

**Key Takeaway:**

Companies and social media influencers should conduct reasonable due diligence and consider the potential for trademark infringement lawsuits before they post promotional content. Both parties should also consider what contractual protections and provisions make sense for each influencer relationship. The U.S. District Court for the Central District of California recently found on August 6, 2021 that Petunia Products could proceed with its trademark infringement lawsuit against Molly Sims, a supermodel and social media influencer. The decision signals that influencers may be held liable for trademark infringement in connection with the products they promote. Petunia Products, owner of the BROW BOOST trademark, filed a complaint against Rodan & Fields for allegedly creating a likelihood of consumer confusion and therefore infringing Petunia's mark with Rodan's BROW DEFINING BOOST product name. Rodan also promoted the product on social media using the hashtag

#BROWBOOST. Petunia also sued Sims, who promoted the allegedly infringing product on her blog, for direct infringement, contributory infringement, false advertising, and unfair business practices. Sims moved to dismiss the claims brought against her. She argued that liability for trademark infringement should not extend to third parties that sponsor a product without confirmation that the use violates trademark rights. Sims also argued that sponsoring the product did not constitute commercial use and, as a result, there was no infringement. The court dismissed the contributory infringement and false advertising claims against Sims but granted Petunia's leave to amend these claims. The court refused to dismiss the direct trademark infringement and unfair business practices claims. The court found that Sims' post was a paid advertisement and "crossed from protected consumer commentary to commercial use." The court noted that Sims' blog post thanked Rodan for sponsoring the post, included the cost of the product, and provided a link to the website where the product could be purchased. The court's refusal to dismiss the claims against Sims should serve as a warning to social media influencers that they can potentially be held liable for trademark infringement related to products that they endorse.

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