.
- The ad must display the permit number.
- The ad must include information stating that betting and gambling are prohibited for minors.
- The ad must include messages inviting individuals to bet/gamble in a responsible manner and with the main purpose of entertainment and fun.

## 9. CRYPTOCURRENCY AND NON-FUNGIBLE TOKENS (NFTS)

### 9.1 Legal/Regulatory Framework

As referred in **4.1 General Requirements**, there are no specific rules or regulations that apply

to advertising, depending on the broadcasting channel, but only general provisions. For their part, Mexican e-commerce policies are still in constant development. As of today, e-commerce is largely regulated by three norms and a tool to enable “good practice”:

- the Consumer Protection Act;
- the Code of Commerce; and
- the Mexican Norm for e-commerce NMX-COE-001-SCFI-2018 (non-binding).

The Ethics Code and digital seal implemented by PROFECO are voluntary and considered as a basis of good practice. In addition, cryptocurrencies is not recognised as a legal tender in Mexico and non-fungible tokens (NFTs) are slowly gaining recognition with no specific regulations to be issued in the near future. Unfortunately, the Mexican legal system is not particularly forward-thinking in regard to developments in information and communication technologies (ICT).

**Arochi & Lindner** (A&L) is one of the most respected and recognised names in Latin American intellectual property protection. Since its founding in 1994, A&L has distinguished itself with its legal expertise and understanding of business needs. A&L handles all aspects of IP, including trade mark, patent, copyright, IP litigation and dispute resolution, IP rights enforcement, life sciences, domain names and trade secret protection, as well as advertising and marketing, data privacy and protection, civil and commercial litigation, and corporate

and regulatory law. A&L has developed a strong technological capacity to provide its clients with relevant information regarding trade mark applications filed at the Mexican Institute of Industrial Property so as to file the required oppositions when needed. Over the years, A&L has anticipated the evolving IP market by developing a tenacious enforcement practice, which is now the largest in Mexico.

The firm would like to thank Verónica Siten and Erick Hernandez for their work on this chapter.

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## Trends and Developments

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Arochi & Lindner see p.20*

### **Legal Regulation of Influencer Marketing in Mexico: an Urgent Requirement**

During the last century, the world witnessed a boom in technology that brought us indispensable tools for day-to-day living that fundamentally changed how we perceive life. We are heading, inevitably, to a virtual, intangible and online world. Although the internet's reach is spreading at a steady pace, there have been some events that have accelerated the process – eg, the COVID-19 pandemic.

With entire countries enforcing lockdowns and societies isolated from each other, virtual tools became a life jacket for many, facilitating the necessity of communicating with the outside world.

From old relatives and friends to making new acquaintances, from remote ways of working and bricks-and-mortar shops to home offices and e-commerce, the internet became an even more important part of many peoples' daily routines. It also allowed personalities to literally become online celebrities, capable of modifying the preferences, opinions, thoughts and tastes of the masses.

Using one of the most significant means to communicate in an isolated world – ie, the social media networks, specific profiled persons gained the ability to influence potential buyers of a product or service by promoting or recommending them, in a discrete and natural manner. Brands started to gain huge credibility before the public by following and observing individuals promoting their goods or services in their daily routines, as part of their lives. This ability to influence the masses, to impact followers, to gener-

ate esteem and approbation, and to make them change their minds towards a particular goal, is what has earned them the title of “influencers”.

### *The effect of influencers on society*

It is no secret that there are market sectors and industries more likely to be desired than others, according to trends and fashion. Society aspires to status, recognition, uniqueness, originality, comfort and security, among other things. Every brand able to provide such characteristics to consumers, is prone to attract the attention of the public. The way those characteristics become apparent to consumers is the key to a good advertising strategy. Worldwide brands do not sell a product or a service anymore, but an entire experience.

A society with only a limited legal framework establishing the parameters, scope and limitations of this world of supply and demand, and the infinite brand competition to advertise products and services, may end up causing serious damage to the community. Intellectual property and legitimate rights corresponding to creators, investors, entrepreneurs and/or project developers could be collateral damage, not only causing a direct harm to the victim companies and individuals, but also reducing the incentive to keep creating, investing, developing and growing companies; it fractures solidarity, empathy and mutual respect among the population, fueling the informal market above economic activity in the formal labour market. Damaging the latter also implies an important decrease in the formal generation of employment.



### *Usefulness of influencers for brands advertising campaigns*

Influencers actually work hard to achieve status that makes them worthy of the attention of the public and brands. They are not only at home recording videos and thinking about new content, but most of them are addressed to specific niches and population sectors. The optimisation of social media profiles, understanding of their audience and constantly creating and posting relevant content are key in this business. Influencers are engaged to their audience and must be regular and consistent to keep that audience attentive and entertained.

Once the consumers identify themselves with a public celebrity, they will mostly imitate their conduct, their preferences and their way of thinking. Social media networks are designed to persuade their users through the content displayed. Word of mouth advertising is far more effective than anything the brand could publicise directly. Thus, once the brands learned that influencers were a crucial opportunity to advertise their products and services – given their closeness, connection and engagement with their followers – those influencers' value rocketed. At the very beginning, those influencers were high-profile celebrities such as athletes, actors, actresses, singers, top models, and those related to the show business world. Nowadays, influencers are human beings with “normal” lives. Circumstances such as the COVID-19 pandemic, technological and digital tools, the wide catalogue of social media apps, and the extensive online traffic passing every day, have opened the possibility for any average person to become an influencer or to make a content viral at a worldwide level in just a few hours.

Brands' marketing departments make deep and carefully scrutinised analyses of potential influencers to advertise their products and services. A full study of the campaign goals, the campaign

audience, budget, influencer type and reputation, past work, message to be transmitted to the public and the expectation of the results is key for companies to achieve marketing success.

Influencers do not only serve the purpose of increasing sales, but to promote contests and referral programmes, to engage consumers with the brand, to guide buyers on how to optimise the use of the product or service, and to create brand awareness, among other things.

### *Legal framework over influencers*

All this power to influence the public and the hard work behind it are worthy of recognition. However, together with the glory comes obligations and legal and social responsibility. Regulations of influencers' conduct is not as up to date as broader society requires and the impact of a bad influence is hardly measured by influencers and by the public itself.

There has been a lot of controversy on the limits imposed on influencers versus their freedom of expression and the right of the general public to access information. On one side of this debate stand data privacy rights and social responsibility. Cases of using third parties' information, lack of commitment to truly verify that a determined product or service is not dangerous or potentially harmful to the public before promoting it, or disregarding or causing damage to other brands' prestige, happen every day. Making vulnerable consumers believe in false realities as a result of disguised scenarios created by influencers is also a social problem affecting specific sectors of the community, such as teenagers, the unwell or those willing to reach a certain status through the use of a specific brand. Beauty standards and miracle products continue to be an issue to be solved by our culture.

On the other side of this controversy, we have those untouchable crucial rights of freedom of expression and the right to access information. Much of the general public believes that the data submitted on the internet should be available to every online user, as we are free to express, to observe and to learn.

The most important players in the online realm have had to work to establish neutral parameters that do not impinge on the rights of users and, on the contrary, guarantee the respect of all rights in a cautious manner. Agents, such as social media, have implemented community policies and sanctions for those who violate them. Apps such as Facebook or Instagram have enabled algorithms to detect content that goes against their policies and have established processes for users to directly report such violations to the app. In addition, sanctions can range from the removal of the forbidden content and warnings made to account holders, to temporary suspension and the definitive blocking of the account. These measures were not exclusively addressed to influencers but rather to protect, in general terms, third parties' rights regarding any content submitted or shared on app platforms, and to promote a friendly space of communication between app users.

Of course, there are some countries that are already working on specifically regulating advertising campaigns and influencers. Some of these policies are already in force and government authorities are investing resources and efforts in this task.

### *Regulation of influencers in Mexico*

Mexico lacks a specific law that regulates advertising and marketing practices, be it online or offline. However, there are many pieces of legislation where some aspects of advertising and marketing are included, such as, the Federal Consumer Protection Law, the General Health

Law, the Federal Law for the Protection of the Industrial Property and the Copyrights Law, the Civil Code, the Criminal Code, the Mexican Data Protection Act, the Mexican Norm for e-commerce NMX-COE-001-SCFI-2018, the Rules for advertising derived from the Health Act, and the recently implemented Act of Transparency and Lawful Practices in the Advertising Industry, which mainly regulates the role, the industry practice, and the activities of the media, the advertising agencies and advertisers.

Advertising and marketing rules are enforced by Mexican authorities with the aim of protecting consumers from misleading advertising or abusive information, understood as that which refers to characteristics or information related to any good, product or service that might not be true, or that could mislead or confuse the consumer by the inaccurate, false, exaggerated, partial, artificial, or tendentious way in which it is presented. However, there is still a long way to go towards regulating advertising and marketing activities in the influencer realm. Currently, influencer behaviour escapes the need to embrace a sincere responsibility for its effects on society, which ends up harming it.

### *Trending cases involving influencers in Mexico*

The absence of specific regulation has not prevented Mexican courts from having to face and rule on cases related to influencers, their ignorance of the legal and social responsibility they have and their false belief that they are untouchable under the umbrella of the right to freedom of expression.

Three of the most notorious cases in Mexico are set out below.

#### *Paid-for political content*

A political party paid over USD1 million to more than 90 influencers based in Mexico to promote

their candidates during their electoral campaign. Some of this paid-for content was submitted after the campaign should have been over, during the electoral ban, before the elections of June 2021. Receiving around USD10,000 per post, many influencers submitted stories supporting the political party, pretending that this was a personal belief and a public manifestation of their sole political opinion of the best candidates for the election. The Federal Tribunal of Electoral Affairs ordered the removal of the content and started an investigation against the political party. So far, the Tribunal has ordered the reduction of the monthly budget of the political party until the USD2 million imposed as a fine is reached, and a prohibition on broadcasting or promoting the party on the radio and television for over a year. For their part, the more than 90 influencers have been subject to investigation by the Federal Attorney's General Office, for the possible commission of an electoral felony.

Although the influencers have claimed ignorance on the matter and respect for their right to express themselves freely, the authority have concluded that all the content was sourced from a script, which cannot be considered spontaneous.

This is not the first time that this political party has used influencers to cause an impact on citizens' voting choices during the electoral ban; the same thing happened in 2015, on smaller scale, involving around 40 influencers. Back then, the fine was only USD350,000.

#### *An influencer's right to freedom of expression versus their responsibility*

Yoseline Hoffman, aka. YosStop, a famous influencer based in Mexico with more than 6 million followers, was detained and indicted in June 2021, based on child pornography possession. In 2018, a minor of 16 years old was raped and filmed by four teenagers during a

party. The video of the non-consensual event, with additional material documenting the same party and involving this same girl, were shared among the acquaintances of those four young men. The influencer YosStop posted a video on their YouTube account, titled "Pathetic generation", criticising the behaviour of the 2018 teenagers' generation, and using this video of the young girl as an example of it. She accepted having seen and stored the video of the sexual assault on the minor in her cell phone. Although those sensitive videos were not reproduced on YosStop's content, the authority determined that the influencer's public announcement of having seen, promoted and having been in possession of a video constituting child pornography was enough evidence to indict her. The criminal trial has not yet been ruled, while the influencer will remain in prison.

Controversial opinions have arisen on the influencer's freedom of expression to publicly state her personal opinion on a determined event; however, other sectors of society and experts in legal matters have stressed the urgency of making influencers aware of the power they have when reaching so many people, and of making them responsible for their acts.

#### *Revelation of criminality through influencer accounts*

Ricardo Gonzalez, also known as Rix, a famous influencer based in Mexico with over 2 million followers, has been recently condemned to three years of imprisonment, for having sexually assaulted another influencer Nath Campos in 2017, taking advantage of her drunk condition. Rix has been denounced by some women for his aggressive behaviour; however, it was not until Nath Campos filed the criminal complaint in January 2021, that an investigation was opened by the authorities. Rix was detained in February 2021 and on 1 September 2021, he pleaded guilty in exchange for a reduced conviction of

three years and two months, together with a fine of the equivalent of USD1,500 and the obligation to repair the damage to Nath Campos.

The case caused serious controversy as the two parties involved are public figures that have worked together in diverse campaigns, and given that the facts were made public using their respective social media accounts.

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and regulatory law. A&L has developed a strong technological capacity to provide its clients with relevant information regarding trade mark applications filed at the Mexican Institute of Industrial Property so as to file the required oppositions when needed. Over the years, A&L has anticipated the evolving IP market by developing a tenacious enforcement practice, which is now the largest in Mexico.

The firm would like to thank Verónica Siten for her work on this chapter.

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