



## Outcomes Report

### **A Silicon Flatirons Intellectual Property Initiative Roundtable: “Influencers: The New Payola?”**

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**Published June 17, 2021**

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#### Executive Summary

On March 1, 2021, the Intellectual Property Initiative of the Silicon Flatirons Center for Law, Technology, and Entrepreneurship at University of Colorado Law School hosted a roundtable focused on the emerging business strategy of influencer marketing. Influencer marketing entails hiring influential users of social media platforms—people who motivate their followers to do or consume (or not do or consume) a product or service—in order to market products and services to potential customers. This relatively recent strategy in business marketing has become more sophisticated in the past decade as social media platforms have become more popular. In recent years, influencer marketing has grown from an underground tactic to an in-demand channel.<sup>1</sup>

For this roundtable, participants with different perspectives from across the business and law communities were invited to share their experiences with influencer marketing dynamics. The goal of the roundtable was to answer a series of questions:

- What is the current state of influencer marketing?
- Who are the players, and what transactions occur in the influencer marketing process?
- Are there analogies between influencer marketing and historical marketing approaches?
- Is there a need for government regulation in this space?

Through conversations with industry participants in various roles, a narrative surfaced about where influencer marketing is now and where the seeds of influencer marketing may have been planted decades ago. The roundtable participants highlighted some of the most crucial

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<sup>1</sup> <https://repository.upenn.edu/cgi/viewcontent.cgi?article=5422&context=edissertations>  
p.44-45

issues affecting contemporary music and influencer marketing industries. Takeaways included:

- While payola has always existed in the music industry, its format has changed.
- Despite its reputation, it is clear that payola is not necessarily “bad,” and it may in fact be useful for traditionally marginalized artists.
- Payola is not illegal; instead, disclosure is required. The resistance to disclosure is especially strong in influencer marketing because of the importance of authenticity to the trade.

### Introduction

Kristelia García, Colorado Law Associate Professor and Director of the Silicon Flatirons Intellectual Property Initiative, kicked off the event with a discussion of influencer marketing in the music industry, particularly the parallels between transactions on music streaming platform services, like Spotify’s “Discovery Mode,” and broadcast systems of pay-for-play dynamics in the radio era of the 1950s.

She explained how, whereas the former means of pay-for-play is new and currently unregulated by federal law (though some state laws may address it), the traditional pay-for-play, commonly referred to as “payola,” has been governed by the Federal Communications Commission (FCC) since the 1950s. This regulation was traditionally justified as necessary to protect consumers and competition. In reality, much of the payola disclosure advocacy was driven by incumbent, white songwriters and music companies, who had grown concerned about losing a share of the market to emerging black musicians.<sup>2</sup> Since payola was sometimes the only way for these marginalized artists to get radio stations to play their music, major record labels sought to regulate it in hopes of limiting its use. Today, the FCC is still charged with enforcement of payola regulation, however it does not have jurisdiction over music streaming services like Spotify or other social media platforms, such as TikTok.

The conversations drew plentiful parallels between the payola of the past and contemporary influencer marketing. Influencers today may disseminate information to the general public on behalf of a business, with the intention of marketing a product, and often without disclosing the existence of a relationship between themselves and the company they are representing. There is a transactional relationship between the person disseminating information and the business or artist who pays for their offering to be pushed out to the masses. The general public is the end consumer of the marketed information.

With these similarities in mind, roundtable participants sought to consider meaningful distinctions and answer questions about the potential for harm, the need for (and potential efficacy of) mandated disclosures, and the potential for distinct approaches across different industries—including music, as opposed to markets that deal more regularly with physical products.

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<sup>2</sup> Pay-to-Playlist: The Commerce of Streaming, 12 UC IRVINE L. REV. \_\_\_\_ (forthcoming 2021)(with Christopher Buccafusco)

## Part I

### **Katya Allison: GRIN, Director of Marketing**

Katya Allison discussed her experience working in marketing throughout her career. Serving as the current director of marketing content at GRIN, an influencer marketing agency, Allison explained how influencer marketing operates from a business perspective. She emphasized that using an influencer to market a product or service is about the consumer's perception. The driving concept behind the entire marketing strategy is convincing a consumer that the influencer is authentic—a perception of authenticity drives whether a consumer will “buy” the influencer's endorsement of a brand or product.

Allison acknowledged that developing a metric for authenticity is complex and nuanced; finding the right influencer to pair with a brand depends on an analysis of the addressable market, the product or service that the business offers, and the demographics of the customer that business is trying to attract.

Allison pointed out that in the last few years, the emergence of different gradations of influencer has led to distinctions between different types of influencers. Today, influencers can be compensated in a traditional sense, with a formal payment, or through access to free products or services. An influencer might be someone who considers influencer marketing their full-time job or even their career, or it could be someone who already uses a brand's product and is encouraged by the brand to continue promotion in exchange for gifts. They may negotiate a contract directly with the business who is transacting for their services, or that transaction might occur through several intermediary parties like management agencies, marketing agencies, and attorneys. As influencer marketing has become more established in the world of business marketing, the process has generated more players in specialized roles than consumers might realize.

Allison also suggested that, as they have become more sophisticated, consumer expectations may also be evolving. While advertising has always sought to openly sway consumers, influencer marketing takes a subtler, but no less effective, approach. Recent polling suggests that many consumers are aware of, and unbothered by, this dynamic.

## Part II

### **Allie Moore: Creatives Learn Law, Founder**

Allie Moore joined to discuss the different approaches small businesses take in looking to contract with influencers, from a legal perspective. Moore is a professor at the University of Denver Sturm College of Law, founder of Creatives Learn Law, and co-operator and photographer at Wood Box Studios. Professor Moore's unique perspective spans that of an artistic entrepreneur, professional photographer, and attorney providing counsel for other creative professionals who need legal assistance as they build and grow their business.

Professor Moore noted that most of her clients are small businesses with less than \$200,000 in annual revenue. These companies approach influencer marketing as an alternative to traditional marketing efforts, usually to get more visibility for their brand within a local or niche market. Typically, they approach the concept of influencer marketing without any

awareness of legal obligations, such as the need for a written contract. Some small businesses, she explained, are only just beginning to consider using influencer marketing when they approach her, while others have already begun working with one or more influencers. She commonly sees small businesses with limited capital compensate influencers by paying cash per post, sending discount codes, or gifting product and services.

Professor Moore differentiated the issue of payola in the music industry from false advertising claims, saying, “it [playing the music] isn’t really advertising, and you don’t have a call to action—you aren’t trying to sell something directly”, so that does not squarely align with Federal Trade Commission (FTC) regulations pertaining to deceptive marketing. In contrast, small businesses marketing a product fall squarely into the realm of advertising, so FTC and state regulations (for example, the Title IIV of the Colorado Consumer Protection Act) apply to what her clients are doing. Therefore, enforcement action from the FTC is still a possibility, though potentially unlikely, since their size and low revenue may make them an unlikely target for the FTC’s limited enforcement resources.

Describing typical contract agreements between small business and influencers, Professor Moore pointed out that the businesses she deals with typically work directly with the influencer instead of through agencies or other third parties. Contracts may include a description of the services the influencer is performing, forms of compensation that the influencer will receive, and other normal business-to-business terms. Professor Moore highlighted that these contracts are a great tool for making people aware of their legal obligations on both sides of the transaction, including disclosure obligations and prohibitions of false reviews. Morality clauses are also commonly included with the specific business market that Professor Moore serves, which give the artist or business the right to terminate the contract or request that posts are removed regarding any issue that reflects negatively on the brand. If the business wants to use an influencer’s post and/or content other than for the built-in tools on the platform, they can contract for that assignment of commercial intellectual property (IP) rights to the brand.

When it comes to creative control, these contractual relationships are unique, because control from the brand might create an issue with the consumer’s perception of the authenticity of the influencer’s content. There is typically a relationship of trust between business and influencer—in a way, influencers are their “outsourced” marketing strategy and have a large degree of flexibility to maximize the authenticity of the resultant content.

On the topic of disclosure, Professor Moore opined that she believes effective disclosure is both possible and preferable. FTC guidelines have been provided on this topic to differentiate between what is, and is not, effective disclosure.<sup>3</sup> To maximize the potential for a person to see the notice, an effective disclosure statement should be prominently displayed or included in the video and caption. She predicted that instead of a change in regulations

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<sup>3</sup> Federal Trade Commission, *.com Disclosures: How to Make Effective Disclosures in Digital Advertising* (March 2013), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>

around marketing and advertising, the FTC may be quicker to issue enforcement actions in the future. In addition, she pointed out that current antitrust actions are bringing more attention and scrutiny from Congress of the means and methods that platforms self-police these practices, which could lead to more effective disclosure statements.

Professor García questioned whether endorsement or advertisement of a song by an influencer might not cause equal harm to those seen in classic consumer protection cases involving tangible goods, and asked whether disclosure is useful for a consumer or is primarily a tool for punishment? Professor Moore pointed out that differentiating between endorsement and advertisement is important – endorsement has to do with celebrity and requires disclosure. She observed that, no matter what the content is, an influencer post *implies* endorsement and could include anything that appears in an influencer’s feed.

### Part III

#### **Noah Yoo: Pitchfork, Journalist and Jennifer Kaufman: Terrorbird Media, Head of Digital Strategy**

The discussion then turned to influencer authenticity, focusing on the music industry. The conversation explored the contours between “grassroots” and professional influencers, including the impact of a formal relationship on authenticity. Kaufman recalled that “influencing” in music once took the form of blogs and music write-ups. Writers and bloggers would write a review, contextualize a song, and, in doing so, participate in a process of artist development. Now the dynamic is shallow—it includes curation of a playlist, possibly including paid placements, for potential fans to listen to with little to no commentary. The status of the playlister is intended to substitute for a thoughtful analysis.

Yoo distinguished between payola as defined by the letter of the law as opposed to the “spirit” of payola. He acknowledged that the vast majority of music influencer marketing is not disclosed. Artists are incentivized to use connections to get plays and increase their visibility. Kaufman agreed, pointing out that if the goal of an artist is market position, they are inevitably going to use every tool in the toolbox. She suggested that payola was one of those tools, a tradition seen throughout history, and questioned if some of the industry frustration over the practice may be related to money being spent differently than how powerful entities may prefer. Yoo agreed that overall, the music you are going to be exposed to the most has the most money behind it, and therefore will likely be the most commercially successful.

Kaufman acknowledged that an interesting aspect of influencer culture is its potential to be democratizing:

“There has been more opportunity created as a result of both of these systems and both of these cultures...Yes, the songs that have the most money behind them will rise to the top, but of the same token, I’ve seen indie bands go viral on TikTok...who wouldn’t have seen that kind of commercial success.”

She suggested that influencer marketing and social media have widened the pool of opportunity for artists.

The roundtable found consensus that payola has a negative connotation based in the association of the term with the concept of bribery, which is bad in the sense that it creates a

perception of anti-meritocracy within a respective industry. Practically, payola creates or reinforces barriers to entry based on access to resources, resulting in disadvantages for less well-funded producers of goods. Professor García suggested that maybe payola needs a “rebrand.” In the form of “discovery mode,” Spotify allows artists who do not have cash to participate by forgoing or lowering royalties in exchange for placement on a playlist.<sup>4</sup> Kaufman suggested this might be considered a “reverse-payola” dynamic.

## Part IV

**Eric Goldman: Santa Clara University School of Law, Professor; Chris Buccafusco: Yeshiva University Benjamin N. Cardozo School of Law, Professor; and Blake Reid: University of Colorado Law School, Associate Professor; Silicon Flatirons, Telecom & Platforms Initiative Director**

Professor Buccafusco and Professor García’s research identifies two traditional arguments against payola: consumer harm and impacts on competition that favor those with greater access to resources. Buccafusco highlighted many instances of pay-for-play with no disclosure in the digital world. However, in the radio world, payment is not illegal, so long as it occurs alongside disclosure. Professor Goldman considered why payment-plus-disclosure models are not seen more broadly, comparing this dynamic with television advertisement. TV show sponsorship disclosures are typically seen at the end of the show and do not specify what was paid for, instead being amorphous and general, and the audience simply does not seem to care. He concluded, “disclosure is so opaque, it’s so disconnected from the actual activity, that it really doesn’t affect consumer behavior in any meaningful way that we can tell. If Spotify were to disclose, I don’t think anyone would care.” Professor Goldman opined that as a remedy or compliance function, this style of disclosure does not seem effective to inform consumers.

The group then contemplated where disclosure might be mandated to be most effective. There was consensus that disclosure on music streaming services would be particularly difficult and that it would likely have to be aurally announced in the same medium to be effective. In addressing the question of harm, Kaufman observed that radio DJs and music writers have similar curatorial roles: as consumers we create one-sided relationships with them, and as a result, we do not want to hear that they were paid to push content. We want to believe that they share the music of their choice. In contrast, Kaufman argued that as consumers, we do not believe that apps like Spotify play a curatorial role with consumers’ enjoyment in mind, therefore consumers do not have the same relationship with the company. Professor Goldman suggested that in terms of harm, there is risk that the entire ecosystem may be perceived as pay-for-play and consumers would stop believing the industry dynamics are organic. As a result, consumers would have to incur greater search costs. Professor Goldman made the comparison to keyword advertising and SEO optimization as a similar dynamic, though explained that there is a legal argument distinguishing between buying an advertisement outright versus paying to boost a search results position.

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<sup>4</sup> <https://pitchfork.com/thepitch/could-spotifys-new-discovery-mode-be-considered-payola/>

Professor Reid made the analogy to a related issue historically found in broadcast licensing, where people may have wanted to believe that demand structures arose organically, but in reality, there is not a pure, organic way to structure demand. He questioned if opposition to legalized payola was based on a belief that there was a more organic alternative while, in fact, there is nothing other than inorganic demand due to out-sized supply. Though, he wondered if for many, admitting that *everything* is payola on some level is uncomfortable and therefore undesirable.

Yoo closed out the session by observing that “the use of payola...is a rhetorical tool more than anything else.” Roundtable participants were unclear as to whether the different forms of payola discussed in this will continue to evade regulation as they evolve alongside the industry.

### Conclusion

Several takeaways emerged from the conversations with roundtable participants. The group generally agreed that influencer marketing seems to replicate some of the dynamics of payola payments of the 1950s radio era. Specifically, shared aspects of influencer marketing and payola center around the relationship between the marketing “personality” and the consumer, and there is a general lack of transparency about the transaction between marketer and the business paying for the marketer’s services.

Participants acknowledged that payola has been around for decades in the music industry, but the format does seem to be changing and evolving quickly. The group was challenged by the idea that payola might not necessarily have identifiable harm to consumers, and that the assumed harm might be due to cultural associations with bribery or fraud. Discussion touched on the ways that modern payola and influencer marketing dynamics might function to uplift marginalized artists and businesses by providing a broader consumer base access to their products.

Several roundtable participants noted that payola has never been illegal, but does require disclosure. Participants pointed out that there is resistance to disclosure mandates in the broader influencer marketing industry, in part because of the importance of authenticity to the influencer marketing strategy. Participants shed light on some of the most pressing issues facing influencers and contemporary music, though time will tell how regulators and industries choose to approach these questions.

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Silicon Flatirons' mission is to elevate the debate surrounding technology policy issues; support and enable entrepreneurship in the technology community; and inspire, prepare, and place students in these important areas.

### Vision

To catalyze the creation and development of better, more innovative, and more inclusive law, policy, and entrepreneurship in the digital age.

### About the Intellectual Property Initiative

Technology and innovation continue to radically influence intellectual property (IP) law. In a world where people interact with the products of creators everyday—music, television and movies, electronics, furniture, and beyond—the careful study of IP law is crucial. Since 2014, Silicon Flatirons has engaged University of Colorado Law students and faculty and a broad community of alumni, policymakers, scholars, practitioners, and industry leaders in programming addressing emerging issues in IP law, copyright law in particular.

Since its inception, the Intellectual Property Initiative has sought to convene stakeholders that wouldn't normally be in the same room, encouraging the free exchange of ideas. Seeking to remedy a shortcoming of conventional copyright programming—a lack of input from creators themselves—we include artists in all conversations, spotlighting their valuable perspectives.

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