

Bitcoin, Botox and Bullion: Protecting Consumers from Deceptive and Illegal Advertising by Social Media Influencers*

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More than 5 billion people will use the Internet and social media by the end of 2024 and global influencer marketers reached USD 24 billion in early 2024. A regulation is thus needed to protect domestic consumers from the negative effects of global influencer marketing, such as deception, hidden advertising, and information uncertainty. Can the current legal framework effectively protect domestic consumers from misleading or deceptive and illegal advertising conducted by influencers through social media platforms from outside of their jurisdiction This essay first examines social influencing and explains how social influencers operate across national borders. It then discusses domestic legislation governing social influencers in China, Japan and South Korea and discusses why these domestic frameworks provide scant protection for consumers against false advertising and misinformation originating in another country. Finally, this essay proposes an international solution to a problem that will only increase size and severity in the future.

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1. Introduction

Buy Bitcoin from us now! You will look more beautiful with our Botox! Stock up with gold and silver from us! The global influencer marketing industry soared to a value of USD 24 billion in 2024, fueled by the popularity of influencer endorsements of goods and services, particularly on social media platforms like Facebook, TikTok, Instagram, and YouTube.

Unfortunately, undisclosed and unlawful advertising about cryptocurrency, medical procedures and precious metals as well as other goods and services has emerged as a very real problem, especially when social influencers residing in Country X target consumers in Countries Y and Z. Recognizing the problem, countries like the US,¹ China,² India,³ France,⁴ Germany,⁵ South Korea,⁶ Singapore,⁷ and Japan⁸ have enacted legislation that attempts to restrict false information and unfair advertising from social influencers operating on digital media platforms. However, these laws

¹ 16 CFR Part 255: Guides Concerning the Use of Endorsements and Testimonials in Advertising, <https://www.ftc.gov/legal-library/browse/federal-register-notices/16-cfr-part-255-guides-concerning-use-endorsements-testimonials-advertising>.

² Guidelines for Social Media Companies, https://mp.weixin.qq.com/s/RC--8_MwctNmMDHRu9Y_wQ.

³ Guidelines for Influencer Advertising in Digital Media; The Advertising Standards Council of India, 2023, <https://www.ascionline.in/wp-content/uploads/2023/08/GUIDELINES-FOR-INFLUENCER-ADVERTISING-IN-DIGITAL-MEDIA.pdf>.

⁴ Influencers Act (Law No. 2023-451), <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000047663185>.

⁵ ROK Act against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb – UWG), https://www.gesetze-im-internet.de/englisch_uwg/englisch_uwg.html.

⁶ KFTC, Guidelines on Examination of Advertisements and Representations Related to Endorsements and Recommendations [추천·보증 등에 관한 표시·광고 심사지침], <https://www.law.go.kr/%ED%96%89%EC%A0%95%EA%B7%9C%EC%B9%99%EC%B6%94%EC%B2%9C%C2%B7%EB%B3%B4%EC%A6%9D%EB%93%B1%EC%97%90%EA%B4%80%ED%95%9C%ED%91%9C%EC%8B%9C%C2%B7%EA%B4%91%EA%B3%A0%EC%8B%AC%EC%82%AC%EC%A7%80%EC%B9%A8>.

⁷ Advertising Standards Authority of Singapore, Guidelines for Interactive Marketing Communication & Social Media, 2016, <https://asas.org.sg/Portals/0/Guidelines%20for%20Interactive%20Marketing%20Communication%20and%20Social%20Media%20%28web%29.pdf>.

⁸ [Japan] Act against Unjustifiable Premiums and Misleading Representations [不当景品類及び不当表示防止法], <https://www.japaneselawtranslation.go.jp/ja/laws/view/2888>.

only protect citizens residing in these countries; they have no extra-territorial effect. Other countries, like Mongolia, have no legislation governing the activities of social influencers - which means no protection for consumers. Even where there is some laws or regulations applicable to digital media influencers, those unable to help those harmed when a social influencer located in one country uses a social media platform to influence (if not manipulate) consumers in another country.

This essay first examines social influencing and explains how social influencers operate across national borders. It then discusses domestic legislation and regulations governing social influencers in three representative jurisdictions South Korea, China, and Japan and discusses why these domestic frameworks provide scant protection for consumers against false advertising and misinformation originating in another country. Finally, because domestic laws and regulations are not able to solve this global problem, this essay proposes an international solution to a problem that will only increase size and severity in the future.

2. What Are Social Influencers and How Do They Operate?

A. Social Influencers: Definition

In the past, advertising standards applicable to communications involving advertising of any product or service focused primarily on the responsibilities of the advertiser and the creator of the advertisement. Conversely, in today's world, the role of advertising is played through images and video content that showcase products and services used by famous or well-known people on the Internet and social media. But social influencer marketing is not only limited to famous and well-known people because it also creates an opportunity for ordinary citizens to start an influencer career. Since influencers are inextricably linked with the Internet environment and social media, they are defined differently in each country: "popular person on the Internet,"⁹ "best face or beautiful face,"¹⁰ "online idols,"¹¹ etc.

The International Consumer Protection and Enforcement Network (ICPEN) defines influencers as "individuals who create and publish content on weblogs, video blogs, social platforms, online newspapers, magazines, and other online

⁹ Crystal Abidin & N.L. Hong-Phuc, *Benchmarking Influencer Regulations in the Asia Pacific Region*, IERLab (2023), https://ierlab.com/wp-content/uploads/2024/02/ierlab_benchmarking_apac.pdf.

¹⁰ *Id.* In Korea, it is called "Uljjang" or "Ulzzang."

¹¹ *Id.* In Japan, it is called "Net Idols."

publications.¹² It is important to note that companies often use social platforms to promote their products and influence consumers.¹³ Depending on the popular social media platform, their names are often associated with their platform name and called “Youtuber,” “Instagram Idol,” or “TikToker.” Finally, influencers are differentiated as follows, depending on the number of their followers: (1) nano-influencers (10,000 or less followers); (2) micro-influencers (10,000-60,000 followers); (3) mid-tier-influencers (60,000-200,000 followers); and (4) macro-influencers (200,000+ followers).¹⁴

B. The Problem of Disclosure in Global Social Media Recommendation and Endorsement Advertising

It is difficult to determine whether the content posted by an influencer on social media is advertising or self-expression. Platforms have already adopted the practice of allowing influencers to use their advertising IDs and provide user data for the content they post. However, there are still cases where influencers do not disclose their sponsors, investors, or followers, and instead post hidden advertisements on social platforms. For example, in July 2020, South Korean website, Dispatch published information revealing the sponsors of YouTube influencers such as Girls Generation singer Jessica, and actress and singer Kang Min Kyung.¹⁵

C. The Problem of Influencers Exploiting Consumer Trust

On social media, through such features as following, liking, and commenting, followers can interact with influencers. This fosters a more intimate and open forum than with traditional celebrities.¹⁶ Furthermore, the higher the product compatibility between the influencer and the advertised product is, the greater the increase in consumer attitudes toward the influencer will be.¹⁷ Recent data from Asia underscores the significant impact of influencer marketing on consumer behavior in

¹² Online Reviews & Endorsements ICPEN Guidelines for Digital Influencers, <https://icpen.org/sites/default/files/2017-06/ICPEN-ORE-Guidelines%20for%20Digital%20Influencers-JUN2016.pdf>.

¹³ K&L Gates Global Law Firm, France’s digital influencer regulation: whether you like it or not, you’ll need to subscribe to those changes!, <https://www.fashionlawwatch.com/2023/10/18/frances-digital-influencer-regulation-whether-you-like-it-or-not-youll-need-to-subscribe-to-those-changes>.

¹⁴ Aspire, The State of Influencer Marketing 2024 report, https://learn.aspireiq.com/rs/982-DON-266/images/The_State_of_Influencer_Marketing_2024.pdf?version=3.

¹⁵ Jin lee & Crystal Abidin, *Backdoor advertising scandals, Yingyeo culture, and cancel culture among Youtube Influencers in South Korea*, 26 NEW MEDIA & Soc’y (2024), <https://journals.sagepub.com/doi/epub/10.1177/14614448211061829>.

¹⁶ Mi Young Kang, Possibility of Punishments and Sanctions for Influencer’s Undisclosed Advertising [인플루언서의 뒷광고에 대한 처벌 및 제재 가능성], 65 JEONBUK L. REV. [법학연구] 119 (2021).

¹⁷ Mutiara RifkiAzkiyah & Arif Hartono, *The Influence of Social Media Influencers on Consumers’ Buying Attitudes and Intentions*, 1 BUS. & INV. REV. 163 (2023).

the region. Notably, 80% of social media followers in Asia are either more likely or much more likely to buy products recommended by those influencers. This trend is also particularly pronounced in countries such as Indonesia (61%), India (60%), and the Philippines (60%).¹⁸

Ordinary consumers might perceive certain online advertisements as informative rather than promotional by mistake. This could lead to the possibility of placing trust in influences, thereby engaging in transactions under the belief that the advertisement presents factual information.¹⁹ This is because the public has a common belief that influencers' opinions on products and services are 'true' based on the influencers' reputation and experience. Nevertheless, influencers continue to covertly advertise, profit from, and mislead consumers. In particular, cryptocurrencies, gambling, and plastic surgery are promoted, which harm the economy and the health of consumers.²⁰

3. Domestic Legislation and Regulations

A. South Korea

The Act on Fair Labeling and Advertising aims to prevent unfair labeling and advertising of products and services that deceive or mislead consumers.²¹ Therefore, this Act fundamentally applies to social media influencer advertising activities. According to Article 3 of this Act, a business entity is prohibited from engaging in labeling or advertising items that may deceive or mislead consumers. This includes false, exaggerated, deceptive, unfairly comparative, and defamatory labeling and advertising that could disrupt fair trade. Under this provision, social media influencers must be included in the term "business entity"²² to be subject to the same regulations. To be recognized as a business entity, one must continuously and repeatedly receive a certain economic benefit in return for providing corresponding consideration to

¹⁸ See 80% of social media users in Asia who follow influencers are likely to purchase products recommended by the influencers, Nielsen (Sept. 2022), <https://www.nielsen.com/news-center/2022/80-of-social-media-users-in-asia-who-follow-influencers-are-likely-to-purchase-products-recommended-by-the-influencers>.

¹⁹ Ko Sang-hyun, A study on the Legal Problems of New Type Online Advertisement: Focusing on the illegality of online advertising" [신유형 온라인광고 법적 문제 연구 : 온라인광고 위법성을 중심으로] 18 (unpublished Master's thesis at Hufs, 2021), <https://www.dbpia.co.kr/journal/detail?nodeId=T15893145>.

²⁰ BEUC, From influence to responsibility: Time to regulate influencer marketing (2023), at 2-4, https://www.beuc.eu/sites/default/files/publications/BEUC-X-2023-093_From_influence_to_responsibility_Time_to_regulate_influencer-marketing.pdf.

²¹ [ROK] Act on Fair Labeling and Advertising, art. 1.

²² The term "business entity" means an entity that engages in manufacturing business, service business, or other business.

others.²³ Influencers who do not engage in such business activities are not considered a business entity under this definition.

If someone violates the Fair Labeling and Advertising Act with deceptive labeling or advertising, they may face corrective orders to cease the violation, public disclosure of the corrective order,²⁴ temporary suspension orders,²⁵ fines of up to 2% of the related sales or up to KRW 500 million,²⁶ imprisonment for up to 2 years, or fines of up to KRW 150 million.²⁷ Additionally, according to Article 14 of the Act, both advertisers and social media influencers can be held responsible for violations of Article 3, Clause 1, and therefore may establish voluntary regulations to maintain the fairness and transparency of advertising.

In the 2019 case of undisclosed advertising on Instagram, however, the Korea Fair Trade Commission imposed corrective orders and fines totaling KRW 269 million on only seven advertising businesses that did not disclose the compensation for the posts created using Instagram and YouTube. Since the regulations had not been applied to influencers, those who received compensation but did not disclose it were exempt from responsibility.²⁸

Therefore, on June 22, 2020, to present specific review standards for unfair advertising related to recommendations and endorsements, the Korea Fair Trade Commission amended the “Guidelines on Examination of Advertisements and Representations Related to Endorsements and Recommendations.”²⁹ The main points of this amendment were: (1) establishing general principles for disclosing economic interests; (2) providing formats and examples of disclosing economic interests for each type of SNS media; and (3) adding examples of endorsements where celebrities are intentionally exposing products or brands for compensation or where endorsers are employed by the advertiser.³⁰

²³ Jumi Jung, *Legal Responsibilities for undisclosed advertisements on Social Network Service* [SNS에 경제적 대가를 제대로 표시하지 않은 추천 보증인의 기만광고에 대한 표시, 광고법상 법적 책], 45 J. KOREAN COMPETITION L. [경쟁법연구], 352 (2022). See also Jihyun Choi, *A Study on Regulations of Advertising without Indicating Influencers' Financial Interests* [인플루언서의 경제적 이해관계를 표시하지 않은 광고 규제에 대한 고찰], 23(1) CHUNG-ANG L. REV. [중앙법학] 192-6 (2021).

²⁴ [ROK] Act on Fair Labeling and Advertising, art. 7.

²⁵ *Id.* art. 8.

²⁶ *Id.* art. 9.

²⁷ *Id.* art. 17.

²⁸ KFTC, The case of sanctions imposed on 7 companies for violating the Act on Fair Labeling and Advertising [표시광고법 위반 7개사 제재], <https://www.ftc.go.kr/solution/skin/doc.html?fn=fd5fd35ba59af83d1fc2440f0099d9bb537897a42d229235f70c9a54a3a6dbe&rs=/fileupload/data/result/news/report/2019>.

²⁹ *Supra* note 6.

³⁰ *Id.* arts. V. 5. Na & V. 5. Da.

In the case of 7 companies for violating the Act on Fair Labeling and Advertising,³¹ the influencers' actions involved providing opinions, evaluations, and feelings based on personal decisions to the consumers who viewed posts where the fact of compensation was not disclosed. Consequently, the review guidelines provided a specific definition of "recommendation and endorsement."³² Thus, if influencers recommend or endorse a product or service based on their personal use or experience, indicating good performance, efficacy, or effect, or encouraging purchase or use, it is considered a recommendation or endorsement,³³ and the economic connection with the advertiser must be disclosed.³⁴ However, according to a press release from the Korea Fair Trade Commission in 2024,³⁵ the main violation type in posts suspected of violating the law still involved inappropriate disclosure positions and methods of economic interests.

B. China

The Advertising Law of the People's Republic of China aims to regulate advertising to be truthful, accurate, and does not mislead consumers.³⁶ The 2021 revision included the definition of an "endorser," directly applying to social media influencers.³⁷ According to Article 3 of this law, "Advertisements shall be truthful and legal, expressed in a healthy manner that aligns with the requirements of socialist spiritual civilization construction and the promotion of the excellent traditional culture of the Chinese nation." Therefore, social media influencers should ensure their content satisfies all of these while showing objective information without breaking any law or cultural coding.³⁸

According to Article 9 of the PRC Advertising Law, absolute terms such as "best," "national level," and "number one" are prohibited from being used in the

³¹ *Supra* note 28.

³² *Supra* note 6.

³³ KFTC, Guidelines on Examination Related to Endorsements and Recommendations: A Guide to Disclosure Economic Interests, at 10, <https://www.ftc.go.kr/solution/skin/doc.html?fn=80f9d496feb4859659a87cabe883796eb59358d97b767f3b5f0bd6853d5c895e&rs=/fileupload/data/result/news/report/2020>.

³⁴ *Id.* at 18.

³⁵ KFTC, Announcement of the 2023 Social Networking Service (SNS) Unfair Advertising Inspection Results [2023년 SNS 부당광고 모니터링 결과 발표] (Feb. 14, 2024), https://www.ftc.go.kr/www/selectReportUserView.do?key=10&rptype=1&report_data_no=10481.

³⁶ The Advertising Law of the People's Republic of China [中华人民共和国广告法], https://www.gov.cn/guoqing/2020-12/24/content_5572939.htm.

³⁷ "Endorser" means a natural person, a legal person, or any other organization, other than the advertiser, that recommends or certifies goods or services in an advertisement in its own name or image. *See* PRC Advertisement Law, art. 2.

³⁸ *Id.* art. 4.

advertisement. Furthermore, advertisements must be distinguishable from the main content to allow consumers to see what is being promoted. Unless distinguishable, it violates Article 14 of this law and loses its trustworthiness. This ensures consumers can readily recognize promotional material and be free from being misled by advertisements. Article 14 aims to protect consumers from being confused and prevent information breakdown by clearly distinguishing advertisements from normal non-commercial content. Moreover, in all advertisements which are released through mass media, an obvious advertising sign should be included. This would visually make the distinction between advertising and editorial or informational material.³⁹

In China, advertising of products like medicines, pesticides, tobacco, food and alcoholic beverages, as well as cosmetics, are subject to specific regulations and restrictions in order to ensure that advertisements tell the truth, are scientifically accurate, and do not mislead the buyers of such products. This is also important for preserving consumer trust, public health, as well as providing accurate descriptions of the products being advertised.⁴⁰ According to Article 19, for instance, broadcasting stations, television stations, newspapers, audio publishers, and the Internet information service providers are prohibited from indirectly posting advertisements for medical products, medicines, medical devices, and health foods in the form of introducing health or wellness knowledge.

The PRC Advertising Law imposes strict penalties for publishing prohibited advertisements, especially those using absolute terms. Violators may be ordered to stop publishing and be fined between RMB 200,000 and RMB 1 million.⁴¹ In severe cases, their business license may be revoked. Additionally, the advertising review agency may revoke the approval letter and reject new applications for one year thereafter.⁴² In order to help market regulator enforce China's advertising-related laws, such as the Advertising Law and the Administrative Punishment Law of the State Administration for Market Regulation (SAMR), the Enforcement Guidelines for Absolute Enforcement Guidelines has been issued.⁴³ The Guidelines aim to regulate such terms as "the best" or "first" to clarify when such terms are allowed and when

³⁹ *Id.* art. 14, ¶2.

⁴⁰ *Id.* arts. 15-18 & 20-23.

⁴¹ *Id.* art. 55.

⁴² Arendse Huld, *Chinese Advertising Law: Market Regulator Issues Guidelines on the Use of "Absolute Terms,"* China Briefing (Mar. 23, 2023), <https://www.china-briefing.com/news/advertising-in-china-guidelines-on-use-of-absolute-terms>.

⁴³ See PRC Enforcement Guidelines for Absolute Enforcement Guidelines [市场监管总局关于发布《广告绝对化用语执法指南》的公告] (Mar. 20, 2023), https://www.samr.gov.cn/ggjgs/tzgg/art/2023/art_183b5cb48d9e4f0dba67f9f912a913ba.html.

they are not.⁴⁴

Also, on February 25, 2023, SAMR issued the Measures for the Administration of Internet Advertising,⁴⁵ which went into effect on May 1, 2023. The Measures replaced the previous Interim Measures for Internet Advertising Management.⁴⁶ They apply to commercial advertising activities conducted through the Internet media (websites, webpages, Internet applications, etc.), encompassing all forms of direct or indirect promotion of goods or services. Specifically, pharmaceutical advertisements can only be posted online if approved by relevant government agencies, and any changes, edits, or modifications without approval are prohibited.⁴⁷

In addition, on June 24, 2020, the China Advertising Association (CAA) issued the Code of Conduct for Online Livestreaming Marketing in China,⁴⁸ the first such code focused on online livestreaming marketing. The Code mandates that livestreaming marketing activities be transparent, requiring full, truthful, and accurate disclosures of relevant information about the products or services. It specifically protect consumers from misleading by fabricating or altering transaction data and user reviews, such as through false orders or data manipulation, and publishing deceptive advertisements.⁴⁹

C. Japan

In Japan, the Act against Unjustifiable Premiums and Misleading Representations (AUPMR) is a particularly important consumer protection regulation.⁵⁰ The Act aims to safeguard the interests of general consumers by restricting and prohibiting unjustifiable premiums and misleading representations that could impede consumers' voluntary and rational decision-making.⁵¹ Article 2 of the AUPMR defines an "entrepreneur"⁵² as "any person who operates a commercial, industrial, financial or any other business. For the purpose of applying the provisions of the following

⁴⁴ *Supra* note 42.

⁴⁵ Measures on the Administration of Internet Advertising [互联网广告管理办法], https://www.samr.gov.cn/zw/zfxxgk/fdzdgknr/fgs/art/2023/art_d93a579afd45413e8576e4623fab348f.html.

⁴⁶ PRC Interim Administrative Measures for Internet Advertisements (the SAIC Order [2016] No. 87), <https://www.hankunlaw.com/upload/newsAndInsights/4b80ba441ce43f7a331ad90865d661df.pdf>.

⁴⁷ *Supra* note 45. arts. 7 & 8, <https://www.chinalawtranslate.com/en/internet-advertising>.

⁴⁸ Code of Conduct for Online Livestreaming Marketing [网络直播营销行为规范], <https://www.china-caa.org/cnaa/newsdetail/369>.

⁴⁹ Justina Zhang, *Code of Conduct for Online Livestreaming Marketing Issued in China*, MONDAQ (July 21, 2020), <https://www.mondaq.com/china/advertising-marketing-branding/967626/code-of-conduct-for-online-livestreaming-marketing-issued-in-china>.

⁵⁰ *Supra* note 8

⁵¹ *Id.* art. 1.

⁵² *Id.* art. 2(1).

paragraph⁵³ and Article 11,⁵⁴ an officer, employee, agent, or any other person who acts for the benefit of an Entrepreneur shall be deemed to be an Entrepreneur.” Entrepreneurs are prohibited under Article 5 of AUPMR from engaging in deceptive acts and practices which may mislead consumers and encroach on their freedom of choice as well as their right to use reason in making wise decisions.⁵⁵

However, a social influencer is not considered to be subject to the Act, because his or her social media posts are voluntary activities of individuals and not advertisements provided by entrepreneur.⁵⁶ On the other hand, only entrepreneurs that supply goods and services (advertisers) are covered by the presenting of trade terms and prices, while third parties such as influencers who receive requests from entrepreneurs (advertisers) to promote their products or services, as well as advertising agencies, are not included within the scope of this description.⁵⁷ In a 2022 report, however, a panel of experts commissioned by the Consumer Affairs Agency recommended expanding the scope of legal responsibility to include influencers and brokers who solicit misleading word-of-mouth reviews.⁵⁸

4. Comparative Analysis: Challenges Faced by Cross-border Influencer Marketing Regulation

A. Comparative Analysis

China, Japan and South Korea all have basic advertising laws which regulate the traditional advertising market. They also have mechanisms to protect consumers from misleading or deceptive and illegal advertising. The problem is that social media influencers have created a new form of advertising where recommendations

⁵³ *Id.* art. 2(3)&(4).

⁵⁴ *Id.* art. 11.1. It states: “Entrepreneur ... may, upon obtaining authorization from the Prime Minister and the Fair Trade Commission pursuant to Cabinet Office Ordinance, with respect to the matters relevant to Premiums or Representations, conclude or establish an agreement or rules, aiming at the prevention of unjust inducement of customers and securing general consumers' voluntary and rational choice-making and fair competition between Entrepreneurs.”

⁵⁵ *Id.* art. 5(3).

⁵⁶ Bong-Hyun Song, *The Regulation of Influencer Marketings in the Act on Fair Labeling and Advertising - Focused on Disclosure of Material Connection* [표시광고법상 인플루언서 마케팅 규제 - 실질적 이해관계의 공개를 중심으로], 19(1) *ECON. L. REV.* [경제법연구] 158 (2020).

⁵⁷ Chie Kasahara, *Legalities of Marketing in Japan: Efforts to Keep It Clean*, *Advertising & Marketing* 2023 <https://web.archive.org/web/20231115181408/https://practiceguides.chambers.com/practice-guides/advertising-marketing-2023/japan/trends-and-developments>.

⁵⁸ *See Stealth Marketing Ban Leaves Influencers Unregulated*, *JAPANESE TIMES* (June 27, 2023), <https://japannews.yomiuri.co.jp/politics/politics-government/20230627-118700>.

and endorsements about the quality of products and services are often confusing to ordinary consumers, who do not always know if influencers genuinely use and endorse products or are receiving compensation or other financial benefits for their endorsements.

Consequently, China, Japan and South Korea all focus on transparency in influencer marketing. These countries have strict regulations prohibiting false, exaggerated, or misleading advertising practices. The primary objective of these regulations is to protect consumers from deceptive practices and ensure they can make informed decisions. Each country's legal system reflects a full commitment to fair trade and the protection of consumer interests. It follows that influencers are required to provide truthful information about the products and services they are promoting. However, while these countries share the common principle and goal of protecting consumers from misleading advertising, their laws vary in their approach and scope - which is the problem.

B. Challenges and Ambiguities in Cross-Border Influencer Marketing Regulation

1. Inconsistency in Influencer Marketing Regulation

Advertisements are differently regulated between countries. Soft law regulations are often guidelines, normative practices, and industry self-regulation, while hard law regulations are statutory instruments or government rules. In China, hard law includes the Advertising Law and the Measures for the Administration of Internet Advertising which require advertising to be truthful and accurate including an absolute ban on terms. In addition, there is a soft law format code.⁵⁹ Japan and South Korea use a mix of hard and soft law. For instance, the AUPMR prohibits false advertising but allows self-regulation, particularly those established by the Japan Advertisers Association (JAA). The differences in regulatory forms can lead to various issues between countries.⁶⁰ First, soft law regulations can limit international standardization, allowing each country to adopt different guidelines. This can result in discrepancies in regulations between countries.⁶¹

⁵⁹ *Supra* note 48.

⁶⁰ Countries without specific regulations on influencer marketing include Mongolia, Cambodia, Laos, Myanmar, and Bhutan. For instance, Mongolia serves as an example of such a country. In Mongolia, influencer relationships are not specifically regulated by laws or guidelines.

⁶¹ See *Selling Under the Influence: How Brands Can Avoid Influencer Advertising Mistakes in the Cross-Border Context*, CURTIS INSIGHT (Jan. 25, 2021), at 2, <https://d20qsj1r5k97qe.cloudfront.net/news-attachments/Selling-Under-the-Influence-How-Brands-Can-Avoid-Influencer-Advertising-Mistakes-in-the-Cross-Border-Context-2.pdf?mtime=2021012140521&focal=none>.

2. Various Regulation of Responsibilities of Influencers and Advertisers

The different national regulations in influencer marketing generates great challenges for compliance in global and consumer protection. These differences in regulations can lead companies to engage in “regulatory shopping,” seeking out jurisdictions with more lenient regulations to conduct their advertising activities. This practice not only makes it challenging for brands to accurately assess legal risks, but also risks creating gaps in consumer protection. Moreover, global Internet accessibility allows influencers to operate across borders, often in jurisdictions with minimal regulatory oversight.

3. Difference of Concept of “Connections” in Advertising and Endorsements

The purpose of disclosing the economic relationship between advertisers and endorsers is to provide consumers with information, so that they can recognize that the recommendation or endorsement is a “commercial advertisement” and make informed purchasing decisions. When an endorser receives economic compensation from an advertiser, it may influence the content of the recommendation or endorsement. Therefore, informing consumers of this fact allows them to assess the credibility of the recommendation or endorsement.⁶²

While all countries share a common goal in this regard, there are differences in the relationships that influencers and advertisers must disclose. South Korea, for example, requires disclosure of any “economic interest.”⁶³ This includes monetary compensation, such as cash, gift cards, discount coupons, or reward points, and non-monetary compensation, such as free products, free rentals, or discounts. Others include profit sharing through collaborations or group purchases, or economic benefits shared through partnerships or employment relationships.⁶⁴

For example, consider Minji, a Korean student who creates English-language content on YouTube and Instagram to target a global audience. Minji receives free products and monetary compensation from companies in the South Korea, the US, and the UK in exchange for reviews and recommendations. Imagine that Minji receives products from her family’s company and promotes them on her platform without disclosing her family relationship with the company. Under the Korean law, Minji may only be required to disclose the economic benefit, such as the free product she received.

Japan generally requires clear disclosure of the relationship between influencers

⁶² *Supra* note 33, at 46.

⁶³ *Supra* note 6, art. IV(2).

⁶⁴ *Supra* note 33, at 17.

and advertisers. In the case of China, advertisements shall be truthful and lawful and shall not adhere to the forms of advertising that laws and administrative regulations prohibit. One prohibition is the publication or indirect publication of, where explained, experience sharing, consumer reviews, and other forms to promote goods or services, or having purchasing links or other means of purchase attached. In such cases, the advertisement publishers shall clearly label them as “advertisements.”⁶⁵

4. The Consumers Facing Language Barriers

Consumers used to have difficulties in overcoming language barriers. These barriers complicate the assessment of the material connection of advertising, which relies on four key factors: prominence, presentation, placement, and proximity.⁶⁶ These criteria are generally reasonable, but tend to be applied differently within individual countries. For example, in one country, an advertisement that meets all of legal criteria may disclose the material connection prominently, present it clearly, place it prominently, and place it close to the claim. However, when the same advertisement is viewed in a country that uses a different language, there is a risk that consumers will not understand this material connection due to language barriers. These criteria are generally reasonable, but they are often country-specific.

In accordance with the guidelines set forth in “Disclosure 101 for Social Media Influencers” by the FTC), disclosures regarding endorsements should be presented in the same language as the endorsement itself. The FTC emphasizes the use of straightforward and unambiguous language to convey the nature of the endorsement. It also specifies that terms such as “advertisement,” “ad,” and “sponsored” are deemed sufficient to indicate the commercial nature of the content. Conversely, the use of vague or confusing terms, including abbreviations such as “sp,” “spon,” or “collab,” is discouraged as they may not effectively communicate the endorsement to the audience. Similarly, in South Korea, the disclosure should be in the same language as the endorsement itself. However, even if a different language is partially included, foreign languages may be used exceptionally if, as a whole, the disclosure can be considered in the same language and is easily understandable by consumers.⁶⁷

5. Jurisdictional Limitations

The essay highlights a key challenge in cross-border influencer marketing. For

⁶⁵ PRC Measures on the Administration of Internet Advertising, art. 9.

⁶⁶ KFTC, .com Disclosures: How to Make Effective Disclosures in Digital Advertising, <https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf>.

⁶⁷ *Supra* note 33, at 28-30.

example, when determining jurisdiction and addressing damages, consumers are affected by undisclosed and illegal advertising from influencers in another country. The nature of influencer marketing and its global reach frequently pose jurisdictional challenges for resolving disputes, especially when the involved parties are based in different countries. Existing laws, primarily national in scope, struggle to effectively regulate influencers and brands that operate internationally. This discrepancy in regulations across borders places considerable legal burdens on influencers, advertisers, and brands. They must navigate a web of complex and often conflicting national laws, which not only increase their legal responsibilities but also imposes significant economic burdens.⁶⁸

For influencers who operate globally and for brands targeting international markets, complying with these diverse regulations is particularly challenging. These requirements necessitate additional legal counsel and management, leading to heightened operational costs.

The need to comply with varying national laws can severely restrict influencers and brands aiming to penetrate new markets or expand within existing ones. Moreover, the complexity of legal compliance, coupled with the associated costs, is particularly burdensome for small businesses and emerging brands, potentially stalling their expansion efforts.

5. Conclusion and Recommendations

Since influencer marketing uses the Internet and social media, advertising content can reach consumers in any country, regardless of nationality and territory. In this article, the authors observed that influencers can engage through the Internet and social media in misleading or deceptive and illegal advertising that can influence consumers in other countries. In sum, the territorial sovereignty principle of developing regulations within a country is not a sufficient solution to protect consumers in their own country.

There is lack of a unified international regulatory framework. In other word, the main issue is that different countries handle influencer marketing in various ways. Some like China, have strong laws, while others have combined hard and soft law. In contrast, there are countries like Mongolia, that have few regulations. This discrepancy can allow for cross-border fraud, including deceptive or misleading

⁶⁸ *Supra* note 61.

and illegal advertising by influencers, making it difficult for consumers to trust the advertising they see online and leaving them vulnerable to potential harm.

As a result, establishing common principles for influencer marketing and developing international cooperation are important to protect consumers in any country. Therefore, based on uniform international standards, each country will optimize its regulatory activities and further influence the creation of mandatory rules for those operating in the online environment, regardless of citizenship. In addition, given the possibility of conflicts between influencers or users of any country in the online environment, it is advisable to create an international solution for dispute resolution and develop an electronic dispute resolution process with the help of technological development.

Future research is necessary to explore standards and regulations of international agreements or model law and how they can be harmonized across different legal systems. Studies should also examine the impact of language barriers and the cultural difference on transparency of advertising, as well as discussing digital jurisdiction and technical solutions. This essay presents recommendations that can protect consumers from misleading or deceptive advertising and unlawful advertising globally as follows:

1. Establishing “an international agreement” that solves the problem under the WTO;
2. Creating “Model domestic legislation” that each country could adopt in its own domestic legislation and would meet a uniform law in every country (that is, MODEL language that you would propose that could be adopted by each country and, when they all have adopted the same wording, this uniformity acts to solve the problem). The Model law must include at least regulations related to definition of influencer activity as a business person, disclosure requirements, platform responsibility, labelling of sponsored content, prohibition of content context, false and misleading claims, cross-border jurisdiction, electronic dispute resolution, etc.

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