

## #IAMAROBOT: Is It Time for the Federal Trade Commission to Rethink Its Approach to Virtual Influencers in Sports, Entertainment, and the Broader Market?

Jim Masteralexis  
Steve McKelvey  
Keevan Statz

### ABSTRACT

From Lil Miquela and Noonouri to Alex Hunter and latest Washington Wizards VIP fan Liam Nikuro, celebrity influencers continue to expand their audiences across the various social media platforms. In doing so, they and the brands they promote are subject to the Federal Trade Commission's *Guides Concerning the Use of Endorsements and Testimonials in Advertising* which require, among other provisions, that influencers disclose any material connections between them and the brands they endorse. While the FTC's continual issuance of updates to the *Guides* illustrates the challenges in keeping up with new technologies, the celebrity influencers cited above pose an additional challenge: they are all computer-generated images (CGIs) or, in other words, Robots. While the *Guides* are written to address humans, the FTC has yet to elaborate on how its disclosure rules and other provisions are to apply to the growing universe of Robots (other than to state that they do apply). Following a discussion of Robots as social media influencers, and an overview of the FTC's recent efforts to address the rapid growth of social media influencing, the authors provide critical assessments that may inform the FTC as it seeks to address how (and even if) the *Guides* can or should apply to Robots. One path proposes a set of standard operating procedures for Robots. Alternatively, the authors contend that the *Guides* should not apply to Robots, examining the challenges of a literal application of the *Guides* to Robots, as well as the FTC's "reasonable consumer" standard.

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## I. INTRODUCTION

The National Basketball Association's ("NBA") response to the global COVID-19 pandemic was to play basketball games in a sheltered and enclosed environment in Florida, called the bubble, and no fans were allowed to attend in order to control the spread of the virus.<sup>1</sup> Yet in July 2020 as Rui Hachimura, a Wizards player who is half Japanese, drove to the basket in an exhibition game, a VIP fan named Liam Nikuro was seen in an Instagram post watching the action as he stood on the court near the three-point line.<sup>2</sup> Liam is also half Japanese and he has 14,800 followers on Instagram, but Liam is not a real person.<sup>3</sup> He is a virtual VIP guest, a computer generated image and a virtual influencer created by Tokyo-based company 1See Inc.<sup>4</sup> "We thought it (Liam) was a really unique and great way to connect with a younger generation and a new audience for us," said Jim Stone, President of Monumental Sports Entertainment the company the owns the Wizards.<sup>5</sup> When the fast-paced world of sports and entertainment collaborates with the even-faster-paced world of computer engineering and creates virtual "fans" and virtual influencers who are in essence Robots, how should our society and government respond, if at all?

In November 2019, the Federal Trade Commission ("FTC") issued a publication entitled *Disclosures 101: New FTC resources for social media influencers* (hereinafter "Disclosures 101").<sup>6</sup> An instructional video accompanied the publication, providing guidance to social media influencers on disclosures that are needed and how to effectively disclose that a material connection exists between a brand and the person posting about the brand on social media. The document was the latest in the FTC's efforts to tackle the Wild West of social media influencing and highlight the need for transparency

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<sup>1</sup> See Tadd Haislop, *NBA Bubble, Explained: A Complete Guide to the Rules, Teams, Schedules, & More for Orlando Games*, SPORTING NEWS (Aug. 26, 2020), <https://www.sportingnews.com/us/nba/news/nba-bubble-rules-teams-schedule-orlando/zhap66a9hcwq1khhmccx3ggabo> [<https://perma.cc/VTW5-8Y7M>].

<sup>2</sup> Scott Allen, *Liam Nikuro is a VIP Guest of the Wizards in the NBA Bubble. He's Also Not a Real Person*, WASH. POST: D.C. SPORTS BLOG (Aug. 5, 2020, 12:19 PM), <https://www.washingtonpost.com/sports/2020/08/05/liam-nikuro-is-vip-guest-wizards-nba-bubble-hes-also-not-real-person/> [<https://perma.cc/9TJJ-8ZSV>].

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Lesley Fair, *Disclosures 101: New FTC Resources for Social Media Influencers*, FED. TRADE COMM'N (Nov. 5, 2019, 12:23 PM), <https://www.ftc.gov/news-events/blogs/business-blog/2019/11/disclosures-101-new-ftc-resources-social-media-influencers> [<https://perma.cc/8KKX-7P73>].

and truthfulness in influencer marketing.<sup>7</sup> The creation and highly public launch of Disclosures 101 followed the enactment of the FTC's revised "Guides Concerning the Use of Endorsements and Testimonials in Advertising" in 2009 (hereinafter "Endorsement Guides").<sup>8</sup> The FTC announced in 2020 that it intended to revisit the Endorsement Guides;<sup>9</sup> however, there have been no recent amendments.

The FTC published helpful guides for online advertising including, among others, the issuance of *.com Disclosures: How to Make Effective Disclosures in Digital Advertising* in 2013,<sup>10</sup> *The FTC Endorsement Guides: What People are Asking* in 2015 and 2017.<sup>11</sup> The FTC then issued a litany of notices and enforcement actions for endorsements that did not adhere to these publications and mailed ninety "educational" letters to brands and influencers, in April 2017, including letters to celebrities/influencers Jennifer Lopez, Allen Iverson and Kourtney Kardashian, as well as companies including Chanel and Adidas.<sup>12</sup> Five months later, on September 6, 2017, the FTC issued warning letters to twenty-one of those influencers.<sup>13</sup>

What distinguished Disclosures 101 from the FTC's previous communications was that for the first time it directly targeted influencers, as op-

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<sup>7</sup> See Jim Dudukovich, *FTC Issues Guidance for Social Media Influencers; Will it Help?*, LEXOLOGY (Nov. 11, 2019), <https://www.lexology.com/library/detail.aspx?g=B6868448-f98b-4fe7-a1aa-90447dbf692a> [<https://perma.cc/EH9D-FYTA>]. A comprehensive timeline of FTC actions relating to influencers is provided in Appendix A, a document created by Dudukovich and published with his authorization.

<sup>8</sup> See 16 C.F.R. §§ 255.0-255.5, *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, FED. TRADE COMM'N (2019) [hereinafter *Endorsement Guides*].

<sup>9</sup> Dudukovich, *supra* note 7.

<sup>10</sup> *.com Disclosures: How to Make Effective Disclosures in Digital Advertising*, FED. TRADE COMM'N (Mar. 2013), <https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf> [<https://perma.cc/49QG-JC9L>].

<sup>11</sup> *The FTC's Revised Endorsement Guides: What People Are Asking*, FED. TRADE COMM'N (Sept. 2017), <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking> [<https://perma.cc/U6QX-AGE2>].

<sup>12</sup> Alexandra Steigrad, *FTC Issued Warnings to 45 Celebrities Over Unclear Instagram Posts*, WOMEN'S WEAR DAILY (May 8, 2017), <https://wwd.com/business-news/media/ftc-issued-warnings-to-45-celebrities-over-unclear-instagram-posts-10883342/> [<https://perma.cc/SK9D-U3QM>]. For a comprehensive timeline of the FTC's guidance and enforcement actions, see Appendix A. The authors wish to thank Jim Dudukovich, Counsel with Bryan Cave Leighon Paisner, LLP, for contributing this research.

<sup>13</sup> *Three FTC Actions of Interest to Influencers*, FED. TRADE COMM'N (Sept. 7, 2017) <https://www.ftc.gov/news-events/blogs/business-blog/2017/09/three-ftc-actions-interest-influencers> [<https://perma.cc/9GEU-6YPE>].

posed to the brands and agencies. Disclosures 101 reinforced the fact that proper disclosure of a “material connection”<sup>14</sup> was the *influencer’s* responsibility and not just the responsibility of the brand or agency who engaged the influencer. It included the directive to “disclose when you have any financial, employment, personal, or family relationship with a brand.”<sup>15</sup> Last but not least, the document informed influencers that tags and likes are also considered endorsements.<sup>16</sup>

What Disclosures 101 did not address is what to do with non-human computer-generated images (“CGIs”), popularly known as virtual influencers, who in almost every way replicate humans, albeit without the actual human experiences of using a product or service.<sup>17</sup> Indicative of a growing trend, some of the most popular social media influencers today are CGIs and for purposes of this article we will refer to these fictional CGI-based virtual influencers as “Robots.” To date, Robots have been most popular and effective within the fashion industry, led by the likes of social media icons including Miquela Sousa, also known as Lil Miquela and lilmiquela, who in 2018 was named one of the most influential people on the internet along with Shudu, Bermuda, and Sophia the IT Girl.<sup>18</sup> Each of these Robots have their own unique fictional back-stories, personalities, and cadre of followers.<sup>19</sup> To date, the most impactful Robot influencers in sports include the previously mentioned Liam Nikuro with the Wizards and soccer player Alex Hunter who is a fictional football player who first appears in the FIFA video

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<sup>14</sup> Fair, *supra* note 6.

<sup>15</sup> *Id.* This mandate is more expansive than the FTC’s previous guidance in its directive to disclose “personal relationships,” creating potential confusion and vagueness as to the scope of this requirement.

<sup>16</sup> *Id.* As noted by one legal expert, this “is a very broad statement that may leave influencers perplexed about what their duties are if and when they ‘like’ a brand post, including how they can or should make a disclosure. This uncertainty may cause influencers to try and push responsibility on brands and agencies to provide clear instructions (including specific hashtags to use) in their influencer contracts.” Dudukovich, *supra* note 7.

<sup>17</sup> See Deborah Paracchini, *Milan Fashion Week and Fashion Law Trends – Lil Miquela, Shudu, Bermuda and Sophia The Robot: CGI and Robot IT Girls Who Will Become the Influencers of the Future*, DLA PIPER (Feb. 21, 2019), <https://blogs.dlapiper.com/iptitaly/2019/02/lil-miquela-shudu-bermuda-and-sophia-the-robot-cgi-and-robot-it-girls-who-will-become-the-influencers-of-the-future/#page=1> [https://perma.cc/S69M-KFKJ].

<sup>18</sup> *Id.*

<sup>19</sup> See *id.*; see generally Ava Farshidi, *Evaluating the FTC Endorsement Guidelines Through the Career of a Fashion Blogger*, 9 HARV. J. SPORTS & ENT. L. 185 (2018).

game in 2017.<sup>20</sup> With the emergence of Liam and Alex, it is likely that the use of Robots influencers in sport and other realms of entertainment will become more commonplace.<sup>21</sup>

The FTC has yet to provide specific guidance for Robot influencers or companies who “hire” or create them. This has resulted in a host of unanswered questions as to how the Guides are to be applied to Robots. For instance, Robots are incapable of having feelings and beliefs in a literal sense. Nor can they ever be deemed *bona fide* users of the products and services they tout. How can a computer-generated image have a “personal relationship” with a company or brand? This article will examine these and other questions raised by the use of Robots as virtual influencers.

Part I of this article examines the emergence of influencer marketing and, in particular, the growing popularity of computer-generated images as social media influencers. Part II provides an overview of the mission, purpose and enforcement role of the Federal Trade Commission followed by a history of the evolution of its guidelines for endorsements and testimonials and its concomitant efforts to deal with the rapid growth of social media influencing. Part III examines how the FTC should handle Robots. One path proposes the FTC develop and promulgate a set of standard operating procedures for Robots. A second path argues that the FTC should simply abandon the application of the Guides to Robots. This latter approach discusses not only the challenges of a literal application of the Guides to Robots, but more critically examines the FTC Guides’ “reasonable consumer” standard.<sup>22</sup> Ultimately, it is our aim to provide critical assessments that may

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<sup>20</sup> See *Alex Hunter*, FIFAFANDOM, [https://fifa.fandom.com/wiki/Alex\\_Hunter](https://fifa.fandom.com/wiki/Alex_Hunter) [<https://perma.cc/CZN8-9RJ6>] (last visited May 1, 2020).

<sup>21</sup> Although not CGIs per se, the recent launch of the Avatar Agency creates a new genre of “influencers” in sports. The company creates 3-D digital versions of professional athletes, commonly referred to as avatars, that are used on their social media platforms, greatly expanding the opportunity for athletes to serve as product and brand influencers without needing to provide their physical presence which is often a challenge for professional athletes with limited time for on-site commercial engagements. Avatar Agency is a division of Genies Inc., a California-based company whose investors include Kyrie Irving, Joe Montana and Russell Westbrook. The company has partnerships with the NFLPA and MLB Players, Inc., among others. See Eric Prisbell, *Avatars Start in Genies Inc. Strategy*, L.A. Biz (Dec. 6, 2019), <https://www.bizjournals.com/losangeles/news/2019/12/06/avatars-star-in-marketing-agency-genies-inc-s.html> [<https://perma.cc/6FUX-YW7B>].

<sup>22</sup> For the remainder of this article, we use the phrase “FTC Guides” throughout to include not only the revised FTC Guides as promulgated in 2009 but also all of the FTC’s subsequent guidance documents on this issue.

inform the FTC as it seeks to address the increasingly prominent realm of virtual influencers.

## II. THE RISE OF SOCIAL MEDIA INFLUENCER MARKETING

Influencer marketing, by definition, is a form of marketing wherein an individual has a disproportionate ability to impact specific behaviors of others.<sup>23</sup> In recent years, influencer marketing has been focused on various social media platforms,<sup>24</sup> with the use of computer-generated images emerging as a new phenomenon.<sup>25</sup> According to one source, the influencer marketing industry, estimated as an \$8 billion industry in 2019, is on track to be a \$15 billion enterprise by 2022.<sup>26</sup>

An influencer possesses opinions trusted by their followers.<sup>27</sup> Influencer marketing hinges on the notion that it is effective because “no-one knows how to connect with [the customer] better than the influencer themselves.”<sup>28</sup> Influencers can meet their audience on a personal level better than large scale advertising.<sup>29</sup> Beyond the notion that followers will trust the influencer’s opinion, because the influencer is credible, there can be a more

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<sup>23</sup> See Eytan Bakshy et al., *Everyone’s an Influencer: Quantifying Influence on Twitter* (2011), <http://snap.stanford.edu/class/cs224w-readings/bakshy11influencers.pdf> [<https://perma.cc/JSN6-KHGD>].

<sup>24</sup> See Morgan Glucksman, *The Rise of Social Media Influencer Marketing on Lifestyle Branding: A Case Study of Lucie Fink*, 8 ELON J. UNDERGRAD. RES. COMMS. 77, 77-78 (2017).

<sup>25</sup> See Tumelo Mojapelo, *The Rise of CGI Influencers*, FLUX TRENDS, <https://www.fluxtrends.com/the-rise-of-cgi-influencers/> [<https://perma.cc/M4RY-PTEG>] (last visited May 1, 2020).

<sup>26</sup> Reena Jain & Carly Kessler, *Pixel Perfect: The Legal Implications of Virtual Influencers and Supermodels*, ROBINS KAPLAN: REAL TALK: THE ROBINS KAPLAN BUS. L. UPDATE BY THE WOMEN OF BUS. LITIG. (Summer 2019), <https://www.robinskaplan.com/resources/legal-updates/real-talk-the-robins-kaplan-business-law-update/2019/real-talk-the-robins-kaplan-business-law-update-summer-2019/pixel-perfect-the-legal-implications-of-virtual-influencers-and-supermodels> [<https://perma.cc/R659-M78X>].

<sup>27</sup> Danielle Hayes, *A Rousing History of Influencer Marketing (We Promise)*, THE SHELF (Apr. 8, 2018), <https://www.theshelf.com/the-blog/influencer-marketing-timeline> [<https://perma.cc/D6SG-XYFB>].

<sup>28</sup> Aaron Brooks, *Effective Influencer Marketing in 2020 Will Hinge on ‘Creator’ Direction*, THE NEXT WEB (Dec. 24, 2019), <https://thenextweb.com/podium/2019/12/24/effective-influencer-marketing-in-2020-will-hinge-on-creator-direction/> [<https://perma.cc/VYK2-5SF2>].

<sup>29</sup> *Social Media Influencers Drive Trends – But How? And Why?*, MEDIKIX.COM (Apr. 18, 2019), <http://mediakix.com/2018/11/power-of-social-media-influencers-trendsetters/#gs.gj2rpo> [<https://perma.cc/43PD-DGGL>].

subtle effect if an influencer uses or appears to use a product or service, i.e. wears a particular brand or frequents a particular establishment, even without directly expressing an opinion about it. The influencer can “create trends and encourage their followers to buy products they promote.”<sup>30</sup> Brands often choose to use celebrity influencers because they are perceived as credible, and research has shown that when influencers are perceived as credible, brand equity increases.<sup>31</sup> The power of a celebrity on consumer evaluation can even be powerful when the celebrity is unfamiliar,<sup>32</sup> which is important for our discussion of computer-created Robot influencers.

The framework guiding influencer marketing is the idea of source credibility in which a communicator’s positive attributes lend its message to be perceived more positively.<sup>33</sup> This concept has become to be more generally known as source effect, initially theorized by Chaiken, who studied physical attractiveness and persuasion, and found that individuals who are seen as more attractive can persuade more easily.<sup>34</sup> Stated simply, the source of information matters, and source effect even applies to non-human, e.g. Robot, communication.

Influencer marketing is not a new phenomenon. The first influencers were likely members of the English monarchy<sup>35</sup> as well as various Popes in the Roman Catholic Church.<sup>36</sup> In the modern era, the first instance of influencer marketing likely occurred when the Davis Milling Company hired Ms. Nancy Green to appear on boxes of Aunt Jemima pancake mix.<sup>37</sup> She was chosen to appear on the product likely because of her warm personality,

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<sup>30</sup> *What is an Influencer? - Social Media Influencers Defined*, INFLUENCER MARKETING HUB (Jan. 28, 2021), <https://influencermarketinghub.com/what-is-an-influencer/> [<https://perma.cc/33TD-M5AY>].

<sup>31</sup> See Amanda Spry et al., *Celebrity Endorsement, Brand Credibility and Brand Equity*, 45 EUR. J. MKT, 882, 886 (2011).

<sup>32</sup> See Karla McCormick, *Celebrity Endorsements: Influence of a Product-Endorser Match on Millennials Attitudes and Purchase Intentions*, 32 J. RETAILING & CONSUMER SERV., 39, 39-45 (2016).

<sup>33</sup> Roobina Ohanian, *Construction and Validation of a Scale to Measure Celebrity Endorsers’ Perceived Expertise, Trustworthiness, and Attractiveness*, 19 J. OF ADVERT. 39, 41 (1990).

<sup>34</sup> Shelly Chaiken, *Communicator Physical Attractiveness and Persuasion*, 37 J. PERSONALITY & SOC. PSYCHOL. 1387, 1387-97 (1979).

<sup>35</sup> Hayes, *supra* note 27.

<sup>36</sup> *The History of Influencer Marketing*, GRIN (Sept. 10, 2019), <https://www.grin.co/blog/the-history-of-influencer-marketing-how-it-has-evolved-over-the-years> [<https://perma.cc/H24B-NF36>].

<sup>37</sup> Hayes, *supra* note 27.



Black skin tone, friendly demeanor and great cooking ability.<sup>38</sup> Throughout the 20th century, other brands joined the ranks in using influencer marketing, often using fictional characters that audiences knew were not real people, such as Coca-Cola using Santa Claus, or even brand-created influencers such as the Marlboro Man created by Philip Morris USA or Tony the Tiger created by Kellogg NA Company.<sup>39</sup>

Influencer marketing has become especially common in a sport context. Influencer marketing is a perfect fit in sports for numerous reasons, including the large and diversified market space in which sport operates, influencers' ability to create word-of-mouth excitement, and influencers' unique and differential characteristics such as passion and authoritative nature.<sup>40</sup> Examples of influencer marketing are as ubiquitous as the game itself. Cristiano Ronaldo is arguably the greatest soccer player of all time, but his off-the-field marketing prowess is equally impressive as he claims over 230 million followers on Instagram and has signed a \$1 billion lifetime contract with Nike to endorse its products.<sup>41</sup> Former NBA MVP Stephen Curry is one of the most popular influencers in the American sports landscape.<sup>42</sup> Curry's agent describes the Warrior point guard's relatable stature and nature, is a home run for influencer marketing: "He looks physically overmatched . . . People that look up to him, certainly the young players, they can't all be 6'9", but they could aspire to shoot or handle the ball like Stephen. His accomplishments are pretty unique, and on top of that he is humble and is just a good guy and it shines through."<sup>43</sup> In addition to professional sport, recreational sport influencers are common, especially related to fitness and

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<sup>38</sup> Erica Taylor, *Little Known Black History Fact: The History of Aunt Jemima*, BLACKAMERICANWEB, <https://blackamericaweb.com/2013/03/28/little-known-black-history-fact-the-history-of-aunt-jemima/> [https://perma.cc/5CDG-2VGJ] (last visited Aug. 20, 2020).

<sup>39</sup> Jose Angelo Gallegos, *The History and Evolution of Advertising*, TINTUP (June 29, 2016), <https://www.tintup.com/blog/history-evolution-advertising-marketing/> [https://perma.cc/UXK4-2LTH].

<sup>40</sup> Keepface, *Why Influencer Marketing is so Effective in the Sports Industry?* MEDIUM (Oct. 3, 2019), <https://medium.com/keepface-com/why-influencer-marketing-is-so-effective-in-the-sports-industry-d3a729b8115> [https://perma.cc/FH4V-VMHP].

<sup>41</sup> *Why Athlete Influencers Are so Effective*, MEDIAXIX <https://mediakix.com/blog/athlete-influencers-social-media-marketing/> [https://perma.cc/F8B5-L54U] (last visited June 30, 2020).

<sup>42</sup> MVPIndex, *MVPIndex Presents the Year's Most Valuable Athletes on Social*, PR NEWSWIRE (Dec. 18, 2017), <https://www.prnewswire.com/news-releases/mvpindex-presents-the-years-most-valuable-athletes-on-social-300572798.html> [https://perma.cc/9Z4T-9D8X].

<sup>43</sup> Jarrel Harris, *Stephen Curry's Brand Growing at Same Exceptional Rate as His Game*, SPORTS ILLUSTRATED (Dec. 29, 2015), <https://www.si.com/nba/2015/12/29/>

well-being. Jen Selter is one of the most popular fitness influencers, posting daily workout videos, programs, and ads to her nearly 13 million Instagram followers.<sup>44</sup>

Although influencer marketing has been utilized in numerous forms, the rise of social media has contributed to its evolving nature.<sup>45</sup> Companies are increasing their spending on social media advertising,<sup>46</sup> often via influencers. Relative to traditional media, social media lends itself to consumer participation and content creation.<sup>47</sup> In the past, with media platforms such as television, radio and newspaper, the producer retained power and the role of the individual was reduced to passively consuming produced content.<sup>48</sup> A significant boundary existed between producer and consumer.<sup>49</sup> Due to these unique and differential characteristics possessed by social media, influencers can more easily connect with potential consumers. Furthermore, social media gives the consumer a platform to take on an active, as compared to passive, role, with an amplified voice.<sup>50</sup> Consumers, including influencers, can use this platform however they see fit, especially via encouraging other consumers both positively and negatively.

#### A. *Emergence of Computer-Generated Imaging & Influencers*

Using computers to create images and art likely began in the late 1960s and early 1970s at the University of Utah.<sup>51</sup> Graduate students, including John Warnock, who would go on to found Adobe; Jim Clark, who would go on to found Silicon Graphics; and Ed Catmull, who would go on to become President of Pixar, Inc., were essentially inventing the field from

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warriors-stephen-curry-under-armour-brand-marketing-superstar [https://perma.cc/D93J-G9RM].

<sup>44</sup> SOCIAL BLADE, <https://socialblade.com/instagram/user/jenselter> [https://perma.cc/Z35D-5676] (last visited Aug. 16, 2020).

<sup>45</sup> See Glucksman, *supra* note 24.

<sup>46</sup> Tereza Litsa, *Social Advertising Channels 2019: Growth, Trends, Spend*, CLICKZ (May 21, 2019), <https://www.clickz.com/social-advertising-channels-2019-growth-trends-spend/238772/> [https://perma.cc/96BE-G4FJ].

<sup>47</sup> See Janna Ehrhardt, *A Brief History of Influencer Marketing*, INFLUENCERDB (Oct. 19, 2017), <https://influencerdb.com/blog/brief-history-of-influencer-marketing/> [https://perma.cc/BG6Z-MWJB].

<sup>48</sup> See generally Henry Jenkins, *CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE* (New York University Press 2006).

<sup>49</sup> See *id.*

<sup>50</sup> Elizabeth B. Delia & Cole G. Armstrong, *#Sponsoring the #FrenchOpen: An Examination of Social Media Buzz and Sentiment*, 29 J. SPORT MGMT., 184, 185 (2015).

<sup>51</sup> ED CATMULL & AMY WALLACE, *CREATIVITY, INC.: OVERCOMING THE UNSEEN FORCES THAT STAND IN THE WAY OF TRUE INSPIRATION* 17 (2014).

scratch in a research lab.<sup>52</sup> Now, computer-generated images are commonplace across movies, television and video games. The CGI technology is of such high quality that these images are often mistaken for authentic photographs.<sup>53</sup> Due to the significant technological advancements, the line between physical and virtual has blurred significantly. According to a 2018 study by *FullScreen*, forty-two percent of respondents were unaware that they were following an influencer they thought was a real human.<sup>54</sup> Additionally, fifty-five percent of those surveyed who engage with a CGI influencer have made a purchase as a result of their following.<sup>55</sup>

Virtual celebrities have been prevalent since the late twentieth century, as the virtual band Gorillaz was founded in the late 1990s.<sup>56</sup> The band consisted of four virtual, animated two-dimensional members, who won a Grammy award in 2006.<sup>57</sup> Robots are now taking the limelight and are set to completely transform the current influencer industry. Today, entire influencer marketing profiles have been created using CGIs. Among the most prominent of these CGI influencers is Miquela Sousa, known as lilmiquela, who has garnered over 2.5 million followers on Instagram. Tables 1 and 2, below, show some popular Robots as measured by total followers on Instagram and Twitter, respectively. Generalizing from this data, it appears that consumers prefer to follow influencers on Instagram as compared to Twitter.

According to the 2019 study by social analytics platform HypeAuditor, “Virtual influencers have almost three times more engagement than real influencers. That means that followers are more engaged with virtual influencers content.”<sup>58</sup> Furthermore, eighteen to twenty-four-

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<sup>52</sup> *See id.*

<sup>53</sup> Dylan Love, *REAL OR FAKE: These Computer-Generated Images Look Just Like Actual Photograph*, BUS. INSIDER (July 18, 2013, 1:15 AM), <https://www.businessinsider.com/cool-3d-images-2013-7> [<https://perma.cc/65MC-H245>].

<sup>54</sup> Rebecca Paddon, *CGI Betrayal: New Study Reveals 42% of People Don't Know They're Following a Bot* (Jan. 24, 2019), ADOTAS, <http://www.adotas.com/2019/01/cgi-betrayal-new-study-reveals-42-people-dont-know-theyre-following-bot/> [<https://perma.cc/3F5A-3EX9>].

<sup>55</sup> *Id.*

<sup>56</sup> Christopher Morency, *Meeting Fashion's First Computer Generated Influencer*, BUS. OF FASHION (Feb. 5, 2018), <https://www.businessoffashion.com/articles/intelligence/meeting-fashions-first-computer-generated-influencer-lil-miquela-sousa> [<https://perma.cc/AD7W-MZX4>].

<sup>57</sup> *Id.*

<sup>58</sup> Andrew Hutchinson, *New Report Looks at the Rise of Virtual Influencers on Instagram*, SOC. MEDIA TODAY (Nov. 19, 2019), <https://www.socialmediatoday.com/news/new-report-looks-at-the-rise-of-virtual-influencers-on-instagram/567550/> [<https://perma.cc/AQ6M-AFDV>].

year-old female users are significantly more likely to engage with Robots.<sup>59</sup> Thus, using Robots on Instagram appears to be a viable strategy to engage with consumers. The exception to the notion that influencers are more popular on Instagram than Twitter is virtual soccer star and Coca-Cola endorser Alex Hunter, whose following is nearly six times larger on Twitter than Instagram, according to a review conducted by the authors of this article in July 2020.

TABLE 1: *POPULAR ROBOT INFLUENCERS ON INSTAGRAM*

Profile	Number of Followers <sup>1</sup>	Influencer Nature
lilmiquela	~2,500,000	Fashion/Social Change
noonouri	~361,000	Fashion/Social Change
bermudaisbae	~264,000	Music/Politics
imma.gram	~230,000	Culture/Fashion
shudu.gram	~205,000	Fashion
blawko22	~156,000	Gaming

<sup>1</sup>Measured by the authors in July 2020

TABLE 2: *POPULAR ROBOT INFLUENCERS ON TWITTER*

Profile	Number of Followers <sup>1</sup>	Influencer Nature
@MrAlexHunter	~60,800	Sports
@JedyVales	~42,700	Pornography
@lilmiquela	~26,200	Fashion/Social Change
@blawko22	~2,100	Gaming
@liam_nikuro	~1,800	Music/Fashion
@bermudaisbae	~1,800	Music/Politics

<sup>1</sup>Measured by the authors in July 2020

Every Robot has been created to meet a specific objective and to hit a target audience. For example, Bermuda (bermudaisbae) is a white, right-wing, President Donald Trump supporter created by the fictional company

<sup>59</sup> *Id.*

Cain Intelligence.<sup>60</sup> Her socio-political opposite, Miquela Sousa (lilmiquela), is a nineteen-year-old Brazilian American who champions more liberal beliefs such as Black Lives Matter and the # LGBTQ+ causes.<sup>61</sup> Sousa is even credited with writing to Congress to advocate for transgender rights.<sup>62</sup> As a singer, she has amassed 324,666 monthly listeners on Spotify as of March 2021.<sup>63</sup> In June 2018, *Time* named Sousa one of “The 25 Most Influential People on the Internet” along with President Trump, Rihanna, and actual human influencers Logan and Jake Paul.<sup>64</sup> The Los Angeles based startup Brud created both Miquela Sousa and video game influencer Blawko22 to effectively generate attention.<sup>65</sup> Joerg Zuber, the creator of noonouri, is quoted as saying that he designed her to be “‘innovative, entertaining, and very personal and honest,’ with an altruistic side as well.”<sup>66</sup>

Robots have also achieved notoriety and followers within the realm of sports. In addition to the previously mentioned NBA VIP Liam Nikuro<sup>67</sup> a notable sport Robot is Alex Hunter, a game series character who first appeared in FIFA ‘17 and was created by EA Sports.<sup>68</sup> Players and fans were able to follow Alex on “The Journey” feature in FIFA ‘17, FIFA ‘18 and FIFA ‘19, before creators ended his story.<sup>69</sup> Hunter’s designers invented him

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<sup>60</sup> Emilia Petrarca, *Body Con Job Miquela Sousa has Over 1 Million Followers on Instagram and Was Recently Hacked by a Trump Troll. But She Isn’t Real.*, THE CUT (May 14, 2018), <https://www.thecut.com/2018/05/lil-miquela-digital-avatar-instagram-influencer.html> [https://perma.cc/U9BA-TJMP].

<sup>61</sup> *Id.*

<sup>62</sup> Taryn Hillin, *Can You Tell This Instagram Model is Actually a Computer Generated Robot*, ENTITY (Apr. 11, 2018), <https://www.entitymag.com/lil-miquela-instagram-model-actually-computer-generated-cyborg/> [https://perma.cc/5SRL-HHLX].

<sup>63</sup> *Miquela*, SPOTIFY, <https://open.spotify.com/artist/7licaqhcEBQUzz9FownRaJ> [https://perma.cc/8RJL-EAXB] (last visited Mar. 21, 2021).

<sup>64</sup> The 25 Most Influential People on the Internet, TIME (June 30, 2018, 7:00 PM), <http://time.com/5324130/most-influential-internet/> [https://perma.cc/S6WM-G5DF].

<sup>65</sup> Petrarca, *supra* note 60.

<sup>66</sup> Farouk Chekoufi, *Meet Noonouri, the Virtual Instagram Influencer Loved by Kim Kardashian West and Dior*, VOUGE (June 19, 2018), <https://www.vogue.com.au/vogue-codes/news/meet-noonouri-the-virtual-instagram-influencer-loved-by-kim-kardashian-west-and-dior/news-story/dfeb2658e3bbc7b2cfd11d0d26eb5bbc> [https://perma.cc/92FJ-87UH].

<sup>67</sup> Allen, *supra* note 2.

<sup>68</sup> Oli Platt, *FIFA 18 The Journey Mode: Alex Hunter’s Story So Far and What to Expect in Season Two*, GOAL (Sept. 29, 2017), <https://www.goal.com/en-us/news/fifa-18-the-journey-mode-alex-hunters-story-so-far-and-what/djw1spdjpwlr1rbe2yu9swpq0> [https://perma.cc/R5TW-FEMD].

<sup>69</sup> Talal Musa, *End of an Era FIFA 19: This is Why EA Sports Decided to End Alex Hunter’s Journey on FIFA*, DREAMTEAMFC.COM (Sept. 18, 2018, 10:21 AM), <https://>

to be an authentic, young star with parents, relationships, and an exciting story: rising to prominence in the virtual soccer world.<sup>70</sup> As his story progressed throughout the trilogy, players were able to customize his appearance and uniform kit.<sup>71</sup> Hunter has since transcended the video game space, generating nearly 60,000 Twitter followers.<sup>72</sup> When he transferred to Real Madrid before the 2019 campaign, the team's official Twitter account, with over 10 million followers, welcomed him to Spain.<sup>73</sup> It remains to be seen if more sports organizations will continue this trend. However, it is clear that the public took an interest in Hunter's story based on the social media following, and thus virtual CGI Robot influencers can be understood as a viable marketing strategy for sports organizations.

### B. Brand Alignment with Virtual Influencers

Given that Miquela Sousa is one of the most popular virtual influencers, brands have lined up to align with her including, among others, Supreme, Vans, Chanel, and Prada (she even "attended" Prada's 2018 runway show).<sup>74</sup> In May 2019, she appeared in an advertisement with fashion company Calvin Klein that generated immense controversy.<sup>75</sup> Although the brand has a history of being provocative in its ads, the advertisement starring Sousa and human model and influencer Bella Hadid was especially divisive.<sup>76</sup> The video showed Sousa and Hadid sharing a loving gaze before a kiss.<sup>77</sup> Many commenters on social media were frustrated and thought the ad was "queerbaiting" as Hadid identifies as straight.<sup>78</sup> The advertisement was a part of Calvin Klein's #MyCalvins campaign, promoting freedom of ex-

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[www.dreamteamfc.com/c/gaming/418949/fifa-19-the-journey-ronaldo-alex-hunter-demo-release-date-review/](http://www.dreamteamfc.com/c/gaming/418949/fifa-19-the-journey-ronaldo-alex-hunter-demo-release-date-review/) [https://perma.cc/7RML-BF5B].

<sup>70</sup> See Mojapelo, *supra* note 25.

<sup>71</sup> *Id.*

<sup>72</sup> MrAlexHunter, TWITTER, <https://twitter.com/MrAlexHunter> [perma.cc/54Z3-38CK] (last visited Mar. 25, 2021).

<sup>73</sup> RealMadrid, TWITTER, <https://twitter.com/realmadrid/status/1026505683225780224> [https://perma.cc/3TDJ-9KBW] (last visited Mar. 25, 2021).

<sup>74</sup> *The Rise of The Fake Influencer*, CREATIVE INDUSTRY BRIEF (May 22, 2018), <https://www.creativeindustrybrief.com/the-rise-of-the-fake-influencer/> [https://perma.cc/9NBS-WKQC].

<sup>75</sup> Adrienne Pasquarelli, *Calvin Klein Apologizes for Bella Hadid Kiss with Lil Miquela*, ADAGE (May 20, 2019), <https://adage.com/article/cmo-strategy/calvin-klein-apologizes-bella-hadid-kiss-lil-miquela/2172796> [https://perma.cc/E7LE-XWJA].

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

pression.<sup>79</sup> The company released the spot on their YouTube channel, and Sousa also posted it to her own Instagram page.<sup>80</sup> Due to the immense backlash, Calvin Klein issued an apology but did not pull the video.<sup>81</sup> The controversy centered on the social complexity of the advertisement, e.g. queerbaiting, not the interaction between the human (Hadid) and the CGI Robot (Sousa).<sup>82</sup> Brands are also aligning with other noted Robots. Hunter was signed by Coca-Cola Zero Sugar as his soccer fame rose, and he appeared in a video advertisement.<sup>83</sup> Most posts on noonouri's Instagram feed are sponsored. Shudu.gram promoted Fenty Beauty Lipstick by Rihanna in a 2018 post.<sup>84</sup>

Whether or not consumers are aware profiles are actually CGI Robots, many want to know who is actually behind the various accounts and signing endorsement contracts on their behalf.<sup>85</sup> Unfortunately, some individuals choose to make their involvement with CGI Robot influencer profiles known, while others do not. For example, as previously mentioned, Zuber (creator of noonouri) is open about not only the fact that he created the profile, but also why he did so.<sup>86</sup> The same can be said for shudu.gram, but not for lilmiquela or bermudaisbae. All that is really known about lilmiquela's and bermudaisbae's creators is that the company Brud was her founder, and Brud wrote itself into lilmiquela's story by using bermudaisbae to "hack" her account.<sup>87</sup>

While human influencers often come with a host of potential challenges and pitfalls, the value and benefits of Robots are much more obvious. They do not age (at least, they don't have to), they can be dressed as desired and transported around the world with the click of a button, and their facial

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<sup>79</sup> Emily Kirkpatrick, *Calvin Klein Apologizes for Ad Featuring Bella Hadid and Lil Miquela Making Out*, N.Y. POST (May 20, 2019), <https://pagesix.com/2019/05/20/calvin-klein-apologizes-for-ad-featuring-bella-hadid-and-lil-miquela-making-out/> [https://perma.cc/2JEF-953N].

<sup>80</sup> Pasquarelli, *supra* note 75.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Mojapelo, *supra* note 25.

<sup>84</sup> Heather Nolan, *Brands Are Creating Virtual Influencers, Which Could Make the Kardashians a Thing of the Past*, ADWEEK (May 11, 2018), <https://www.adweek.com/brand-marketing/brands-are-creating-virtual-influencers-which-could-make-the-kardashians-a-thing-of-the-past/> [https://perma.cc/Z549-TAQT].

<sup>85</sup> Paddon, *supra* note 54. .

<sup>86</sup> Charles Trepany, *The Robot Invasion Has Begun: Meet the Computer Generated Influencers Taking Over Instagram*, USA TODAY (Feb. 3, 2021), <https://www.usatoday.com/story/life/2019/10/16/cgi-influencers-blur-line-between-reality-and-fantasy-instagram-advertising/3790471002/> [https://perma.cc/V7MM-ZQW4].

<sup>87</sup> *Id.*

expressions can be engineered as desired. Furthermore, with CGI Robot influencers, versus other fictional characters, creators can more easily develop a storyline over time, evidenced by Hunter's soccer career. Finally, brands can be ensured that they will not have a controversial or embarrassing past.<sup>88</sup> It is likely due to their adaptability, control over brand safety, and apparent authenticity that companies decide to align with Robots to promote their products.<sup>89</sup> But as such, there remain unresolved issues as to just how the Endorsement Guides should be, or even can be, applied to Robots.

### III. OVERVIEW OF FTC MISSION AND EVOLUTION OF THE GUIDES

President Woodrow Wilson signed the Federal Trade Commission Act (the Act) on September 26, 1914, creating the Federal Trade Commission (FTC).<sup>90</sup> The Act declared unlawful “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce”<sup>91</sup> The Act, together with the Sherman Anti-Trust Act of 1890<sup>92</sup> and the Clayton Antitrust Act of 1914<sup>93</sup> articulates the economic policy goals of the United States to foster vigorous competition, free of monopolistic behavior, and with protections for the consumer from unfair and deceptive practices.

The mission of the FTC is to “[p]rotect consumers and competition by preventing anticompetitive, deceptive, and unfair business practices through law enforcement, advocacy, and education without unduly burdening legitimate business activity.”<sup>94</sup> The vision of the FTC is to help ensure that the United States has a “vibrant economy characterized by vigorous competition and consumer access to accurate information.”<sup>95</sup> The FTC has a “unique

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<sup>88</sup> *CGI Influencers: Why Brands and Consumers Should Pay Attention*, MEDIAKIX, <http://mediakix.com/2019/02/cgi-influencers-instagram-models/#gs.fifbge> [<https://perma.cc/U54U-M9KQ>] (last visited Aug. 13, 2020).

<sup>89</sup> *Id.*

<sup>90</sup> *See generally Our History*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/our-history> [<https://perma.cc/3J3X-44LT>] (last visited June 7, 2019).

<sup>91</sup> 15 U.S.C. § 45 (a) (1) (2010).

<sup>92</sup> The Sherman Anti-Trust Act of 1890 is codified at 15 U.S.C. §§ 1-38 (1890).

<sup>93</sup> The Clayton Antitrust Act of 1914 is codified at 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52-53 (1914).

<sup>94</sup> *About the FTC*, <https://www.ftc.gov/about-ftc> [<https://perma.cc/64XQ-GGBK>], FED. TRADE COMM'N (last visited July 8, 2019).

<sup>95</sup> *Id.*



dual mission to protect consumers and promote competition.<sup>96</sup> The FTC has the authority to declare unlawful an act or practice if they deem it to be “unfair,” including if the act or practice causes or is likely to cause “substantial injury to consumers which is not reasonably avoidable by consumers themselves” and “not outweighed by countervailing benefits to consumers or to competition.”<sup>97</sup>

The FTC Guides are administrative interpretations of the laws, in order to inform the public and businesses what is expected of them.<sup>98</sup> While none of the Guides constitute law, they each represent the FTC’s articulation of what the applicable law requires or prohibits, and failure to comply with the FTC’s Guides may result in “corrective action” by the FTC.<sup>99</sup>

The FTC may issue a cease and desist order and seek civil monetary penalties against a person, partnership, or corporation committing an unfair or deceptive practice and violating the Act.<sup>100</sup> The FTC must first issue a complaint if it believes that a person, partnership, or corporation is employing an unfair and deceptive method of competition and it is in the public interest to issue the complaint.<sup>101</sup> A hearing is then held at the FTC at least thirty days after service of the complaint to show why the FTC should not issue a cease and desist order.<sup>102</sup> At the conclusion of the hearing the FTC may issue an order to the person, partnership, or corporation compelling it to stop using the unfair or deceptive practice.<sup>103</sup> The person, partnership, or corporation can appeal to the Commission to reopen the matter.<sup>104</sup> The case could proceed to a federal appeals court and ultimately to the U.S. Supreme Court.<sup>105</sup>

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<sup>96</sup> *What We Do*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/what-we-do> [https://perma.cc/9LXM-QD6R] (last visited July 8, 2019).

<sup>97</sup> 15 U.S.C. § 45(n) (2010).

<sup>98</sup> The Supreme Court has held that the FTC’s guides are “not fixed rules as such, and were designed to inform businessmen of the factors which would guide Commission decision. *F.T.C. v. Mary Carter Paint Co.*, 382 U.S. 46, 48 (1965). The Guides are also used as guidance in false advertising cases based on state law or based on the Lanham Act, 15 U.S.C. §§ 1051-1141. See Jessica Godell, Comment, *Consumer-Generated Media and Advertising-Are They One and the Same? An Analysis of the Amended FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 10 J. MARSHALL REV. INTELL. PROP. L. 206, 209-11 (2010).

<sup>99</sup> FTC Practice Rules, 16 C.F.R. § 1.5 (2012).

<sup>100</sup> 15 U.S.C. § 45(b) (2010).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> 15 U.S.C. § 45(b) and (c) (2010).

If an FTC cease and desist order is violated, a civil penalty of “not more than \$10,000 for each violation” may be “forfeit[ed] and pay[ed] to the United States” in a civil action brought by the Attorney General of the United States<sup>106</sup> or by the FTC.<sup>107</sup> A U.S. district court may also grant injunctions and other equitable relief to enforce final orders of the FTC.<sup>108</sup> In addition, if the FTC proves to a federal court that a reasonable person would have known that the act or practice, which is the subject of the final cease and desist order, was “dishonest or fraudulent”<sup>109</sup> the court may grant whatever relief it deems necessary including, but not limited to, rescission or reformation of contracts, the refund of money, return of property, the payment of damages, and public notification, but not punitive damages.<sup>110</sup>

On December 1, 2009, the FTC’s latest version of the Endorsement Guides took effect<sup>111</sup> reflecting the first updates to them in twenty-nine years.<sup>112</sup> The public comments to the revised Guides “correctly point out that the recent developments of a variety of consumer-generated media poses new questions about how to distinguish between communications that are considered ‘endorsements’ within the meaning of the Endorsement Guides and those that are not.”<sup>113</sup>

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 ad-

<sup>106</sup> 15 U.S.C. § 45(l) (2010). Clarification in brackets added.

<sup>107</sup> 15 U.S.C. § 45(m)(1)(A) (2010).

<sup>108</sup> 15 U.S.C. § 45(l) (2010)

<sup>109</sup> 15 U.S.C. § 57b(a)(2) (2010).

<sup>110</sup> 15 U.S.C. § 57b(b) (2010). See discussion *infra* Section IV. A. Apply FTC Endorsement Guides with Specific Rules for Robots and note 153 on the question of whether it is fraud if the controllers of the Robot engaged in behavior that demonstrated that they attempted to trick people into believing that the Robot was a real person and secured some benefit based on that trickery.

<sup>111</sup> Notice of Adoption Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53124, 53125 (Oct. 15, 2009) [hereinafter Notice of Adoption]. The Guides for Endorsements and Testimonials can be found at 16 C.F.R. §§ 255.0-255.5 (July 3, 2019).

<sup>112</sup> See Press Release, *FTC Publishes Final Guides Governing Endorsements, Testimonials. Changes Affect Testimonial Advertisements, Bloggers, Celebrity Endorsements*, FED. TRADE COMM’N, available at <http://www.ftc.gov/opa/2009/10/endortest.shtm> [<https://perma.cc/BHX8-WN5Z>] (last visited July 8, 2019); see also Godell, *supra* note 98.

<sup>113</sup> Notice of Adoption, *supra* note 111.

vertiser. 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.<sup>114</sup>

According to the FTC, in order to determine if a statement is an endorsement, the fundamental question is whether, viewed objectively, “the relationship between the advertiser and the speaker is such that the speaker’s statement can be considered ‘sponsored’ by the advertiser and therefore an ‘advertising message.’”<sup>115</sup>

In other words, in disseminating positive statements about a product or service, is the speaker: (1) acting solely independently, in which case there is no endorsement, or (2) acting on behalf of the advertiser or its agent, such that the speaker’s statement is an ‘endorsement’ that is part of an overall marketing campaign? The facts and circumstances that will determine the answer to this question are extremely varied and cannot be fully enumerated here, . . .<sup>116</sup>

The Endorsement Guides instruct that endorsements must “reflect the honest opinions, findings, beliefs, or experience of the endorser” and “an endorsement may not convey any express or implied representation that would be deceptive if made directly by the advertiser.”<sup>117</sup> Furthermore, if an advertisement represents that the endorser uses the endorsed product, the endorser must be a bona fide user of a product.<sup>118</sup>

The Endorsement Guides, in 16 C.F.R. § 255.1(d), make it clear that “[a]dvertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers.”<sup>119</sup> The Endorsement Guides further state that: “Endorsers also may be liable for statements made in the course of their endorsements.”<sup>120</sup> For example, if an endorser claims that a

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<sup>114</sup> 16 C.F.R. § 255.0(c) (2010) (“The Commission intends to treat endorsements and testimonials identically in the context of its enforcement of the Federal Trade Commission Act”).

<sup>115</sup> See Notice of Adoption, *supra* note 111, at 53126.

<sup>116</sup> *Id.* Since they could not “fully enumerate” all facts and circumstances, the Guides included some examples: whether the speaker is compensated; whether the product or service was provided for free by the advertiser; the terms of any agreement; the length of the relationship; the previous receipt of products or services from the same or similar advertisers; or the likelihood of future receipt of such products or services; and the value of the items or services received.

<sup>117</sup> 16 C.F.R. § 255.1(a) (2010).

<sup>118</sup> *Id.* at § 255.1(b).

<sup>119</sup> *Id.* at § 255.1(d).

<sup>120</sup> *Id.*

product works well and is effective, and it in fact does not, then the endorser can be held liable.<sup>121</sup> Whether reading from a script or using their own words, endorsers must be especially careful with statements that amount to testimonials that describe a product's efficacy or benefits.<sup>122</sup> "The Commission is not persuaded that a celebrity endorser's contractual obligation to read the script he or she is given should confer immunity from liability for misrepresentations made in the course of that endorsement."<sup>123</sup> In other words, an endorser's testimonial must be accurate and not just part of a script, so that the consumer is not deceived.<sup>124</sup>

The language in 16 C.F.R. § 255.1(d) attempts to provide clarity regarding possible liability for endorsers, bloggers, advertisers, and those who publish endorsements on social media after using a product. In discussing § 255.1(d) of the FTC, the Federal Register states that "if the advertiser initiated the process that led to these endorsements being made – e.g., by providing products to well-known bloggers or to endorsers enrolled in word of mouth marketing programs – it potentially is liable for misleading statements made by those consumers."<sup>125</sup>

As stated in the Endorsement Guides at 16 C.F.R. § 255.5, entitled *Disclosure of Material Connections*:

When 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 (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed.<sup>126</sup>

In determining if an advertisement is deceptive, the FTC first looks at the advertisement from the perspective of a "reasonable consumer" which the FTC defines as "the typical person looking at the ad."<sup>127</sup> In 2015 the FTC issued its "Enforcement Policy Statement on Deceptively Formatted

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<sup>121</sup> See Notice of Adoption, *supra* note 111, at 53128.

<sup>122</sup> See *id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53124, 53127 (Oct. 15, 2009).

<sup>126</sup> 16 C.F.R. § 255.5 (2010) (offering additional guidance concerning endorsements by listing nine hypothetical examples and suggesting appropriate disclosure solutions).

<sup>127</sup> *Advertising FAQ's: A Guide for Small Business*, FED. TRADE COMM'N (Apr. 2001), <https://www.ftc.gov/tips-advice/business-center/guidance/advertising-faqs-guide-small-business> [<https://perma.cc/H9YT-JDN2>].

Advertisements.”<sup>128</sup> In it, the FTC articulated the test as set forth in its 1983 policy statement: “a representation, omission, or practice is deceptive if it is likely to mislead consumer acting reasonably under the circumstances and is material to consumers; in other words, it is likely to affect the consumer’s conduct or decision with regard to a product or service.”<sup>129</sup> In this 2015 Enforcement Policy Statement, the FTC further elaborated on the nature of the “reasonable consumer.”<sup>130</sup> To be reasonable, “an interpretation or response of consumers to a particular ad need not be the only one nor shared by a majority of consumers.”<sup>131</sup> Rather, “[i]nterpretations that advertisers intend to convey about an advertisement’s nature or source are presumed reasonable.”<sup>132</sup> Thus, in “evaluating whether reasonable consumers would recognize ads . . . the Commission will consider the particular circumstances in which the ad was disseminated, including customary expectations based on consumers’ prior experience with the media in which it appears and the impression communicated by the ad’s format.”<sup>133</sup> Hence, by way of simple illustration, a consumer who sees Shaquille O’Neal advertising Carnival Cruise Lines in a television commercial, or hears Steph Curry promoting Adidas in a newspaper ad, would reasonably assume a material connection between the celebrities and the brands.

The FTC then went on, in this document, to define the “reasonable consumer” in the context of advertising and promotional messages directed toward a specific target audience, stating that “[i]ncreasingly, in digital media, advertisers can target natively formatted ads to individual consumers and even tailor the ad’s messaging to appeal to the known preferences of these consumers.”<sup>134</sup> The FTC concluded that “[t]o the extent that an advertisement is targeted to a specific audience, the Commission will consider the effect of the ad’s format on reasonable or ordinary members of *that targeted group* (emphasis added).”<sup>135</sup> Although this FTC guidance was primarily in the context of native advertising, its clarification of what constitutes a “reasonable consumer” is still instructive. Ultimately, whether or not there is

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<sup>128</sup> *Enforcement Policy Statement on Deceptively Formatted Advertisements*, FED. TRADE COMM’N (Dec. 22, 2015), available at [https://www.ftc.gov/system/files/documents/public\\_statements/896923/151222deceptiveenforcement.pdf](https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf) [<https://perma.cc/REN5-EVBL>].

<sup>129</sup> *Id.* at 1.

<sup>130</sup> *Id.* at 11.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 11-12.

<sup>134</sup> *Id.* at 12.

<sup>135</sup> *Id.*

sufficient disclosure of a material connection depends on who the “reasonable consumer” is.<sup>136</sup>

The Endorsement Guides reiterate the FTC’s expectation that all bloggers and persons who endorse products or services on the Internet, as well as celebrities or well-known athletes who do the same, disclose any contractual relationship, or other material connection, that they have with a company in any situations where the audience would not reasonably expect that a material connection exists.<sup>137</sup> As stated above, the FTC’s mission is to “protect consumers and competition.”<sup>138</sup> With the growing popularity of influencer marketing on social media platforms over the past several years, the FTC has stepped up its enforcement not only against brands, but more importantly against the social media influencers themselves, as demonstrated in the CSGO Lotto case.<sup>139</sup>

In some instances, brands and Robots are beginning to adhere to the FTC’s disclosure guidelines in various ways on different channels. Instagram added the “Paid Partnership With” tag in March 2017<sup>140</sup> which is visible in Miquela Sousa’s controversial Calvin Klein post. Many posts include various hashtags such as #ad, #sponsored, and #paid, and the FTC has generally voiced its approval of these hashtags as a method for disclosing a material connection, provided the hashtag’s meaning is commonly understood, and provided it is not buried in a string of other hashtags in which it would be less likely to be clearly noticed.<sup>141</sup> Given, however, that the Endorsement Guides were written prior to the advent of the virtual influencer industry,

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<sup>136</sup> See generally Celine Shirooni, *Native Advertising in Social Media: Is the FTC’s “Reasonable Consumer” Reasonable?*, 56 WASH. U. J.L. & POL’Y 221 (2018).

<sup>137</sup> 16 C.F.R. § 255.5 (2010).

<sup>138</sup> *About the FTC*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc> [<https://perma.cc/L4N8-XLSM>] (last visited May 19, 2020).

<sup>139</sup> See *CSGO Lotto Owners Settle FTC’s First-Ever Complaint Against Individual Social Media Influencers*, FED. TRADE COMM’N, available at <https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against> [<https://perma.cc/9QUH-BUHD>]. See In the Matter of CSGO Lotto, Inc., Agreement Containing Consent Order, File No. 162-3184, FED. TRADE COMM’N (Nov. 29, 2017), [https://www.ftc.gov/system/files/documents/cases/1623184\\_csgolotto\\_agreement\\_and\\_decision\\_and\\_order.pdf](https://www.ftc.gov/system/files/documents/cases/1623184_csgolotto_agreement_and_decision_and_order.pdf) [<https://perma.cc/4TYQ-V5NA>]. The FTC ordered two social medial influencers to “clearly and conspicuously disclose any material connections with an endorser or between an endorser and any promoted product or service.” See also Appendix A for a more comprehensive review of the FTC’s enforcement actions.

<sup>140</sup> *FTC Rules for Influencers - Here Are the Key Takeaways for Brands*, GRIN (Apr. 8, 2019), <https://www.grin.co/blog/ftc-rules-for-influencers> [<https://perma.cc/RQ6H-4PS2>].

<sup>141</sup> Fair, *supra* note 6, at 5.

the increasing popularity and prominence of Robots has raised important questions as to how they must or can abide by them. According to Columbia University marketing professor Olivier Toubia, “There is room for consumers to be confused.”<sup>142</sup> Syracuse University communications Professor Jennifer Grygiel echoed a similar sentiment: “It’s not obvious that she (lilmiquela) is a CGI [robot] and it’s not obvious on the post level. It’s deeply problematic.”<sup>143</sup>

#### IV. HOW SHOULD THE FTC HANDLE ROBOTS?

Regardless of whether a social media influencer is human or computer-generated, one cannot argue the merits of the Endorsement Guides: to prevent the “reasonable consumer” from being misled or deceived by messages that are designed and intended to “influence” these consumers. To date, however, the FTC has not established guidelines specifically addressing the issues attendant to Robots other than to publicly announce that the Endorsement Guides “do apply.”<sup>144</sup> Given the challenges of applying the current language and interpretations of the FTC Guides to Robots, we propose that the FTC can go one of two ways.

One path is to apply the FTC Guides, with specific rules for Robots, because they are masquerading as a human endorser of products. The second path is that the FTC simply cannot apply the Guides to Robots as they are not human beings. We examine both of these paths below in more detail.

##### A. *Apply the FTC Endorsement Guides with Specific Rules for Robots*

Perhaps the strongest argument for a clear application of the Endorsement Guides to Robots is the fact that the Guides apply a duty on the part of the companies and brands seeking to use social media influencers to have those influencers follow the Endorsement Guides when promoting their products and services.<sup>145</sup> In other words, regardless of whether the influencer is a human being or a CGI Robot, the Endorsement Guides place an equal onus on the endorsed brand to ensure that its influencers disclose any material connections. In fact, until fairly recently, the bulk of the FTC’s enforce-

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<sup>142</sup> Kaya Yurieff, *Instagram Star Isn’t What She Seems but Brands Are Buying In*, CNN (June 25, 2018, 11:23 AM), <https://money.cnn.com/2018/06/25/technology/lilmiquela-social-media-influencer-cgi/index.html> [https://perma.cc/ESR6-866S].

<sup>143</sup> *Id.*

<sup>144</sup> Jain & Kessler, *supra* note 26.

<sup>145</sup> Telephone interview with Jim Dudukovich, Counsel, Bryan Cave Leighton Paisner, LLP, (Dec. 28, 2019).

ment actions have come against companies and brands, not against the influencers.<sup>146</sup> Hence, from this perspective, the argument holds that “even if they’re not real, CGIs can still exert influence, and so people still have the right to know that they are somehow being compensated, and so the brand that hires the [Robot] CGI should mandate that it make a disclosure.”<sup>147</sup>

Conceding this point, however, we contend that consumers then *also* have the right to know that Robots, who are endorsing products that consumers are considering buying, are not *real people*. The CGI production companies, obviously not the Robots, may indeed be receiving some material compensation.<sup>148</sup> The Robot’s endorsement of the product or service is in no way based upon its *bona fide* use of the product or service, nor is it based upon personal opinions, beliefs, or experiences with or about the product or service because the Robots never use a product. Toward this end, we propose that if the Endorsement Guides are to apply, the FTC develop and promulgate specific rules for the use of CGIs as virtual influencers in order to alleviate any potential misleading or deceptive behavior.<sup>149</sup>

Since Robots are masquerading as humans who are endorsing products, the guides should apply to Robots and their creators. Just as Twitter has developed the “blue check” to serve as a proof of authentication of an influencer account, the FTC could develop a universal icon (such as a small red gear cogwheel) applicable to all social media platforms that all Robot accounts are required to prominently display.<sup>150</sup> Second, the top of the landing page of each social media platform used by a Robot could be required to provide a prominent disclosure statement such as the following: “I’m a computer-generated image created by XYZ Company which is compensated for brands that I promote on this social media channel.”<sup>151</sup> One potential issue with this tactic is that this statement may not “travel” with a particular

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> In reality, it is the CGI production companies behind the virtual influencers who are being compensated.

<sup>149</sup> 16 C.F.R. § 255.1(a) and (b) (2009).

<sup>150</sup> Alternatively, the FTC could require each social media platform to develop an appropriate icon for its platform that would immediately indicate to consumers that the influencer is a CGI. Granted, one could argue that consumers might not know what the icon means. However, as with Twitter’s blue check, eventually, the users of this social media platform quickly came to learn what the icon means.

<sup>151</sup> This type of approach to disclosure of materials connections has been deemed appropriate by the FTC. For an example of this approach involving New Orleans Saints quarterback Drew Brees. See Natasha T. Brison et al, *Tweets and Crumpets: Examining U.K. and U.S. Regulation of Athlete Endorsements and Social Media Marketing*, 23 J. LEGAL ASPECTS SPORT 55, 70 (2013).



post, and so it would only be effective for posts when they are seen on that particular landing page. The third approach, and admittedly likely the least impactful, would be to require all Robots to prominently disclose their identity by including #ROBOT in all places in which it should otherwise include a material connection disclosure (such as #adv) pursuant to the Guide's requirements on hashtag usage generally.<sup>152</sup> We can think of little on its face that may be more potentially deceptive and misleading than trying to pawn off CGI Robots as "real people."<sup>153</sup> Hence, if the purpose of the Endorsement Guides is to protect consumers from deceptive and misleading advertising, we believe that the above measures would be a good start to effectively accomplishing this mission.

*B. Endorsement Guides Need Not Apply to Robots*

In the alternative, there are two separate and distinct approaches we take in arguing that the Endorsement Guides should simply be discarded in the context of Robots, who are not human, although they are pretending to be human endorsers. The FTC guides were simply not written for non-human beings. In addition, the FTC Guides should not apply to Robots because of the growing sophistication of consumers. We contend that the reasonable consumer can, or certainly should, be able to distinguish real people from Robots. Put another way, a reasonable consumer should be able to understand fact from fiction. The time has come for the FTC to better align its "reasonable consumer" test with the sophistication and expectations of today's typical users of social media. We further explain and examine these arguments below.

On the simplest and most literal level, the language of the Endorsement Guides cannot apply to non-humans for a number of reasons. First, the Guides identify endorsements and testimonials as any advertising messages that consumers are likely to believe reflect "the honest opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser."<sup>154</sup> As consumer-generated images, Robots are quite literally incapable of forming any such opinions or beliefs with regard to products or services. They are also literally incapable of having "findings" or real-life experiences within the meaning and purpose of this provision of the Guides. Second, the Guides

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<sup>152</sup> *Id.*

<sup>153</sup> One might even make the argument that the creators of Robots may be liable for fraudulent behavior in violation of 15 U.S.C. § 57(a)(2) (2010) if they attempted to trick people into believing that a Robot was a real person and secured some benefit based on this trickery.

<sup>154</sup> 16 C.F.R. § 255.0(b) (2009).

require that endorsers disclose “material connections” that exist between the “endorser” and the sponsoring company.<sup>155</sup> While it may be true that the *creators* of the Robots may be receiving some material benefit—i.e., free product or monetary compensation—or otherwise have a material connection with the brand, it is again literally impossible for a Robot to receive or accept any such material benefit. Finally, the Guides require that when the advertisement represents that the endorser uses the endorsed product, said endorsers must be “bona fide user[s] of it at the time the endorsement was given.”<sup>156</sup> While one might stretch the argument that a Robot can actually “wear” clothes or cologne, this cannot happen in the literal sense any more so than it can be said that soccer Robot Alex Hunter drinks Coca-Cola products. In sum, applying the Endorsement Guides to Robots, when they were specifically designed to apply to human individuals and incorporations, is inappropriate on its face.

Our second line of analysis in relation to the applicability of the Endorsement Guides to Robots is premised on the growing sophistication of social media consumers within the context of how we define the “reasonable consumer.”<sup>157</sup> We contend that the “reasonable consumer” can, or should, be able to distinguish real people from Robots.<sup>158</sup> Certainly, we readily expect such discernment of real versus fictional characters in mediums such as movies, literature, and video games. This argument is further strengthened when one considers that the FTC’s criteria is that 25% of consumers tested must be misled by the advertisement.<sup>159</sup> Put another way, more than a quarter of reasonable consumers would need to be deceived into believing not only that a Robot is a real person but, within the context of the Enforcement Guides, is also expressing its genuine opinions, beliefs, and experiences with the product, as well as being a “bona fide” user of the product.

Building upon our argument that the Endorsement Guides should not apply to Robots due to the increasing sophistication of the “reasonable consumer,” we turn first to the FTC’s historical notion of the “reasonable con-

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<sup>155</sup> 16 C.F.R. § 255.5 (2009).

<sup>156</sup> 16 C.F.R. § 255.1(c) (2009).

<sup>157</sup> See Shirooni, *supra* note 136.

<sup>158</sup> A consumer who is unable to make this distinction might be otherwise called an “ignorant consumer,” whom the FTC is not responsible for protecting from him or herself. See generally Ivan Preston, *Reasonable Consumer or Ignorant Consumer: How the FTC Decides?*, 8 J. CONSUMER AFFS. 131, 131-43 (1974).

<sup>159</sup> See Brison et al., *supra* note 151, at 65 (citing Basak Cali, *On Interpretivism and International Law*, 20 EUR. J. INT’L L. 805, 807 (2009)). The FTC’s 25% standard is a less rigorous standard as compared to the U.K. standard whereby an advertisement could be banned if there is the potential for one consumer to be misled. *Id.*

sumer.”<sup>160</sup> As already noted, the FTC, in its December 22, 2015 *Enforcement Policy Statement on Deceptively Formatted Advertisements*, reiterated that “a representation, omission, or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and is material to consumers – that is, it would likely affect the consumer’s conduct or decision with regard to a product or service.”<sup>161</sup> Further, in the same 2015 policy statement, the FTC elaborated on the nature of the “reasonable consumer” when “evaluating whether reasonable consumers would recognize ads . . . the Commission will consider the particular circumstances in which the ad was disseminated, including customary expectations based on consumers’ prior experience with the media in which it appears and the impression communicated by the ad’s format.”<sup>162</sup>

Especially given the constant emergence of new technologies, the FTC has continued to grapple with the question of how to establish clear guidelines for advertisers, and also human influencers, so that the “reasonable consumer” is aware of material connections between the advertiser and the influencer.<sup>163</sup> As suggested by Shirooni, the notion of what is a “reasonable consumer” has evolved with the differing type of media.<sup>164</sup> Certainly, when an average consumer sees a television advertisement or hears a radio advertisement featuring a spokesperson, he or she reasonably knows that there is some material connection between the advertiser and the spokesperson. In the early days of social media, one can see how a reasonable consumer could be misled or deceived by influencers. However, over time, and particularly given the sophistication of the younger users of social media,<sup>165</sup> one can argue that as platforms like Twitter and Instagram have become ubiquitous, promotional messaging has become no different than that which appears on television or radio. Today’s “reasonable consumer” knows that someone

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<sup>160</sup> See Shirooni, *supra* note 136.

<sup>161</sup> See *Enforcement Policy Statement*, *supra* note 128. Although this particular policy statement addressed advertising and promotional messages integrated into and presented as non-commercial content, this language represents essentially the same test for social media posts.

<sup>162</sup> *Id.* at 11.

<sup>163</sup> See Fair, *supra* note 6.

<sup>164</sup> See Shirooni, *supra* note 136.

<sup>165</sup> *Id.* at 234. Shirooni argues that “in stark contrast to the consumers of the past, the consumers of social media are undoubtedly unique. There are many defining characteristics of the social media consumer that separate them from the consumers of print, radio, or television media . . . [I]t is undeniable that the ‘reasonable consumer’ of social media advertisements is not an ‘average consumer.’” *Id.*

touting a product or service is receiving some type of material compensation for doing so.<sup>166</sup>

Prior to the creation of social media, consumers intuitively expected that celebrities endorsing products and services on television, radio, and in-print were somehow being compensated.<sup>167</sup> It is reasonable to assume, arguably, that today's habitual user of social media would likewise expect that celebrities whom they see or hear endorsing products and services on social media platforms are being somehow compensated. Indeed, the Endorsement Guides themselves recognize this phenomenon in its example of a movie star endorsing a food product.<sup>168</sup> The example states, in relevant part: "regardless of whether the star's compensation for the commercial is a \$1 million cash payment or a royalty for each product sold by the advertiser during the next year, no disclosure is required *because such payments likely are ordinarily expected by viewers.*"<sup>169</sup> As Shirooni insightfully contends:

"When a celebrity is seen in her professional capacity, for example at a press junket, in a film or television show, or on the red carpet, it can safely be assumed that a consumer will realize that the celebrity is being compensated to wear or use a particular brand. . . . social media consumers arguably *expect* that Instagram posts from celebrities raving about a product are paid endorsements, even without a disclosure. The Instagram post has therefore become an additional arena for celebrities to behave in their professional capacities. The social media post is the new red carpet."<sup>170</sup>

Indeed, the landscape of social media has quickly evolved to a point necessitating that the FTC broaden its outdated test of what constitutes a "reasonable consumer."<sup>171</sup> Today's typical user of social media is most likely very computer literate and comfortable with technology.<sup>172</sup> Social media platforms like Twitter and Instagram have become ubiquitous enough that,

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<sup>166</sup> The FTC accepted this concept in a 2009 incident involving Gwyneth Paltrow, who posted favorably on her personal blog about a hotel resort without disclosing her complimentary hotel stay. The FTC declined to take further action against Paltrow, reasoning that for some celebrities, consumers automatically assume that they have been compensated for their tweet or blog, and hence disclosure is not necessary. See Jeff Bercovici, *How the FTC's Endorsement Rules Unfairly Favor Celebrities*, AOL (Jan. 6, 2010, 6:30 PM), <https://www.aol.com/2010/01/06/how-the-ftcs-endorsement-rules-unfairly-favor-celebrities/> [https://perma.cc/6B8U-MY6T].

<sup>167</sup> Shirooni, *supra* note 136, at 226.

<sup>168</sup> 16 C.F.R. §255.5 (2009).

<sup>169</sup> *Id.* (emphasis added).

<sup>170</sup> Shirooni, *supra* note 136, at 238.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 234.

from a commercial standpoint, they are in many ways no different than what television and radio was in the past. As such, the “reasonable consumer” of social media influencers is wise enough to discern what is going on as they are “in on the secret.”<sup>173</sup> Hence if we conclude that disclosures are increasingly no longer required for human celebrities acting as influencers, one can then make the same argument for Robots.

## V. CONCLUSION

As the social media landscape continues to grow and evolve, the FTC faces an ongoing challenge with regard to how to handle and instruct influencers in the overall economy and the sports and entertainment space. Exacerbating the challenge is the notion that, arguably, social media is fast becoming, if it hasn't already become, just another form of media whereby the “reasonable consumer” expects that influencers, and celebrity and athlete influencers, are being compensated for promoting products and services. Yet, while the Endorsement Guides and subsequent documents have been written to address humans, the FTC has yet to elaborate on how its Guides are to apply to the growing universe of Robots. We likewise don't have the answer. We have, however, attempted to present and analyze the options. Thus, we propose one approach in which Robots would be required to disclose any material connections, but through a specific set of tactics designed to clearly and unequivocally identify them as Robots so as to eliminate the potential of misleading or deceiving the consumer. The second approach we propose is that, when it comes to Robots specifically, no disclosures be required either because the Guides cannot, in a purely literal sense, be applied to Robots and/or because of the increasing sophistication of today's “reasonable consumer.”

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<sup>173</sup> *Id.* at 236.

APPENDIX A – COMPREHENSIVE TIMELINE OF FTC GUIDANCE  
AND ENFORCEMENT ACTIONS<sup>174</sup>

Over the years, the FTC has taken a number of actions to enforce the principles articulated in the Endorsement Guides, including the following:

**April 2010:** FTC issues closing letter to Ann Taylor Stores<sup>175</sup> for providing gifts to bloggers in exchange for their attendance at an event it hosted for its LOFT collection. The FTC voiced concerns that the bloggers who attended were likely to post about the event and the collection without disclosing that they had received a gift. The FTC opted not to take enforcement action due to the small number of bloggers who actually attended, the fact that several of them who blogged included a disclosure, and Ann Taylor's issuance of a written policy not to issue gifts to bloggers without advising them of their responsibility to disclose it.

**August 2010:** FTC announces Consent Order with Reverb Communications, a PR firm that encouraged its employees to post positive reviews of its clients' apps in the iTunes store without disclosing their relationship.<sup>176</sup>

**March 2011:** FTC announces Consent Order with Legacy Learning Systems for its affiliate marketing practices, through which affiliates would post positive reviews of its instructional DVDs without disclosing their connection to Legacy Learning and receive commissions from sales made via hyperlinks posted with those reviews.<sup>177</sup>

**May 2012:** FTC hosts a public workshop entitled *In Short: Advertising & Privacy Disclosures in a Digital World*.<sup>178</sup>

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<sup>174</sup> Again, the authors wish to thank Jim Dudukovich, Counsel with Bryan Cave Leightron Paisner, LLP, for contributing to the research in Appendix A.

<sup>175</sup> AnnTaylor Stores Corp., File No. 102-3147, FED. TRADE COMM'N (Apr. 20, 2010), *available at* [https://www.ftc.gov/sites/default/files/documents/closing\\_letters/anntaylor-stores-corporation/100420anntaylorclosingletter.pdf](https://www.ftc.gov/sites/default/files/documents/closing_letters/anntaylor-stores-corporation/100420anntaylorclosingletter.pdf) [<https://perma.cc/PW5Z-PT8F>].

<sup>176</sup> In the Matter of Reverb Communications, Inc., et al., File No. 092 3199, FED. TRADE COMM'N (Nov. 26, 2010), *available at* <https://www.ftc.gov/enforcement/cases-proceedings/092-3199/reverb-communications-inc> [<https://perma.cc/VZ7C-252N>].

<sup>177</sup> In the Matter of Legacy Learning Systems, Inc., et al., File No. 102-3055, FED. TRADE COMM'N (June 10, 2011), *available at* <https://www.ftc.gov/enforcement/cases-proceedings/102-3055/legacy-learning-systems-inc-et-al-matter> [<https://perma.cc/3V8F-FFAL>].

<sup>178</sup> In Short: Advertising & Privacy Disclosures in a Digital World, FED. TRADE COMM'N (May 30, 2012), *available at* <https://www.ftc.gov/news-events/events-calendar/2012/05/short-advertising-privacy-disclosures-digital-world> [<https://perma.cc/JD53-WC92>].

**March 2013:** FTC issues *.com Disclosures: How to Make Effective Disclosures in Digital Advertising*.<sup>179</sup>

**Feb. 2014:** FTC issues closing letter to Village Green Network in connection with its practice of acting as an intermediary between marketers and its network of bloggers to facilitate payments from the marketers to the bloggers to promote their products.<sup>180</sup> The FTC opted not to take enforcement action based on its being a case of first impression (e.g., involving an intermediary network) and the small number of blog postings that were deficient. But the FTC made clear that in order to be compliant, intermediaries like Village Green must inform their bloggers of their responsibility to be transparent.

**March 2014:** FTC announces Consent Order with ADT for hiring spokespeople to appear on television programming as home security, child safety, or technology experts and to recommend ADT systems without disclosing they were paid endorsers.<sup>181</sup>

**March 2014:** FTC issues closing letter to Cole Haan in connection with its “Wandering Sole” contest, which required participants to post five photos of Cole Haan shoes on a Pinterest board and tag it #WanderingSole for a chance to win a \$1,000 shopping spree; this was a case of first impression, so the FTC opted not to take enforcement action, but the FTC opined that going forward these types of contest entries should be considered endorsements and require a clear disclosure of a material connection (such as #ColeHaanContest).<sup>182</sup>

**Sept. 2014:** FTC issues closing letter to Yahoo in connection with the posting by Yahoo employees of positive reviews of Yahoo apps in the iTunes store without disclosing that they were employees. The FTC opted not to take enforcement action based on the small number of them, the fact that Yahoo didn’t encourage or incentivize the activity, the fact that the app was free, and Yahoo’s commitment to improving its social media policy.<sup>183</sup>

**March 2015:** FTC announces final orders with Sony and its advertising agency Deutsch in connection with a campaign which (a) made misleading statements about Sony’s PS Vita product, and (b) involved a

<sup>179</sup> *Supra* note 10.

<sup>180</sup> Village Green Network, FTC File No. 132-3267, FED. TRADE COMM’N (Feb. 18, 2014), *available at* [https://www.ftc.gov/system/files/documents/closing\\_letters/village-green-network/140218villagegreenetter.pdf](https://www.ftc.gov/system/files/documents/closing_letters/village-green-network/140218villagegreenetter.pdf) [<https://perma.cc/69TB-TNJP>].

<sup>181</sup> *Home Security Company ADT Settles FTC Charges that Endorsements Deceived Consumers*, FED. TRADE COMM’N (Mar. 6, 2014), <https://www.ftc.gov/news-events/press-releases/2014/03/home-security-company-adt-settles-ftc-charges-endorsements> [<https://perma.cc/F9LK-GW45>].

<sup>182</sup> Cole Haan, FTC File No. 142-3041, FED. TRADE COMM’N (Mar. 20, 2014), *available at* [https://www.ftc.gov/system/files/documents/closing\\_letters/cole-haan-inc./140320colehaanclosingletter.pdf](https://www.ftc.gov/system/files/documents/closing_letters/cole-haan-inc./140320colehaanclosingletter.pdf) [<https://perma.cc/8AU3-J4BU>].

<sup>183</sup> Yahoo App Reviews, File No. 142-3092, FED. TRADE COMM’N (Sept. 3, 2014), [https://www.ftc.gov/system/files/documents/closing\\_letters/yahoo-app-reviews/140903zwillingletter.pdf](https://www.ftc.gov/system/files/documents/closing_letters/yahoo-app-reviews/140903zwillingletter.pdf) [<https://perma.cc/N77F-GXPB>].

concerted effort by Deutsch to have its employees promote the product on social media without disclosing that they worked for Sony's agency.<sup>184</sup>

**May 2015:** FTC issues *The FTC Endorsement Guides: What People are Asking*.<sup>185</sup>

**March 2016:** FTC announces Consent Order with Lord & Taylor for a campaign in which it (a) paid for misleading native advertising promoting its collection in Nylon magazine (ads that looked like editorial posts), and (b) gave 50 fashion influencers a dress and paid them to post pictures of themselves wearing it without disclosing that they were paid or given something.<sup>186</sup>

**March 2016:** FTC announces Consent Order with Machinima for a campaign in which Machinima had been hired by Microsoft's agency to promote Microsoft's Xbox One system and several games and, without Microsoft's or its agency's knowledge, paid YouTube influencers to post videos promoting them without disclosing that they were paid.<sup>187</sup>

**July 2016:** FTC announces Consent Order with Warner Bros. for a campaign in which WB paid influencers anywhere from hundreds to tens of thousands of dollars to post and promote positive gameplay videos for WB's *Shadow of Mordor* game.<sup>188</sup>

**April 2017:** "Educational" letters are sent by FTC to 90 influencers and brands.<sup>189</sup>

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<sup>184</sup> *FTC Approves Final Orders Related to False Advertising by Sony Computer Entertainment America and Its Ad Agency Deutsch LA for PS Vita Game Console*, FED. TRADE COMM'N (Mar. 31, 2015), <https://www.ftc.gov/news-events/press-releases/2015/03/ftc-approves-final-orders-related-false-advertising-sony-computer> [<https://perma.cc/SB6G-47UJ>].

<sup>185</sup> *Supra* note 11.

<sup>186</sup> *Lord & Taylor Settles FTC Charges It Deceived Consumers Through Paid Article in an Online Fashion Magazine and Paid Instagram Posts by 50 "Fashion Influencers"*, FED. TRADE COMM'N (Mar. 15, 2016), <https://www.ftc.gov/news-events/press-releases/2016/03/lord-taylor-settles-ftc-charges-it-deceived-consumers-through> [<https://perma.cc/ZYJ8-P8ZD>].

<sup>187</sup> *FTC Approves Final Order Prohibiting Machinima, Inc. from Misrepresenting that Paid Endorsers in Influencer Campaigns are Independent Reviewers*, FED. TRADE COMM'N (Mar. 17, 2016), <https://www.ftc.gov/news-events/press-releases/2016/03/ftc-approves-final-order-prohibiting-machinima-inc> [<https://perma.cc/F4WG-MRGE>].

<sup>188</sup> *Warner Bros. Settles FTC Charges It Failed to Adequately Disclose It Paid Online Influencers to Post Gameplay Videos*, FED. TRADE COMM'N (July 11, 2016), <https://www.ftc.gov/news-events/press-releases/2016/07/warner-bros-settles-ftc-charges-it-failed-adequately-disclose-it> [<https://perma.cc/8WUQ-KBCB>].

<sup>189</sup> *FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship*, FED. TRADE COMM'N (Apr. 19, 2017), <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose> [<https://perma.cc/PX6Y-Y69W>].



Sept. 2017: Actual *warning letters* issued by FTC to 21 of those influencers.<sup>190</sup>

Sept. 2017: FTC announces Consent Order with owners of CSGO Lotto for promoting the CSGO Lotto service without disclosing that they were owners of the service; this was the first-ever complaint filed by the FTC against individual social media influencers (who, as noted, also happened to be the owners of the company being promoted).<sup>191</sup>

Sept. 2017: FTC issues updated version of *The FTC Endorsement Guides: What People are Asking*, which includes 20 additional questions and answers.<sup>192</sup>

Sept 20, 2017: FTC hosts a Twitter Q&A on influencer marketing.<sup>193</sup>

Nov. 2018: FTC announces Consent Order with Creaxion for running a campaign promoting its client's mosquito repellent using misleading native advertising and endorsements by gold medal athletes who did not disclose that they were compensated.<sup>194</sup>

Feb. 2019: FTC announces Consent Order with Cure Encapsulations, a company that bought fake Amazon reviews for its products to boost its average rating.<sup>195</sup>

April 2019: FTC announces Consent Order with UrthBox based on its practice of furnishing free products to consumers who posted positive reviews of UrthBox without any disclosure that they were being compensated.<sup>196</sup>

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<sup>190</sup> Warning Letter, FED. TRADE COMM'N (Sept. 6, 2017), [https://www.ftc.gov/system/files/attachments/press-releases/los-propietarios-de-csgo-lotto-resuelven-la-primera-demanda-jamas-entablada-contrainfluyentes-de-instagram\\_influencer\\_warning\\_letter\\_template\\_9-6-17.pdf](https://www.ftc.gov/system/files/attachments/press-releases/los-propietarios-de-csgo-lotto-resuelven-la-primera-demanda-jamas-entablada-contrainfluyentes-de-instagram_influencer_warning_letter_template_9-6-17.pdf) [<https://perma.cc/4UE4-J7GM>].

<sup>191</sup> *Supra* note 139.

<sup>192</sup> *Supra* note 11.

<sup>193</sup> *FTC to Hold Twitter Chat on Social Media Influencer Disclosures*, FED. TRADE COMM'N (Sept. 18, 2017), <https://www.ftc.gov/news-events/press-releases/2017/09/ftc-hold-twitter-chat-social-media-influencer-disclosures> [<https://perma.cc/W42L-VCHU>].

<sup>194</sup> *PR Firm and Publisher Settle FTC Allegations They Misrepresented Product Endorsements as Independent Opinions, Commercial Advertising as Editorial Content*, FED. TRADE COMM'N (Nov. 13, 2018), <https://www.ftc.gov/news-events/press-releases/2018/11/pr-firm-publisher-settle-ftc-allegations-they-misrepresented> [<https://perma.cc/5YQJ-FG56>].

<sup>195</sup> Cure Encapsulations, Inc., File No. 172-3113, FED. TRADE COMM'N (JUNE 4, 2019), <https://www.ftc.gov/enforcement/cases-proceedings/172-3113/cure-encapsulations-inc> [<https://perma.cc/CU7V-C2B3>] (last updated June 4, 2019).

<sup>196</sup> *FTC Approves Final Consent Order against UrthBox, Inc. and its Principal Related to Compensated Online Reviews and "Free" Trial Offer*, FED. TRADE COMM'N (May 17, 2019), <https://www.ftc.gov/news-events/press-releases/2019/05/ftc-approves-final-consent-order-against-urthbox-inc-its> [<https://perma.cc/2LKZ-6CQM>].

Oct. 2019: FTC announces a Court Order in the Southern District of Florida against Devumi, LLC, and its owner and CEO, German Calas, Jr. for their unlawful practice of selling fake indicators of social influence, including fake followers, subscribers, likes, and views. The order includes an injunction and a monetary judgment of \$2,500,000, the amount Devumi was paid under its scheme; upon payment of \$250,000, the remainder of the judgment was suspended based on Mr. Calas's representations about his financial condition.<sup>197</sup>

Oct. 2019: FTC announces Consent Order against Sunday Riley and its namesake founder and CEO<sup>198</sup> for its scheme of posting fake reviews (by Ms. Riley herself and her employees) to promote the brand. Of note is that Commissioners Chopra and Slaughter issued a dissent<sup>199</sup> in which they voiced their frustration that the lack of any financial penalties in the settlement sends the wrong message to the marketplace and will not deter similar activities.

Nov. 2019: FTC issues *Disclosures 101 for Social Media Influencers*, the first guidance document targeted specifically at influencers.<sup>200</sup>

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<sup>197</sup> Devumi, LLC, File No. 182-3066, FED. TRADE COMM'N (May 17, 2019), <https://www.ftc.gov/enforcement/cases-proceedings/182-3066/devumi-llc> [<https://perma.cc/7XB9-DHQR>].

<sup>198</sup> In the Matter of Sunday Riley Modern Skincare, LLC, File No. 192-3008, FED. TRADE COMM'N (Oct. 21, 2019), <https://www.ftc.gov/enforcement/cases-proceedings/192-3008/sunday-riley-modern-skincare-llc-matter> [<https://perma.cc/X33J-EXTZ>].

<sup>199</sup> Statement of Commissioner Chopra Joined by Commissioner Slaughter Regarding Sunday Riley, FED. TRADE COMM'N (Oct. 21, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1550127/192\\_3008\\_fi-nal\\_rc\\_statement\\_on\\_sunday\\_riley.pdf](https://www.ftc.gov/system/files/documents/public_statements/1550127/192_3008_fi-nal_rc_statement_on_sunday_riley.pdf) [<https://perma.cc/EW96-43RT>].

<sup>200</sup> Disclosures 101 for Social Media Influencers, FED. TRADE COMM'N, [https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508\\_1.pdf](https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf) [<https://perma.cc/V9UZ-XZPT>] (last visited May 17, 2020).