

ARE INFLUENCERS MAKING A BAD IMPRESSION?: EXPLORING
THE CONSUMER HARM OF THE INFLUENCER MARKETING
ECONOMY

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ABSTRACT

The influencer marketing business is predicted to grow to a \$24 billion industry by the end of 2024.¹ As the name suggests, influencers have a substantial effect on consumers. While the federal government has attempted to regulate the influencer business, the efficacy of these regulations is up for debate. The relationship between brands and influencers has gone largely unregulated and unenforced until recently. This gap in enforcement has emboldened both the brands and the individual influencers. False endorsements and trademark and copyright infringements occur daily, and the FTC, SEC, and intellectual property rights holders have started to notice.

Businesses must understand the potential direct and indirect liability they face when working with influencers, draft their contractual agreements accordingly, and implement a heightened review of sponsored influencer content. Influencers must understand regulations and review brand deals carefully to ensure the agreements comply with current laws or regulations. Lastly, as the lines between personal posts and sponsored content become increasingly blurred, it begs the question of whether influencers exceed their rights under the fair use doctrine.

This paper is organized in three parts. Part one introduces the idea of influencer marketing, provides definitions for classifying types of influencers, and explains the influencer marketing business. Part two reviews the different intellectual property ownership and liabilities issues that both influencers and brands encounter. Finally, part three offers two proposals for how to better regulate and enforce regulations on influencer marketing to reduce consumer harm and strengthen IP rights. The proposition is two-fold: (1) the burden to ensure content meets minimum legal requirements should be placed on the brands rather than individual influencers, and (2) a commercial purpose, for the purposes of the fair use analysis, can be found once an influencer has reached the level of a brand using a totality of the circumstances analysis.

* Elizabeth Porter graduated with her Juris Doctor degree from the Sandra Day O'Connor College of Law in 2024. I am thankful for Professor Trevor Reed's gracious encouragement and insightful expertise, which made this article possible.

¹ Werner Geysler, *The State of Influencer Marketing 2023: Benchmark Report*, INFLUENCER MARKETING HUB (Feb. 1, 2024), <https://influencermarketinghub.com/influencer-marketing-benchmark-report/#toc-0> [https://perma.cc/95SE-G56G].

INTRODUCTION: DEFINING INFLUENCERS

“. . . all influence is immoral. . . To influence a person is to give him one's own soul. He does not think his natural thoughts, or burn with his natural passions. His virtues are not real to him. His sins, if there are such things as sins, are borrowed.”²

The word “influencer” was only added to the English dictionary in 2019, but the business of influencing has existed since at least ancient Rome when gladiators endorsed products.³ In 1760, a potter marketed his tea set as “Royal Approved” after collaborating with the Queen of England—the brand has maintained its luxury status to this day.⁴ The first actress to endorse a product was Lillie Langtry, who appeared in ads for Pears Soap in 1882.⁵ Nancy Green, who is considered one of the first black influencers, is the face of Aunt Jemima.⁶ This collaboration catapulted the pancake mix to fame, despite evidence suggesting she did not share the profits from her contribution. One of the first fashion influencers of the modern age, Gabrielle “Coco” Chanel, popularized and legitimized women wearing what was traditionally considered menswear.⁷

² OSCAR WILDE, *THE PICTURE OF DORIAN GRAY* 18-19 (Robert Ross ed., Random House 1926) (1890).

³ Peter Suci, *History of Influencer Marketing Predates Social Media by Centuries – but Is There Enough Transparency in the 21st Century?*, FORBES (Dec. 7, 2020, 09:45 AM), <https://www.forbes.com/sites/petersuci/2020/12/07/history-of-influencer-marketing-predates-social-media-by-centuries--but-is-there-enough-transparency-in-the-21st-century/?sh=77f4921440d7> [<https://perma.cc/CA7K-KS5J>].

⁴ Aaron Brooks, *[Timeline] A Brief History of Influencers*, SOCIAL MEDIA TODAY (May 9, 2019), <https://www.socialmediatoday.com/news/timeline-a-brief-history-of-influencers/554377/> [<https://perma.cc/UQV2-P9DC>].

⁵ Quinn Schwartz, *The History of Influencer Marketing*, GRIN, <https://grin.co/blog/the-history-of-influencer-marketing/> (last visited Feb. 17, 2023) [<https://perma.cc/7RJ4-EPEC>].

⁶ *Id*; see also Katherine Nagasawa, *The Fight To Commemorate Nancy Green, The Woman Who Played The Original 'Aunt Jemima'*, WBUR, <https://www.wbur.org/npr/880918717/the-fight-to-commemorate-nancy-green-the-woman-who-played-the-original-aunt-jemi> (June 19, 2020) [<https://perma.cc/BCC7-6K92>].

⁷ Vivian Song, *The French Icon Who Revolutionised Women's Clothes*, THE BBC (Feb. 1, 2021), <https://www.bbc.com/culture/article/20210201-the-french-icon-who-revolutionised-womens-clothes> (“. . . Chanel is famously credited as the designer who popularised trousers, making them a key piece in women's wardrobes, and also for helping to liberate women from the tyranny of the corset.”) [<https://perma.cc/W8QU-E8S6>].

From there, the concept of movie and sports stars endorsing products and brands developed throughout the 20th century. During this era, the idea of celebrity influence was confined to the entertainment industry— Michael Jordan’s endorsement deal with Nike, Jennifer Aniston’s partnership with L’Oréal, and Cindy Crawford’s deal with Pepsi, to name a few.⁸ Endorsements from celebrities and entertainers also led to the era of reality TV influencers. Paris Hilton and Nicole Richie rose to fame in the 2000s as heiress influencers and were early examples of people becoming famous for “doing nothing.” Eventually, Paris and Nicole landed a reality TV show which added to their fame and influence and formally launched the era of the Reality TV influencer.

Kim Kardashian is one of the savviest influencers to rise from the Reality TV era. Her meteoric rise to fame can be attributed to both her connection to Paris Hilton, as her personal assistant, and her relationship with then-boyfriend Ray J.⁹ After a 2004 sex tape of Kardashian and Ray J was leaked in 2007, Kim Kardashian became a household name, and her influence has only grown from there. The TV show *Keeping Up with the Kardashians* launched in 2008 and still airs today, though it has rebranded and moved from E! to the Hulu platform. Other successful Reality TV influencers include Snooki and DJ Pauly D from *The Jersey Shore*,¹⁰ Kaitlyn Bristowe and Nick Viall from *The Bachelor* franchise,¹¹ and Molly Mae Hague and Amber Rose Gill from *Love Island UK*.¹²

Now, influencers are a subset of modern-day celebrities, without the need to be famous for being in movies or playing a sport. In a poll of 3,000 children in the United States and the United Kingdom, nearly 30 percent of respondents said they wanted to be an influencer when they grew up, whereas only 11 percent selected

⁸ Brooks, *supra* note 4.

⁹ Schwartz, *supra* note 5.

¹⁰ Megan Friedman, *What Are the ‘Jersey Shore’ Cast Members’ Net Worths?*, COSMOPOLITAN (Sep. 17, 2021), <https://www.cosmopolitan.com/entertainment/celebs/g20105930/jersey-shore-cast-members-net-worth/> [https://perma.cc/HW4T-FSF4].

¹¹ Sarah Veldman, *10 of the Most Successful Bachelor Nation Influencers*, MONSTERS AND CRITICS (Jul. 10, 2021, 10:07 AM), <https://www.monstersandcritics.com/tv/reality-tv/10-of-the-most-successful-bachelor-nation-influencers/> [https://perma.cc/MZ7X-66RD].

¹² *Top Love Island Influencers*, INFLUENCER MATCHMAKER, <https://influencermatchmaker.co.uk/top-influencers/top-love-island-influencers> (last visited Feb. 20, 2023) [https://perma.cc/RE4W-84JC].

astronaut as their ideal profession.¹³ A recent poll asked 2,000 Millennial and Generation Z respondents about their thoughts on influencing. The results show that 12 percent consider themselves to be influencers, 27 percent personally know an influencer, 54 percent would become an influencer given the opportunity, and 86 percent would be willing to post sponsored content in exchange for money. One might assume that the Millennial and Generation Z generations would be motivated by fame, but the polling showed that when asked what major reasons affected their desire to become an influencer, respondents largely cited business related interests like flexible work hours, fun and interesting work, and money. Only about 15 percent cited fame as a motivating factor.¹⁴ This study illustrates how influencing has evolved into a well-respected business, akin to a hybrid of acting and marketing.

Historically, the idea of “influence” was intangible, unquantifiable, ephemeral. Today, calculating influence can be done with concrete metrics such as follower count, likes, link clicks, and discount code use.¹⁵ Defining what an influencer is, how they earn money, and how much influence they have over segments of the population is no longer a qualitative analysis.

There is a common misconception that influencers are famous for ‘doing nothing.’ This is a criticism often directed towards celebrity influencers like the Kardashian family.¹⁶ Perhaps it appears that influencers have no value to contribute to society, but when one peels back the layers, it becomes obvious that successful influencers exercise immense skill in an important industry.

Rather than thinking of influencers as marketing tools, it is more accurate to describe influencers as a social relationship assets that brands can leverage for

¹³ Erica Parker, *LEGO Group Kicks Off Global Program to Inspire the Next Generation of Space Explorers as NASA Celebrates 50 Years of Moon Landing*, THE HARRIS POLL (July 16, 2019), <https://theharrispoll.com/briefs/lego-group-kicks-off-global-program-to-inspire-the-next-generation-of-space-explorers-as-nasa-celebrates-50-years-of-moon-landing/> [<https://perma.cc/CM4K-LDG3>].

¹⁴ *The Influencer Report, Engaging Gen Z and Millennials*, MORNING CONSULT, <https://morningconsult.com/form/influencer-report-engaging-gen-z-and-millennials-download/> (last visited Feb. 20, 2023) [<https://perma.cc/5CL3-C8YT>].

¹⁵ See Katie Sehl & Shannon Tien, *Engagement Rate Calculator + Guide for 2023*, HOOTSUITE (Feb. 22, 2023), <https://blog.hootsuite.com/calculate-engagement-rate/> [<https://perma.cc/D3P6-TQ7D>].

¹⁶ See Sheila Marikar, *Top 5 Celebrities Famous for ... Nothing*, ABC NEWS (June 5, 2009, 4:13 AM), <https://abcnews.go.com/Entertainment/CelebrityCafe/story?id=7762876&page=1> [<https://perma.cc/G3SP-LTBA>].

marketing purposes.¹⁷ Influencers have the power to affect their followers' consumer spending habits because of their knowledge or authority on a topic.¹⁸ Roughly 3.4 billion people use social media and seek out influencers' opinions to guide their behaviors and purchasing decisions.¹⁹ It can be easy for an influencer to gain followers rapidly after a post goes viral, but maintaining a following and building a relationship and reputation is more difficult. To remain relevant, influencers need to engage with their followers regularly. An ideal posting strategy depends on the social media platform, but typically, this looks like a minimum of one post a day in addition to leaving comments and likes on others' posts.

There are two categories used to describe influencers: level and niche.²⁰ Level is typically determined by follower count.²¹ Mega (or celebrity) influencers have over 1 million followers, Macro influencers have over 40,000 followers, Micro influencers have over 5,000 followers, and Nano influencers have over 1,000. Niche refers to the specific topic area covered in the influencer's posts and content. Examples of existing niches include mommy bloggers, sports commentators, prank bloggers, fashion influencers, lifestyle influencers, music critics, game reviewers, twitch streamers, pop culture podcasters, vinyl record collectors, comedians, and fan accounts.

Overall influence is determined by combining these two metrics.²² It is more valuable for brands to collaborate with a creator who has a high level of influence in their specific industry than to work with someone who has a high level of influence over the general population but low level in the industry. To illustrate this point, a speaker brand may choose to partner with a micro influencer who has 25,000 followers but is considered an authority on high fidelity audio setups over a mega influencer with 2.5 million followers, but no connection with audio technology.²³

Contemporary trends demonstrate that brands partner with micro influencers who have a considerable influence in a specific niche related to their brand more often than with any other level.²⁴ Brands have realized that niche micro influencers

¹⁷ Werner Geyser, *What is an Influencer? – Social Media Influencers Defined*, INFLUENCER MARKETING HUB (Feb. 14, 2024), <https://influencermarketinghub.com/what-is-an-influencer/> [<https://perma.cc/5QL8-SYEX>].

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *See id.*

²⁴ Geyser, *supra* note 1.

have the most value because they cultivated a loyal following who trust their expertise within the niche. Micro influencers are known to generate higher levels of engagement.²⁵ Celebrity influencers can be less desirable to brands seeking to promote a niche product because they are more expensive, and the cost-benefit ratio is lower.

“The formula is simple: If you get the influencers, you will likely get the eyeballs, and if you get the eyeballs, you get the advertisers and their dollars.”²⁶

Social media influencer marketing is the new norm. Today, many brands have pivoted their marketing strategy away from traditional ad-buys in magazines, commercials, and other mediums and towards influencer and social media marketing. Even the luxury brand Burberry, known for its more traditional British “personality,” launched its 2021 spring/summer collection by livestreaming the fashion show on Twitch.²⁷

A survey by Advertiser Perceptions of 207 marketers and 125 influencers found that in 2022, 12 percent of digital ad budgets were spent on influencer marketing, and 53 percent of advertisers planned to increase influencer marketing spending in 2023.²⁸

Social media advertising is generally more desirable than traditional marketing platforms because of the ability to create targeted ads on social media platforms. When users sign up to join a social media platform, the platform collects

²⁵ *The History of Social Media Marketing*, THE PAYMENTS ASS’N (May 26, 2022), <https://thepaymentsassociation.org/article/the-history-of-social-media-marketing/> [https://perma.cc/W9TS-6AT8].

²⁶ Keith Bendes, *The Growth of The Creator Economy and What it Means for Marketers*, FORBES (Jan. 25, 2022, 07:15 AM), <https://www.forbes.com/sites/forbescommunicationscouncil/2022/01/25/the-growth-of-the-creator-economy-and-what-it-means-for-marketers/?sh=4b57f7e84f1d> [https://perma.cc/T3YW-524C].

²⁷ Katinka Haugnaess, *Burberry Partners with Twitch to Livestream Its Upcoming Fashion Show*, HARPER’S BAZAAR ARABIA (Sep. 14, 2020), <https://www.harpersbazaararabia.com/fashion/shows-trends/burberry-partners-with-twitch-to-livestream-their-ss21-show>.

²⁸ Sabiq Shahidullah, *Advertisers Plan to Increase Investment in Influencer Marketing*, ADAGE (Feb. 7, 2023), https://adage.com/article/digital-marketing-ad-tech-news/why-investment-influencer-marketing-growing/2467031?utm_source=influencer-marketing-today&utm_medium=email&utm_campaign=20230209&utm_content=article6-headline [https://perma.cc/DC7F-8U55].

information about that user which advertisers can leverage to direct their ads and stretch their advertising dollars further. According to GWI, an audience insights technology company, 26 percent of social media users say they tend to buy from brands they see advertised on their feeds.²⁹

GWI collects data and creates reports that brands can use to inform their advertising strategies. Its studies show that people spend about half of their waking hours online, and Generation Z uses Instagram almost as often as they use Google.³⁰ In fact, Google's Senior Vice President, Prabhakar Raghavan said, "In our studies, something like almost 40 percent of young people, when they're looking for a place for lunch, they don't go to Google Maps or Search. . . They go to TikTok or Instagram."³¹

The business model for social media platforms is advertising. Social media platforms recognized the potential of ad buys on their platforms early on and users now expect to see ads when logging into one of these platforms. Facebook launched in 2004, and by 2006, it landed its first ad deal with JP Morgan to promote Chase credit cards.³² YouTube launched ads in 2007, followed by Twitter in 2010, Instagram and Pinterest in 2013, and Snapchat in 2014.³³

Advertising on social media began in a more traditional sense, with brands creating and paying for ad space on a platform to promote their products to a specific demographic. Today, brands can leverage influencers' accounts to appear more organically on consumers' feeds and elevate the brand's status and equity with a "celebrity" endorsement.

²⁹ Stephanie Harlow, *How Effective are Ads on Social Media?*, GWI (June 5, 2023), <https://blog.gwi.com/trends/ads-on-social-media/> [<https://perma.cc/QAL4-R8HH>].

³⁰ Tom Morris, *The World Wide Ebb*, GWI, <https://www.gwi.com/connecting-the-dots/world-wide-ebb> (last visited Feb. 22, 2023) [<https://perma.cc/W4FE-SM5B>].

³¹ Sarah Perez, *Google Exec Suggests Instagram and TikTok Are Eating into Google's Core Products, Search and Maps*, TECHCRUNCH (July 12, 2022, 2:57 PM), https://techcrunch.com/2022/07/12/google-exec-suggests-instagram-and-tiktok-are-eating-into-googles-core-products-search-and-maps/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ3dpLmNvbS9jb25uZW50aW5nLXR0ZS1kb3RzL3NlZW4tb24tc29jaWFs&guce_referrer_sig=AQAAAGobh5GSbDKncJWf5uBRCLVENh54xL09qrwWjYZdNojk1whCpil7ZafTGan1aQ3rL-8TJSwh8DtDbEobf_4phIkruEieLnONa0edQyJVOjXCQ3yi2HCIRrqOfObO4qhm7aNfEm-GBMbHbrUoea_F6YI4e31jq7Bhp_BIKjPYu4ba [<https://perma.cc/M3UY-YUEQ>].

³² *The Evolution of Social Media Advertising*, INTEGRAL AD SCIENCE (Dec. 19, 2017), <https://integralads.com/insider/evolution-of-social-ads/#:~:text=Twitter%2C%20which%20opened%20to%20users,own%20ad%20products%20in%202013> [<https://perma.cc/2AKJ-RPRC>].

³³ *Id.*

Brands view influencers as marketing professionals, and thus have stringent guidelines and formal contractual agreements to define the scope of their relationship. Brands have begun to require formal contracts for every type of partnership, whether the relationship is more extensive, such as that of an ongoing brand ambassador, or is a one-off exchange of a product for a post.

The contract for influencers looks somewhat like a typical employment agreement for an independent contractor, a name, image, and likeness contract, or a trademark licensing deal. The typical terms include:³⁴

- (1) Exclusivity,
- (2) Scope of relationship including the number of posts, guidelines on what to include in the content and caption, explanation of approval process, and compliance regulations
- (3) Schedule of posts
- (4) Ownership and grant of rights
- (5) Use of name, image, and likeness
- (6) Payment
- (7) Confidentiality
- (8) Representations and Warranties
- (9) Indemnification
- (10) Termination
- (11) Standards of conduct

If brands view influencers as professionals who are integral to their business marketing strategy, the courts should also take this approach. But why do brands value influencers as marketing professionals? The essential attributes of influencer marketing are authenticity and the ability to garner trust from their followers. Consumers cite authenticity as a key reason to choose particular influencers to follow. There has been a recent trend of “de-influencing,” where influencers tell their followers what *not* to buy. This supports the idea that people prefer influencers who they perceive to be authentic. Nothing seems more authentic than someone who ordinarily is paid to endorse products going out of their way to tell followers which popular items are not worth your money.³⁵

³⁴ See *Influencer Terms and Conditions*, SUGARFINA, <https://www.sugarfina.com/influencer-terms-and-conditions> (last visited Mar. 7, 2023) [<https://perma.cc/LU9E-LBPU>]; see also *Micro-Influencer Agreement*, TEMPEST MEDIA (Apr. 23, 2021), <https://www.tempestamedia.com/influencer-terms/> [<https://perma.cc/45S3-NRUD>].

³⁵ See Theara Coleman, *'De-influencers' Are Telling TikTok Users What Not to Buy*, THE WEEK (Feb. 24, 2023), <https://theweek.com/tiktok/1021118/de-influencers-are-telling-tiktok-users-what-not-to-buy> [<https://perma.cc/MD7J-AXLG>].

Brands also choose influencer marketing because it works. Research shows that influencer ads generate 277 percent greater emotional intensity and 87 percent higher memory encoding than TV ads. They are even more effective than traditional ad placements on YouTube and Facebook.³⁶

People follow influencers they perceive as relatable and authentic. They are fans of traditional celebrities who they perceive as having impeccable taste and who they want to emulate, but they care less about their actual trustworthiness. Traditional celebrities seem ephemeral, but influencers feel accessible. An influencer who has not yet necessarily hit celebrity level may have followers who want to emulate them, but more often, people follow them because they already feel a level of relatability.

Anecdotally, I have been told by someone that they follow influencers who have the same body type and lifestyle but may seem to “have it more together” than they do. This person relates to the influencer and trusts their judgment on how they can improve their current life. They trust that they will like the items from their Amazon storefront, or other affiliate links, because the influencer that they relate to says that they like the items. Of course, this is mostly a façade, but it is effective. There is empirical support for this as well. According to a 2021 news article, 40 percent of YouTube subscribers say that they relate to their favorite influencer more than their friends, 86 percent of women use social media for purchasing advice, and 49 percent of consumers depend on influencer recommendations.³⁷

In an increasingly digital era, traditional laws and regulations must be adapted or risk becoming obsolete. The current regulatory landscape is likely sufficient to protect consumers, but there is a general lack of enforcement which has emboldened influencers and brands, and consumers are harmed as a result.

I. PART I – CONFLICTS BETWEEN INFLUENCERS RIGHTS AND BRANDS RIGHTS

Influencers should understand their rights under the law in addition to understanding potential liabilities they might encounter in the course of business.

³⁶ Blake Drosch, *What Does Your Brain on Influencer Marketing Look Like?*, EMARKETER (Aug. 26, 2019), <https://www.insiderintelligence.com/content/your-brain-on-influencers-neuroscience-study-explains-the-effects-of-influencer-marketing> [<https://perma.cc/QBT4-ENSV>].

³⁷ *Surprising Influencer Marketing Statistics*, DIGITAL MARKETING INST. (Oct. 19, 2021), <https://digitalmarketinginstitute.com/blog/20-influencer-marketing-statistics-that-will-surprise-you> [<https://perma.cc/9EH2-FCC2>].

These rights include intellectual property rights. Influencers can author, own, assign, license, and protect the intellectual property that they generate.³⁸ The name, username, logo, slogans, and maybe even hashtags³⁹ that influencers use in association with their personal brand are potentially trademarkable. Any original sound recording, caption, video, photo, or other creative work may be copyrightable. Depending on the state, influencers have publicity rights which generally allow them to prevent third party use of their name, image, and likeness.⁴⁰ Additionally, most social media platforms include a clause in their terms of service confirming that users own the intellectual property that they upload to their sites.⁴¹

³⁸*Social Media Influencers and Intellectual Property Rights*, KIPG, <https://www.kashishworld.com/blog/social-media-influencers-and-intellectual-property-rights/#:~:text=Primarily%2C%20influencers%20should%20obtain%20the,may%20violate%20their%20IP%20rights> (last visited Mar. 10, 2023) [<https://perma.cc/FNG3-JETN>].

³⁹ Hashtags are difficult to register because they must meet the basic requirement of acting as a source identifier of a good or service and they are difficult to enforce because there is no infringement unless the mark is being used to promote a good or service. *See* #EVERYDAYMADEWELL Registration No. 4895377 (registered on the principal register for retail stores and contests).

⁴⁰ Jennifer Van Kirk & Rachel Nicholas, *Social Media and the Right of Publicity: What Advertisers Need to Know*, WORLD TRADEMARK REV. (Dec. 12, 2020), <https://www.worldtrademarkreview.com/article/social-media-and-the-right-of-publicity-what-advertisers-need-know> [<https://perma.cc/NAW9-V952>].

⁴¹ *See* TIKTOK, <https://www.tiktok.com/legal/terms-of-service-us> (“You or your licensors will own any User Content you upload or transmit through [TikTok].”) [<https://perma.cc/3QGC-EYK8>]; TWITTER, <https://twitter.com/en/tos> (“You retain your rights to any Content you submit, post or display on or through [Twitter]. What’s yours is yours — you own your Content.”) [<https://perma.cc/ES5N-ZAQL>]; FACEBOOK, <https://www.facebook.com/terms.php> (“You retain ownership of the intellectual property rights . . . in any such content that you create and share on Facebook and other Meta Company Products you use.”) [<https://perma.cc/M4ZY-HRD6>]; YOUTUBE, <https://www.youtube.com/static?template=terms> (“You retain ownership rights in your Content.”) [<https://perma.cc/A7MF-YKFT>]; SNAPCHAT, <https://snap.com/en-US/terms> (“Many of our Services let you create, upload, post, send, receive, and store content. When you do that, you retain whatever ownership rights in that content you had to begin with.”) [<https://perma.cc/X7AY-X5LF>]; PINTEREST, <https://policy.pinterest.com/en/terms-of-service> (“You retain all rights in, and are solely responsible for, the User Content you post to Pinterest.”) [<https://perma.cc/ND6R-VHY8>]; LINKEDIN, <https://www.linkedin.com/legal/user-agreement> (“You own all of the content, feedback and personal information you provide to us.”) [<https://perma.cc/C7TV-TB3G>].

A. Trademark Ownership and Liability

A trademark functions as a source identifier for goods and services. A mark must be sufficiently distinctive to qualify for trademark protection.⁴² Marks can be either inherently distinctive or acquire distinction through secondary meaning.⁴³ In *Abercrombie*, the court identified five categories to classify marks.⁴⁴ Fanciful, arbitrary, and suggestive marks are inherently distinctive and are legally protectable from the time they are first used in commerce. A fanciful mark would be a made-up word, like ‘KODAK’ whereas an arbitrary mark is a word that exists, but when applied to something it does not describe, is arbitrary. For example, ‘Apple’ is an arbitrary mark when used to sell computers. Suggestive marks hint at the type of good or service they represent but require a bit of thought to understand why the word and good are related. Like ‘Coppertone’ for suntan lotion.

The other two *Abercrombie* categories are descriptive and generic marks. Words that directly describe the good or service they are associated with are called descriptive marks. For example, ‘Holiday Inn’ describes an inn where people stay on holiday. A descriptive mark is not inherently distinctive and can only be granted protection when it acquires secondary meaning in the market, which is generally established when about 40 percent of the public associate the mark with the good or service.⁴⁵ As such, trademark owners often argue over whether a mark is suggestive or merely descriptive. One test is the imagination test which explains that “[a] term is suggestive if it requires imagination, thought and perception to reach a conclusion as to the nature of the goods. A term is descriptive if it forthwith conveys an immediate idea of the ingredients, qualities or characteristics of the goods.”⁴⁶ Generic words can never be trademarked because they are not distinctive. A generic word is the word for the good or service—like ‘Apple’ used to sell apples.

⁴² Lanham (Trademark) Act § 45, 15 U.S.C.A. § 1127.

⁴³ 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:2 (5th ed. 2024).

⁴⁴ *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976).

⁴⁵ 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 3:1; *Co-Rect Products, Inc. v. Marvy! Advertising Photography, Inc.*, 780 F.2d 1324, n.9 (8th Cir. 1985) (“Consumer surveys are recognized by several circuits as the most direct and persuasive evidence of secondary meaning.”).

⁴⁶ *Stix Products, Inc. v. United Merchants & Mfrs., Inc.*, 295 F. Supp. 479, 488 (S.D.N.Y. 1968).

The basic reason generic words cannot ever be trademarked, even if they acquire secondary meaning, is because trademark protections allow an owner to exclude others from using their mark in a confusingly similar way. If generic words could be trademarked, it would be anticompetitive and create non-reputational harm to competitors.

This also means that not all third-party uses of a trademark are prohibited. Consider a hypothetical water bottle company called “Iris.” The company has likely picked an arbitrary name because although Iris is a word for a type of flower, it is arbitrary when used to sell water bottles. Thus, the company can likely receive trademark protection as soon as they demonstrate use in commerce. When it comes to trademark enforcement, they can likely prevent a new competing water bottle company from selling a water bottle called “the Iris.” But they likely cannot prevent someone named Iris from personally using the username “@iris” on Instagram.⁴⁷ The individual is not using the mark in a commercial setting and is not likely to cause consumer confusion. Thus, even though the Iris water bottle company may want to claim the username from Iris the person, it has no legal right to do so.

It is possible to trademark a personal name, though, and influencers should seek trademark protection for their names. However, it is difficult to both register and enforce trademarks for personal names.

J. Thomas McCarthy, of McCarthy on Trademark and Unfair Competition, states that there are two basic rules for personal name marks: “(1) [p]roof of a secondary meaning is required to achieve status as a valid trademark or service mark for registration or for recognition in court as an unregistered mark, and (2) even where infringement by a likelihood of confusion is shown, the junior user who uses his or her own personal name as a mark will often receive lenient judicial treatment in the framing of an injunction.”⁴⁸ Put plainly, because secondary meaning is required to register a personal name, it is difficult to obtain registration. Further, because personal names are descriptive in nature, it is difficult to bring certain trademark infringement claims because of the defense of nominative fair use.

Descriptive fair use is a common defense for trademark infringement claims. To assert a claim of descriptive fair use, the defendant must argue that they are “not using a descriptive, geographically descriptive, or personal name designation in a trademark sense, but only to describe the defendant's goods or services, or their

⁴⁷ *Trademarks and Social Media: What Startups Should Know!*, EU STARTUPS (Aug. 8, 2018), <https://www.eu-startups.com/2018/08/trademarks-and-social-media-what-startups-should-know/> [<https://perma.cc/KY3C-ML28>].

⁴⁸ MCCARTHY, *supra* note 43, § 13:1.

geographic origin, or to name the person involved in running the business.”⁴⁹ The applicable example here would be if someone happened to have the last name “Kardashian” and opened a clothing store with their siblings named “Kardashian Sisters Apparel.” Even Kim, Khloe, and Kourtney would have a challenging time bringing a trademark infringement claim to stop them from using their name to describe the store, though it would not be impossible.

The Kardashian family provides a good example of influencers acquiring sufficient secondary meaning and registering their name for trademark protection. For example, the youngest “Kar-Jenner” sister, Kylie Jenner, has a registered trademark for her first name for “[a]dvertising services, namely promoting the brands, goods, and services of others; endorsement services, namely promoting the goods and services of others.”⁵⁰ In fact, collectively, the Kardashian family owns over 50 registered trademarks.⁵¹ The right of publicity provides some protection for influencers when it comes to endorsements, but where possible, they should follow Kylie’s example and seek trademark protection. Especially if they decide to start a product line like “Kylie Cosmetics.”⁵²

When brands use influencer marketing, they open themselves up to external trademark liability. One such example arises when influencers use a competitor’s mark in their content. Conversely, when influencers decide to work with a brand, the influencer is potentially liable if the brand infringes another’s intellectual property rights.

To prevail in a trademark infringement case, the plaintiff must establish that the defendant used a valid mark in commerce in such a way that is likely to cause confusion or mistake.⁵³ Trademark infringement can be either direct or indirect.⁵⁴ Like copyright indirect liability, a finding of trademark indirect liability is conditioned on a finding of direct liability. Liability can be either contributory or vicarious. McCarthy notes the difference between the two theories: “contributory infringement focuses on the conduct of potentially liable persons, vicarious infringement focuses on legal relationships between the direct infringer and other

⁴⁹ *Id.* § 11:45.

⁵⁰ KYLIE, Registration No. 5595981.

⁵¹ Jonathan Beer, *Keeping up with the Kardashians’ Trademarks*, CBS NEWS (Aug. 1, 2017), <https://www.cbsnews.com/news/keeping-up-with-the-kardashians-trademarks/> [<https://perma.cc/965B-WXAH>].

⁵² KYLIE COSMETICS, Registration No. 5561416.

⁵³ 15 U.S.C. § 1114.

⁵⁴ *See Hard Rock Cafe Licensing Corp. v. Concession Servs.*, 955 F.2d 1143, 1150 (7th Cir. 1992).

potentially liable persons.”⁵⁵ Contributory trademark infringement occurs when a party intentionally induces the primary infringer to infringe.⁵⁶ Vicarious liability is established when there is a relationship between the direct and indirect infringer and the parties exercise control over each other.⁵⁷

B. Influencer Liability – Petunia Products, Inc. v. Sims

In 2021, the legal community was abuzz after a federal judge refused to dismiss a trademark infringement claim brought against model Molly Sims. This development signaled a new era of influencer trademark liability. Cosmetics company, Rodan & Fields, partnered with Sims to promote its new eyebrow product on her blog. The blog post gave a favorable review of the product and included both the price and a link to purchase the product. Petunia Products sued both Rodan & Fields and Sims for trademark infringement. In a motion to dismiss, Sims argued that third party endorsers should not be liable for working with brands that infringe other’s trademarks. She further argued that the blog post did not constitute a “use in commerce” required for liability. The judge disagreed and denied her motion to dismiss the direct trademark infringement claim.⁵⁸

This case has not been decided, but the fact that a direct trademark infringement theory against an influencer survived the motion to dismiss stage demonstrates a trend toward recognizing influencers as business professionals. As influencers’ pockets deepen, their potential for legal liability grows accordingly. A glib remark is often heard among legal professionals: “Go for the deep pockets.” Though the phrase lacks tact, the advice is sound. In civil courts, where money damages are the objective, filing suit against a party who lacks funds is often fruitless. Thus, when an influencer has “deep pockets,” like Molly Sims, they are more likely to be a named defendant in a civil suit for monetary damages.

To avoid liability, influencers should ensure the brand has registered their mark and include indemnification clauses in their contracts.⁵⁹ Standard contracts

⁵⁵ 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25:22 (5th ed. 2024).

⁵⁶ *Id.* § 25:17.

⁵⁷ *Id.*

⁵⁸ Order Granting in Part and Denying in Part Defendant’s Motion to Dismiss, *Petunia Products, Inc. v. Rodan & Fields, LLC*, No. SACV 21-00630-CJC (C. D. Cal. Aug. 6, 2021).

⁵⁹ Anthony V. Lupo, et. al., *Court Holds that Influencers Can be Liable for Use of a Brand’s Infringing Trademark*, ARENTFOX SCHIFF (Sept. 23, 2021), <https://www.afslaw.com/perspectives/alerts/court-holds-influencers-can-be-liable-use-brands-infringing-trademark> [<https://perma.cc/B2DR-XPPD>].

will have the influencer indemnifying the company, but influencers should be indemnified by the company if brand marks are found to infringe.⁶⁰

i. Brand Liability - Hypothetical

A brand can be held liable for trademark infringement committed by an influencer if the influencer's actions were done on behalf of, or with the approval of, the brand. In such cases, the brand may be held vicariously liable for the influencer's actions. Though there have not been any reported cases of brands being held liable for an influencer's trademark infringement, the legal doctrine would hypothetically allow a claim to be brought.

Consider the following hypothetical. 'Brand' hires 'Influencer' to promote a new product line. Brand chose to work with Influencer because they are known for being creative and authentic. As such, Brand did not give Influencer strict guidelines on how they should promote the product line. Instead, the contract simply stated that Influencer should create a minimum of six posts over three months enthusiastically talking about the new line and encouraging their followers to try it. When Influencer emailed Brand to ask if they had any further direction, they simply responded, "We love your creativity and personal brand and trust your judgment to create a brilliant campaign! We are excited to see what you produce."

Given that direction, Influencer created an incredibly effective campaign and even crafted a slogan for the product line to be spoken, captioned, and hashtagged. Brand loved the videos and approved them to be posted. The videos did extremely well, maybe even went viral, and grew the follower count of Influencer and Brand. Brand received record sales on their new product line. Influencer's videos are the only form of advertising that Brand used for the new product line.

But there is an issue. The slogan that Influencer created, while catchy and effective, is a registered trademark of "Third Party." Third Party caught wind of Influencer's viral advertising campaign and filed a claim for direct and vicarious trademark infringement against Influencer and Brand. Third Party claimed that Brand was vicariously liable for Influencer's actions and that Brand should be held responsible for any trademark infringement committed by their influencers.

This hypothetical highlights the importance for brands to have proper agreements and protocols in place with their influencers to minimize the risk of liability for any trademark infringement. Brands are generally the sophisticated party in influencer deals, and thus, should be held accountable.

⁶⁰ *Id.*

C. Copyright Ownership and Liability

The brand value and goodwill that influencers provide is an essential part of the business, but so is the actual creative content that they generate. Influencers can obtain copyright protection for original creative content they generate, including photos, writings and captions, videos, songs, or skits. But much of the creative work that influencers generate does not fall within the parameters for copyright protection.

The United States Constitution allows Congress to “. . . promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁶¹ Congress passed the Copyright Act which provides legal protection for "original works of authorship fixed in any tangible medium of expression".⁶²

What can be done when someone “steals” or “copies” an idea? Legally, not much. If you spend any amount of time on social media, you might have seen discourse around “content stealing,” the idea that one content creator ‘steals’ another’s work. An accusation of content stealing can be over the format and structure of a post, the look and feel of a photo, or even the caption or script. Copyright laws may protect some aspects of a post, but what folks often complain about are the stealing of ideas. It is a *sine qua non* of copyright law that ideas are not protectable, but an original expression of an idea may be.⁶³

When someone takes the idea of content, for example, a type of prank that goes viral and replicates it on their own page, they have not done anything illegal. But oftentimes, supporters of the original creator are seen ‘calling out’ the copycat and accusing them of stealing the content of the original creator. They may leave comments, stitch the “stolen” post, or make their own post to complain about the stealing. This is an example of a regulation that does not exist in a legal sense but rather is enforced through social contract.

The social contracts that regulate internet use may in some cases provide better protection for creators than what the current legal structure can practically accomplish. It may be tempting to advocate for new laws or regulations to codify some of these social norms, but in doing so you welcome a level of bureaucracy that may do more harm than good. For example, it may not be possible for a government to regulate content stealing. Looking at the United States regulatory and legal system, there is not a clear fit. Regulating content stealing under copyright law would not work because of the fundamental principle that copyright

⁶¹ U.S. CONST. art. I, § 8, cl. 8.

⁶² 17 U.S.C. § 102(a).

⁶³ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991).

laws do not protect ideas. There is not a common economic or consumer harm that accompanies most instances of content stealing, so regulation by the FTC does not fit either. This is an example of effective social “policing” which can provide creators with something akin to a “moral right” (in terms of copyright legal doctrine), to their ideas.

Copyright ownership “vests initially in the author or authors of the work.”⁶⁴ There is an exception for work that is made in the scope of employment called “work made for hire.” If the work is for hire, “the employer or other person for whom the work was prepared is considered the author” and copyright owner.⁶⁵ Work made for hire is either prepared by an employee within the scope of their employment, specifically ordered, or commissioned when the parties expressly agree in written instrument.⁶⁶ There are nine statutory categories for specifically ordered or commissioned works:

“(1) use as a contribution to a collective work, (2) as a part of a motion picture or other audiovisual work, (3) as a translation, (4) as a supplementary work, (5) as a compilation, (6) as an instructional text, (7) as a test, (8) as answer material for a test, or (9) as an atlas.”⁶⁷

The content that influencers create for brands can be a work made for hire under the audiovisual statutory category. Brands typically include contract provisions that allow the brand to retain the IP rights, whether it be by a work made for hire agreement, assignment, or license. This allows the brand to reproduce content on its own channels within the parameters of the agreement.⁶⁸ A work made for hire agreement is the most desirable for brands because brands can own the copyright for 70-95 years,⁶⁹ but assignments and licenses should be sufficient for the purposes of marketing and advertising where the brand’s specific campaigns have a finite duration.⁷⁰ An influencer may want to negotiate for the IP to be licensed under parameters that allow them to revoke the license after a specified period of time because they may want to pivot their business, or no longer be associated with a brand as their business grows.

⁶⁴ 17 U.S.C. § 201(a).

⁶⁵ 17 U.S.C. §201(b).

⁶⁶ 1 DAVID NIMMER, NIMMER ON COPYRIGHT § 5.03[B] (rev.. ed. 2023).

⁶⁷ 17 U.S.C. § 101.

⁶⁸ See NIMMER, *supra* note 66.

⁶⁹ 3 *Id.* § 9.10[B].

⁷⁰ See generally *id.* § 11.01[B].

There are five exclusive rights reserved for copyright holders: reproduction, derivative works, distribution, display, and performance.⁷¹ An individual commits copyright infringement by violating one or more of the exclusive rights of the copyright owner.⁷² An interesting example of copyright infringement on social media is when celebrities post paparazzi photos on their pages. One might think that because the photos the celebrities are posting are of them, they can post the photos with no legal ramifications. However, it is the person who took the photo (or perhaps the employer of the person who took the photo) who owns the copyright of the photo, not the subject.⁷³

Infringement can be direct or indirect. Direct infringement occurs when the defendant directly violates the exclusive right of a copyright owner. Indirect infringement occurs when the defendant induces or contributes toward another's direct infringement. Thus, indirect infringement is possible only when direct infringement is also found. There are two categories of indirect infringement, vicarious and contributory. Vicarious infringement can be established when a defendant has the ability to control the infringing activity and receives financial benefit from the infringing activity.⁷⁴ Contributory infringement similarly requires knowledge of the infringing activity in addition to inducement or material contribution of the infringing activity.⁷⁵ An influencer could face indirect infringement liability if they are featured in a video ad that is posted on a brand account, and that ad uses a song without permission.

Fair use is the most common defense to a claim of copyright infringement.⁷⁶ The fair use doctrine balances the public benefit against the private interest of the copyright owner. Thus, a large part of the inquiry is whether there is a public benefit to the infringing content.⁷⁷ The Copyright Act requires the court to consider four factors to assess whether the use is fair: (1) The purpose and character of the

⁷¹ 17 U.S.C. §106.

⁷² 17 U.S.C. §501.

⁷³ See O'Neil v. Ratajkowski, No. 19 CIV. 9769 (S.D.N.Y. Sept. 28, 2021) (Plaintiffs sued Defendant for copyright infringement after she reposted their paparazzi photo on her Instagram story).

⁷⁴ 3 DAVID NIMMER, NIMMER ON COPYRIGHT § 12.04 (rev. ed. 2023).

⁷⁵ Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005).

⁷⁶ Richard Stim & Glen Secor, *Fair Use: The 4 Factors Courts Consider in a Copyright Infringement Case*, NOLO, [https://www.nolo.com/legal-encyclopedia/fair-use-the-four-](https://www.nolo.com/legal-encyclopedia/fair-use-the-four-factors.html#:~:text=If%20someone%20comes%20along%20and,to%20claims%20of%20copyright%20infringement)

[factors.html#:~:text=If%20someone%20comes%20along%20and,to%20claims%20of%20copyright%20infringement](https://www.nolo.com/legal-encyclopedia/fair-use-the-four-factors.html#:~:text=If%20someone%20comes%20along%20and,to%20claims%20of%20copyright%20infringement) (last visited Feb. 22, 2023) [<https://perma.cc/GC7B-LJEV>].

⁷⁷ 4 DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (rev. ed. 2023).

use; (2) the nature of the copyright work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for, or value of, the copyrighted work.⁷⁸ This paper argues that under factor one, the purpose and character of the use, courts can consider an influencer's use of others' copyrighted works to be for a commercial purpose, and thus weigh against fair use. However, the fair use defense can also weigh in an influencer's favor, depending on the context. A commonly accepted fair use defense is when a copyrighted work is used for a new purpose, or the use is transformative. Here, if an influencer is reviewing and analyzing a movie on their YouTube account, they can likely include a short clip of the movie for illustrative purposes because the purpose of the YouTube video is to provide commentary, the influencer is reusing an insubstantial portion of the original work, and the video is unlikely to have a substantial effect on the market for the movie. Conversely, if an influencer makes a vlog of their day and chooses to use a popular song as the backtrack, the fair use defense is unlikely to be successful.

There are two theories underpinning the protection of artistic expression under the law: the economic theory and the moral theory. United States copyright laws are largely based on the economic theory but other countries, such as France, give creators more expansive moral rights.⁷⁹ The economic theory of copyright law suggests that laws should weigh public access to creative works against individual incentives to create the works. These two goals are at odds, but effective copyright laws balance these competing interests to incentivize the production of creative works most efficiently.⁸⁰ On the other hand, the moral theory of copyright law is grounded in the idea of personal property, ownership, and creative liberties.⁸¹ It suggests that authors should be able to own and control how the public perceives their work. When the United States joined the Berne Convention, the Copyright Act was amended to include some moral protections for visual arts.⁸²

The music licensing regulatory scheme in the United States attempts to balance the public benefit of the creation of new works with musicians' moral ownership rights and record labels' economic interests. To this end, there are differing ownership rights and licensing rights that exist within the sound recording sector of the music business. When a sound recording is made, there are two types of rights that exist, the rights to the musical composition (arrangement, lyrics, etc.)

⁷⁸ 17 U.S.C. §107.

⁷⁹ 3 NIMMER, *supra* note 74, § 8D.

⁸⁰ William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEG. STUD. 325, 325-33, 344-53 (1989).

⁸¹ *See* 3 NIMMER, *supra* note 74, §8D.

⁸² *See* Kelley v. Chicago Park Dist., 635 F.3d 290, 296 (7th Cir. 2011).

and the rights to the actual recording. The songwriter or publisher typically owns the rights to composition and the record company typically owns the rights to the sound recording of the song.⁸³ In order to use songs commercially, one needs to obtain permission from both copyright owners by obtaining two types of licenses: (1) a synchronization license, and (2) a master license.⁸⁴

A synchronization, or ‘sync,’ license allows a party to use the musical composition and any audio/visual elements. In contrast, only a master license allows a party to use sound recording. So, while a sync license permits a party to record a cover of a song, it would not permit a party to use any portion of the original sound recording in creating that cover. For example, when Whitney Houston recorded her version of “I will always love you,” a song originally recorded by Dolly Parton, she only needed permission in the form of a sync license. But, if Whitney’s recording of the song were used in an upcoming film, the film makers would need to acquire both a sync license from Dolly Parton and a master license from the owner of the sound recording of Whitney’s version.⁸⁵

There is also a compulsory license scheme that allows someone to,

“mak[e] a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.”⁸⁶

Essentially, it allows other musicians to create covers of songs without express approval from the copyright owner as long as they pay the statutorily defined royalty rate and do not change the melody and heart of the song. However, sync and master licenses are not subject to the compulsory license scheme and are instead governed by the free market.

⁸³ *How To Get Permission To Use a Song*, COPYRIGHT ALLIANCE, <https://copyrightalliance.org/faqs/how-to-get-permission-to-use-a-song/> (last visited March 25, 2023) [<https://perma.cc/WEA7-B596>].

⁸⁴ *Id.*; see also UNITED STATES COPYRIGHT OFFICE, *Circular 56A: Musical Compositions and Sound Recordings*, (Rev. March, 2021) (providing an overview of the musical rights and licensing) <https://www.copyright.gov/circs/> [<https://perma.cc/Y7K4-C598>].

⁸⁵ See *ABKCO Music, Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 63 n.4 (2d Cir. 1996) (“A synchronization license is required if a copyrighted musical composition is to be used in ‘timed relation’ or synchronization with an audiovisual work.”).

⁸⁶ 17 U.S.C. §115.

The sound recording licensing scheme is designed to protect the moral ownership rights of artists and the economic rights of the record labels and preserve public benefit and access to works. The compulsory license allows people to create covers of songs and thus the public benefits from the creation and access to more creative works. Sync licensing is beneficial to song writers who want to control how their music is associated. Song writers can expressly approve which businesses to work with and how their music will be perceived alongside other works. A master license of the recorded music incentivizes record labels to devote resources in creating recorded versions of compositions that the public can enjoy, and the artists can earn a living from. Understanding the music licensing system is important for anyone who seeks to enter the advertising and marketing world. Attempts to skirt the system devalue the music business and thin copyright protections and may result in legal liabilities.

In *ABKCO Music Inc. v. Stellar Records, Inc.*, the defendant secured a compulsory license for their karaoke system rather than a sync license.⁸⁷ Plaintiff owns the copyrights for popular Rolling Stones songs which were used in the defendant's karaoke system.⁸⁸ Plaintiff argued that because the karaoke system displays lyrics that accompany the sound recording, defendants needed to obtain the more costly synchronization license.⁸⁹ The court held that, "while a compulsory license permits the recording of a "cover" version of a song, it does not permit the inclusion of a copy of the lyrics. That requires the separate permission of the copyright holder."⁹⁰ This case is an example of how a seemingly cunning attempt to avoid a more costly master and sync license can turn into a legal battle which ultimately costs more.

Like traditional advertising and commercials, influencers are required to obtain the proper licenses when using sound recordings in social media ads. TikTok is a video-based application that became popular for the functionality of syncing songs to video. Thus, if a brand is using TikTok for a commercial purpose, they must obtain a synchronization license and a master license for music they do not own the copyright to. Traditional commercials have operated under this scheme for decades, but as explained in the next section, some brands have attempted to avoid the need for a sync license by using influencers for their advertising.

⁸⁷ *ABKCO Music, Inc.*, 96 F.3d at 62.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 64.

i. Brand Indirect Liability – UMG Recordings, Inc. v. Vital Pharms, Inc.

When a brand hires an influencer to promote their product or service and fails to properly review the paid content prior to approval, the brand is exposed to potential copyright liability. Until recently, enforcement of copyrights against influencers and the brands they work with has been limited. However, recent cases point toward a trend of more aggressive enforcement.⁹¹

A 2022 case out of the Southern District of Florida illustrates how brands can be held liable for copyright infringement when they use influencer marketing.⁹² The most recent decision in the case was a Motion for Summary Judgment granted in favor of the Plaintiffs for direct copyright liability on July 11, 2022.⁹³ The plaintiffs, UMG Recordings, Inc. and Capitol Records, LLC, are record companies whose business is centered on recording, reproducing, distributing, selling, licensing, and performing their recorded works.⁹⁴ The defendant is Vital Pharms, Inc., which owns the brand Bang Energy. Bang Energy is a popular energy drink that does not use traditional marketing and advertisements. Instead, they use influencers for the marketing of their energy drinks.⁹⁵ The brand owns the content that the influencers create either by work for hire or assignment.⁹⁶ Plaintiffs allege that Defendant infringed their exclusive copyrights when they posted video—which used sound recordings they own—to the various TikTok accounts that Bang Energy owns.⁹⁷ Defendants argue that they believed that TikTok gave them a license to use the works.⁹⁸

The court granted summary judgment for Counts I and II, alleging direct copyright liability.⁹⁹ The court found that there was no dispute as to direct

⁹¹ See Sara L. Edelman, *That Post Could Cost You: Copyright Infringement Claims Continue for Social Media Posts*, DAVIS & GILBERT, <https://www.dglaw.com/that-post-could-cost-you-copyright-infringement-claims-continue-for-social-media-posts/> (Last visited March 24, 2023) [<https://perma.cc/BJS5-XSM7>]; see also Isaiah Poritz, *TikTok Music Lawsuits Fire Warning Shots to Brands, Influencers*, BLOOMBERG L. (Dec. 6, 2022, 3:10 AM), <https://news.bloomberglaw.com/ip-law/tiktok-music-lawsuits-fire-warning-shots-to-brands-influencers> [<https://perma.cc/2Y7K-J2X6>].

⁹² *UMG Recordings, Inc. v. Vital Pharms., Inc.*, No. 21-cv-60914-CIV, 2022 U.S. Dist. LEXIS 122046, at *15 (S.D. Fla. July 11, 2022).

⁹³ *Id.* at 25.

⁹⁴ *Id.* at 2.

⁹⁵ *Id.* at 3.

⁹⁶ *Id.*

⁹⁷ *Id.* at 14.

⁹⁸ *Id.*

⁹⁹ *Id.* at 25.

copyright infringement liability because both parties agreed that Defendants posted approximately 140 TikTok videos using exact portions of plaintiffs copyrighted works.¹⁰⁰ Because direct copyright infringement is strict liability, the Defendants assertion that they believed they had a license through the TikTok platform is not a defense as to liability, but may be relevant to the issue of damages.¹⁰¹

The court declined summary judgment for Counts III and IV, contributory and vicarious liability.¹⁰² Plaintiffs failed to raise the proper argument for contributory infringement in their briefs and instead conflated contributory infringement with vicarious infringement.¹⁰³ Under the vicarious liability theory, the court found that Plaintiffs sufficiently established that Defendants had control over the infringing content but failed to provide evidence of direct financial benefit.¹⁰⁴ As such, plaintiffs will have to prove contributory infringement and the direct financial benefit element of vicarious infringement in trial.

Even if Bang Energy had not directly reposted the influencer content on their accounts, the courts analysis indicates a willingness to hear vicarious and contributory theories. As such, brands should implement rigorous clearance processes prior to posting influencer content. Brands should further instruct influencers on best practices before they create content. For example, TikTok has sounds that have been specifically licensed for commercial content. Brands should advise influencers to use this feature if they wish to include sound recordings in their posts.

ii. Brand Direct Liability – Batra v. PopSugar, Inc.

Brands may be tempted to post influencers' photos featuring their goods or services because of the reputational value influencers can lend the brand. Though social media sites like Instagram have blanket third party licenses that cover reposts within the app, if a brand decides to use a photo in advertising or on their website, they may still be held liable for copyright infringement.

In *Batra v. PopSugar, Inc.*, plaintiff, Nita Batra, alleges, inter alia, that the fashion and lifestyle website PopSugar infringed on her copyrighted images.¹⁰⁵

¹⁰⁰ *Id.* at 8.

¹⁰¹ *Id.* at 15.

¹⁰² *Id.* at 25.

¹⁰³ *Id.* at 20-21.

¹⁰⁴ *Id.* at 23-25.

¹⁰⁵ *Batra v. PopSugar, Inc.*, No. 18-cv-03752-HSG, LEXIS 20299 (N.D. Cal. Feb. 7, 2019).

Specifically, Batra alleges that PopSugar reposted her Instagram images, which contained affiliate links, on their website and replaced her affiliate links with their own. Batra alleges that this act of replacing the affiliate links interfered with her revenue stream because when users purchase items using her links, she shares a portion of the revenue.¹⁰⁶ She argues that this constitutes both copyright infringement and a violation of her right of publicity.¹⁰⁷

PopSugar argues that it has a valid fair use defense because “the Photographs had been published prior to the alleged infringement; at least some of the allegedly infringed Photographs were thumbnails and thus the use was insubstantial; and because the Photographs were publicly available, the alleged publication had no impact on the market for the Photographs.”¹⁰⁸ The website also argues that Batra's claims were barred by Instagram's terms of use. These terms grant Instagram a broad license to use and sublicense user content.

The case is pending in the central district of California. Most recently, the court denied Popsugar's motion to dismiss.¹⁰⁹

This case illustrates how brands could face liability in a situation wherein they promote an image of an influencer using their products. Overall, this case underscores the need for brands to carefully consider the potential legal implications of using photographs and other intellectual property created by influencers in their marketing and advertising materials.

iii. Right of Publicity

Ironically, it is the least settled area of Intellectual Property law that might provide the best protection for the most valuable asset influencers have, which is their persona. The intangible quality of what makes an influencer successful comes in part from their brand identity. As such, influencers should attempt to protect their brand identity aggressively. The Minnesota District Court agrees that brand identities are commercially valuable— “[a] name is commercially valuable as an endorsement of a product or for use for financial gain only because the public

¹⁰⁶ Class Action Complaint at 7-8, *Batra v. PopSugar Inc.*, No. 4:18-CV-03752-HSG (N.D. Cal. June 25, 2018).

¹⁰⁷ Plaintiff's Opposition to Defendants Motion to Dismiss, *Batra v. PopSugar Inc.*, No. 4:18-CV-03752-HSG (N. D. Cal. Nov. 8, 2018).

¹⁰⁸ Answer to Class Action Complaint at 11, *Batra v. PopSugar Inc.*, No. 4:18-CV-03752-HSG (N.D. Cal. June 25, 2018).

¹⁰⁹ *Batra*, LEXIS 20299, at *18.

recognizes it and attributes good will and feats of skill or accomplishments of one sort or another to that personality.”¹¹⁰

The right of publicity is the right for a person to control and make money from the commercial use of their identity.¹¹¹ While it is not a federally protected right, it is regulated at the state level.¹¹² There are 33 states that recognize the right of publicity either through common law, statute, or a combination of the two.¹¹³

Influencers, who often rely on their personal brand image to earn a living, can leverage their right of publicity to control how their name and likeness are used for commercial purposes. This means that they can prevent others from using their image to promote products without their permission. Additionally, they can negotiate compensation for the use of their likeness.

To assert the right to publicity, a plaintiff makes a claim of misappropriation. Generally, to prevail on a claim of misappropriation, a plaintiff has the burden to prove that: (1) the defendant used an aspect of their identity that is protected by law, and (2) the use was for commercial gain.¹¹⁴ As for all tort claims, a plaintiff must also show that they suffered harm, whether it be economic or reputational.¹¹⁵

If a plaintiff can establish all of these elements, they may be able to prevail on a claim of right of publicity misappropriation. However, the specific legal requirements for a successful claim vary depending on the jurisdiction in which the claim is brought.

Overall, the right of publicity is a vital tool that influencers may use to protect their personal brand image, and to ensure that they are fairly compensated for their endorsements, sponsorships, and other deals.

C. Social Media

Most social media platforms have internal tools and regulations designed to help brands and influencers leverage their platforms while abiding by the law. One of the key features on TikTok is the ability to include sound recordings along with your videos and edit them separately. TikTok has an extensive library of music that it licenses from the copyright owners. TikTok then makes the music available for users to include within their personal content on the platform. Additionally,

¹¹⁰ *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1283 (D. Minn. 1970).

¹¹¹ 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, *RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. 2023).

¹¹² *See Id.* § 6:141.

¹¹³ *Id.* § 6:2.

¹¹⁴ *Id.* § 3:2.

¹¹⁵ *Id.*

there is a separate library of music that has been licensed for use in branded content. The language below is crucial for brands and influencers to understand in order to avoid copyright infringement liability for sound recordings.

“Branded content must only contain music from the Commercial Music library. If you (or your brand / advertising partner) have obtained the necessary music licensing rights to use music which is not available in the Commercial music library then you must upload your Branded content post via the normal TikTok post upload flow (not through the TikTok Creator Marketplace) and confirm you have obtained the necessary rights to use that music.”¹¹⁶

Creators should use this commercial library when creating sponsored and commercial content if they do not have a separate license agreement with the copyright owners of a sound recording in place.¹¹⁷ In addition to the general Terms of Service and Community Guidelines, TikTok clarifies the burden that users carry when posting branded content.

“You are responsible for ensuring that any Branded Content that you post complies with all applicable laws and regulations. While the rules in this Branded Content Policy are intended to help you to comply with relevant laws and regulations, they are not exhaustive and you should be aware of any other applicable legal requirements.”¹¹⁸

The platform’s statement elaborates on their branded content policy that content can be removed for failure to comply with their guidelines. This encompasses all applicable laws and regulations of specific countries where the content is accessible. TikTok further prohibits and restricts branded content in certain categories depending on the country where the content is accessible. In the

¹¹⁶ *Promoting a Brand, Product, or Service*, TIKTOK, <https://support.tiktok.com/en/business-and-creator/creator-and-business-accounts/branded-content-on-tiktok> (last visited Mar. 29, 2024) [<https://perma.cc/YFY6-898M>].

¹¹⁷ See *UMG Recordings, Inc. v. Vital Pharms., Inc.*, No. 21-CV-60914-CIV, 2022 U.S. Dist. LEXIS 122046 (S.D. Fla. July 11, 2022).

¹¹⁸ *Branded Content Policy: What Is Branded Content?*, TIKTOK, <https://www.tiktok.com/legal/bc-policy?lang=en> (last visited Mar. 29, 2024) [<https://perma.cc/UGJ4-9QVL>].

United States, the following branded content is prohibited: alcohol, drug-related products and services, weapons, gambling, sexual services and transaction companionship, weight loss promotion, cosmetic procedures, and financial exchanges relating to securities. The following content is not prohibited in the United States but has restrictions: products and services targeted to minors, financial services and products, pharmaceuticals, and healthcare, dating services and applications, media entertainment, shopping rewards, and sports betting and fantasy sports.

When videos are uploaded through the Creator Marketplace, the TikTok UI tags the video as an ad. Far too often, however, influencers do not upload content from the Creator Marketplace and will use songs they do not have the rights to. Currently, like in the Bang energy case discussed below, there has only been enforcement of music copyrights where an influencer is using a song in connection with sponsored content. Nevertheless, this paper argues that influencers should not avoid copyright liability as long as there is no evidence of a brand partnership in posts. Instead, a commercial purpose can be found if the totality of the circumstances indicates that the influencer themselves can be legally recognized as a “brand.”

PART II – RIGHTS OF THE CONSUMER AND FTC REGULATION OF INFLUENCERS

A. Federal Trade Commission Regulations

The Federal Trade Commission (“FTC”) is an administrative branch of the federal government that regulates advertising.¹¹⁹ The Federal Trade Commission Act allows the FTC to act in the interest of all consumers to prevent deceptive and unfair acts or practices.¹²⁰ The same rules that govern traditional advertising apply to influencer advertising.¹²¹ Generally, the FTC requires that advertisements are truthful and not misleading, and that all claims made can be substantiated.¹²²

¹¹⁹ *About the FTC*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc> (last visited Mar. 29, 2024) [<https://perma.cc/6NFX-8XPX>].

¹²⁰ *Advertising and Marketing on the Internet: Rules of the Road*, FED. TRADE COMM’N, <https://www.ftc.gov/business-guidance/resources/advertising-marketing-internet-rules-road> (last visited Mar. 29, 2024) [<https://perma.cc/R5TA-KCKH>].

¹²¹ *Id.*

¹²² *Id.*

i. Disclosure

The business of influencing is most effective when done in the shadows. People are reluctant to admit when their behavior has been influenced because society highly values autonomy and free will. As such, there is an incentive for brands and influencers to obfuscate their relationship.

The Federal Trade Commission (“FTC”) has attempted to address this by explicitly stating that endorsements must be disclosed before the “. . . more” button in clear and inconspicuous language.¹²³ Posting #ad as the final hashtag in a string is not sufficient to abide by FTC guidelines. The influencer business is thus directly in tension with the FTC rules for disclosure. It remains to be seen whether the FTC will eventually regulate the influencer industry to the point of extinction or merely transform the industry and society.

In 2020, Rohit Chopra released a statement from the FTC announcing that they unanimously approved to call for public comments on whether the endorsement guides for advertising need to be updated.¹²⁴ “When companies launder advertising by paying an influencer to pretend that their endorsement or review is untainted by a financial relationship, this is illegal payola. . . The FTC will need to determine whether to create new requirements for social media platforms and advertisers and whether to activate civil penalty liability.”¹²⁵ One of the issues that Chopra noted was the lack of enforcement of current regulations. Chopra indicated that the FTC was more interested in placing liability on brands rather than influencers. “When individual influencers are able to post about their interests to earn extra money on the side, this is not a cause for major concern. . . [but] when we do not hold lawbreaking companies accountable, this harms every honest business looking to compete fairly.”

The need for disclosure generally hinges on “whether the audience understands the reviewer’s relationship to the company whose products are being recommended.”¹²⁶ If an influencer is questioning whether disclosure is necessary, the FTC recommends influencers use a test to determine “whether knowing about that gift or incentive would affect the weight or credibility your readers give to

¹²³ *Id.*

¹²⁴ Josh Constine, *FTC Votes to Review Influencer Marketing Rules & Penalties*, TECHCRUNCH (Feb. 12, 2020, 12:52 PM), <https://techcrunch.com/2020/02/12/ftc-influencer-marketing-law/> [<https://perma.cc/HG2D-LSCV>].

¹²⁵ *Id.*

¹²⁶ *FTC’s Endorsement Guides: What People Are Asking*, FED. TRADE COMM’N, <https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking> (last visited Mar. 29, 2024) [<https://perma.cc/GB22-GQXH>].

your recommendation. If it could, then it should be disclosed.”¹²⁷ When in doubt, the FTC recommends disclosure. The FTC notes that even a free gift can be an incentive to provide a favorable review because it suggests future free gifts could follow.¹²⁸

The Code of Federal Regulations explains that an endorsement is “. . . any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group, or institution.”¹²⁹ And that “[w]hen there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement . . . such connection must be fully disclosed.”¹³⁰

A sliding scale determines whether a relationship constitutes a material connection such that the FTC regulations control. One end of the scale would be a formal employment contract between a business and influencer, the opposite end would be a wholly volitive use of a product with no direct or perceived incentive. For example, the difference between an influencer that has an ongoing relationship with a brand, in comparison with an influencer who happens to mention in a video that they use a product, but the product was purchased of their own volition, and they have no direct or perceived incentive to mention the use of the product.

The tricky part can be determining whether there is a perceived incentive. As an influencer gains reputation, followers, and business portfolio, the argument that any of their content is personal becomes more tenuous. When someone has wholly monetized their online personality, any public accounts they have could be considered business accounts and all content could be considered commercial content. Below is an example of where a perceived incentive may exist.

ii. Misrepresentations of Partnerships

Not all brands want to work with all influencers, even if the collaboration would be at no cost. Brands are rightfully concerned about their reputation in

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ 16 C.F.R. § 255.0(b) (2023).

¹³⁰ 16 C.F.R. § 255.5 (2023).

addition to their bottom line. When an aspiring influencer reviews a product and intentionally leads the public to believe that the content is sponsored, does it infringe on trademark rights? Is it false advertising? False endorsement? What harm can consumers potentially experience from this misrepresentation?

Brands select which influencers to work with based on who will best represent the brand and provide the greatest return to the company. Some influencers or aspiring influencers will create seemingly branded content with the hope that someone from the brand will see it and want to collaborate with them. Or maybe the influencers hope that other brands will place a higher value on their services because of a perceived affiliation with another brand. This strategy may bear fruit, but influencers should beware that the brands may not want or appreciate free marketing.

The business of influencing is directly tied to follower count because the cost of a sponsored post is often determined by the number of followers an influencer has. Each influencer deal is unique but generally, an influencer receives \$100 for every 10,000 followers they have.¹³¹ Because every post has the potential to “go viral”, there is an incentive for influencers to generate content that is likely to go viral and thus, generate more followers. People who are new to the influencing business have been known to generate misleading content that appears as though they are partnering with a brand but, they are instead creating the content on a completely voluntary basis with the hope that the brand (or other brands) will want to work with them in the future.¹³² They are essentially creating a social media portfolio. So, even though these fake sponsored posts are one sided, there is an incentive to provide a positive review in the hopes that the brand will see it and decide to work with the influencer in the future.

If the brand does not mind free marketing, why should the FTC care? In the vast majority of cases, FTC enforcement would be unnecessary. But what happens when an influencer creates a post promoting a product (and they say they use all the time and love but actually have never used), falsely labels it as sponsored, and an appreciable number of consumers purchase the product on reliance of the influencers endorsement resulting in disappointment when it is actually subpar.

¹³¹ Sydney Bradly, *How Much Money Instagram Influencers Make*, BUS. INSIDER (Dec. 23, 2022, 6:44 AM), <https://www.businessinsider.com/how-much-money-instagram-influencers-earn-examples-2021-6> [<https://perma.cc/X235-DJ52>].

¹³² Taylor Lorenz, *Rising Instagram Stars Are Posting Fake Sponsored Content*, THE ATLANTIC (Dec. 18, 2018), <https://www.theatlantic.com/technology/archive/2018/12/influencers-are-faking-brand-deals/578401/> [<https://perma.cc/546U-R66B>].

Under the current scheme, the FTC should be able to sanction the influencer for failure to disclose a perceived incentive to provide a favorable review of a product and false endorsement. Examples like the one above occur frequently, whether there is an actual relationship or not.

iii. False advertising

It is a common occurrence that consumers watch a video on TikTok or Instagram providing a glowing endorsement of a beauty product and purchase the product, only to find they cannot replicate the results in the social media post. There are many tricks that influencers use to make products look more enticing on video. These ethically questionable tricks fall somewhere between the use of good lighting and the concealed use of a filter, or photoshop,

These “tricks” likely fall under misleading or deceptive advertising.¹³³ Because of the reliance on their perception that influencers are more authentic, consumers are less likely to verify influencer claims. “As confidence in the truth of advertising diminishes, prospective purchasers may be forced to expend additional resources in examining and sampling competing products.”¹³⁴

Mikayla Nogueira, a beauty influencer with over 14 million followers on TikTok, rose to fame during the Covid-19 pandemic in part due to her reputation as a relatable and authentic beauty product reviewer.¹³⁵ When Mikayla posted a sponsored post for L’Oreal’s new ‘telescopic’ mascara, her followers immediately noticed something was off.

In the video, Mikayla claims that the mascara creates an effect that “looks like false lashes,” but viewers speculated she had literally used false eyelashes. Mikayla responded to comments asking if she was wearing falsies by doubling down on her claims and insisting that the ‘unbelievable effect’ was the result of multiple layers of mascara. Fans also noticed that Mikayla hid her brand partnership disclosure behind the TikTok UI, so even though she put (in small font) “L’Oreal Partner” on the video, viewers could not see the disclosure unless they downloaded the video. This is likely in violation of the FTC disclosure regulations.

After this revelation, suspicious followers started to question everything about Mikayla, including accusing her of fabricating her signature thick Boston accent.

¹³³ *FTC’s Endorsement Guides: What People Are Asking*, *supra* note 126.

¹³⁴ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 2 cmt. a (AM. L. INST. 1995).

¹³⁵ Charisa Cheong & Mara Leighton, *Inside the Meteoric Rise of Mikayla Nogueira, the TikTok Mega-influencer Whose Reputation for Authenticity May Soon Come Crashing Down*, BUS. INSIDER (July 20, 2023, 8:11 AM), <https://www.businessinsider.com/mikayla-nogueira-background-controversy-feud-mascara-2023-1> [<https://perma.cc/N6ZB-T6WF>].

Ultimately it was revealed that she made a false ad for mascara by using false eyelashes. The problem is that traditional TV ads for mascara have been using false lashes for a while.¹³⁶ In 2007 L’Oreal was under fire for using falsies in an ad for the telescopic mascara and was required to use disclaimers moving forward.¹³⁷ Seemingly, L’Oreal sought to get around this regulation by using an influencer to advertise the product. This has arguably caused more consumer harm than in previous instances. Compared to traditional ads, consumers perceive influencer ads as more authentic and tend to be less wary of deception. When consumers view TV ads, at the very least, the tiny print at the bottom tells them that what they just saw was fabricated or enhanced in some way. Until recently, society has not expected influencers, especially ones who pride themselves on authenticity, to deploy the same tactics.

Some might argue that people should be more discerning and less trusting—that government enforcement is not necessary as long as consumers understand the level of deception involved in marketing. The issue is that most consumers do not understand the realities of social media marketing and advertising. Disclosure of sponsored posts is inconsistent in influencer feeds. Because of the failure to disclose, consumers could rely on influencer endorsements to their detriment, such as when they spend \$14.99 on a mascara that should have been spent on a set of falsies.¹³⁸

Mikayla’s post not only hurt her own personal brand, but L’Oreal is likely thinking twice about their relationship as well due to the backlash.

B. Securities and Exchange Commission

Influencers may need to provide additional disclosures outside of the FTC regulations when they promote goods or services within a specific industry such as health and banking. For example, Kim Kardashian recently reached a settlement

¹³⁶ Andrew Adam Newman, *Mascara Ads: Thick Lashes, Fine Print*, N.Y. TIMES (Nov. 12, 2013), <https://www.nytimes.com/2013/11/14/fashion/Mascara-Ads-Draw-Criticisms.html> [<https://perma.cc/8QWA-4PLJ>].

¹³⁷ See Catherine Shannon, *L’Oreal Ad Given the Brush-off*, THE GUARDIAN (July 25, 2007, 03:51 AM), <https://www.theguardian.com/media/2007/jul/25/advertising.asa> [<https://perma.cc/H7AN-7TMU>].

¹³⁸ See *Telescopic Instant Lift Washable Mascara*, L’OREAL PARIS, <https://www.lorealparisusa.com/makeup/eye/mascara/telescopic-lift-mascara-washable> (last visited Mar. 17, 2024) (showing listed price as \$14.99 at the time of accessing) [<https://perma.cc/4BMK-ENX3>].

after the Securities and Exchange Commission (“SEC”) investigated allegations against her for a sponsored post for Crypto Currency.¹³⁹

Kardashian was paid approximately \$250,000 in exchange for a post promoting EthereumMax token (“EMAX”). The SEC investigated allegations that the post violated Section 17(b) of the Securities Act which has a more stringent disclosure requirement than the Lanham Act. Under the Securities Act, a post promoting Crypto Currency must “fully disclos[e] the receipt...of such consideration and the amount thereof.”

The SEC stated that Kardashian should have known about the requirement because they issued a report in 2018 reminding celebrities that when they “promote[] a virtual token or coin that is a security [they] must disclose the nature, scope, and amount of compensation received in exchange for the promotion.”¹⁴⁰

The only disclosure that Kardashian included in her caption was a “#AD” at the end of her caption which read, “Are you guys into crypto???? This is not financial advice but sharing what my friends just told me about the Ethereum Max Token. A few minutes ago, Ethereum Max burned 400 trillion tokens — literally 50 percent of their admin wallet giving back to the entire E-Max community.”

The SEC reached a settlement with Kardashian which required her to return the \$250,000 and pay \$1.3 million in civil penalties.¹⁴¹ That settlement was not the end of Kardashian’s legal issues. Kardashian was named co-defendant in a class action lawsuit brought in the Central District of California. The complaint alleges that Kardashian and her co-defendants made false and misleading statements to investors about the ability for investors to make money with EMAX.

As discussed above, the FTC also requires more than what Kardashian disclosed in her caption. They specifically state that the use of “#ad” at the end of a caption is likely insufficient. If Kim Kardashian, who has some legal education herself, years of experience in the influencing industry, and a team of business professionals advising her, does not follow the disclosure requirements for branded content, then there is clearly a need for further enforcement and education.

¹³⁹ John Hyatt, *The Untold Story Behind Emax, the Cryptocurrency Kim Kardashian Got Busted for Hying*, FORBES, (Nov. 11, 2022, 6:30 AM), <https://www.forbes.com/sites/johnhyatt/2022/11/11/the-untold-story-behind-emax-the-cryptocurrency-kim-kardashian-got-busted-for-hying/> [https://perma.cc/77XX-KKYX].

¹⁴⁰ *SEC Penalizes Kim Kardashian Over \$1 Million for Paid Crypto Post*, DAVIS & GILBERT, <https://www.dglaw.com/sec-penalizes-kim-kardashian-over-1-million-for-paid-crypto-post/> (last visited Mar. 29, 2024) [https://perma.cc/TJ4T-82XQ].

¹⁴¹ Hyatt, *supra* note 139.

PART III – ARGUMENTS AND ANALYSIS

A. Brands Should Carry the Burden of Ensuring Their Partners Make the Proper Disclosures.

“Our ongoing challenge, then, will be to negotiate the inherent inauthenticity and cynicism of an influence economy while preserving our ability to be occupied, and perhaps changed for the better, by the alien ideas of other people.”¹⁴²

Not all influencers are similarly situated. Some have agents, higher education, and the wisdom that comes with age, but a plurality of influencers are thrust into notoriety and are not well situated to participate in the technical and legal aspects of the influencing business. As discussed above, many brands use micro influencers for their social media campaigns. Specifically, 69 percent of brands prefer to work with nano or micro influencers compared to the larger macro and celebrity influencers.¹⁴³

Small influencers are more likely to run their accounts as a side business and tend to be less attuned to any potential legal liabilities. They also are more likely to accept in-kind compensation in the form of gifts compared to monetary compensation.¹⁴⁴

Influencer content that is connected to a brand relationship requires more enforcement of disclosures to mitigate consumer harm. Because there are so many influencers, and they are generally the less sophisticated party, brands themselves should carry the burden of ensuring that influencer content contains the proper disclosures and does not infringe on the IP of third parties.

This can be achieved first by having the FTC and SEC selectively enforce their regulations against brands rather than influencers. Second, when a business relationship exists and indirect copyright and trademark liability theories are raised, unless the agreement explicitly states that the influencer has full creative control, courts should interpret the agreements in light of the brand having ultimate ownership and control over content. This would align more closely with the well-established indemnification and respondeat superior legal doctrines. Lastly, consumers should be able to lodge complaints with the FTC, which the FTC can

¹⁴² Laurence Scott, *A History of the Influencer, From Shakespeare to Instagram*, THE NEW YORKER, (Apr. 21, 2019), <https://www.newyorker.com/culture/annals-of-inquiry/a-history-of-the-influencer-from-shakespeare-to-instagram> [<https://perma.cc/X9ZN-9B9M>].

¹⁴³ Geysler, *supra* note 1.

¹⁴⁴ *Id.*

then use to determine which brands and influencers are bad actors such that enforcement is needed.

Currently, brands can shift liability to influencers as independent contractors as long as the brands do not repost the influencer content on their pages. In traditional advertising, a brand cannot blame the model or actor in their commercial for their own failure to comply with the law. If the burden were placed on influencers, the courts would be overrun with claims and adjudications, making enforcement impractical if not impossible. Placing the onus on brands limits the number of discrete claims. Instead, parties can bring targeted claims against brands who employ multiple influencers. This is not to suggest that influencers can never be held liable for their actions, but rather to offer a pragmatic and just approach for the heightened level of enforcement that this paper suggests.

B. When an Influencer Has Achieved a Critical Mass of Influence Such That They Have Become a Brand, a Commercial Purpose May be Found in the Fair Use Analysis Using a Totality of the Circumstances Analysis.

Celebrity influencers are likely to have commercialized virtually their entire online persona. They typically have companies, trademarks, employees, managers, and attorneys supporting their influencing business. The lines between commercial and personal social media use grow blurrier each year. Social media influencing is a \$16.4 billion global industry fueled by follower engagement.¹⁴⁵ Each time someone posts on social media, that post has a chance of “going viral” and earning the user a substantial increase in followers and engagement. The number of followers a user has factors into their engagement rate which determines the value of paid content.¹⁴⁶ As such, depending on the user, any Tweet could arguably be for a commercial purpose.

When influencers make a viral, seemingly personal, post that uses a copyrightable song, odds are that the song will similarly “go viral” and earn the

¹⁴⁵ *Id.*

¹⁴⁶ See Werner Geysler, *Influencer Rates: How Much do Influencers Really Cost in 2024?*, INFLUENCER MARKETING HUB, (May 16th, 2024) (explaining which factors influence the rates an influencer typically charges for a sponsored post) <https://influencermarketinghub.com/influencer-rates/> [<https://perma.cc/5TYM-748G>]; see also Joel Mathew, *Understanding Influencer Marketing And Why It Is So Effective*, FORBES (2022), <https://forbes.com/sites/theyec/2018/07/30/.../?sh=3377bda471a9> (last visited Oct. 22, 2022) [<https://perma.cc/UWY7-S474>].

copyright owners monetary gain.¹⁴⁷ As a result, influencers' unauthorized use of copyrightable works in their content may not fit under an economic theory of copyright law but certainly fit under the moral theory. In terms of copyrightable songs, the artist should not have to prove financial harm in order to assert their ownership rights. The mere fact that a song was used without permission by an influencer should suffice. Though we do not want the courts to be overrun with copyright infringement claims we also should not allow influencers to avoid liability because the judiciary has not yet caught up with the influencer economy. The United States Copyright Office has recently opened a small claims court. We may see more copyright infringement claims over social media marketing content brought in this forum.

The law evolves along with society. As our understanding of currency, valuable exchange, and benefits evolve, so should the definition of commercial purpose. Influencers are marketing and business professionals who have decided to turn their online persona into a business. If an influencers' entire online presence is part of their business, why should they have immunity from intellectual property infringement? At what point do influencers' public posts become entirely commercialized? This paper suggests the court implement a multifactor totality of the circumstances analysis. This analysis would be applied to factor one of the fair use analyses, the purpose and character of the use, to determine whether the use was for a commercial purpose.

Generally, a commercial purpose is found based on the overall 'influence level' and analysis of whether the influencer has monetized their entire online persona. Some factors courts can consider are: (1) whether influencing is their full time job, (2) the amount of income received each year, (3) how extensive their partnerships are, (4) whether the platform the alleged infringing content is posted on pays creators for views, (5) whether the influencer has registered trademarks for their personal name, and (6) whether the influencer runs their influencing business through a personal company.

Why is this important? Consider the following hypothetical: A celebrity influencer, who earns millions per year from their content and brand deals, posts a video on TikTok of them dancing to a song. The copyright owner and creator of the song takes offense to the influencer's video because they do not want to be associated with the influencer or the content. They filed a claim for copyright infringement with TikTok and requested the video be removed. TikTok's

¹⁴⁷ See Ben Beaumont-Thomas, *Fleetwood Mac's Dreams Breaks Streaming Records After Viral TikTok Video*, THE GUARDIAN (Oct. 6, 2020, 4:26 AM), <https://www.theguardian.com/music/2020/oct/06/fleetwood-mac-dreams-breaks-streaming-records-after-viral-tiktok-video> [<https://perma.cc/H3KV-D8AD>].

commercial license applies to any branded content. Under this proposed factor test, the influencer is a brand. TikTok's policy is that creators have the onus to ensure that their content uses the correct licenses. Because the influencer did not get a license for this post, the artist copyright owner should be able to enforce their rights to public performance and synchronization of their music on TikTok against those who are using it for financial gain.

This is not to say that the other three factors of the fair use analysis would not weigh in the influencer's favor, and thus the defense would nonetheless apply, but, because the influencing business is fueled by the social currency of likes and followers, the suggestion that this use was for a non-commercial purpose defies logic.

Copyright laws allow artists to choose which companies they work with. This type of use would not fall under a compulsory license. To remain consistent with historical advertising and licensing laws, we should treat the influencers' use of the song in a similar way we would if a TV show used it in their soundtrack. Also, when a company posts content on TikTok, engage in commercial activity as a brand. Similarly, when a copyright infringement claim is raised against an influencer, the court can find a commercial purpose when the influencer themselves has become a brand.

Some may argue that this would open the floodgates for litigation but in most circumstances, artists would not be concerned about the use either because it generates publicity for them or because their economic harm is minimal.

CONCLUSION

Today, as consumer activity occurs increasingly online, government regulations and enforcement must modernize to protect consumers from harms resulting from influencer marketing. Brands have seized the opportunity to capitalize on this enforcement vacuum and either avoid liability or shift their potential liability to influencers. Influencers are key contributors in this era of social media marketing economy. In fact, social media marketing would be unsuccessful without the contribution of influencers. Influencers deserve to be treated as business professionals, and when parties fail to consider influencers as business professionals, it leads to consumer harms and the thinning of intellectual property rights.

In this economy of trust, it is important to pay due respect to the influencer business. Failure to do so harms consumers. We should care about whether influencers are properly disclosing their partnerships or deploying deceptive advertising practices. The harm to consumers is not lessened when they purchase

a bad product after seeing an influencer ad as opposed to a traditional television ad. As such, the FTC should heighten enforcement of disclosure rules and explicitly clarify whether a brand-influencer relationship must be established for an incentive to exist. Brands should carry the burden of ensuring that influencer marketing content meets federal government regulations (FTC, SEC, Copyright, and Trademark).

Finally, the law should expand its definition of commercial purpose to include economic activity that is not explicitly monetary. Namely, the law should consider activity for the purposes of gaining social influence and followers to be a potentially commercial endeavor. The business of influencing has flown under the legal radar for too long.