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Kelly Callahan

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# CGI Social Media Influencers: Are They Above the FTC's Influence?

KELLY CALLAHAN\*©

## I. INTRODUCTION

Meet Lil Miquela, a “musician, change-seeker,” and with 2.5 million Instagram followers, a social media influencer.<sup>1</sup> Lil Miquela is just like everyone else. She has a pet dog named Harley Rose,<sup>2</sup> has a crush on a boy named Nick,<sup>3</sup> and even feels lonely sometimes.<sup>4</sup> However, there is one caveat to Lil Miquela that makes her quite unlike everyone else; she's not real.<sup>5</sup> A quick scroll through this computer-generated social media influencer's Instagram<sup>6</sup> will reflect the Instagram feeds of social media's most prominent influencers.<sup>7</sup> However, what sets Lil Miquela apart from human social media influencers, is that Lil Miquela's world is a seamless blend of

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\* Kelly Callahan is a J.D. Candidate, 2021, at the University of Maryland, Francis King Carey School of Law. I would like to thank my fellow editors on the Journal of Business and Technology Law for their support and review, Professor Frank Pasquale for his invaluable insight, and my friends and family. I dedicate this comment to my mother, Laura Callahan, and my father, Patrick Callahan; thank you for your unyielding love and encouragement, and the many sacrifices you have made, without which this would not be possible.

1. See Lil Miquela (@lilmiquela), INSTAGRAM, <https://www.instagram.com/lilmiquela/> (photo of Lil Miquela's Instagram showing how many followers she has) (last visited Aug. 06, 2020); See also *What is a social media influencer?* PIXLEE, <https://www.pixlee.com/definitions/definition-social-media-influencer> (“A Social Media Influencer is a user on social media who has established credibility in a specific industry. A social media influencer has access to a large audience and can persuade others by virtue of their authenticity and reach.”) (last visited Oct. 06, 2019).

2. See Lil Miquela (@lilmiquela), INSTAGRAM (Aug. 31, 2019), <https://www.instagram.com/p/B11rbOmYzF/> (photo of Lil Miquela holding her dog, Harley Rose).

3. See Lil Miquela (@lilmiquela), INSTAGRAM (Oct. 05, 2019), <https://www.instagram.com/p/B3P2xNAHes2/> (photo of Lil Miquela laying in the grass with her “boyfriend”).

4. See Lil Miquela (@lilmiquela), INSTAGRAM (Aug. 14, 2019), <https://www.instagram.com/p/B1KmpoUnPXH/> (photo of Lil Miquela hanging with her real human “friend”).

5. See Lil Miquela (@lilmiquela), INSTAGRAM, <https://www.instagram.com/lilmiquela/> (Lil Miquela's Instagram bio stating she is a “Change-seeking robot”) (last visited Aug. 06, 2020).

6. *Id.*

7. *Top Instagram Influencers for 2020*, INFLUENCER MARKETING HUB (Mar. 27, 2020), <https://influencermarketinghub.com/top-instagram-influencers/> (the top five most followed celebrities on Instagram are Cristiano Ronaldo, Kylie Jenner, Leo Messi, Selena Gomez and Ariana Grande).

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computer generated imagery (“CGI”) and reality, making it hard to tell what is real,<sup>8</sup> which is dangerous.

One could say, it is a CGI world, and we are just living in it. Computer generated imagery is “the creation of still or animated visual content with imaging software.”<sup>9</sup> It allows companies to generate content, such as advertisements, without having to use real live people, places, or objects.<sup>10</sup> The development of CGI technology is a revolution in the way corporations engage with consumers.<sup>11</sup> Many herald the use of CGI because it makes content more engaging, exciting, and unique.<sup>12</sup> Aside from the excitement and fantasy that CGI brings to consumers,<sup>13</sup> another compelling reason to use CGI over real things is the liberation from worrying about the practical costs that come with using live content and people.<sup>14</sup>

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8. See Charles Trepany, *The Robot Invasion Has Begun: Meet Computer-Generated Influencers Taking Over Instagram*, USA TODAY (Oct. 16, 2019, 1:36 PM), <https://www.usatoday.com/story/life/2019/10/16/cgi-influencers-blur-line-between-reality-and-fantasy-instagram-advertising/3790471002/> (“42 percent of Gen Z and millennials have followed an influencer they didn’t realize was CGI”); See also Lil Miquela (@lilmiquela), INSTAGRAM (Aug. 05, 2019), <https://www.instagram.com/p/B0zVKcinx8-/> (Lil Miquela appearing to be browsing the collection of music records at a real-life store in Hollywood).

9. Margaret Rouse, *CGI (Computer-Generated Imagery)*, WHAT IS (Jul. 2016), <https://whatis.techtarget.com/definition/CGI-computer-generated-imagery>.

10. See *Computer Generated Imagery*, SCIENCE DAILY, [https://www.sciencedaily.com/terms/computer-generated\\_imagery.htm](https://www.sciencedaily.com/terms/computer-generated_imagery.htm) (CGI “can also allow a single artist to produce content without the use of actors, expensive set pieces, or props.”) (last visited Oct. 06, 2019).

11. See *Not Just for Movies: Five Reasons to Use CGI for Marketing and Advertising*, TRANSPARENT HOUSE, <https://www.transparenthouse.com/blog/not-just-movies-five-reasons-use-cgi-marketing-advertising/> (last visited Oct. 07, 2019) (“CGI has gotten so realistic – as we know from the all-too-authentic monsters seen in movies – you won’t be able to tell the difference between a photo and CGI. In fact, CGI often looks better than the “real thing”. With CGI, you can highlight your product’s best features ... With CGI, you’ll hook potential customers and build some serious buzz before your product hits the shelves.”).

12. See Kyle Neubeck, *This Is How CGI Actually Works*, COMPLEX (May 29, 2015), <https://www.complex.com/pop-culture/2015/05/this-is-how-cgi-actually-works> (“With CGI, artists can imagine new worlds and make us ponder the breadth of the universe”); See also *Generate UK On: Computer Generated Photorealism*, GENERATE UK (Jul. 13, 2016), <https://www.generateuk.co.uk/blog/generate-uk-on-computer-generated-photorealism/>

(“Combining photorealism with cartoon animation in recent years has created a brand new style in movie production. Mixing large eyed playful characters with the realistic skin, hair and clothing material and textures, offering the audience a stimulating and more enriched viewing experience.”).

13. See *How CGI Changed Movies Forever*, HUFFINGTON POST (Jul. 18, 2016, 10:15 AM), [https://www.huffingtonpost.com.au/2016/05/12/how-cgi-changed-movies-forever\\_a\\_21358758/](https://www.huffingtonpost.com.au/2016/05/12/how-cgi-changed-movies-forever_a_21358758/) (Critics credit CGI for the success of movies such as *The Lord of the Rings* and *Avatar*).

14. See John Smith, *The Upside of Using CGI in Commercial Marketing*, BUSINESS 2 COMMUNITY (Aug. 18, 2017), <https://www.business2community.com/tech-gadgets/upsides-using-cgi-commercial-marketing-01900380> (“CGI makes it possible for companies to capture those intricate details of their products/services without the need to hire expensive and professional crews for film and product photography...there’s absolutely no doubt that CGI is more cost-efficient in comparison to traditional photo/video shoot.”).

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The secret is out about the endless capabilities of consumer engagement through CGI,<sup>15</sup> which is why the tech startup company, Brud, created Lil Miquela.<sup>16</sup> In 2019, consumers viewed 5,000 advertisements every day,<sup>17</sup> and it is only getting more difficult to tell what is real and what is fake online.<sup>18</sup> When CGI converges with the current social media influencer culture of pushing products on impressionable youths, in a legal and regulatory system that has struggled to keep up with technology, it threatens the health and wellbeing of consumers.<sup>19</sup> The Federal Trade Commission (“FTC”) has only recently begun to hold regular human social media influencers accountable for their deceptive marketing practices online.<sup>20</sup> However, this recent enforcement also shows just how far behind the FTC is in keeping up with regulating the newest digital marketing influencers. Enter, Lil Miquela.

The United States is facing a “pacing problem” regarding the substantive legal protections for consumers against deceptive false advertising and the FTC’s ability to timely enforce existing law and regulations against the dangerous byproducts of a rapidly progressing digital advertising industry.<sup>21</sup> The perpetual advancement of technology is far outpacing our current law and administrations’ abilities to keep up.<sup>22</sup>

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15. *Id.*

16. *See Brud is Reading War of the Worlds on the Radio a Transmedia Studio That Creates Digital Character Driven Worlds*, BRUD WEBSITE <3, <http://www.brud.fyi/> (last visited Oct. 23, 2020) (“Brud is a transmedia studio that creates digital character driven story worlds.”).

17. Ryan Holmes, *We Now See 5,000 Ads a Day . . . and It’s Getting Worse*, LINKEDIN (Feb. 19, 2019), <https://www.linkedin.com/pulse/have-we-reached-peak-ad-social-media-ryan-holmes/>.

18. *See* Hilke Schellmann, *Deep Fake Videos Are Getting Real and That’s a Problem Moving: Upstream Explores the Dark Side of Sophisticated Video Fakery*, THE WALL STREET JOURNAL (Oct. 15, 2018), <https://www.wsj.com/articles/deepfake-videos-are-ruining-lives-is-democracy-next-1539595787> (reporting on the dangerous consequences of not being able to tell what is real or fake anymore due to the sophistication of computer-generated technology of deep fakes).

19. *See infra* Section V.

20. *Lord & Taylor Settles FTC Charges It Deceived Consumers Through Paid Article in an Online Fashion Magazine and Paid Instagram Posts by 50 “Fashion Influencers”*, FEDERAL TRADE COMMISSION (Mar. 15, 2016), <https://www.ftc.gov/news-events/press-releases/2016/03/lord-taylor-settles-ftc-charges-it-deceived-consumers-through> (“Lord & Taylor paid 50 online fashion “influencers” to post Instagram pictures of themselves wearing the same paisley dress from the new collection, but failed to disclose they had given each influencer the dress, as well as thousands of dollars, in exchange for their endorsement . . . ‘Lord & Taylor needs to be straight with consumers in its online marketing campaigns,’ said Jessica Rich, Director of the FTC’s Bureau of Consumer Protection. “Consumers have the right to know when they’re looking at paid advertising.”).

21. *See* Adam Thierer, *The Pacing Problem and the Future of Technology Regulation: Why Policymakers Must Adapt to a World That’s Constantly Innovating*, MERCATUS CENTER (Aug. 08, 2018), <https://www.mercatus.org/bridge/commentary/pacing-problem-and-future-technology-regulation> (“This phenomenon is known as ‘the pacing problem,’ and it has profound ramifications for the governance of emerging technologies . . . the pace of change has been kicked into overdrive, making it more difficult than ever for traditional legal schemes and regulatory mechanisms to stay relevant.”).

22. *Id.*

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Section II summarizes advertising's evolution from a traditional print medium into a booming digital industry that is now monopolized by social media influencers, both human and CGI alike.<sup>23</sup> Section III highlights the FTC's pacing problem with regulating deceptive digital advertising practices, specifically addressing the current threat CGI social media influencer advertisements pose to consumers in the absence of proactive FTC oversight.<sup>24</sup> Finally, this comment concludes in Section IV with a call to action for the FTC to update its regulations governing deceptive advertising practices to bring CGI social media influencers within their reach and encourages a more consistent and proactive application of these regulations to the rapidly evolving digital advertising industry.<sup>25</sup>

## **II. THE HISTORY AND BUSINESS OF ADVERTISING**

### *A. Transition From Traditional Advertising to Digital Advertising*

For the first time in history, as of 2019, the digital advertising industry in the United States is now larger than the traditional print advertising industry.<sup>26</sup> In 2019, the digital industry spent around \$129.24 billion on online digital advertisements, which is around \$20 billion more than the traditional print industry spent in 2019.<sup>27</sup> In 2021, the gap is expected to widen to a whopping difference of \$92 billion.<sup>28</sup> This is remarkable considering that in just 2015, the digital advertising industry was only half the size of the traditional print ad industry market.<sup>29</sup> The numbers show a clear trend that digital ads are worth the investment based on how much companies are willing to spend for online ads to generate consumer engagement and revenue.<sup>30</sup>

### *B. Social Media Influencer Marketing Usurps Digital Advertising*

Traditional advertising has been around since the invention of the printing press in the 1440s.<sup>31</sup> In today's market, standard digital advertising is no longer a new or

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23. See *infra* Section II.

24. See *infra* Section III.

25. See *infra* Section IV.

26. Kurt Wagner, *Digital Advertising in the US is Finally Bigger Than Print and Television*, VOX (Feb. 20, 2019, 9:02 AM), <https://www.vox.com/2019/2/20/18232433/digital-advertising-facebook-google-growth-tv-print-emarketer-2019>.

27. *Id.*

28. *Id.*

29. *Id.*

30. See *id.* (reporting that in 2019, 22.1% of Facebook's revenue came from digital ads, including Instagram advertising revenue).

31. Jose Angelo Gallegos, *The History and Evolution of Advertising*, TINT (Jun. 29, 2016), <https://www.tintup.com/blog/history-evolution-advertising-marketing/>.

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groundbreaking medium thanks to social media influencers.<sup>32</sup> So, why is social media influencer marketing shaking up the digital and online advertising industry so much?<sup>33</sup> Since advertising has been around for so long,<sup>34</sup> people have become immune to the influence of traditional advertising methods and have learned how to filter ads out of the daily content they view.<sup>35</sup> Using social media influencers to promote products has provided an enticing solution to this phenomenon and also offers many other practical benefits.<sup>36</sup>

The first practical benefit of using social media influencers for product advertisements is dodging digital ad blockers.<sup>37</sup> Not only do consumers subconsciously and mentally block digital ads, they also can intentionally and physically block ads using ad blocker technology.<sup>38</sup> However, since a consumer decides who they follow on social media, they will not automatically block out a post by someone they chose to follow that happens to have a product advertised in their post. A second practical benefit of influencer digital marketing is that advertising through an influencer via their social media platforms gets products out in front of a diverse audience at once.<sup>39</sup> Lastly, unlike traditional digital ads, social media influencers invite a two-way conversation with consumers when they endorse a product on their social media page.<sup>40</sup> Therefore, social media influencers not only increase the exposure of a company's product to consumers, but also invite interaction and engagement that deepens consumers' connection with a product that is unavailable with standard advertising, print or digital.

Beyond the practical benefits of social media influencer marketing, this new wave of product promotion offers opportunities for a more genuine emotional connection

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32. Mario Peshev, *Influencer Marketing is Growing Faster Than Digital Ads*, FORBES (May 02, 2017, 2:26 PM), <https://www.forbes.com/sites/quora/2017/05/02/influencer-marketing-is-growing-faster-than-digital-ads/#1e4992da7b39>.

33. *Id.*

34. Gallegos, *supra* note 31 and accompanying text.

35. See Mary Atamaniuk, *How Many Ads Do You Actually See Daily?*, CLARIO (Apr. 21, 2020), <https://clario.co/blog/live-secured/ads-seen-daily/> ("Second, super saturation of ads has resulted in a phenomenon called banner blindness. Essentially, most of us have learned to ignore any banner-like information we see on the internet.").

36. Peshev, *supra* note 32 (reporting on the economic, practical and social allure of using social media influencers over regular digital advertisements).

37. *Id.*

38. Peshev, *supra* note 32 ("According to IAB, 26 percent of desktop users use blockers to remove ads. That limits a quarter of a website's users from even seeing the advertisement in the first place, thus reducing conversion rates.").

39. *Id.* ("Influencer marketing may facilitate the exposure and network growth in months, and position businesses higher than competitors that have been sponsoring outlets for many years.").

40. *Id.* ("One of the drawbacks of digital ads is the lack of dialog. Influencers (especially well-established ones without PR teams) are reachable, and can elaborate on their choice of preferred brand that they advertise. You can find them at conferences, on Twitter, email them, or interact in their blog.").

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with consumers. One feature of influencer marketing that makes it more effective than typical digital advertising is that consumers trust and relate to humans more than they do corporations.<sup>41</sup> A business that markets directly to consumers in advertisements, whether they be print or digital, clearly indicates that it is doing so strictly to sell its product for money.<sup>42</sup> Contrastingly, social media influencers bring a more genuine and personal approach to advertising because they “tend to promote brands that they are willing to connect to and bet their name on.”<sup>43</sup> After all, if someone’s favorite celebrity is willing to put their personal brand on the line to promote a product they love, it must be worth the purchase, right? When social media influencers slip product placements and endorsements into their closely followed and meticulously stylized feeds, consumers feel less targeted to buy the product because it was their choice to follow the influencer in the first place.

Consider this: if a consumer is surfing a website and sees a typical digital banner ad from Flat Tummy Co. promoting its “Flat Tummy Tea,”<sup>44</sup> the consumer will instinctually block that ad from sight and focus on the actual content they came to the website for. The consumer has no interest in Flat Tummy Co. and did not come to that website to buy a weight loss product. However, that consumer loves Khloé Kardashian. She has a great figure and her body has bounced back so well after recently having a child. How does she do it? The consumer sees that Khloé posted on Instagram about a product called “Flat Tummy Tea,”<sup>45</sup> which is made by Flat Tummy Co. Suddenly, the consumer is intrigued to buy the weight loss tea because that consumer has been keeping up with Khloé for years and is one of her 121 million

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41. *Influencer Marketing is Growing Faster Than Digital Ads*, FORBES (May 02, 2017), <https://www.forbes.com/sites/quora/2017/05/02/influencer-marketing-is-growing-faster-than-digital-ads/#1e4992da7b39> (“Just like a B2B transaction isn’t a deal between two businesses (but rather managers trusting each others’ abilities), selling products and services to consumers also converts better with a trusted figure.”).

42. *Id.* (“Digital ads rely (mostly) on a media outlet promoting one’s services. It’s (almost) always a cash-driven transaction and widespread across the net for decades.”).

43. *Id.*

44. See *Flat Tummy Tea*, FLAT TUMMY CO., [https://flattummyco.com/?gclid=Cj0KCQjw0brtBRDOARIsANMDykb85kgaGk59Ad3FUQGjW6FNF-zSW1MkHQqs78o-RLJGIAVZnFnEwEQaAiOpEALw\\_wcB](https://flattummyco.com/?gclid=Cj0KCQjw0brtBRDOARIsANMDykb85kgaGk59Ad3FUQGjW6FNF-zSW1MkHQqs78o-RLJGIAVZnFnEwEQaAiOpEALw_wcB) (last visited Nov. 23, 2020) (website advertising Flat Tummy Tea).

45. See Alesandra Dubin, *Jameela Jamil Responds to “Irresponsible” Khloé Kardashian’s Diet Ad: Don’t Hurt Other Girls as “You Have Been Hurt”*, BRAVO (Mar. 21, 2019, 11:21 AM), <https://www.bravotv.com/the-feast/jameela-jamil-responds-to-khloe-kardashian-flat-tummy-tea-instagram-ad> (“Khloe posted a selfie, in which she stands in front of a mirror clad in a bra and jeans, with her full abdomen exposed. She captioned the sponsored post, “#ad Loving how my tummy looks right now you guys! I brought @flattummyco’s meal replacement shakes into my routine about 2 weeks ago, and the progress is undeniable P.S the shakes are 20% off today and you can get Flat Tummy Tea at a really good deal too. Go check it out!”).

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Instagram followers.<sup>46</sup> This consumer trusts Khloé and wants to look like her, so they buy Flat Tummy Co.'s "Flat Tummy Tea" to be just like Khloé. See the difference? Think of social media influencers as the Trojan horse for companies to get their products in front of consumers in the most authentic way possible.

*C. Social Media Influencers: Numbers By The Billions*

If an anecdote demonstrating the effect a social media influencer can have on consumers' purchase decisions does not convince you of a social media influencer's power, take a look at the numbers. In 2019, 3.5 billion people used social media, which is approximately 45% of the world's population.<sup>47</sup> People spent 33% of the time they spent online using social media.<sup>48</sup> Almost 50% of consumers rely on social media influencers when making purchasing decisions, which makes social media influencers powerful marketing weapons.<sup>49</sup> These sizeable numbers are driving social media influencer marketing to become a standard integrated strategy for marketers.<sup>50</sup> In 2020, the social media influencer advertising market was worth around \$9.7 billion and has been increasing by about 50% each year.<sup>51</sup> The record amount for how much money a social media influencer makes for one Instagram post is \$1,266,000.<sup>52</sup> This astronomical payday for only one post shows the value marketers see in leveraging popular social media influencers' influential presence online.

Advertisers take into account numerous factors when selecting a social media influencer to promote a product.<sup>53</sup> Factors include "an influencer's follower count, engagement rate, project scope, and production costs."<sup>54</sup> The amount a social media influencer charges for a sponsored post or story for product endorsements varies for each influencer.<sup>55</sup> However, many influencers use a standard rate, charging \$10,000

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46. See Khloé Kardashian (@khloekardashian), INSTAGRAM, <https://www.instagram.com/khloekardashian/> (last visited Sep. 04, 2020) (Khloé's Instagram bio showing her follower count).

47. Maryam Moshim, *10 Social Media Statistics You Need to Know in 2020*, OBERLO (Aug. 7, 2020), <https://www.oberlo.com/blog/social-media-marketing-statistics>.

48. Brad Smith, *31 Advertising Statistics to Know in 2018*, WORDSTREAM (Jul. 17, 2020), <https://www.wordstream.com/blog/ws/2018/07/19/advertising-statistics>.

49. *Id.*

50. *Id.*

51. *The State of Influencer Marketing 2020: Benchmark Report*, INFLUENCER MARKETING HUB (Mar. 1, 2020), <https://influencermarketinghub.com/influencer-marketing-benchmark-report-2020/#:~:text=This%20means%20that%20the%20growth,to%20%249.7%20billion%20in%202020.>

52. See Nicola Cronin, *The 2019 Instagram Rich List – Who Earns the Most From Sponsored Posts*, HOPPER (Jul. 1, 2020), <https://www.hopperhq.com/blog/2019-instagram-rich-list/> (reporting billionaire, Kylie Jenner, taking the number one spot).

53. Carbone, *supra* note 51.

54. *Id.*

55. *Id.*



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per Instagram post or \$100 for every 10,000 followers.<sup>56</sup> This may seem like a jarring amount of money to pay for a simple online post, but studies show that the investment is worth it.<sup>57</sup> Every dollar spent on social media influencer marketing generates five times more earned interactions with consumers than standard paid advertising.<sup>58</sup> Following the money paints a clear picture of just how profitable social media advertising is.

Social media has become so integrated into the daily lives of consumers that it has now become a major source for product purchase ideas and recommendations.<sup>59</sup> A main reason social media is becoming the hub of consumer reliance is attributed to the influencers that dominate the social media scene.<sup>60</sup> Statistics show that 70% of teenagers trust social media influencers more than the run-of-the-mill tabloid celebrity.<sup>61</sup> Additionally, 86% of women look to social media for purchasing advice and 49% of consumers rely on social media influencer recommendations for brands and other products.<sup>62</sup> Finally, 40% of consumers actually purchased a product after seeing it on social media platforms.<sup>63</sup> These statistics are somewhat unsurprising given how many people use social media today.<sup>64</sup> However, the monotony and comfortability of today's generations' use and reliance on social media influencers does not negate the potential threat and danger social media influencers can pose if their influence is used in the wrong way and goes unregulated by important government watchdogs.<sup>65</sup>

#### *D. CGI Influencers: The Newest Wave of Social Media Influencer Advertising*

With the social media influencer advertising market booming and showing no signs of slowing down,<sup>66</sup> it is no surprise that a new wave of advertising is now nipping at its heels to take the lead in a perpetual race to command consumers' attention and money. The global augmented reality advertising industry reached \$3

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56. *Id.*

57. *Id.*

58. *Id.*

59. 20 *Influencer Marketing Statistics That Will Surprise You*, DIGITAL MARKETING INSTITUTE, <https://digitalmarketinginstitute.com/en-us/blog/20-influencer-marketing-statistics-that-will-surprise-you> (last visited Dec. 15, 2019) [hereinafter *Marketing Statistics*] (“As social media becomes a more integrated part of our lives, influencer marketing has exploded. People are turning to their favorite Instagram models, Twitter personalities and YouTube stars for advice and recommendations on purchasing decisions.”).

60. *Id.*

61. *Id.* (“4 in 10 millennial subscribers say their favorite influencer understand them better than their friends.”).

62. *Id.*

63. *Id.*

64. Moshim, *supra* note 47 and accompanying text.

65. *See infra* Section III.

66. *See supra* Section II.C.

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billion in 2017.<sup>67</sup> The masterminds behind Lil Miquela were smart to cash in on this fast-growing digital influencer advertising market,<sup>68</sup> because over 50% of social media users who follow CGI social media influencers online said they purchased a product or followed a brand that the CGI influencer introduced to them over 50% of the time.<sup>69</sup> This is clear evidence that consumers are placing their trust in these CGI influencers and making important decisions based on what the CGI influencers they follow encourage them to do. Thus, CGI social media influencers like Lil Miquela are the ideal influencers for brands to partner with because not only do their product endorsements foster the same, if not more, engagement with consumers compared to human social media influencers, but corporations can also completely control, manipulate and dominate how the CGI influencers promote their products;<sup>70</sup> a luxury not readily available when using real human social media influencers.

Currently, there are approximately seven major CGI influencers on social media.<sup>71</sup> The two most prominent CGI influencers to hit the social media market are girl-next-door turned pop-star CGI influencer, Lil Miquela,<sup>72</sup> and fashionista CGI influencer, Noonoori.<sup>73</sup> While these CGI social media influencers are all merely puppets of their respective creators, they all have been flawlessly integrated into the mainstream social media culture and their makers know how to play the influencer game well.

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67. Kyt Dotson, *Report: AR and VR Companies Raised a RecordBreaking \$3 Billion in Funding in 2017*, SILICON ANGLE (Jan. 09, 2018, 12:56 PM), <https://siliconangle.com/2018/01/09/report-ar-vr-companies-saw-record-breaking-3-billion-funding-2017/>.

68. See Jonathan Shieber, *The Makers of the Virtual Influencer, Lil Miquela, Snag Real Money From Silicon Valley*, TECHCRUNCH (Apr. 24, 2018, 2:01 AM), <https://techcrunch.com/2018/04/23/the-makers-of-the-virtual-influencer-lil-miquela-snap-real-money-from-silicon-valley/> (reporting that Brud, the company that created Lil Miquela, is backed by Silicon Valley investors, having around \$6 million in investments).

69. Trepany, *supra* note 8.

70. *Id.*

71. See Shane Barker, *CGI Influencers: Just Another Fad or the Next Big Thing on Social Media*, MEDIUM (Mar. 08, 2019),

<https://medium.com/swlh/cgi-influencers-just-another-fad-or-the-next-big-thing-on-social-media-118704400954> (introducing CGI influencers Lili Miquela, Bermuda, Blawko, Shudu, Lil Wavi, and Imma); See also Farouk Chekoufi, *Meet Noonoori, the Virtual Instagram Influencer Loved by Kim Kardashian West and Dior*, VOGUE (Jun. 19, 2018), <https://www.vogue.com.au/vogue-codes/news/meet-noonoori-the-virtual-instagram-influencer-loved-by-kim-kardashian-west-and-dior/news-story/dfeb2658e3bbc7b2cfd11d0d26eb5bbc/> (introducing another popular CGI influencer, Noonoori).

72. See *supra* Section I.

73. Chekoufi, *supra* note 71.

*CGI Social Media Influencers***III. THE PACING PROBLEM: ADVERTISING LAW'S INCOMPATIBILITY WITH CGI INFLUENCERS AND THE FTC'S COMPLACENCY***A. What is the Federal Trade Commission and What Does it Do?*

The FTC is a federal government administrative agency<sup>74</sup> that serves as a watchdog to protect consumers while also promoting fair market competition in the United States.<sup>75</sup> The FTC pledges to “protects consumers by stopping unfair, deceptive or fraudulent practices in the marketplace . . . conduct investigations, sue companies and people that violate the law, develop rules to ensure a vibrant marketplace, and educate consumers and businesses about their rights and responsibilities.”<sup>76</sup> As a federal administrative agency,<sup>77</sup> the FTC issues rules and guidelines that facilitate the application of and compliance with federal statutory

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74. See *Administrative Agency Law and Legal Definition*, US LEGAL (last visited Oct. 19, 2019), <https://definitions.uslegal.com/a/administrative-agency/> [hereinafter *Administrative Agency Law*] (“An administrative agency is an official governmental body empowered with the authority to direct and supervise the implementation of particular legislative acts . . . Administrative agencies are created to manage crises, redress serious social problems, or to oversee complex matters of governmental concern beyond the expertise of legislators . . . Administrative agency rules and regulations have the force of law against individuals.”).

75. See *What We Do*, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/about-ftc/what-we-do> (last visited Oct. 19, 2019) [hereinafter *What We Do*], (“The FTC is a bipartisan federal agency with a unique dual mission to protect consumers and promote competition. For one hundred years, our collegial and consensus-driven agency has championed the interests of American consumers. As we begin our second century, the FTC is dedicated to advancing consumer interests while encouraging innovation and competition in our dynamic economy.”); See also Leah W. Feinman, *Celebrity Endorsements in Non-traditional Advertising: How the FTC Regulations Fail to Keep Up With the Kardashians*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 97, 107 (2011) (stating the history of the F.T.C.’s regulation of product endorsements originated with the tobacco industry and after numerous F.T.C. investigations over suspect celebrity cigarette endorsements where non-smoking celebrities were advertising the nicotine products, cigarette companies were pushed to self-regulate and start disclosing paid celebrity advertisements).

76. *What We Do*, *supra* note 75.

77. *Administrative Agency Law*, *supra* note 74 and accompanying text.

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laws governing deceptive and unfair practices.<sup>78</sup> Since its establishment in 1914,<sup>79</sup> the FTC has accumulated its vast regulatory authority under various federal statutes.<sup>80</sup> The Federal Trade Commission Act gives the FTC its investigative and enforcement authority to protect consumers from deceptive and unfair advertising.<sup>81</sup>

*B. The FTC's Slow Crawl to Keep Pace With Modern Advertising*

As a federal administrative agency,<sup>82</sup> the FTC issues guidelines to educate relevant industry actors in the United States on how to comply with the applicable laws the FTC enforces.<sup>83</sup> These guides will often include examples of practices that qualify as deceptive or unfair, and standards to meet that will ensure compliance.<sup>84</sup>

In attempting to keep pace, the FTC has been extremely slow to update its advertising guidelines to catch up to the new digital online platforms which companies use to advertise, including social media.<sup>85</sup> Starting in 2000, the FTC

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78. See *Guides Concerning Use of Endorsements and Testimonials in Advertising*, 16 C.F.R. § 255.0 (2009) (“(a) The Guides in this part represent administrative interpretations of laws enforced by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. Specifically, the Guides address the application of Section 5 of the FTC Act (15 U.S.C. 45) to the use of endorsements and testimonials in advertising. The Guides provide the basis for voluntary compliance with the law by advertisers and endorsers. Practices inconsistent with these Guides may result in corrective action by the Commission under Section 5 if, after investigation, the Commission has reason to believe that the practices fall within the scope of conduct declared unlawful by the statute. The Guides set forth the general principles that the Commission will use in evaluating endorsements and testimonials, together with examples illustrating the application of those principles. The Guides do not purport to cover every possible use of endorsements in advertising. Whether a particular endorsement or testimonial is deceptive will depend on the specific factual circumstances of the advertisement at issue.”).

79. *Our History*, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/about-ftc/our-history> (last visited Oct. 19, 2019).

80. *Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FEDERAL TRADE COMMISSION (revised, Oct. 2019), <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority>.

81. *Id.*; Federal Trade Commission Act, 15 U.S.C. §§ 41-58.

82. *Administrative Agency Law*, *supra* note 74 and accompanying text.

83. See *.Com Disclosures: How to Make Effective Disclosures in Digital Advertising*, FEDERAL TRADE COMMISSION at 2 no.5 (Mar. 2013), <https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf> [hereinafter *.Com Disclosures*] (“Guides are “administrative interpretations of laws administered by the Commission.” 16 C.F.R. § 1.5. Although guides do not have the force and effect of law, if a person or company fails to comply with a guide, the Commission might bring an enforcement action alleging an unfair or deceptive practice in violation of the FTC Act.”).

84. *Id.* at 2. (“For certain industries or subject areas, the Commission issues rules and guides. Rules prohibit specific acts or practices that the Commission has found to be unfair or deceptive. Guides help businesses in their efforts to comply with the law by providing examples or direction on how to avoid unfair or deceptive acts or practices.”).

85. *Id.* at 2 no.4. (“The Commission issues rules pursuant to Section 5 of the FTC Act when it has reason to believe that certain unfair or deceptive acts or practices are prevalent in an industry. 15 U.S.C. § 57a(a)(1)(B). In

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engaged in a typical administrative agency public comment period where it gathered public input on the viability and applicability of the FTC consumer protection guidelines to online activities.<sup>86</sup> After many years of consideration and studies, in 2013, the FTC published a guidebook for online advertising disclosures.<sup>87</sup> In accordance with its watchdog powers of protecting consumers from deceptive and unfair practices,<sup>88</sup> the FTC made it clear that despite technological advancements in the way corporations engage with consumers, “cyberspace is not without boundaries, and deception is unlawful no matter what medium.”<sup>89</sup> With the increasing popularity and usage of social media for both selling and buying products, the FTC announced:

*“[t]he same consumer protection laws that apply to commercial activities in other media apply online, including activities in the mobile marketplace. The FTC Act’s prohibition on “unfair or deceptive acts or practices” encompasses online advertising, marketing, and sales. In addition, many Commission rules and guides are not limited to any particular medium used to disseminate claims or advertising, and therefore, apply to the wide spectrum of online activities.”<sup>90</sup>*

Thus, the same prohibition against false and misleading advertising of products in traditional media advertising, also applies to digital and online platforms.

However, the FTC soon realized that its blanket statement that the archaic general rules prohibiting deceptive acts or practices also apply to online advertising, was not going to be enough to hold up against the social media marketing boom. In trying to modernize its regulatory oversight, the FTC created new guidelines and regulations directly applicable to social media advertisers and influencers specifying digital advertising practices, especially when using social media applications, they must follow to comply with federal advertising laws.<sup>91</sup>

Specifically, a major issue that arose with social media influencer product endorsements was that influencers were not disclosing that they were being paid to promote products on their personal social media feeds.<sup>92</sup> The FTC indicated that an

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addition, the Commission promulgates rules pursuant to specific statutes, which are designed to further particular policy goals.”).

86. *Id.* at 1.

87. *Id.*

88. *What We Do*, *supra* note 75.

89. *.Com Disclosures*, *supra* note 83.

90. *Id.*

91. *Id.* at i-iii.

92. See Shannon Byrne, *The Age of the Human Billboard: Endorsement Disclosures in New Millenia Media Marketing*, 10 J. BUS. & TECH. L. 393, 406 (2015) (discussing the F.T.C.’s crackdown and regulation of social media influencer product endorsements).

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influencer's failure to disclose that they have been paid to promote a product on social media is deceptive because:

***“Many consumers rely upon influencer recommendations in making purchasing decisions, and they should know when a brand paid an influencer for an endorsement, because it affects the weight and credibility the consumers may give to that endorsement[.]”***<sup>93</sup>

In response, the FTC in 2013 issued guidelines requiring clear and conspicuous disclosures on social media posts that denote an influencer has been compensated for their product promotion.<sup>94</sup> This is why social media users now see disclaimers such as “#ad” in Instagram captions or the words “paid sponsorship” in the location tag. Failure to abide by these guidelines will not be a direct violation of advertising law, however, those who fail to comply with the recommended practices will likely be on the hook for violating federal advertising law prohibiting deceptive and unfair advertising.<sup>95</sup> These 2013 guidelines, however, are the only whiff of the FTC attempting to keep pace with modern digital advertising trends in almost a decade. While these guidelines were progressive and much needed, they are simply not enough to protect consumers from this rapidly progressing digital ad industry that is constantly finding new ways to unfairly deceive and exploit consumers to spend their money.<sup>96</sup>

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93. Paolo Zialcita, *FTC Issues Rules for Disclosure of Ads by Social Media Influencers*, NPR (Nov. 05, 2019, 4:57 PM), <https://www.npr.org/2019/11/05/776488326/ftc-issues-rules-for-disclosure-of-ads-by-social-media-influencers> (quoting Michael Atelson, an FTC staff attorney for the Bureau of Consumer Protection) (emphasis added).

94. See *Disclosure of Material Connections*, 16 C.F.R. §255.5 (2009) (“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. For example, when an endorser who appears in a television commercial is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public, then the advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement or the fact that the endorser knew or had reason to know or to believe that if the endorsement favored the advertised product some benefit, such as an appearance on television, would be extended to the endorser.”); See also, *.Com Disclosures*, *supra* note 83 (“Required disclosures must be clear and conspicuous. In evaluating whether a disclosure is likely to be clear and conspicuous, advertisers should consider its placement in the ad and its proximity to the relevant claim. The closer the disclosure is to the claim to which it relates, the better.”). Thus, the FTC offers specific standards with which advertisers and paid celebrity product endorsers online must meet in order not engage in deceptive or unfair practices forbidden by the FTC. *Id.*

95. Zialcita, *supra* note 93.

96. See *infra* Sections III.C, III.D.

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### *C. Using CGI Influencers to Endorse Consumer Products Violates Federal Advertising Regulations Because CGI Influencers Cannot be “Bona Fide Users” of a Product*

#### *1. The “Bona Fide User” Regulation*

Today, the Electronic Code of Federal Regulations (“ECFR”)<sup>97</sup> defines an “endorsement” as:

*“[A]ny advertising message. . .that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.”<sup>98</sup>*

Furthermore, federal product endorsement regulations mandate that an endorser of a product who holds themselves out to have actually used the product which they are endorsing in an advertisement, must have been a “bona fide user” of that product:

*“Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser. . .When the advertisement represents that the endorser uses the endorsed product, the endorser must have been a bona fide user of it at the time the endorsement was given. Additionally, the advertiser may continue to run the advertisement only so long as it has good reason to believe that the endorser remains a bona fide user of the product.”<sup>99</sup>*

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97. See 16 C.F.R. §255.0 (2009) (“(a) The Guides in this part represent administrative interpretations of laws enforced by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. Specifically, the Guides address the application of Section 5 of the FTC Act (15 U.S.C. 45) to the use of endorsements and testimonials in advertising. The Guides provide the basis for voluntary compliance with the law by advertisers and endorsers. Practices inconsistent with these Guides may result in corrective action by the Commission under Section 5 if, after investigation, the Commission has reason to believe that the practices fall within the scope of conduct declared unlawful by the statute. The Guides set forth the general principles that the Commission will use in evaluating endorsements and testimonials, together with examples illustrating the application of those principles. The Guides do not purport to cover every possible use of endorsements in advertising. Whether a particular endorsement or testimonial is deceptive will depend on the specific factual circumstances of the advertisement at issue.”); See also Byrne, *supra* note 92 (“While it is true that the FTC advertising and disclosure guides do not have the force and effect of law, non-compliance by advertisers or businesses may lead to enforcement actions brought by the FTC alleging unfair or deceptive practice in violation of the FTC Act. There is an underlying legal duty for businesses not to engage in deceptive advertising; the guidelines are a non-binding attempt to articulate rules of conduct that will keep businesses from deceptive advertising. But the duty to comply rests fully with the businesses and not with the FTC.”).

98. 16 C.F.R. § 255.0 (2009) (emphasis added).

99. 16 C.F.R. § 255.1 (a), (c) (2009) (emphasis added).

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This means endorsers who are paid to promote a product, must have actually used the product and that the opinion they are giving is an honest reflection of their experience using the product. The “bona fide user” requirement all comes down to the “basic truth-in-advertising principle that endorsements must be honest and not misleading.”<sup>100</sup> It is a simple concept. If someone is paid to endorse a product, highlights all its glories, and encourages others to buy it, it is only fair to require the endorser to have actually used the product. To not have such a requirement would be deceptive and downright dangerous to consumers relying on an unsubstantiated false endorsement.

*2. CGI Social Media Influencers That Endorse Consumer Products Directly Violate Federal Advertising Regulations Because a Fake Person Cannot Be a Bona Fide User of a Product*

It is clear that crux of being able to endorse a product without it being deceptive or misleading is based on the endorser’s “bona fide” actual use of the product they promote.<sup>101</sup> But, what happens when fake, computer-generated social media influencers get paid to endorse consumer products just like real human influencers? Do Lil Miquela and other CGI social media influencers get a free pass to cash a check and endorse products they obviously have not used? Right now, it seems they do, considering the FTC has done nothing to enforce this regulation against CGI influencers.

How the bona fide user regulation may apply to CGI influencers that endorse products on social media is not just a hypothetical question. This is really happening. CGI social media influencer Lil Miquela has posted several paid Instagram advertisements endorsing consumer products. Most notably, Lil Miquela has posted several sponsored Instagram ads endorsing Samsung cell phones.<sup>102</sup> How is it that Lil Miquela can be a “bona fide” user<sup>103</sup> of a Samsung cell phone when she is not real? The answer is, she cannot. Yet, Lil Miquela holds herself out as a bona fide user of this product and has personally endorsed it via paid social media advertisements.<sup>104</sup>

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100. *The FTC’s Endorsement Guides: What People Are Asking*, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking> (last visited Aug. 19, 2020).

101. 16 C.F.R. § 255.1 (a), (c) (2009) (emphasis added).

102. See Lil Miquela (@lilmiquela), INSTAGRAM (Jun. 19, 2019), <https://www.instagram.com/p/By6Sl-2ntxx/> (paid partnership Instagram post with Samsung Mobile promoting the new Galaxy S10 cellphone with the caption “Happy 10th to my bb Samuel Phonington III AKA @samsungmobile #GalaxyS10 (yeah I used your legal name!!), ilu 🥰💕👉 Thanks for keeping all my secrets #TeamGalaxy #ad.”).

103. 16 C.F.R. § 255.1 (a), (c) (2009) (emphasis added).

104. *Id.*



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Take another CGI social media influencer veteran like Noonoori,<sup>105</sup> who has gained the admiration and allegiances of household name celebrities like Kim Kardashian,<sup>106</sup> and global publications like *Vogue*.<sup>107</sup> Noonoori is one of the go-to CGI social media influencers for all things fashion and beauty.<sup>108</sup> As a face of Kim Kardashian West Beauty (“KKW”), Noonoori has posted numerous paid sponsorship advertisements on her page for products such as new KKW eyeshadow palette launches,<sup>109</sup> or KKW cream makeup contouring sticks.<sup>110</sup> When “asked” in a *Vogue* interview about her favorite beauty products, Noonoori “said” that she loves the “KKW Beauty contour and highlighter—they truly work!”<sup>111</sup> The CGI social media beauty guru has also posted a variety of paid sponsorship Instagram posts promoting a plethora of high end fragrances by brands ranging from Miu Miu to Calvin Klein.<sup>112</sup> Noonoori has even been paid to promote several skincare products from brands like Philosophy.<sup>113</sup>

No matter the product these CGI social media influencers get paid to promote, all these CGI social media product endorsements have one thing in common: a fictional CGI character cannot be a “bona fide user” of any of these consumer products, because they are not real human beings. This is a blatant violation of federal product endorsement regulations and the underlying truth-in-advertising principle, yet, where is the FTC to protect consumers from these deceptive ads?<sup>114</sup>

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105. See Chekoufi, *supra* note 71 and accompanying text; See also Noonoori (@noonoori), INSTAGRAM, <https://www.instagram.com/noonoori/> (“digital character. activist. vegan. fufree”) (last visited Sep. 05, 2020).

106. See Noonoori (@noonoori), INSTAGRAM (Oct. 21, 2019), <https://www.instagram.com/p/B34f9QLIoYW/> (Noonoori posing in a photo with Kim Kardashian, both wearing Kardashian’s new shapewear line, Skims); See also Chekoufi, *supra* note 71 (reporting on Noonoori’s close connections with Kardashian).

107. *Id.*

108. See Noonoori (@noonoori), INSTAGRAM, <https://www.instagram.com/noonoori/> (last visited Dec. 16, 2019) (The CGI social media influencer’s Instagram spread is riddled with images of high fashion photo shoots, hangouts with fashion designers and other beauty gurus, and plenty of beauty products).

109. See Noonoori (@noonoori), INSTAGRAM (Sep. 12, 2019), <https://www.instagram.com/p/B2T3XC0oi9c/> (Noonoori posing with Kim Kardashian and model Winnie Harlow to promote Kardashian and Harlow’s new makeup collaboration).

110. @noonoori x @KKWbeauty by @kimkardashian, YOUTUBE (May 16, 2018), <https://www.youtube.com/watch?v=7B9cQIWnetE>.

111. See Chekoufi, *supra* note 71.

112. See Noonoori (@noonoori), INSTAGRAM (Dec. 16, 2019), <https://www.instagram.com/p/B6DZjXcqWHP/> (paid sponsorship Instagram post for Miu Miu fragrance); See also Noonoori (@noonoori), INSTAGRAM (Jun. 14, 2019), <https://www.instagram.com/p/BysXGfei17e/> (paid sponsorship Instagram post for Calvin Klein perfume).

113. See Noonoori (@noonoori), INSTAGRAM (Oct. 31, 2019), <https://www.instagram.com/p/B4SRdLYBU1M/> (paid sponsorship Instagram post for Philosophy face wash).

114. See *supra* Section III.D.

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*3. Consequences*

There are real dangers and ethical concerns posed when the FTC complacently allows CGI social media influencers to openly and deceptively endorse consumer products, especially products closely related to health,<sup>115</sup> without any oversight or rules to regulate this new breed of paid product promotion.<sup>116</sup> Using CGI influencers to endorse products is not the same as paying real human influencers to promote products, which is why it is so dangerous to allow them to do so in a regulatory field that is not properly equipped to oversee the CGI influencer sector of digital advertising. Real human social media influencers serve as a trusted intermediary.<sup>117</sup> When human influencers are paid to promote a product, they have the autonomous decision-making capability to use the product, test its safety and effectiveness, and share their honest findings with consumers.<sup>118</sup> Studies show that consumers are wholeheartedly relying on these recommendations to purchase those same products.<sup>119</sup>

There is a sense of legitimacy and accountability with paid product promotions by human social media influencers that consumers are being deceived into believing is also available with CGI influencers.<sup>120</sup> For example, at the very least, even though Khloé gets paid to promote Flat Tummy Tea, Khloé's loyal followers can rest easy knowing they bought a product Khloé, in compliance with the FTC's guidelines, has actually consumed at least once and that she trusted the diet product enough to attach it to her own personal brand.<sup>121</sup> Human influencers would not risk losing their followers' trust and admiration they worked so hard to earn by promoting a product that they themselves did not vet for quality and safety. Furthermore, in a worst-case scenario, if human social media influencers promote a bad product, whether it be unsafe or ineffective, consumers can hold them accountable via their purchasing power or look to the FTC for punitive measures to make sure the poor quality or unsafe product is off the market.<sup>122</sup> Overall, with real human influencer product endorsements, there is both a self-regulatory function and actual federal regulations that provide for a safe consumer market. The same safeguards are unfortunately not currently available to protect consumers from CGI influencer product endorsements.

Since the FTC has not addressed CGI influencer marketing activities, CGI influencers like Lil Miquela and Noonouri are exercising unbridled freedom to promote whatever consumer product they wish, unrestricted by the mandates to be a

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115. See *supra* Section III.C.ii.

116. See *supra* Section III.C.

117. *Id.*

118. See *supra* Sections III.B., III.C.

119. Trepany, *supra* note 8 and accompanying text.

120. See *supra* Section II.B.

121. *Id.*

122. *Id.*

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“bona fide user” of the products they promote. The unregulated advertising activities of CGI social media influencers are especially problematic when impressionable young social media users<sup>123</sup> look to their favorite influencers, both real and CGI, for purchasing advice and product recommendations.<sup>124</sup> When social media users cannot tell whether a CGI influencer is real or fake, they may critically rely on Lil Miquela’s recommendation for a new phone or Noonoori’s recommendation for skin care products, believing these influencers have tried the products for themselves.<sup>125</sup> Under ordinary circumstances with real human social media influencers, if the influencer promotes an unsafe or poor quality product, consumers know who to hold accountable and how to reach them.<sup>126</sup> However, if a consumer goes out and buys a Samsung cellphone that they saw from Lil Miquela’s sponsored Instagram post, and that phone blows up,<sup>127</sup> how can the consumer hold Lil Miquela accountable?

In addition to the FTC’s problematic silence and complacency, Lil Miquela’s creator, Brud,<sup>128</sup> has established an uncooperative and tight-lipped approach to transparency when probed with questions about Lil Miquela’s business model and operation.<sup>129</sup> The lack of information made available by the puppeteers of Lil Miquela’s every look, action and business endeavor, only exacerbates the danger she and other CGI influencers like her pose to society. Are consumers able to go after

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123. See Smith, *supra* note 48; See also Gwon *infra* note 144.

124. See *supra* Section II.C.

125. See Trepany, *supra* note 8 and accompanying text (“42 percent of Gen Z and millennials have followed an influencer they didn’t realize was CGI.”); See also *supra* Section III.C.ii. It is not far-fetched to presume that many consumers, especially youths, on social media actually use these products when you have as reputable of a publication like *Vogue* pretending to engage a real interview with a CGI influencer, Noonoori, where Noonoori says how much she loves using Kim Kardashian’s products. *Id.*

126. See Simon Owens, *Is it Time to Regulate Social Media Influencers?*, NEW YORK MAGAZINE (Jan. 17, 2019), <http://nymag.com/intelligencer/2019/01/is-it-time-to-regulate-social-media-influencers.html> (reporting that social media followers held YouTuber influencers accountable for promoting a poor quality mental health service noting “[b]ut the tide of community goodwill shifted after many noticed that several of these YouTubers ended their videos by promoting BetterHelp, an app that, for a price, connected you with a professional therapist with whom you could chat virtually about your mental health issues. Users reported shoddy service from the app and filed dozens of complaints with the Better Business Bureau. Soon, these famous YouTubers who had shared their raw, personal stories were accused of cynically exploiting the topic of mental health to line their own pockets. YouTube stars like Philip DeFranco paused their sponsorship collaborations with the app in response.”).

127. *Samsung’s Exploding Phone Nightmare Is Back: Galaxy Note 9 Burns in Woman’s Purse*, BUSINESS TODAY (Sep. 17, 2018, 12:15 PM), <https://www.businesstoday.in/technology/news/samsung-exploding-phone-galaxy-note-9-burns-woman-purse/story/282474.html>.

128. See *supra* note 16 and accompanying text.

129. See Choruk Akik, *CGI Influencers Are Flooding Social Media: Should We Be Very Shook?*, KULTURE HUB (Aug. 27, 2019), <https://kulturehub.com/cgi-influencers-flooding-social-media-shook/> (“Their [Brud’s] Instagram bio claims the mission of “building a more tolerant world by leveraging cultural understanding and technology.” Additionally, the company is definitely very concerned with image, because of its consistent refusal to communicate who is in charge of the design of their CGI, or any in-depth explanations of their business model.”).

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Brud if Lil Miquela promotes a bad product? Is Brud the “bona fide user” of these products that Lil Miquela is promoting and supposed to be using? The answers to all these questions are unanswerable based on the startling lack of information and regulatory enforcement guidelines available by the FTC regarding these computer-generated influencers.<sup>130</sup> For all of these reasons, it is imperative that there be express laws or regulations that govern the specific product endorsement activities of CGI influencers. At the very least, the FTC needs to prioritize enforcing its existing regulations if it is not interested in creating CGI-influencer specific regulations yet.

*D. False Advertising Via Deception: It is False Advertising for CGI Influencers to Endorse Consumer Products Without Conspicuous Disclosures That They Are Not Real People*

*1. Federal Law’s General Prohibition Against False Advertising Through Deceptive and Unfair Practices*

In general, federal law states that “**unfair or deceptive acts or practices in or affecting commerce**, are hereby declared **unlawful**.”<sup>131</sup> Specific to advertisements, it is unlawful “for any person, partnership, or corporation to disseminate, or cause to be disseminated, any **false advertisement**.”<sup>132</sup> Generally, a false advertisement is deemed an “**unfair or deceptive act** as described in the aforementioned provision.”<sup>133</sup> More specifically, a “false advertisement” is defined as:

*“[A]n advertisement . . . which is **misleading in a material respect**; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only **representations made or suggested by statement, word, design, device, sound, or any combination thereof**, but also the extent to which the **advertisement fails to reveal facts material in the light of such representations** . . .”<sup>134</sup>*

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130. See Garry Grant, *Virtual Influencers: Brands Could Land Themselves in Trouble*, BUSINESS 2 COMMUNITY (Oct. 16, 2018), <https://www.business2community.com/social-media/virtual-influencers-brands-could-land-themselves-in-trouble-02128753> (“As of now, the Federal Trade Commission or FTC, and other Regulators haven’t said anything specifically about the use of virtual influencers . . . A virtual identity can’t really have an opinion based on actual experience so it’s important to clarify whether it is the creator’s or the operator’s experience that is relevant.”).

131. Federal Trade Commission Act, 15 U.S.C. § 45. (emphasis added).

132. Federal Trade Commission Act, 15 U.S.C. § 52. (emphasis added).

133. *Id.* (emphasis added).

134. Federal Trade Commission Act, 15 U.S.C. § 55. (emphasis added).

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Thus, federal law creates a general legal prohibition against false advertising committed through a deceptive act.<sup>135</sup> A false advertisement may constitute an affirmative representation that is materially misleading, or an advertisement can be false if it omits material facts in light of the representations made regarding a product.<sup>136</sup>

#### *2. Laying the Foundation for Deception: The Behind-the-Scenes Corporate Efforts to Manipulate Consumers to Believe That Lil Miquela is a Real Person*

If one missed the “robot” in Lil Miquela’s Instagram bio,<sup>137</sup> it would be nearly impossible to tell that she is not a real person. Lil Miquela regularly posts on her Instagram, sharing updates on her life, relationships, mental health, and music career.<sup>138</sup> Lil Miquela’s Instagram integrates her into reality with photoshopped images of her CGI animated character in photos consisting of real environments and real people.<sup>139</sup> For example, Lil Miquela frequently posts photos of her posing with real human celebrities, including globally renowned celebrities such as Bella Hadid<sup>140</sup> and Tracee Ellis Ross.<sup>141</sup> It is not just the impeccable photoshop that bolsters the illusion that Lil Miquela is a real human and not a CGI influencer. Rather, it is also the fact that reputable and trusted celebrities, magazines, corporations, and brands acknowledge Lil Miquela as being a real human that can trick even the most critical eye that Lil Miquela is a flesh and blood human being.

For example, globally known, trusted, and adored celebrity, Millie Bobby Brown, posed for a photo that Lil Miquela was photoshopped into for the established teen lifestyle magazine, *Seventeen Magazine*.<sup>142</sup> Notably, *Seventeen*’s primary target

135. *Id.*

136. *Id.*

137. See Lil Miquela (@lilmiquela), INSTAGRAM, <https://www.instagram.com/lilmiquela/> (last visited Aug. 06, 2020) (Lil Miquela’s Instagram bio).

138. See Lil Miquela (@lilmiquela), INSTAGRAM (Dec. 14, 2019), <https://www.instagram.com/p/B6EIpGnIXo/> (Lil Miquela posting about attending a Netflix show premier); See also Miquela, *supra* note 3 (Lil Miquela kissing her real-life boyfriend, Nick Killian); Lil Miquela (@lilmiquela), INSTAGRAM (Sep. 09, 2019), [https://www.instagram.com/p/B2M-MxU1\\_o5/](https://www.instagram.com/p/B2M-MxU1_o5/) (Lil Miquela sharing with her followers that she is upset over a fight with her boyfriend); Lil Miquela (@lilmiquela), INSTAGRAM (Nov. 20, 2019), <https://www.instagram.com/p/B5GYMq8nZiQ/> (Lil Miquela promoting her new song “Automatic”).

139. Miquela, *supra* note 137.

140. Lil Miquela (@lilmiquela), INSTAGRAM (May 16, 2019), <https://www.instagram.com/p/Bxhji4UHNmr/>.

141. See *Lil Miquela Meets Tracee Ellis Ross and It’s All Love + Positivity*, GLITTER, <https://glittermagrocks.com/connect/2018/10/09/lil-miquela-meets-tracee-ellis-ross/> (last visited Dec. 15, 2019) (article discussing Lil Miquela “meeting” and interviewing the real human celebrity); See also Lil Miquela (@lilmiquela), INSTAGRAM (Oct. 08, 2018), [https://www.instagram.com/p/BosgQznlT9m/?utm\\_source=ig\\_embed](https://www.instagram.com/p/BosgQznlT9m/?utm_source=ig_embed) (Lil Miquela posting a photo of her with Ross during the interview).

142. Lil Miquela (@lilmiquela), INSTAGRAM (Nov. 26, 2019), [https://www.instagram.com/p/B5V3\\_FNnpAJ/](https://www.instagram.com/p/B5V3_FNnpAJ/) (Lil Miquela’s photo with Brown is also a paid ad for Samsung).

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audience is teenagers.<sup>143</sup> Although younger generations are becoming more tech savvy, they are still young and impressionable and can be manipulated into buying this false narrative that CGI influencers like Lil Miquela are real. Thus, this vulnerability is further exploited when legitimate celebrities like Millie Bobby Brown and publications like *Seventeen* validate Lil Miquela as being real.<sup>144</sup>

Lil Miquela has also “posed” for a photo with actress Tracee Ellis Ross, which she then posted to her Instagram. However, this photo went deeper than just being another real-life scene that Lil Miquela was photoshopped into.<sup>145</sup> The photo was part of an “interview” Lil Miquela did with Ross.<sup>146</sup> The write up that documented the event reflects a classic question and answer style interview between the CGI influencer and Ross. Neither Lil Miquela nor Ross at any point in the interview acknowledged the fact that Lil Miquela is a fictional being and that her responses were carefully crafted by Lil Miquela’s corporate puppet masters. Without an explicit acknowledgement of this fact, there was nothing identifiably CGI about Lil Miquela.<sup>147</sup>

In addition to incorporating Lil Miquela into real life events and human interactions, Lil Miquela’s creator, Brud, also uses even more direct manipulative tactics to sell the narrative that Lil Miquela is a real person. Most exemplary are the claims Brud makes in a sketchy Google document online, which is the sole bare bones source of information about what Brud is.<sup>148</sup> Specifically, Brud blatantly states that Lil Miquela is “as real as Rihanna.”<sup>149</sup> This is dangerous because the entity that dominates Lil Miquela’s every action has no trouble plainly analogizing Lil Miquela to a real human being and omitting the key detail that Lil Miquela is a digital fictional creation.<sup>150</sup> That Brud only lists an email address and offers no further information about itself or who is a part of Brud, escalates this danger monumentally.<sup>151</sup> Even if one sees through Lil Miquela’s digital façade, people are still in the dark about who

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143. See *Demographic Profile*, SEVENTEEN (last visited Dec. 15, 2019), [http://www.seventeenmediakit.com/r5/showkiosk.asp?listing\\_id=4285342&category\\_id=31773](http://www.seventeenmediakit.com/r5/showkiosk.asp?listing_id=4285342&category_id=31773) (last visited Dec. 15, 2019) (*Seventeen*’s readership consists of 3,908,000 teenagers).

144. See Seok Hyun Gwon and Suyong Jeong, *Concept Analysis of Impressionability Among Adolescents and Young Adults*, NURSING OPEN (Jul. 20, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6177548/> (Impressionability is defined as “(a) one is able to be susceptible to external stimuli; (b) one is incapable of reasonable judgement; and (c) one has a changeability to accept or modify one’s attitude and behaviour.”). The study showed that the “impressionable years” range from 12-14 and 19-24 years old. *Id.*

145. See *supra* notes 137-142.

146. *Id.*

147. *Id.*

148. See *supra* note 16 and accompanying text.

149. *Id.*

150. *Id.*

151. *Id.*

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to hold accountable for her actions when Brud offers no material information about itself.<sup>152</sup>

Further, Lil Miquela's Instagram narratives and photo captions supplement this outright lie that she is real, by purporting to give her a voice and personality that imitates genuine human thought and emotion.<sup>153</sup> Her Instagram photos and videos imitate a real person's life, struggles, and triumphs.<sup>154</sup> Lil Miquela also engages in social activism,<sup>155</sup> has friendships (both real and CGI),<sup>156</sup> social drama,<sup>157</sup> dreams,<sup>158</sup> and concerns<sup>159</sup> which mimic many of today's youths' emotions, thoughts, and experiences.<sup>160</sup> Lil Miquela also posts content that relate to this generation's favorite pastimes such as binge watching tv in bed all day.<sup>161</sup> Lil Miquela's online persona is engaging, relatable and convincingly human, which is enough to lure any passive and vulnerable social media user to buy in to her fictional world.

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152. *Id.*

153. *See supra* note 138 and accompanying text; *See also* Miquela, *supra* note 1.

154. *Id.*

155. *See* Lil Miquela (@lilmiquela), INSTAGRAM (Jun. 12, 2019), <https://www.instagram.com/p/ByoQgdrHxLE/> (Instagram post of Lil Miquela supporting LBTQ rights); *See also* Lil Miquela (@lilmiquela), INSTAGRAM (May 15, 2019), <https://www.instagram.com/p/BxgTVUZHDnm/> (Lil Miquela Instagram post about abortion rights).

156. *See* Lil Miquela (@lilmiquela), INSTAGRAM (Sep. 07, 2019), <https://www.instagram.com/p/B2HwDNzHkSx/> (Instagram photo of Lil Miquela hanging with the Chainsmokers, a popular Electronic Dance Music real human duo); *See also* Lil Miquela (@lilmiquela), INSTAGRAM (Dec. 03, 2019), <https://www.instagram.com/p/B5n0—tHLE6/> (Instagram photo of Lil Miquela spending time with CGI friend, Bermuda).

157. *See* Lil Miquela (@lilmiquela), INSTAGRAM (Jun. 29, 2018), <https://www.instagram.com/p/BkoO-puFeI2/> (Lil Miquela venting on Instagram how a producer that she trusted lied to her and ghosted her after promising to help her make music).

158. *See* Lil Miquela (@lilmiquela), INSTAGRAM (Mar. 05, 2019), <https://www.instagram.com/p/BunYQJVnl0g/> (Lil Miquela's Instagram post with a caption talking about her dreams and plans for the future).

159. *See* Lil Miquela (@lilmiquela), INSTAGRAM (Sep. 12, 2019), <https://www.instagram.com/p/B2VUusjHDgL/> (Lil Miquela posted an Instagram video titled "Storytime" discussing how she has no friends); *See also* Lil Miquela (@lilmiquela), INSTAGRAM (Jan. 02, 2019), <https://www.instagram.com/p/BsJhQqDH21a/> (Lil Miquela Instagram post expressing nervousness about returning back to work).

160. *See* Lil Miquela (@lilmiquela), INSTAGRAM (Mar. 27, 2019), <https://www.instagram.com/p/BviOmK6njmd/> (Lil Miquela posted an Instagram photo captioned "April is going to be wild. And amazing. And busy. And scary. How do you even pack for a whole new chapter in your life? What shoes go with excitement SLASH nervousness?? Do these pants make my existential crisis look good????").

161. *See* Lil Miquela (@lilmiquela), INSTAGRAM (Nov 23, 2018), <https://www.instagram.com/p/Bqi2nX2nWjj/> (Lil Miquela Instagram post with caption describing that she binge-watched movies all day in bed).

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*3. Paid CGI Social Media Influencer Product Endorsements Are False Advertisements Because They Materially Mislead Consumers to Believe a Real Person is Endorsing the Product*

Emphasizing all the things Lil Miquela “says” and “does” outside explicit product endorsements is vitally important when analyzing the falsity and deceptiveness of her paid social media product endorsements. This is because the connections Brud makes behind the guise of Lil Miquela with her followers play a direct role in using her as a false advertising weapon that deceptively influences consumers to buy products based on material misrepresentations of Lil Miquela’s realness. Brud gains peoples’ trust by building this fake life for Lil Miquela and exploiting her followers’ emotions and desire to trust and connect with celebrities they look up to.<sup>162</sup> Now, creating an Instagram profile for a fictional being is not per se illegal and most people would likely agree it is not even ethically questionable. However, these tactics lay the foundation for Lil Miquela’s corporate controllers to illegally deceive consumers into believing that Lil Miquela’s product endorsements reflect the honest opinion and experience of a real person.

This concept is not new. Brands sponsoring Lil Miquela to endorse their products on social media is deceptive for the same reasons real human social media influencers’ sponsored ads were condemned by the FTC as deceptive for not disclosing to their followers they were being paid to sponsor products on their social media.<sup>163</sup> It has been proven that consumers frequently rely heavily on their trusted influencer’s recommendations to buy products.<sup>164</sup> As a result, the FTC made it clear that the fact that the influencers were being paid to endorse a product was material information that needed to be disclosed with the endorsement, because it would affect the weight and credibility consumers may give to that endorsement and impliedly influence their purchasing decision.<sup>165</sup>

A consumer may or may not be as willing to buy a product based off an influencer’s recommendation if they knew the influencer’s positive praise was in part as a result of that influencer being compensated to do so.<sup>166</sup> However, the key point of the FTC’s 2013 regulations was that consumers should have all the truthful material information to make an informed decision on whether to rely on that influencer’s endorsement of that product.<sup>167</sup> It would be deceptive to make consumers believe that an influencer is endorsing a product out of their own good will when they are really being compensated to do so.<sup>168</sup>

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162. See *supra* Section III.D.ii.

163. See *supra* Section III.B., III.C.

164. See Trepany, *supra* note 8 and accompanying text.

165. Zialcita, *supra* note 93 and accompanying text.

166. *Id.*

167. See *supra* Section III.C.

168. *Id.*



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Just the same, it is deceptive for Lil Miquela's and other CGI influencers' corporate puppeteers to make consumers trust and believe that their product endorsements are coming from a trusted third person's personal opinion and experience, when in reality the "endorsement" is a message crafted by a corporation hiding behind the guise of a trendy social influencer. Consumers must know this material information before making a purchasing decision because it also may affect the weight and credibility they give to the CGI influencer's endorsement.<sup>169</sup>

A false advertisement is a deceptive act that makes materially misleading representations and/or omissions.<sup>170</sup> The way Lil Miquela's creators and managers affirmatively purport her to be a real person giving a genuine endorsement of a product based on her own personal experience using the product is materially misleading.<sup>171</sup> Likewise, it is also materially misleading to omit the material fact that Lil Miquela's "endorsement" is actually just a commercially motivated corporate message that is unaccompanied by the personal opinion of someone that has actually used the product.

Endorsements are different from normal advertisements, because they are supposed to be a reflection of a person's personal thoughts and experience from using a product rather than a simple dissemination of corporate words via a commercial or banner ad.<sup>172</sup> Endorsers are allowed to be compensated by a brand to endorse its product so long as the influencer tells people the whole story, i.e., that they are being compensated.<sup>173</sup>

The exact same issue needs to be addressed with CGI social media influencer product endorsements. There is nothing wrong if corporations and brands want to engage consumers in a new and innovative way through these new unique CGI influencers. As long as consumers know all the material facts about the endorsement, i.e., the CGI influencer is not real and a corporation is controlling her words and actions, then CGI influencers can simply be an unproblematic exciting new wave of digital advertising. However, absent these disclosures, consumers are being manipulated to believe that Lil Miquela's endorsement is coming from her independent experience and opinion, when, in reality, there is no division between the endorser's message and the corporation's.

#### *4. The Solution*

The solution to making paid social media influencer product endorsements not deceptive was pretty simple, i.e., the social influencer must merely disclose to

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169. *Id.*

170. Federal Trade Commission Act, 15 U.S.C. § 55 (emphasis added).

171. *See supra* Section III.C.

172. *Id.*

173. *See supra* Section II.B.

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consumers they got paid to rave about the product.<sup>174</sup> It is likely just as simple to resolve the deceptiveness with CGI influencers' product endorsements by requiring conspicuous disclosures which state that the CGI influencer is not a real person and the opinion they share about a product is not coming from a real person that has used and personally vetted the product.<sup>175</sup>

A natural counterargument is that anyone can figure out that Lil Miquela is not a real human if they look hard enough, so disclosures are unnecessary. However, it is not the people who have the wherewithal to uncover that Lil Miquela is not a real person that gives cause for concern. What matters is if there is even one person that gets duped by Lil Miquela's CGI sophistication, and as a result makes a detrimental purchasing decision relying on a false notion that the CGI influencer has vetted the quality and effectiveness of a product. Even intelligent sophisticated industry professionals are being fooled by these CGI influencers. CGI social media influencer, Shudu, convinced a Fenty Beauty manager that she was a real human model using Fenty Beauty makeup products.<sup>176</sup> Hence, the argument that Lil Miquela and other CGI influencers are so obviously CGI that it mitigates the dangers they pose, does not have much weight.

## IV. CONCLUSION

The consequences of CGI influencers' deceptive product endorsements are by no means fake like they are, which is why the FTC needs to take these consequences seriously and start clarifying, updating, and enforcing its regulations. The FTC has not updated its social media advertising regulations since 2013,<sup>177</sup> which is clear evidence that the FTC has a pacing problem. As the influence of CGI social media influencers continues to grow, the law and regulators must do the same to keep pace to protect consumers. Until the FTC takes an authoritative role to regulate the rapidly growing CGI social media influencer industry, millions of consumers remain vulnerable and susceptible to the dangers posed by CGI influencers' false and deceptive advertising practices.<sup>178</sup>

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174. *Id.*

175. See Trepany, *supra* note 8 (““You’re basically assuming that they are a person who is making their decisions based out of free will, that they have some sense of volition or agency, when in fact it’s a brand,” he said. “It’s decisions that might be made by six people sitting in a conference room.””).

176. Kaitlyn Tiffany, *Lil Miquela and the Virtual Influencer Hype, Explained*, VOX, <https://www.vox.com/the-goods/2019/6/3/18647626/instagram-virtual-influencers-lil-miquela-ai-startups> (last visited Jun. 03, 2019).

177. *Com Disclosures*, *supra* note 83, at 1 and accompanying text.

178. Though, this seems far off considering the FTC in 2017 has just now brought its first ever case against human social media influencers for deceptive advertising activities. See Phyllis H. Marcus & Emma Lewis, *FTC Issues First Endorsement Case Against Social Media Influencers*, HUNTON RETAIL LAW SOURCE (Sep. 11, 2017), <https://www.huntonretailindustryblog.com/2017/09/articles/advertising-marketing/ftc-issues-first-endorsement-case-social-media-influencers/> (reporting on the recent lawsuit).