

2021

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Recommended Citation

Samantha Favela, *Uncovering the “Realness” of CGI Influencers*, 24 SMU SCI. & TECH. L. REV. 325 (2021)
<https://scholar.smu.edu/scitech/vol24/iss2/5>

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Uncovering the “Realness” of CGI Influencers

Samantha Favela*

I. INTRODUCTION

In 2018, the Instagram account of nineteen-year-old influencer, Miquela, was hacked, and after finally regaining control, she posted about the hardest week of her life and thanked her followers for their support.¹ This story is normal in today’s age of social media, but what makes Miquela’s story unique is that the nineteen-year-old ends her post with a revelation: she is not human.² Miquela is one of the first and most famous computer-generated imagery (CGI) influencers on social media.³ With a current count of three million followers on Instagram and collaborations with Calvin Klein and Samsung Mobile, Miquela represents a shift in how brands view advertising potential on social media platforms.⁴ The potential, brought on by evolving technology and heightened connectivity,⁵ is no longer limited to human influencers. Despite being a recent phenomenon, CGI influencers are just as impactful as their human counterparts.⁶ In fact, Miquela was named one of *Time* magazine’s twenty-five most influential people on the Internet in 2018.⁷ Additionally, fifty percent of Generation Z and Millennials have not only followed a brand but have also made a purchase after seeing it endorsed

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1. Charles Trepany, *The robot invasion has begun: Meet the computer-generated influencers taking over Instagram*, USA TODAY, (Feb. 3, 2021, 8:56 AM) <https://www.usatoday.com/story/life/2019/10/16/cgi-influencers-blur-line-between-reality-and-fantasy-instagram-advertising/3790471002/> [https://perma.cc/FQ9C-HZZB].
2. *Id.*
3. Megan Mosley, *Virtual Influencers: What Are They & How Do They Work?*, INFLUENCER MATCHMAKER BLOG, <https://influencermatchmaker.co.uk/blog/virtual-influencers-what-are-they-how-do-they-work> (last updated Sept. 29, 2021); Julie Alexander, *Virtual Creators Aren’t AI – But AI Is Coming for Them*, VERGE (Jan. 30, 2019), <https://www.theverge.com/2019/1/30/18200509/ai-virtual-creators-lil-miquela-instagram-artificial-intelligence> [https://perma.cc/3L2A-53J8].
4. Miquela (@lilmiquela), INSTAGRAM, <https://www.instagram.com/lilmiquela/?hl=EN> [https://perma.cc/XL6Y-2ZXG] (last visited Mar. 3, 2022); Trepany, *supra* note 1.
5. Laurence Scott, *A History of the Influencer, from Shakespeare to Instagram*, 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/LX8H-E2KW].
6. Trepany, *supra* note 1.
7. *Id.*

by the CGI influencer.⁸ However, less than half know that the influencers they follow are not real.⁹

Part II of this Comment discusses social media influencing including its history and regulations. Part III addresses what exactly a CGI influencer is, what makes it different from human influencers, and the lack of regulations surrounding the topic. Part IV analyzes the concerns this new type of influencing presents due to the lack of explicit regulation, and Part V considers possible solutions and regulation to those concerns. Finally, Part VI addresses the practical considerations for the current use of a CGI influencer.

II. SOCIAL MEDIA INFLUENCERS

Simply defined, an influencer is someone whose opinions are trusted by those who follow them.¹⁰ For the past 100 years, marketers and businesses have capitalized on the power of influencers and brand advocates to market their products and services beyond the traditional advertising model.¹¹ At the turn of the nineteenth century, brands began to move away from the word-of-mouth advertising to newspaper advertisements and catchy slogans.¹² The Davis Milling Company created one of the first influencers used to market a product—Aunt Jemima.¹³ The company wanted to build trust in their consumers, so Aunt Jemima became the face of their brand.¹⁴ Other companies followed suit with Coca-Cola using Santa Clause and Kellogg's using Tony the Tiger.¹⁵ The appeal, which still holds today, was total control over the message and the image.¹⁶ By the mid-twentieth century, companies turned to celebrities instead of fictional characters.¹⁷ For example, the 1950s introduced the Marlboro Man, who was played by different actors with the goal to change the narrative around smoking.¹⁸ As the twentieth century continued

8. Samson Haileyesus, *42% of Gen Zers and Millennials Couldn't Spot a CGI Influencer*, SMALL BUS. TRENDS (Feb. 11, 2020), <https://smallbiztrends.com/2020/02/cgi-influencers.html> [https://perma.cc/M8HH-SH8T].

9. *Id.*

10. Danielle Hayes, *A Rousing History of Influencer Marketing (We Promise)*, THE SHELF BLOG (Apr. 8, 2018), <https://www.theshelf.com/the-blog/influencer-marketing-timeline> [https://perma.cc/Z79J-V5LV].

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. Hayes, *supra* note 10.

17. *Id.*

18. *Id.*

so did the use of celebrities as influencers.¹⁹ Actors, singers, and sport personalities were all used to sell products and services.²⁰ The bigger the celebrity, the better.²¹

The creation of the Internet changed the landscape of influencing, and now brands have the ability to market to a person across the world.²² The Internet digitalized connectivity,²³ and with that, the idea of who an influencer is and how an influencer operates evolved to its current and most known form: a social media influencer. With the growing popularity of blogs and the creation of social media platforms such as Facebook, Instagram, and YouTube, people can become brand ambassadors and can personally advertise products for companies.²⁴

But what exactly is a social media influencer and what do they do? A social media influencer is a user on social media “who has established credibility in a specific industry and has access to a huge audience.”²⁵ An influencer can be a blogger, a celebrity, or an online entrepreneur.²⁶ A social media influencer engages in influencer marketing, which is a “form of word-of-mouth marketing that typically plays out on social media (like Instagram and Facebook) and search engines (like Pinterest and YouTube) wherein brands hire social media creators who have influence in specific areas . . . to publicize the various benefits of their products.”²⁷ The goal of this type of marketing is to use influential people to persuade other people to take a specific action.²⁸ But why is there even a need for this type of marketing? Since 2012, consumers’ trust in brands has fallen, and as more consumers experience banner blindness, brands need a way to reach their uninterested consumers.²⁹ Influencer marketing solves that problem since brands can work with influencers who are often regular people, who have a targeted audience,

19. *Id.*

20. *Id.*

21. *Id.*

22. Hayes, *supra* note 10.

23. Scott, *supra* note 5.

24. Hayes, *supra* note 10.

25. *9 of the Biggest Social Media Influencers on Instagram*, DIGIT. MKTG. INST. (Nov. 27, 2018), <https://digitalmarketinginstitute.com/blog/9-of-the-biggest-social-media-influencers-on-instagram> [<https://perma.cc/9EEJ-PZCB>].

26. *Id.*

27. Lauren Jung, *What is Influencer Marketing (In Layman’s Terms)*, SHELF BLOG (Mar. 4, 2019), <https://www.theshelf.com/the-blog/what-is-influencer-marketing> [<https://perma.cc/JUX6-XBQJ>].

28. *Id.*

29. *Id.*; *What is Banner Blindness? – Definition & Information*, MKTG. TERMS.COM, https://www.marketingterms.com/dictionary/banner_blindness/ [<https://perma.cc/43JK-CKBQ>] (last visited Mar. 3, 2022).

and who can help produce genuine interest in a brand's product or service.³⁰ So, in a round-about way, brands can advertise their products or services to consumers who have become conditioned to ignore traditional advertising.³¹ In order to get social media influencers to endorse a product, brands will either pay influencers for their endorsements or compensate them in the form of free products.³² What makes influencer marketing so appealing is that influencers can showcase the product in an authentic, real-world way that is relevant and at the disposal of the user.³³ Influencers can also expand a brand's target demographic in ways traditional advertising cannot.³⁴ Instagram is the leading social media platform for influencers, as nearly eighty percent of brands predominately use this platform for campaigns.³⁵ As social media influencers continue to grow, brands are estimated to spend \$15 billion on influencer marketing by 2022.³⁶

A. Current FTC Regulation for Influencers

The regulation of social media influencers falls under the jurisdiction of the Federal Trade Commission (FTC).³⁷ The FTC is tasked with stopping deceptive advertisements, and specifically under Section 5 of the FTC Act, it regulates the use of endorsements and testimonials in advertising.³⁸ Influencers and brands are responsible for complying with false advertising laws, as well as the FTC's own disclosure requirements and guidelines.³⁹ In November 2019, the FTC issued its most comprehensive guidelines for social media influencers and brands to follow.⁴⁰ The guidelines describe the general principles that the FTC will use in evaluating endorsements and testimonials, which are treated the same for the purposes of the guidelines.⁴¹ The guidelines are not all inclusive, and whether an endorsement is considered decep-

30. Jung, *supra* note 27.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Influencer Marketing: Social Media Influencer Market Stats and Research for 2021*, BUS. INSIDER (July 27, 2021), <https://www.businessinsider.com/influencer-marketing-report> [<https://perma.cc/7EM2-P22T>].

36. *Id.*

37. 16 C.F.R. § 255.0(a) (2020).

38. *Id.*

39. Andrea LaFrance et al., *FTC Issues New Guidelines for Social Media Influencers, Brands*, JD SUPRA (Jan. 28, 2020), <https://www.jdsupra.com/legalnews/ftc-issues-new-guidelines-for-social-40544/> [<https://perma.cc/NY2L-FSNE>].

40. *Id.*

41. 16 C.F.R. § 255.0(a), (c).

tive depends on the facts surrounding the advertisement.⁴² Violations may result in corrective action if the FTC determines after an investigation that the advertisement was unlawful.⁴³ The FTC defines an endorsement as

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.⁴⁴

Therefore, an endorsement on a social media platform includes featuring a product or service in a post, as well as tagging, liking, pinning, commenting, or reviewing brands.⁴⁵ Further, an endorser is not limited to one individual.⁴⁶ It can also include a group or institution.⁴⁷

The FTC has two tiers of regulations when it comes to endorsements.⁴⁸ The first tier concerns the endorser themselves.⁴⁹ When the advertisement is about the endorser using a certain product, the endorser must have been a “bona fide user” of the product at the time of the endorsement.⁵⁰ So, an influencer cannot discuss or praise a product they have never used.⁵¹ If that endorsement continues, so must the use of that product by the endorser.⁵² Further, the endorsement must reflect the “honest opinions, findings, beliefs, or experience of the endorser.”⁵³ Therefore, if an influencer believes the product was horrible, they cannot recommend or praise it.⁵⁴ Finally, the influ-

42. 16 C.F.R. § 255.0(a).

43. *Id.*

44. 16 C.F.R. § 255(b).

45. LaFrance et al., *supra* note 39.

46. 16 C.F.R. §§ 255(b), 255.1(a).

47. 16 C.F.R. § 255.0(b).

48. See 16 C.F.R. § 255.1(a); Fed. Trade Comm’n, *Disclosures 101 for Social Media Influencers*, FTC.GOV 1, 2 (Nov. 2019), https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf [<https://perma.cc/5ZBD-NSKZ>] [hereinafter *Disclosures 101*].

49. 16 C.F.R. § 255.1(a).

50. 16 C.F.R. § 255.1(c).

51. LaFrance et al., *supra* note 39.

52. 16 C.F.R. § 255.1(c).

53. 16 C.F.R. § 255.1(a).

54. LaFrance et al., *supra* note 39.

encer cannot make unsubstantiated claims about a product if the brand itself does not have the proof to back the claims up.⁵⁵

The second tier concerns the actual endorsement itself.⁵⁶ If an individual is endorsing a product through social media and is in a material relationship with the brand, the FTC requires the endorser to disclose the relationship and endorsement in simple and obvious language.⁵⁷ A material relationship includes a personal, family, financial, or employment relationship in which the brand is paying the individual.⁵⁸ Financial and employment relationships are not limited to money compensation, since it also includes situations where the brand gives the influencer free or discounted products or services.⁵⁹ Therefore, if the endorser received anything of value to mention a product or service, a disclosure is necessary.⁶⁰ The endorsement message should make it obvious that there is a material connection with the brand.⁶¹ The FTC requires the endorser to make a disclosure even if the brand did not ask the endorser for a mention of the product that was gifted.⁶² Further, it does not matter if an individual's followers already know of the brand relationship.⁶³ Disclosure is necessary since this connection might affect the credibility of the endorsement and since this connection may not be reasonably expected by the audience.⁶⁴ It also does not matter if an endorser believes that their post is unbiased.⁶⁵ Disclosure is always necessary.⁶⁶ However, if an individual does not have a material relationship with a brand and posts a product they like, there is no need for a disclosure that there is no brand relationship.⁶⁷

Second, followers need to be able to see and understand the disclosure.⁶⁸ The goal is for it to be hard to miss.⁶⁹ Ideally the disclosure should be placed with the endorsement message, and it should not be mixed with other

55. *Id.*

56. *Disclosures 101, supra* note 48, at 3.

57. *Id.* at 2.

58. *Id.*

59. *Id.* at 3.

60. *Id.*

61. *Id.* at 2.

62. *Disclosures 101, supra* note 48, at 3.

63. *Id.*

64. 16 C.F.R. § 255.5 (2020).

65. *Disclosures 101, supra* note 48, at 3.

66. *Id.*

67. *Id.*

68. *Id.* at 4.

69. *Id.*

hashtags or links.⁷⁰ The FTC recommends the use of simple and clear language, and it provides examples of both acceptable and unacceptable disclosures.⁷¹ For example, a disclosure that includes a simple explanation such as “Thanks [Brand] for the free product” in a way that is hard to miss, satisfies the disclosure requirement.⁷² Similarly, using the term “advertisement,” “ad,” and “sponsored” in an obvious way is acceptable.⁷³ When it comes to “Stories,” where the social media platform does not show the picture or video with accompanying text like a post, an influencer should add a disclosure to the picture or video itself.⁷⁴ Additionally, if the endorsement is in a video, influencers should make the disclosure in audio and print in the video.⁷⁵ Placing the disclosure only in the description is not enough since social media users may watch the videos without the sound.⁷⁶

Unacceptable locations for disclosures include those placed in an easily overlooked location such as an “About Me” section on the influencer’s profile, those buried in hashtags or tags, and those places in text that requires a user to click to see more of the description or profile.⁷⁷ Influencers cannot use vague terms such as “sp,” “spon,” or “collab,” or stand-alone terms like “ambassador,” to denote a material relationship.⁷⁸ The disclosure must be in the same language as the endorsement.⁷⁹ Finally, influencers cannot assume that a particular social media platform’s disclosure tool is adequate on its own.⁸⁰

III. CGI INFLUENCERS

The rise of both the quality and accessibility of three dimensional imaging and CGI technology brought with it the ability to use this technology in expansive and creative ways.⁸¹ Thus, it was only a matter of time until CGI

70. *Id.*

71. *Disclosures 101, supra* note 48, at 5.

72. *Id.*

73. *Id.*

74. *Id.* at 4.

75. *Id.*

76. *Id.*

77. *Disclosures 101, supra* note 48, at 4.

78. *Id.* at 5.

79. *Id.*

80. *Id.*

81. Lindsay Dodgson, *Fake, Computer-generated Instagram Influencers are Modeling Designer Clothes, Wearing Spanx, and Attending Red Carpet Premieres*, INSIDER (Sept. 4, 2019), <https://www.insider.com/cgi-influencers-what-are-they-where-did-they-come-from-2019-8> [<https://perma.cc/932E-TGYM>].

made its transition to social media.⁸² CGI is a broad term that includes many types of visual effects,⁸³ but at its basic level, it is the creation of still or animated visual content with computer software.⁸⁴ More commonly known, it is the use of three dimensional computer graphics to create characters and special effects.⁸⁵ The increase in use of CGI is due to it being less expensive than physical methods.⁸⁶ There is a range of different methods to create CGI, such as the use of algorithms to produce complex patterns.⁸⁷ Three dimensional graphics software can create anything from simple shapes to more complex ones, and it can also be used to simulate the way light reacts to a surface.⁸⁸

First used in 1972, CGI has notoriously been used in movies, television programs, and games, but it can be used in advertising, virtual reality, and engineering.⁸⁹ However, it was not until 2016 that this technology made its way to social media.⁹⁰ The most popular CGI influencers, such as Miquela, are still run by people, meaning the captions, the replies, and the image itself are all done by a person either from an agency or a brand.⁹¹ Miquela's popularity gave rise to a shift in the industry, and since her appearance in 2016, venture capitalists have begun to invest heavily in virtual creators to combine CGI and artificial intelligence (AI) capabilities.⁹² The goal is to have virtual creators that do not require any human involvement.⁹³ Everything from the images to the captions would be computer generated, and the CGI influencer would be able to interact directly with other users without the help of a human.⁹⁴

82. *Id.*

83. Rafael Abreu, *What is CGI? How CGI Works in Movies and Animation*, STUDIOBINDER BLOG (Aug. 23, 2020), <https://www.studiobinder.com/blog/what-is-cgi-meaning-definition/> [https://perma.cc/M2U8-XSFS].

84. Andrew McDonald, *What is CGI (Computer-Generated Imagery) & How Does it Work?*, THE ROOKIES (Apr. 2019), <https://discover.therookies.co/2020/04/05/what-is-cgi-computer-generated-imagery-how-does-it-work/> [https://perma.cc/X9TT-EK2J].

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. Dodgson, *supra* note 81.

91. Alexander, *supra* note 3.

92. *Id.*

93. *Id.*

94. *Id.*

For brands, the use of CGI produces many benefits that can be hard to find with human influencers.⁹⁵ The use of a digital influencer creates a sense of novelty.⁹⁶ As a fairly new concept, CGI influencers attract the attention of media and users.⁹⁷ Which leads into the idea of mystery.⁹⁸ The use of CGI and the idea that this influencer is not real creates a mystifying presence to the brand and the CGI itself.⁹⁹ Additionally, brands have total control over the message and the content.¹⁰⁰ There is no risk of human error on part of the influencer, as brands have the ability to control every aspect of the influencer and the influence they can create.¹⁰¹ Therefore, the unpredictability of working with human influencers is negated.¹⁰² Finally, the use of CGI also saves brands money and time, as there is no need to fly an influencer to a location for a photoshoot or spend money on makeup artists or hairstylists.¹⁰³ Brands are already using virtual influencers to push their products such as Calvin Klein, Samsung Mobile, Marc Jacobs, Balenciaga, and Valentino.¹⁰⁴ With nearly 150 virtual influencers already on social media and a website dedicated to virtual influencers, this digital trend shows no sign of slowing down.¹⁰⁵

A. No FTC Guidance

Despite the massive increase of CGI influencers, there are no current regulations that specifically address these virtual influencers. While the FTC has suggested that their guidelines should apply to CGI influencers as well, the guidelines are very much focused on human influencers with no mention of their CGI counterparts.¹⁰⁶ The only regulations that remotely apply to CGI

95. Dodgson, *supra* note 81.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. Ashlee Hamilton, *Can CGI Influencers Displace Their Human Counterparts?*, JD SUPRA (Dec. 5, 2019), <https://www.jdsupra.com/legalnews/can-cgi-influencers-displace-their-22527/> [<https://perma.cc/63RQ-GLVY>].

101. *Id.*

102. *Id.*

103. Dodgson, *supra* note 81.

104. Trepany, *supra* note 1.

105. *See generally* VIRTUAL HUMANS, <https://www.virtualhumans.org> [<https://perma.cc/6MQE-6K4R>] (last visited Feb. 18, 2022).

106. Hamilton, *supra* note 100; *Reality Check: TINA.ORG Calls on FTC to Address Virtual Influencers*, TRUTH ADVERTISING.ORG (June 22, 2020), <https://www.truthinadvertising.org/reality-check-tina-callson-ftcto-address-virtual-influencers/> [<https://perma.cc/H6MV-HR9A>] [hereinafter *Reality Check*].

influencers comes from California's Bolstering Online Transparency (B.O.T.) Act which states:

(a) It shall be unlawful for any person to use a bot to communicate or interact with another person in California online, with the intent to mislead the other person about its artificial identity for the purpose of knowingly deceiving the person about the content of the communication in order to incentivize a purchase or sale of goods or services in a commercial transaction or to influence a vote in an election. A person using a bot shall not be liable under this section if the person discloses that it is a bot.¹⁰⁷

The B.O.T. Act defines a bot as “an automated online account where all or substantially all of the actions or posts of that account are not the result of a person.”¹⁰⁸ Further, it applies only to public-facing Internet websites, applications, or social networks that have at least ten million monthly U.S. visitors or users.¹⁰⁹ Therefore, if a brand purports to use a CGI influencer run by AI in California or targets California residents, then it must disclose the use of a bot.¹¹⁰ The B.O.T. Act clarifies that disclosure must be clear, conspicuous, and reasonably designed to inform individuals who communicate or interact with the bot that it is a bot.¹¹¹ This state legislation is the first of its kind and, therefore, only applies to those who live in California or those outside California who communicate with the state's residents, leaving the rest of nation with no such regulation.¹¹²

IV. CONCERNS

As CGI technology grows more popular and as CGI influencers make their way to social media, an open question remains as to what legal rules and regulations apply to this new evolution in influencers. The concerns relate to three major areas: (1) FTC guidelines, (2) manipulation, and (3) intellectual property.

107. S.B. 1001, 2017-2018 Leg., Reg. Sess. (Cal. 2018) (codified in CAL. BUS. & PROF. CODE §§ 17940-17943 (West 2019)).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. Gail J. Kamal, *California's BOT Disclosure Law, SB 1001, Now in Effect*, NAT'L L. REV. (July 15, 2019), <https://www.natlawreview.com/article/california-s-bot-disclosure-law-sb-1001-now-effect> [<https://perma.cc/6BPL-2JD2>].

A. FTC Guidelines

First, due to the language and intent behind the FTC guidelines, it is unclear whether the regulations even apply in the CGI context.¹¹³ As referenced above, the FTC has suggested the current guidelines for human influencers should apply to CGI influencers: “The FTC doesn’t have specific guidance on CGI influencers, but advertisers using CGI influencer posts should ensure that the posts are clearly identifiable as advertising.”¹¹⁴ But just how the guidelines apply, and even if they apply, is unclear. For example, with CGI influencer Miquela, her posts often tag different brands, but there is no other indication the posts are endorsements.¹¹⁵ Miquela, however, has an apparent fee of \$8,500 per sponsored post, indicating that many of her posts are sponsored, but it seems she is just not following appropriate FTC guidelines.¹¹⁶ The use of a CGI influencer does not necessarily impact the disclosure requirement by the FTC since according to the FTC, and in theory, it remains the same.¹¹⁷ As long as CGI influencers clearly disclose their relationship to the brand, tell their followers there was some sort of compensation, and do not mislead in the promotion of the product, the disclosure will be enough under the current FTC guidelines.¹¹⁸ However, the issues arise when the nuances of the requirements are examined.

The first issue concerns the determination of whether CGI influencers can truly be in a relationship with a brand.¹¹⁹ Under the FTC guidelines, a relationship can be personal, family, financial, or employment and the influencer receives compensation for any endorsement arising from this relationship.¹²⁰ However, a CGI influencer is not a real individual and is instead a computer-generated image, so it cannot technically be in a relationship with

113. See Sarah Robertson, *Bot or Not? The Rise of CGI Influencers*, JD SUPRA (Oct. 31, 2018), <https://www.jdsupra.com/legalnews/bot-or-not-the-rise-of-cgi-influencers-60838/> [<https://perma.cc/Y8EJ-M7C4>].

114. Kaya Yurieff, *Instagram Star Isn’t What She Seems. But Brands Are Buying In*, CNN Bus. (June 25, 2018), <https://money.cnn.com/2018/06/25/technology/lil-miquela-social-media-influencer-cgi/index.html> [<https://perma.cc/R3Y9-V9ED>].

115. Trepany, *supra* note 1.

116. Thuy Ong, *Virtual Influencers Make Real Money While Covid Locks Down Human Stars*, BLOOMBERG BUSINESSWEEK (Oct. 29, 2020), <https://www.bloomberg.com/news/features/2020-10-29/lil-miquela-lol-s-seraphine-virtual-influencers-make-more-real-money-than-ever> [<https://perma.cc/863H-7DFE>].

117. Yurieff, *supra* note 114.

118. Hamilton, *supra* note 100.

119. *Id.*

120. *Disclosures 101*, *supra* note 48, at 3.

the brand.¹²¹ There is no personal, family, or financial relationship between the two. Further, the CGI itself is not receiving any compensation for endorsing a product since it is just an image. Arguably, the owner of the CGI influencer is the one who is in a relationship with the brand and the one who is being compensated for the endorsement.¹²² However, without explicit guidance this is just an assumption. The addition of an AI-run CGI influencer would further complicate the analysis since the law is vague when it concerns AI and human creation.¹²³ Additionally, if the CGI is owned by the brand that is endorsing a product or service, then another legal analysis is needed to address what a violation would entail.¹²⁴ For example, will the FTC require disclosure that the CGI is an affiliate of the brand and not an independent influencer? The purpose of the relationship disclosure is, in part, to address the credibility of the endorsement, and with the FTC's focus on consumer protection, it would seem a disclosure is necessary to avoid deceptiveness.¹²⁵

The second issue concerns whether CGI influencers can actually try the products they are promoting.¹²⁶ The FTC requires that endorsements be truthful and not misleading.¹²⁷ While an influencer is endorsing a product, they must have used it and continue to use it if they continue to endorse it.¹²⁸ And yet CGI influencers cannot comply with this requirement since it is impossible for CGI to use a product.¹²⁹ A CGI influencer cannot consume food or a beverage, nor can it claim that it lost ten pounds due to a weight loss product.¹³⁰ CGI cannot speak to the comfiness of clothes or the texture of makeup they endorse.¹³¹ Then, as with the first issue, does the necessary use of a product need to be by the owner of the CGI influencer instead, and does this

121. Hamilton, *supra* note 100.

122. Robertson, *supra* note 113.

123. See *Public Views on Artificial Intelligence and Intellectual Property Policy*, U.S. PAT. & TRADEMARK OFF. (Oct. 2020), https://www.uspto.gov/sites/default/files/documents/USPTO_AI-Report_2020-10-07.pdf [<https://perma.cc/LFM6-N48Y>] [hereinafter *Public Views*].

124. Katie Powers, *Virtual Influencers Are Becoming More Real – Here's Why Brands Should Be Cautious*, AM. MKTG. ASS'N (June 20, 2019), <https://www.ama.org/marketing-news/virtual-influencers-are-becoming-more-real-heres-why-brands-should-be-cautious/> [<https://perma.cc/ZY29-N5HS>].

125. *What We Do*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/what-we-do> [<https://perma.cc/94D7-P9WR>] (last visited Mar. 3, 2022).

126. Hamilton, *supra* note 100.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

mean the required opinions about the product need to come from the creator of the CGI?¹³²

Third, the issue of disclosure arises in the context of whether it is necessary for the CGI to disclose that it is not human.¹³³ It is unclear whether this requirement is necessary for CGI influencers since there is no explicit federal requirement.¹³⁴ As stated above, the California B.O.T. Act may require disclosure if the majority of the CGI’s actions are not done by a person, and it targets consumers or followers in California.¹³⁵ However, the Act was not necessarily created with CGI influencers in mind.¹³⁶ The FTC guidelines never address CGI, but it is possible to make an argument that the truthfulness requirement and the anti-deceptive goal of the FTC can be interpreted to require a non-human disclosure in addition to the relationship disclosure.¹³⁷

Given the above issues and the unclear regulations, the biggest hurdle this new type of influencer faces is whether the use of CGI influencers to endorse products is inherently deceptive.¹³⁸ With influencer marketing, the FTC is concerned with the misleading of the public and the prevention of unfair business practices.¹³⁹ Specifically, according to the FTC’s Deception Policy Statement, an advertisement is deceptive if it contains a statement or omits information that “is likely to mislead consumers acting reasonably under the circumstances” and “is ‘material’—that is, important to a consumer’s decision to buy or use the product.”¹⁴⁰ Therefore, the FTC will look at an advertisement and determine what it does not say and whether that failure to include information leaves the consumers with a misimpression about that product or service.¹⁴¹ Then, the FTC will determine if this claim is material, meaning if this claim is important to consumers when deciding to buy or use a product.¹⁴² So, in the context of CGI, the FTC must determine whether the undisclosed aspect that the influencer is not human impacts a consumer’s view of the product and whether that is material. If the CGI as-

132. Hamilton, *supra* note 100.

133. *Id.*

134. *Id.*

135. S.B. 1001, 2017-2018 Leg., Reg. Sess. (Cal. 2018).

136. *Id.*

137. Hamilton, *supra* note 100.

138. *Id.*

139. *What We Do*, *supra* note 125.

140. *Advertising FAQ’s: A Guide for Small Businesses*, FED. TRADE COMM’N (Apr. 2001), <https://www.ftc.gov/tips-advice/business-center/guidance/advertising-faqs-guide-small-business> [<https://perma.cc/V6X6-WVDD>] [hereinafter *Advertising FAQ’s*].

141. *Id.*

142. *Id.*

pect of the influencer is disclosed, then the FTC must determine whether the notion that this influencer who cannot physically experience the product impacts a consumer's view in a material way.

With a combination of human-focused regulation and no mention of CGI, the current FTC guidelines create a loophole that brands can use to make their content seem more authentic.¹⁴³ First, it is unclear if CGI influencers need to follow the FTC guidelines at all given that the current definition of who an endorser can be is an "individual, group or institution."¹⁴⁴ Second, the lack of clear regulations also creates a loophole in the enforcement process since it needs to be determined whether the FTC warning letters should be sent to the CGI influencer itself, the owner of the CGI influencer, the brand, or all three.¹⁴⁵ Under the current landscape, brands arguably do not need to comply with the FTC guidelines.¹⁴⁶ The lack of clear and explicit guidance put brands in precarious situations since the ambiguity can expose brands to a large number of violations or not none at all.¹⁴⁷ Additionally, consumer protection is put in limbo.¹⁴⁸

B. Manipulation

The second CGI influencer concern focuses on the idea of manipulation and authenticity. The current conflict in the human influencer marketing industry is over the need for greater transparency and authenticity, and with CGI influencers this battle is only magnified.¹⁴⁹ CGI influencers offer a unique degree of flexibility and targeting due to their artificial nature.¹⁵⁰ Because of this, creators and owners of the CGI influencer can create "a composite personality based on market research."¹⁵¹ Further, the CGI's personality can be adapted using machine learning-based social listening to target audiences even more effectively.¹⁵² Every aspect of the influence from

143. Hamilton, *supra* note 100.

144. Robertson, *supra* note 113.

145. Hamilton, *supra* note 100.

146. Robertson, *supra* note 113.

147. Hamilton, *supra* note 100.

148. *Id.*

149. Dale Barnett, *Are CGI Influencers Really the Future of Influencer Marketing?*, INFLUENCER INTEL., <https://www.influencerintelligence.com/blog/p2/are-cgi-influencers-really-the-future-of-influencer-marketing> [https://perma.cc/C4SE-RUMF] (last visited Mar. 3, 2022).

150. Ignas Kalpokas, *Problematizing Reality: The Promises and Perils of Synthetic Media*, U.S. NAT'L LIBR. MED., NAT'L INST. HEALTH (Nov. 9, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7649059/> [https://perma.cc/3VUU-FZYJ].

151. *Id.*

152. *Id.*

age, gender, and tone of voice can be tailored to match what an audience expects.¹⁵³ Thus, with these virtual influencers, a brand can “marry the concept of social prediction with the limitless nature of what a virtual influencer can be or do, [virtual] influencers will inherently be hard for the target market . . . to dislike.”¹⁵⁴

Virtual influencers have the ability to be more impactful than human ones, as they generate around three times more engagement than a human influencer and at the same time gain followers at a significantly higher rate as well.¹⁵⁵ The artificial nature that makes these influencers so impactful also makes them an effective tool for manipulation.¹⁵⁶ Activists have already begun to warn of the potential adverse consequences relating to that of manipulation and authenticity that range from body image to the CGI influencers taking a political stance.¹⁵⁷ Currently, the concerns are seen more as a side effect, but it is possible to foresee a virtual influencer intentionally created for manipulative purposes.¹⁵⁸ CGI influencers can be created to appeal to a certain target audience and can be designed to evoke trust from that specific portion of the population, and thus they can become highly respected and trusted sources of information.¹⁵⁹ Thus, due to little to no regulation, as compared to human influencers, brands are left with flexibility in creating their advertisements and campaigns.¹⁶⁰ Virtual influencers endorsing products that they cannot have possibly tried starts to head towards manipulation territory.¹⁶¹ Beyond products and brands, it is foreseeable that virtual influencers can be used as vessels for misinformation and to magnify existing political agendas.¹⁶²

C. Intellectual Property

The third main concern focuses on who holds the rights to intellectual property.¹⁶³ The possible parties include the artist who first envisioned the

153. *Id.*

154. *Id.*

155. *Id.*

156. Kalpokas, *supra* note 150.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. Kalpokas, *supra* note 150.

163. Tara Phadnis, *The Rise of CGI Influencers: Getting Real About the Virtual Within the Fashion Industry*, LEXOLOGY (Aug. 22, 2019), <https://www.lexology.com/library/detail.aspx?g=4c93831e-3d74-4060-9294-582a94ccd637> [https://perma.cc/HGU5-RFVK].

creation, the brand whose product the influencer is promoting, or an external third-party creator.¹⁶⁴ Under standard copyright law, the author is the owner of the rights, unless the copyrighted work was created under work-for-hire or some sort of contract.¹⁶⁵ Therefore, this can be easily sorted out under current copyright law, specifically with contracts and licensing agreements.¹⁶⁶ But the inquiry becomes much more complicated when the CGI is doing the work itself with no human intervention. Therefore, an even more important consideration is whether the CGI, if run by AI, can and should be the owner of the intellectual property rights.¹⁶⁷

The current debate around this intellectual property issue focuses on two fundamental questions: (1) can the AI hold the intellectual property rights; and (2) if not the AI, then who does?¹⁶⁸ The idea of AI as the owner faces an uphill battle, especially when it concerns copyrighted works.¹⁶⁹ The creator of the AI inputs the data into the AI's networks, and the computer program does the actual creating.¹⁷⁰ With AI powered CGI influencers, this means the AI creates the caption and creates the picture.¹⁷¹ In theory, since copyright ownership vests with the author of the work, the CGI should be the author.¹⁷² The Copyright Act fails to define an author, but the U.S. Copyright Office and the courts have suggest that AI cannot be an author under the Act.¹⁷³ The U.S. Copyright Office will not grant a registration of a work unless the author is a human being, relying on old Supreme Court precedent that states "copyright law only protects 'the fruits of intellectual labor' that 'are founded in the creative powers of the mind.'" ¹⁷⁴ Further, the U.S. Copyright Office's position is that this does not include "works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human-author."¹⁷⁵

164. *Id.*

165. *Works Made for Hire*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/circs/circ09.pdf> [<https://perma.cc/GLJ3-27H6>] (last visited Oct. 17, 2021).

166. *Id.*

167. Sarah Ligon, *AI Can Create Art, but Can It Own Copyright in It, or Infringe?*, PRAC. GUIDANCE J. (Feb. 28, 2019), <https://www.lexisnexis.com/lexis-practical-guidance/the-journal/b/pa/posts/ai-can-create-art-but-can-it-own-copyright-in-it-or-infringe> [<https://perma.cc/8JUX-JVFT>].

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. Ligon, *supra* note 167.

174. *Id.*

175. *Id.*

The courts have also agreed that an author must be human, highlighted in *Naruto v. Slater*.¹⁷⁶ In this case, the animal activist group People for the Ethical Treatment of Animals (PETA) argued that since a crested macaque monkey picked up a photographer’s camera, clicked the button, and took a picture, it was the sole owner of the copyright.¹⁷⁷ The U.S. Court of Appeals for the Ninth Circuit disagreed, stating that “[t]he Copyright Act does not expressly authorize animals to file copyright infringement suits under the statute.”¹⁷⁸ Referring to other sections of the Copyright Act, the court reasoned that since the Copyright Act refers to “children” and “widow,” this implies that the author must be human.¹⁷⁹ Therefore, under current law, only humans can be considered an author for the purpose of copyright ownership.¹⁸⁰ This does not completely foreclose AI authorship, since so far AI cannot be the sole author.¹⁸¹ The question remains open to whether the AI can claim some sort of authorship such as being recognized as a co-author.¹⁸² Logistically, the AI cannot create the work in question without the creator’s initial input of data and the initial algorithm.¹⁸³ However, an AI arguably exercises some degree of originality when selecting the underlying works or data to create the final work.¹⁸⁴

So, if an AI cannot be an author and it is unclear whether it can be a co-author, the next inquiry is then who is the author of the work. Although the United States currently does not have any laws or regulations addressing this specific question and the intellectual property rights of AI and AI creators in general, other countries do.¹⁸⁵ The United Kingdom, for example, grants copyright protection to work that is made with assistance from AI but involves human creativity.¹⁸⁶ Unlike other countries, the United Kingdom has also extended protection to works created solely by AI with no human creators.¹⁸⁷

176. 888 F.3d 418, 427 (9th Cir. 2018).

177. *Id.* at 420.

178. *Id.* at 426.

179. *Id.*

180. *Id.*

181. *See* Ligon, *supra* note 167.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Artificial Intelligence Call for Views: Copyright and Related Rights*, INTELL. PROP. OFF. (Mar. 23, 2021), <https://www.gov.uk/government/consultations/artificial-intelligence-and-intellectual-property-call-for-views/artificial-intelligence-call-for-views-copyright-and-related-rights>. [https://perma.cc/H9YF-RXCW].

187. *Id.*

The law defines the author as “the person by whom the arrangements necessary for the creation of the work are undertaken,” and the copyright protection extends to fifty years.¹⁸⁸ Additionally, China recently decided that an article written by an AI program can have copyright protection.¹⁸⁹ Deciding against an argument that the work should be placed in the public domain due to its non-human creator, the Chinese court stated that the article meets the requirements for copyright protection.¹⁹⁰ However, the court did not hold that the AI was the creator, and instead held the AI was merely a writing tool.¹⁹¹ According to the court, the creation process was not just the result of running established rules, algorithms, and templates of the AI but involved work from the creative team members.¹⁹² Knowing that the purpose of the Copyright Act is to incentivize individuals to create writings, pictures, and other pieces of art, the United States may follow the United Kingdom and provide some sort of regulation soon.¹⁹³

V. REGULATIONS NEEDED

With a projected industry growth of \$2 billion just for 2020, it is clear CGI influencers are not going away any time soon.¹⁹⁴ With the lack of explicit regulations creating the current loophole in the FTC’s guidelines, it is necessary to create specific guidelines that cover the use of CGI influencers and the nuances that this new evolution of influencing creates.¹⁹⁵ The whole goal for the FTC when it concerns influencer marketing is to protect the public.¹⁹⁶ The guidelines are supposed to promote transparency and to avoid

188. *Id.*

189. Vivian Desmonts & Ivy Liang, *Is the Chinese ‘Dreamwriter’ Case Really a Groundbreaking Case for AI-Generated Works?*, GOWLING WLG (June 12, 2020), https://gowlingwlg.com/en/insights-resources/articles/2020/china-dream-writer-case/?utm_source=Mondaq&utm_medium=Syndication&utm_campaign=LinkedIn-integration [https://perma.cc/E3GH-XP23].

190. Andres Guadamuz, *Chinese Court Rules That AI Article Has Copyright*, INFOJUSTICE (Jan. 22, 2020), <http://infojustice.org/archives/41972> [https://perma.cc/X8B2-55SU].

191. Desmonts & Liang, *supra* note 189.

192. *Id.*

193. Ligon, *supra* note 167.

194. Beth Negus Viveiros, *The Rise of CGI Social Media Influencers*, CHIEF MARKETER (June 20, 2018), <https://www.chiefmarketer.com/rise-cgi-social-media-influencers/> [https://perma.cc/MR3L-QL6E].

195. Robertson, *supra* note 113.

196. *What We Do*, *supra* note 125.

deception.¹⁹⁷ While the FTC’s guidelines currently promote this goal in the context of human influencers, the goal is arguably not being accomplished in the context of virtual influencers.¹⁹⁸

Interest in regulating has already begun.¹⁹⁹ In July 2020, the FTC sent a report to Congress addressing social media bots and concerns over deceptive advertising.²⁰⁰ The report was in response to Congress asking the FTC to describe for the United States Senate Committee on Appropriations “the growing social media bot market as well as the use of social media bots in online advertising and how their use might constitute a deceptive practice.”²⁰¹ While the report was focused on automated computer software bots that perform tasks along a set of algorithms and not in the context of CGI influencers, it is still clear that the FTC is concerned with malicious use of these bots and enforcement actions against them.²⁰² Further, the FTC Commissioner Rohit Chopra in a statement made it clear that social media platforms are engaged in insufficient policing and in order to rectify this, there may be “the imposition of specific requirements to increase accountability and transparency” by Congress.²⁰³ Commissioner Chopra also made clear that the FTC can explore creating rules to guarantee accountability for undisclosed influencer connections and deceptively formatted ads.²⁰⁴ The report highlights the growing concerns for the deceptive and malicious use of bots such as using them to drive up clicks an advertisement receives to increase ad revenue.²⁰⁵

The FTC finds malicious uses especially alarming because ninety percent of social media bots are used for commercial purposes.²⁰⁶ Further, the FTC is constrained by the FTC Act, and it points out that its authority to stop the spread of social media bots is limited by the enforcement powers given to it under that Act.²⁰⁷ In order for the FTC to take action, it is required to show in every case that the use of social media bots constitutes a deceptive or

197. See *Truth in Advertising*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/media-resources/truth-advertising> [<https://perma.cc/K8KK-7RMS>] (last visited Feb. 18, 2022); *Disclosures 101*, *supra* note 48, at 2.

198. *Disclosures 101*, *supra* note 48, at 2.

199. Sarah Robertson, *FTC Report on Social Media Bots and Deceptive Advertising*, JD SUPRA (Oct. 14, 2020), <https://www.jdsupra.com/legalnews/ftc-report-on-social-media-bots-and-48242/> [<https://perma.cc/8LEZ-CXG7>].

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. Robertson, *supra* note 199.

206. *Id.*

207. *Id.*

unfair practice in or affecting commerce.²⁰⁸ Arguably this leaves open the need for change in this area.²⁰⁹

A. FTC Guidelines

At minimum, the current FTC guidelines should expand the definition of endorsement to specifically include CGI influencers, but there is a need for more tailored regulations that specifically address this new type of influencer.²¹⁰ This is necessary in order to adequately fix the loophole that is currently in effect and to avoid further confusion.²¹¹ First and foremost, disclosure is necessary. CGI influencers should disclose that they are non-human and are in fact computer generated.²¹² This threshold regulation will alleviate much of the tension and address many of the concerns inherent in the discussion about CGI influencers, since many users do not know that the influencer they follow is not human.²¹³ The purpose of the FTC is to protect against deceptive practices and deceptive advertising, so when the crucial fact that the influencer is not a real human is revealed, the risk of that consumer confusion and deception can be avoided.²¹⁴ Therefore, a material factor is disclosed, and this allows consumers and users to fully understand who they are interacting with and understand the artificialness that may go along with that interaction.²¹⁵ The CGI influencer should make this disclosure in their bios or about me sections on their social media.²¹⁶ Further, with every sponsored post and endorsement, a simple hashtag can be used such as “#CGIinfluencer” or “#virtualinfluencer” to disclose once again the fact that the influencer is CGI.²¹⁷ Thus, the users who are not familiar with the virtual influencer will instantly know from the post that the influencer they are viewing is computer generated. This is already similar to current sponsorship disclosure requirement from the FTC.²¹⁸

Additionally, the new guidelines should make clear that the material connection disclosure is required by virtual influencers and the same advertising disclosure is necessary.²¹⁹ The standards of truthful advertising still

208. *Id.*

209. *Id.*

210. *Reality Check*, *supra* note 106.

211. Hamilton, *supra* note 100.

212. *Reality Check*, *supra* note 106.

213. *See* Haileyesus, *supra* note 8.

214. *See What We Do*, *supra* note 125.

215. *See Advertising FAQ's*, *supra* note 140.

216. *Reality Check*, *supra* note 106.

217. *Id.*

218. *Disclosures 101*, *supra* note 48, at 5.

219. *Reality Check*, *supra* note 106.

apply.²²⁰ If a material connection exists between a brand and a virtual influencer, then it must be clear and obvious to other users.²²¹ Current FTC guidelines should be followed concerning how to indicate to other users that the post is an advertisement.²²² This includes using the same type of language and making sure the disclosure is clearly visible.²²³ New guidelines should make it explicit that there is a need for the virtual influencer to make clear that their post is sponsored, since currently this is not being followed.²²⁴

Because it is unclear whether the CGI influencer is the one in a relationship with a brand,²²⁵ disclosure of the organization running the CGI’s account should also be disclosed, in order to be more consistent with the FTC’s transparency standards.²²⁶ For example, virtual influencer, Imma, not only discloses her virtual influencer status in her bio, but she also tags the agency that manages her.²²⁷ Other virtual influencers should follow by disclosing it in their bios or about me sections, along with the fact that they are CGI.²²⁸ This promotes transparency because consumers can understand who is actually behind the posts and endorsements.²²⁹ Further, if the CGI is run by AI, then the same entity disclosure applies, especially because concerns and regulations about the use of bots has already begun.²³⁰ The relationship and organization disclosures become even more apparent and necessary when the CGI is run by an actual brand because the brand is controlling the message and advertisement.²³¹ Without such a disclosure, it is easier for brands to blur the line between reality and fantasy, and users will not know that the brand is

220. Heather E. Nolan, *How to Approach Legal Issues With CGI Influencers – Keep In Mind Virtual Endorsements and Brand Sponsorships*, INFOGROUP LLP (Sept. 1, 2020), <https://www.infogroup.com/insights/cgi-influencers> [<https://perma.cc/8NUF-H8YS>].

221. *Reality Check*, *supra* note 106.

222. *See Disclosures 101*, *supra* note 48, at 5.

223. *See id.*

224. Dodgson, *supra* note 81.

225. Hamilton, *supra* note 100.

226. *See Truth in Advertising*, *supra* note 197; *Disclosures 101*, *supra* note 48, at 2.

227. Imma (@imma.gram), INSTAGRAM, <https://www.instagram.com/imma.gram/?hl=EN> [<https://perma.cc/PQ48-7CVQ>] (last visited Mar. 3, 2022).

228. *See Reality Check*, *supra* note 106.

229. *See Truth in Advertising*, *supra* note 197.

230. *See id.*; Robertson, *supra* note 199; S.B. 1001, 2017-2018 Leg., Reg. Sess. (Cal. 2018).

231. Thomas Daigle, *Mixing Reality and Fantasy, Virtual Influencers Thrive Amid the Pandemic*, CBC/RADIO CANADA, <https://www.cbc.ca/news/technology/virtual-influencers-thrive-amid-pandemic-1.5845775> [<https://perma.cc/DE3Q-KM95>] (last updated Dec. 28, 2020).

actually the one pulling the strings.²³² This goes against the whole purpose behind the FTC creating specific guidelines for influencers, and thus, to be in line with the FTC's purpose, the CGI should disclose that it is being run by a specific brand.²³³ As stated above, this can be done in the influencer's bio, but with each post, a hashtag such as "#BrandXowned" can suffice as well.²³⁴ This permits new users to instantly know there is some connection to a brand beyond the usual endorsement.²³⁵

In order to remedy the uncertainty around whether the CGI influencer can truly try a product, the issue can be fixed by narrowing down the possible types of relationships a virtual influencer can have.²³⁶ Understandably, CGI cannot truly give an honest review or praise.²³⁷ However, if brand relationships were limited to promoting clothing, accessories, and products that are mainly used for aesthetic reasons such as furniture and home décor, the concern of an honest review is mitigated.²³⁸ This alleviates the deceptive tension because these products do not necessarily rely on testimonials of some change or effect.²³⁹ Unlike the need for an influencer to use a weight loss product to post about its effects, an influencer does not necessarily need to own a lamp to promote the style or uniqueness of the product. Thus, virtual influencers cannot post or be in a relationship with brands that sell products such as vitamins, food, and skincare.²⁴⁰ And consequently, posts about how a diet drug helped the virtual influencer lose ten pounds or how the new face lotion changed the look of their face is off limits.²⁴¹

Secondly, in the actual post itself, the CGI influencer cannot claim to have tried a product, because claiming they have is essentially deceptive.²⁴² This, however, does not foreclose CGI influencers from making any endorsements. Because of a mandatory CGI disclosure, users will know that the influencer cannot truly try a product, so there is an understanding of artificialness that is inherent in human influencers as well.²⁴³ For example, a sponsored post could be: "Loving the newly opened restaurant X. Best new

232. *Id.*

233. *See Truth in Advertising, supra* note 197; *Disclosures 101, supra* note 48, at 2.

234. *Disclosures 101, supra* note 48, at 2.

235. *Id.* at 4–5.

236. Hamilton, *supra* note 100.

237. *Id.*

238. *See id.*

239. *See Truth in Advertising, supra* note 197.

240. *See id.*; Hamilton, *supra* note 100.

241. *See Reality Check, supra* note 106; Hamilton, *supra* note 100.

242. 16 C.F.R. § 255.1(c).

243. *See* Tiffany Hsu, *These Influencers Aren't Flesh and Blood, Yet Millions Follow Them*, N.Y. TIMES (June 17, 2019), <https://www.nytimes.com/2019/06/17/>

place to hang with friends and grab some Insta-worthy photos. Thanks Brand X for the tour.” Additionally, when it comes to clothing or accessories, the CGI influencer could post a photo wearing a particular piece of clothing and caption it: “Thanks to Brand X for my new sweatshirt. With it, I am the talk of the town.” Limiting what the CGI can actually say about the product limits the consumer deception that the endorsement could cause.²⁴⁴ Undoubtedly endorsements of certain products, such as vitamins, misleads consumers, but this does not mean that every endorsement has the same effect.²⁴⁵ The category of endorsements can possibly be expanded to include products like makeup, but this would then require more disclaimers and more specification from the FTC on how to treat such endorsements which would be an exception to the bona fide user requirement.²⁴⁶

CGI influencers are not inherently deceptive as long as their CGI nature is disclosed.²⁴⁷ Without that crucial requirement, it is hard to categorize these emerging influencers as not deceptive.²⁴⁸ In determining whether an advertisement is unfair or deceptive, the FTC looks at the advertisement for a statement or an omission that “is likely to mislead consumers acting reasonably under the circumstances” and is material to a consumer’s decision to buy or use the product.²⁴⁹ If consumers believe that virtual influencers are actual people who are providing independent views about a product or brand, then this falls squarely within what the FTC is intended to combat.²⁵⁰ Hiding the fact that the influencer is CGI is clearly an omission that misleads consumers to think they are human.²⁵¹ But when the virtual influencer discloses it is non-human, the misleading of consumers is lessened.²⁵² Currently, this inquiry is a major concern since users do not know that the influencer on their Instagram promoting a new pair of boots is not human.²⁵³ And, therefore, that is likely material to a consumer’s decision to buy or use a product because consumers believe they are receiving independent views about a product or brand from an actual person.²⁵⁴

business/media/miquela-virtual-influencer.html [https://perma.cc/M3TS-ZXTF].

244. See Hamilton, *supra* note 100.

245. *Id.*

246. *Reality Check*, *supra* note 106.

247. *Id.*

248. *Id.*

249. *Advertising FAQ’s*, *supra* note 140.

250. Powers, *supra* note 124.

251. See *id.*

252. *Reality Check*, *supra* note 106.

253. See Haileyesus, *supra* note 8.

254. See Powers, *supra* note 124; *Advertising FAQ’s*, *supra* note 140.

But with a necessary CGI disclosure, the FTC inquiry now becomes whether the idea that this influencer who cannot truly experience the product impacts a consumer's view in a material way.²⁵⁵ Once the material factor that the influencer is non-human is disclosed, individuals are now on alert and understand that the interactions and the endorsements are coming from a virtual influencer. This, in combination with tighter restrictions on what the virtual influencer can actually promote and what endorsements can say, not only counteracts the misrepresentation, but it also reduces the material inquiry into a less substantial one.²⁵⁶ With this critical factor known to the user, then the basis for the relationship is established, and so every subsequent interaction is based on the knowledge that the interaction is with a computer-generated image most likely run by an agency or the brand itself. Additionally, the narrowed types of relationships and types of products that can be promoted protects consumers even more, aligning with the FTC's goal.²⁵⁷

Each requirement is for the purpose of disclosing to the consumer who they are interacting with so that the consumer can make a clear and affirmative choice to continue those interactions or to stop. Awareness is a key aspect, and that is done through every post and every interaction, which is the sentiment that underlies current FTC influencer disclosure requirements.²⁵⁸ It is also important that regulations addressing virtual influencers do not limit or stifle the progression of this technology on social media and elsewhere.²⁵⁹ There is a need to protect consumers, but this should also be balanced against wanting to give credit to consumers that, once the CGI aspect of the influencer is disclosed, they can make their own choices.²⁶⁰

B. Manipulation

Transparency, authenticity, and manipulation are not new issues that the influencer industry faces.²⁶¹ With these concerns still apparent with human influencers and with the recent FTC report raising alarms on deceptive advertising on social media by bots, the manipulation and authenticity concerns with virtual influencers are just intensified.²⁶² Virtual influencers are unique

255. See *Advertising FAQ's*, *supra* note 140.

256. See Hamilton, *supra* note 100; *Reality Check*, *supra* note 106.

257. See *What We Do*, *supra* note 125.

258. See *Disclosures 101*, *supra* note 48, at 2–3.

259. Natalie Koltun, *Virtual Ambassadors Cloud Already Murky Legal Picture for Influencer Marketing*, MKTG. DIVE (Oct. 1, 2019), <https://www.marketdive.com/news/virtual-ambassadors-cloud-already-murky-legal-picture-for-influencer-market/563843/> [<https://perma.cc/KR7Z-5QR6>].

260. See *id.*

261. Barnett, *supra* note 149.

262. *Id.*; Robertson, *supra* note 199.

since they always stick to the script and always look perfect.²⁶³ A virtual influencer, in many instances, is just the modern-day version of Tony the Tiger.²⁶⁴ Each CGI influencer can easily be molded to fit any objective a company is seeking, and the company can achieve this goal through persuasive communication coming from an easily trusted source.²⁶⁵ Virtual influencers do not have independent opinions or thoughts, and thus they are just another way of brands communicating sponsored messages to consumers.²⁶⁶ Therefore, the best and most efficient way to address these transparency and manipulative concerns is to create regulations specifically addressing virtual influencers, like those in the previous section.²⁶⁷

The disclosure of the CGI nature of the influencer is the most important regulation needed.²⁶⁸ That threshold regulation, as referenced above, provides more transparency because many social media users do not know that the person providing recommendations is not a real person.²⁶⁹ It took two years for Miquela to admit on Instagram that she was CGI.²⁷⁰ In the era where Mona Lisa can be trained to speak and anything can be faked, a two-year waiting period prior to disclosure should not be the norm.²⁷¹ Further, requiring disclosure of the organization that runs the CGI influencer, including if the owner is a brand itself, reduces the possibility for manipulation that is inherent with nondisclosure.²⁷² Specifically, brands without regulation may be tempted to blur the line between reality and fantasy by not openly declaring that their virtual influencer is not the one pulling the strings.²⁷³ Thus, with regulations, consumers can be in a better position to discern the difference between real and virtual influencers which not only makes it more of an acceptable approach but also gives users the ability to choose if they want further interactions.²⁷⁴

C. Intellectual Property Ownership

Intellectual property ownership of virtual influencers can initially be sorted out using standard copyright law rules such as general work-for-hire

263. Powers, *supra* note 124.

264. *Id.*

265. *Id.*; see Kalpokas, *supra* note 150.

266. Powers, *supra* note 124.

267. See *supra* Part V Section A.

268. See Powers, *supra* note 124; *Reality Check*, *supra* note 106.

269. Haileyesus, *supra* note 8.

270. Hsu, *supra* note 243.

271. *Id.*

272. See Daigle, *supra* note 231.

273. *Id.*

274. Powers, *supra* note 124.

principles and contracts.²⁷⁵ The assumption would be that the owner or creator of the CGI owns the CGI's intellectual property, and specifically its copyright, unless there is a contract specifying otherwise.²⁷⁶ If the brand owns and runs the CGI, then the brand would be the owner.²⁷⁷ However, when it comes to an AI-run CGI influencer, the initial inquiry becomes much more complicated.

But a recent European Union (EU) initiative and United States Patent and Trademark Office (USPTO) report are helpful in determining what the scope of protection and ownership should be.²⁷⁸ The EU initiative recommends that when AI is used solely as a tool to assist the author in the process of creating, their current IP framework remains applicable.²⁷⁹ This would mean that the author, and the right of ownership, should still remain in the owner or creator of the CGI, whoever that may be, as long as the AI is just a tool.²⁸⁰ This aligns with a recent USPTO report where it received comments from bar associations, industry associations, academia, and various stakeholders on the AI impact on intellectual property policies.²⁸¹ The report categorizes AI as a tool and, as long as there is human involvement, a work would qualify for copyright protection, referring to the U.S. Copyright Office's stance on not granting copyright registration unless the author is a human being.²⁸² This is important because, although an AI cannot be the owner or author of the copyrighted work, that does not mean the work itself does not deserve copyright protection.²⁸³ The idea that the work remains in the public domain should be avoided. Affording no copyright protection at all would prevent creation and would counter what the copyright law is intended to promote.²⁸⁴ Further, this sentiment is also echoed by the EU, as it takes the view that protection is needed in order "to encourage investment in this form of creation and improve legal certainty for citizens, businesses and,

275. *Works Made for Hire*, *supra* note 165.

276. *See id.*

277. *See id.*

278. Alejandro Sanchez del Campo, *Artificial Intelligence and Intellectual Property: The European Union Takes a Stance*, EUR. UNION (Nov. 10, 2020), <https://www.lexology.com/library/detail.aspx?g=4e2f5539-683e-4e86-867b-2062708d8e9a> [<https://perma.cc/5E5T-X46Y>]; *Public Views*, *supra* note 123.

279. Sanchez del Campo, *supra* note 278.

280. *See id.*

281. *Public Views*, *supra* note 123.

282. *Id.*

283. *See Guadamuz*, *supra* note 190.

284. *United States Copyright Office: A Brief Introduction and History*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/circs/circ1a.html> [<https://perma.cc/7Z75-AKBS>] (last visited Feb. 18, 2022).

since they are among the main users of AI technologies for the time being, inventors.”²⁸⁵

Both the EU initiative and USPTO report contrast protection for AI as just a tool with AI as the main creator, and with the latter, protection might not be available due to the lack of a human author.²⁸⁶ However, the EU does recognize that certain AI-generated works may be protected in order to encourage investments in this form of creation.²⁸⁷ Thus, the rights to such AI-generated works should be assigned to a natural or legal person, not the AI, and the EU “calls for a technologically neutral approach to such protection.”²⁸⁸ The USPTO report does not take such a stance, maintaining that any work created by a machine without human intervention will not be granted copyright protection.²⁸⁹ The rationale, according to the report, is to support incentives for humans to create new works.²⁹⁰ So now the inquiry centers around how much human input or intervention is needed.²⁹¹ Under U.S. copyright law, there is a minimum threshold of human creativity in order to qualify for copyright protection, and whether a work can be copyrighted depends on if the “creative expression, contributed by someone who can reasonably be described as an author of the work, is evident in the resultant work.”²⁹² Thus, the answer will be fact specific and be determined on a case-by-case consideration.²⁹³ Foreseeably, people will continue to be heavily involved in the use of AI, such as by designing algorithms, guiding the choices made by algorithms, and selecting the necessary outputs.²⁹⁴ A presumption would be that as long as the outputs of the AI are heavily reliant on human creativity, the work is copyrightable, but the contours need to be determined by a court or legislature.²⁹⁵

285. European Parliament Resolution of 20 October 2020 on Intellectual Property Rights for the Development of Artificial Intelligence Technologies, EUR. PARL. RESOL. P9_TA(2020) 0277 (2020), https://www.europarl.europa.eu/doceo/document/TA-9-2020-0277_EN.html [<https://perma.cc/WPM5-K9ZD>] [hereinafter European Parliament Resolution].

286. Sanchez del Campo, *supra* note 278; *Public Views*, *supra* note 123.

287. European Parliament Resolution, *supra* note 285.

288. *Id.*

289. *Public Views*, *supra* note 123.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Public Views*, *supra* note 123.

VI. PRACTICAL GUIDELINES FOR CURRENT USE

Despite the current lack of clarity, there are certain precautions brands, CGI influencers, and their creators can take in their advertisements.²⁹⁶ First, disclose everything and aim for obviousness.²⁹⁷ Follow the current FTC guidelines on placement, prominence, language, and repetition in order to properly disclose that the post is an advertisement.²⁹⁸ Additionally, the FTC has stated the same rules apply to CGI influencers, so following the current guidelines is adequate for now.²⁹⁹ Second, disclose that the influencer is not human, even though there is no such requirement in place.³⁰⁰ Doing so will protect the brand and the CGI influencer in the event of an FTC investigation because disclosure is the main focus in its guidelines.³⁰¹ Third, disclose the relationship with the brand.³⁰² Even though it is still unclear if the FTC will determine CGI influencers can have a relationship with a brand, it is unlikely they will be exempt from disclosing such a sponsorship.³⁰³ By over-disclosing, brands and CGI influencers can avoid potential lawsuits and bad press.³⁰⁴ Finally, ensure proper contracts are in place to assign intellectual property ownership to ensure that there are no disputes concerning ownership.³⁰⁵ Further, virtual influencer contracts should be treated the same as contracts with human influencers, and therefore standard contractual agreements are necessary to address trademark licensing, compliance, and moral clauses.³⁰⁶ This also includes using the same careful contracting language that would normally be used with a human influencer, especially if a brand is contracting with a CGI influencer they do not own.³⁰⁷ Brands and owners of CGI influencers should use the same degree of oversight that would be used with

296. Hamilton, *supra* note 100.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Disclosures 101*, *supra* note 48, at 2.

302. Hamilton, *supra* note 100.

303. *Id.*

304. Koltun, *supra* note 259.

305. *Id.*

306. *Id.*

307. *Does the FTC's Recent Influencer Guidance Address Robots?*, CROWELL MORNING (Dec. 6, 2019), <https://www.crowell.com/NewsEvents/AlertsNewsletters/all/Does-the-FTCs-Recent-Influencer-Guidance-Address-Robots> [https://perma.cc/T9FU-6QQC].

human influencers.³⁰⁸ Most importantly, brands and CGI influencers need to be truthful.³⁰⁹

VII. CONCLUSION

The virtual influencer era is here to stay.³¹⁰ In fact, many of the virtual influencers may even be making more than the average human influencer, as it was estimated that Miquela made \$11.7 million from sponsorships and partnerships in 2020.³¹¹ The ability to blur the virtual and real world has made virtual influencers appealing for non-social media uses such as traditional advertising.³¹² Recently, Ikea worked with Imma, a Japanese virtual influencer, to promote their company in Japan, knowing her popularity would help them advertise in a market that is not inclined to home improvement and to attract a younger generation.³¹³ The growing popularity only highlights the need and urgency for more tailored regulations.³¹⁴ The three main concerns facing CGI influencers can easily be remedied by the creation of new regulations. Doing so eliminates the loophole that brands and virtual influencers can, and are, currently taking advantage of in their endorsements and lessens the more problematic concern that virtual influencers face: whether they are inherently deceptive.³¹⁵ Plus, more tailored regulations also alleviate the tension concerning the possible manipulation CGI influencers can produce.³¹⁶ Finally, there is a need to address growing concerns about AI and its intellectual property protection, specifically concerning how much human input is necessary.³¹⁷ It is necessary to lay the groundwork for AI regulation now because it is simpler to modify existing law in step with technological innovations, rather than scrambling to catch up. By being proactive, future loopholes and gaps in the law can be avoided.

308. *Id.*

309. *Id.*

310. Barnett, *supra* note 149.

311. See *Social Media Influencer Salary*, ZIPRECRUITER, <https://www.ziprecruiter.com/Salaries/Social-Media-Influencer-Salary> [https://perma.cc/MY35-3ZUX] (last visited Mar. 3, 2022); Ong, *supra* note 116.

312. Doug Zanger, *Here’s How Ikea, a Challenger Brand in Japan, Built a New Audience*, ADWEEK (Feb. 23, 2021), <https://www.adweek.com/brand-marketing/ikea-challenger-brand-japan-built-new-audience/> [https://perma.cc/G3WE-WGZW].

313. *Id.*

314. *Reality Check*, *supra* note 106.

315. Trepany, *supra* note 1; Hamilton, *supra* note 100.

316. See Powers, *supra* note 124; *Reality Check*, *supra* note 106.

317. *Public Views*, *supra* note 123.

