

Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 28 *XXVIII*
Number 3

Article 3

2018

Making the FTC 😊: An Approach to Material Connections Disclosures in the Emoji Age

Christina Sauerborn

Fordham University School of Law, csauerborn@fordham.edu

Follow this and additional works at: <https://ir.lawnet.fordham.edu/iplj>



Part of the [Intellectual Property Law Commons](#)

Recommended Citation

Christina Sauerborn, *Making the FTC 😊: An Approach to Material Connections Disclosures in the Emoji Age*, 28 Fordham Intell. Prop. Media & Ent. L.J. 571 (2018).

Available at: <https://ir.lawnet.fordham.edu/iplj/vol28/iss3/3>

This Note is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Intellectual Property, Media and Entertainment Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Making the FTC 😊: An Approach to Material Connections Disclosures in the Emoji Age

Cover Page Footnote

Online Editor, Fordham Intellectual Property, Media & Entertainment Law Journal, Volume XXVIII; J.D. Candidate, Fordham University School of Law, 2018; B.A., Individualized Study, with a concentration in Art and Business, New York University, 2011. The Author would like to thank Professor Olivier Sylvain for his guidance and feedback in developing this Note, and the IPLJ Editorial Board and staff for their hard work throughout the editorial process, especially E. Alex Kirk, Matt Hershkowitz, and Jillian Roffer. The Author would also like to thank her family and friends, especially Kathryn and Gary Sauerborn, James DiStefano, and Jessica Drake, for their unconditional love and support.

Making the FTC ☺ : An Approach to Material Connections Disclosures in the Emoji Age

Christina Sauerborn*

In examining the rise of influencer marketing and emoji's concurrent surge in popularity, it naturally follows that emoji should be incorporated into the FTC's required disclosures for sponsored posts across social media platforms. While current disclosure methods the FTC recommends are easily jumbled or lost in other text, using emoji to disclose material connections would streamline disclosure requirements, leveraging an already-popular method of communication to better reach consumers. This Note proposes that the FTC adopts an emoji as a preferred method of disclosure for influencer marketing on social media. Part I discusses the rise of influencer marketing, the FTC and its history of regulating sponsored content, and the current state of regulation. Part II explores the proliferation of emoji as a method of communication, and the role of the Unicode Consortium in regulating the adoption of new emoji. Part III makes the case for incorporating emoji as a method of disclosure to bridge compliance gaps, and offers additional recommendations to increase compliance with existing regulations.

* Online Editor, *Fordham Intellectual Property, Media & Entertainment Law Journal*, Volume XXVIII; J.D. Candidate, Fordham University School of Law, 2018; B.A., Individualized Study, with a concentration in Art and Business, New York University, 2011. The Author would like to thank Professor Olivier Sylvain for his guidance and feedback in developing this Note, and the IPLJ Editorial Board and staff for their hard work throughout the editorial process, especially E. Alex Kirk, Matt Hershkowitz, and Jillian Roffer. The Author would also like to thank her family and friends, especially Kathryn and Gary Sauerborn, James DiStefano, and Jessica Drake, for their unconditional love and support.

INTRODUCTION	573
I. THE RISE OF INFLUENCER MARKETING.....	578
A. <i>The History of Regulation for Endorsement- Based Marketing</i>	578
1. The Federal Trade Commission Act	579
2. FTC Actions Regarding Endorsements.....	582
3. Recent FTC Actions	585
4. What Constitutes Proper Disclosure?.....	592
B. <i>What Is Influencer Marketing, and Why Does It Matter?</i>	596
C. <i>The Fyre Festival: A Case for Clear and Conspicuous Disclosure</i>	604
II. THE DEVELOPMENT OF EMOJI.....	610
A. <i>A Brief History of Emoji, and the Unicode Consortium as Gatekeepers</i>	611
B. <i>Procedures for Proposing the Addition of New Emoji</i>	615
C. <i>Emoji as an Evolving Part of the Cultural Lexicon</i>	619
III. THE CASE FOR DISCLOSURE VIA EMOJI, AND OTHER SUGGESTED IMPROVEMENTS FOR DISCLOSURE.....	626
A. <i>Proposal for the Adoption of a Dedicated Emoji for Disclosing Material Connections</i>	626
B. <i>Advantages and Potential Difficulties Underlying Disclosure via Emoji</i>	629
C. <i>Additional Recommendations to Increase Voluntary Compliance with Material Connections Disclosure Requirements</i>	632
CONCLUSION.....	634

INTRODUCTION

If you have spent any amount of time scrolling through Instagram, Snapchat, or virtually any other image-focused social media platform,¹ at some point you have probably been on the receiving end of influencer marketing. You know the type of post when you see it. It might be a photo of the author using a product, or maybe even holding the product while smiling directly into the camera.

Additionally, there's an accompanying caption format that now feels all too familiar: "Thanks [brand] for inviting me to check out [product]. This thing is next level!" followed by #ad or #sponsored.² There are infinite variations of this caption. Maybe it personalizes the message in the author's tone of voice. Maybe it includes some interesting or funny anecdote about the author's experience using the product.³ Maybe it simply reads "Thanks [brand]!" without giving the reader any other context.⁴ If the

¹ Social media is a form of communication, generally over the Internet, where users share information, ideas, personal messages, photos, videos, and other content. See *Definition of Social Media*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/social%20media?utm_campaign=sd&utm_medium=serp&utm_source=jsonld [<https://perma.cc/4WT5-PA74>] (last visited Jan. 18, 2018). Popular social media platforms in 2017 included Facebook, Instagram, Twitter, Snapchat, and Pinterest, among others. See Jeff Dunn, *Facebook Totally Dominates the List of Most Popular Social Media Apps*, BUS. INSIDER (July 27, 2017), <http://www.businessinsider.com/facebook-dominates-most-popular-social-media-apps-chart-2017-7> [<https://perma.cc/3TMA-KLUN>].

² See David Lopez (@davidlopezfilms), INSTAGRAM (Jan. 19, 2016), <https://www.instagram.com/p/BAvJOwVOpLc/> [<https://perma.cc/2ZYR-KGZ7>] ("Thanks @xfinity for inviting me to check out X1. This thing is next level! More to come from our collaboration. #RealFansGetIt #ad.").

³ See Maddie Greer (@maddiegreer), INSTAGRAM (Jan. 25, 2016), https://www.instagram.com/p/BA_LL9HJPGL/ [<https://perma.cc/S3AB-N2NB>] ("After watching the trailer for The Finest Hours, and seeing how they found courage in the midst of danger, it had me thinking. I've never been one to find myself in the face of danger, but I truly overcame one of my biggest fears this past year. I left everything I knew and was familiar with and headed out West to live. It's been an unbelievable adjustment and something I would have never had the courage to do without a push. But I wouldn't trade it for anything because since then, I have grown more than ever. I can't wait to see #TheFinestHours and how being courageous pushes them. #sponsored.").

⁴ See Scott Disick (@letthelordbewithyou), INSTAGRAM (Dec. 17, 2016), https://www.instagram.com/p/BOIM_mFBWpt/ [<https://perma.cc/J68K-JYDR>] ("Vintage rollie vibes today thanks [to] @byoungco.").

author is *really* succinct, maybe it just tags a brand or company.⁵ The inclusion and placement of the hashtags⁶—if any—is also varied. For example, perhaps it includes “#ad” at the beginning of the post. Maybe it buries “#ad” or “#sponsored” in an avalanche of other hashtags.⁷ Maybe you’ll need to click “more” to even see the hashtags.⁸

Despite the myriad iterations of this content, all influencer marketing⁹ has two common threads: (1) it attempts to promote a product or service,¹⁰ and (2) it does so by paying an “influencer,” leveraging their social media presence to target a highly engaged demographic of viewers.¹¹ Through influencer marketing, what once took the form of traditional advertisements now looks almost indistinguishably like other content created by your favorite celebrities and internet personalities. Influencer marketing is on the rise, and with companies spending ever-increasing allotments of advertising budgets on influencer marketing campaigns, the trend continues to gain momentum.¹²

As influencer marketing has increased, attention has turned toward efforts to regulate it. In 2009, the Federal Trade Commission (“FTC”) revised their endorsement guidelines, designed to protect consumers while also giving marketers

⁵ See Amra Olević (@amrezy), INSTAGRAM (Oct. 24, 2017), <https://www.instagram.com/p/BapGFluAP9/> [<https://perma.cc/ST5A-XN6G>] (including the caption “@yslbeauty” alongside an image showing a table of Yves Saint Laurent lipsticks).

⁶ A hashtag, popularized by its use on Twitter, is a word or phrase preceded by the “#” symbol, commonly used to topically group or categorize user posts. See *How to Use Hashtags*, TWITTER HELP CTR., <https://help.twitter.com/en/using-twitter/how-to-use-hashtags> [<https://perma.cc/ZH9E-C6SH>] (last visited Mar. 3, 2018); see also Lexi Pandell, *An Oral History of the #Hashtag*, WIRED (May 19, 2017), <https://www.wired.com/2017/05/oral-history-hashtag/> [<https://perma.cc/UV44-DP4M>].

⁷ See, e.g., Christina Elmen (@chrisssymarice), INSTAGRAM (Dec. 30, 2017), <https://www.instagram.com/p/BdWPlwvF6r9/> [<https://perma.cc/GW8U-JCP8>] (including “#sponsored” at the end of the first paragraph, after three other hashtags, and “#ad” towards the very bottom of the caption, with approximately sixteen additional hashtags before it and two after it).

⁸ See *id.* When viewed using the Instagram App for iPhone, hashtags are not visible until the viewer clicks “more.”

⁹ See *infra* Section I.B.

¹⁰ See *infra* Section I.B.

¹¹ See *infra* Section I.B.

¹² See *infra* Section I.B.

flexibility.¹³ On their website, the FTC has also assembled an informal FAQ that describes best practices for popular disclosure methods, including hashtags and other language.¹⁴ Despite the FTC's efforts to educate the public, there remains a significant lack of understanding regarding disclosure requirements.¹⁵ A 2016 survey found that while two-thirds of marketers are aware of FTC guidelines, only eleven percent of marketers claim they understand them.¹⁶ While influencers seem to have a better grasp on disclosure requirements, another issue persists—in the same 2016 survey, three-in-ten influencers reported having been asked by a client or marketer to hide the sponsored nature of their post.¹⁷

Regardless of marketers' attitudes toward disclosure requirements, it is also questionable whether existing disclosure methods are even accomplishing their intended purpose.¹⁸ The digital world puts a premium on concise messaging, as the Internet increasingly caters to ever-diminishing attention spans.¹⁹

¹³ Throughout this Note, a “marketer” generally refers to the marketing arm of a brand or company, an advertising agency or marketing firm working with a brand or company, or any other organization or individual seeking to promote a product or service through the use of a marketing strategy, including but not limited to influencer marketing. *See infra* Section I.A; *cf. Definition of Marketer*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/marketer> [<https://perma.cc/7NYA-DEQG>] (last visited Mar. 12, 2018).

¹⁴ *See infra* Section I.A.4.

¹⁵ *See* Alison McCarthy, *Marketers ‘Unaware’ of FTC Social Media Guidelines Regulating Influencers*, EMARKETER (Mar. 1, 2017), <https://www.emarketer.com/Article/Marketers-Unaware-of-FTC-Social-Media-Guidelines-Regulating-Influencers/1015341> [<https://perma.cc/46WN-MLWG>].

¹⁶ *See id.* The survey was conducted by Lightspeed GMI and Research Now, for IZEA. *See id.* Participants included over 852 influencers, content marketers, and content creators based in the United States. *See* IZEA, *THE 2017 STATE OF THE CREATOR ECONOMY STUDY: AN EXPANDED IZEA INVESTIGATION OF MARKETERS, CREATORS, AND CONSUMERS*, at *16, *46–47 (2017), [http://content.izea.com/hubfs/Gated_Content/2017%20State%20of%20the%20Creator%20Economy%20\(SOCE\).pdf](http://content.izea.com/hubfs/Gated_Content/2017%20State%20of%20the%20Creator%20Economy%20(SOCE).pdf) [<https://perma.cc/C454-FX65>].

¹⁷ *See* McCarthy, *supra* note 15.

¹⁸ *See infra* Section I.A.1 (detailing the methods implemented by the FTC).

¹⁹ *See, e.g.*, Timothy Egan, *The Eight-Second Attention Span*, N.Y. TIMES (Jan. 22, 2016), <https://www.nytimes.com/2016/01/22/opinion/the-eight-second-attention-span.html> [<https://perma.cc/Y6X8-PE7X>] (“A New York friend used to send me clever, well-thought-out emails, gems of sprightly prose. Then he switched to texting, which abbreviated his wit and style. Now all verbs and nouns have vanished; he sends emojis, the worst thing to happen to communication in our time.”); Kevin McSpadden, *You Now*

Disclosure is also hamstrung by the limitations of social media platforms. For example, even the shortest FTC-approved disclosure,²⁰ the commonly used “#ad,” still requires using three characters—which, though still very short, becomes important when crafting a message to fit within certain character limits.²¹ Additionally, on many platforms, influencers are unable to set off disclosures using bold type or contrasting colors that distinguish disclosures from other surrounding text.²² By allowing influencers and marketers considerable discretion to use hashtags and other language to indicate a sponsored post,²³ the FTC leaves the door open for disclosure practices that consumers will eventually come to ignore.

Have a Shorter Attention Span than a Goldfish, TIME (May 14, 2015), <http://time.com/3858309/attention-spans-goldfish/> [<https://perma.cc/N3ND-WUGA>] (“The average attention span for the notoriously ill-focused goldfish is nine seconds, but according to a new study from Microsoft Corp., people now generally lose concentration after eight seconds, highlighting the affects [sic] of an increasingly digitalized lifestyle on the brain.”).

²⁰ See *infra* Section I.A.4.

²¹ See Dominique Jackson, *Know Your Limit: The Ideal Length of Every Social Media Post*, SPROUT SOCIAL (May 22, 2017), <https://sproutsocial.com/insights/social-media-character-counter/#instagram> [<https://perma.cc/8ELW-RUNA>]. The most ubiquitous example of character limitation in social media is Twitter, which in 2017 increased the limit from 140 characters to 280 characters per Tweet. See Aliza Rosen, *Tweeting Made Easier*, TWITTER BLOG (Nov. 7, 2017), https://blog.twitter.com/official/en_us/topics/product/2017/tweetingmadeeasier.html [<https://perma.cc/4RR9-683N>]. Snapchat has an even lower character limit, which in April 2016 was increased from thirty-one to eighty characters. See Maggie Mallon, *This New Snapchat Update Will Take Your Stories from Good to Great*, GLAMOUR (Apr. 21, 2016, 12:30 PM), <https://www.glamour.com/story/this-new-snapchat-update-will-take-your-stories-from-good-to-great> [<https://perma.cc/FUK5-UD9X>]. Instagram has a generous 2,200-character limit for captions. See Jackson, *supra*. However, Instagram truncates captions after 125 characters, with characters exceeding the limit viewable after the reader clicks “More” on individual posts. See *Why Doesn't My Entire Caption Display in Feed?*, INSTAGRAM HELP CTR., <https://help.instagram.com/1643471055915254?helpref=uf> [<https://perma.cc/EK3Q-GHPD>] (last visited Mar. 3, 2018). YouTube also has a comparatively high five thousand-character limit for video descriptions. See Jackson, *supra*.

²² In the Author’s experience, Instagram and Twitter do not allow users to change the color or typeface of caption text or tweets. Hashtags and hyperlinks appear in a contrasting color, but the individual user has no control over this feature. YouTube offers perhaps the most flexibility, in that content creators can utilize video editing software to add text to their videos.

²³ See *infra* text accompanying notes 126–27.

In the meantime, advertisers have grabbed the attention of coveted demographics by using another trending method of communication—emoji.²⁴ Since their limited introduction to Japanese cell phones in the late 1990s, emoji have ascended to worldwide popularity.²⁵ Once primarily a novelty supplementing tweets and text messages, uses for emoji have rapidly evolved and expanded.²⁶ Emoji have also taken on enormous significance in our daily conversations.²⁷ As society has gradually assigned meaning to these tiny images, it has allowed us to contextualize our messages, or even replace aspects of them entirely.²⁸

In examining the rise of influencer marketing and emoji's concurrent surge in popularity, it naturally follows that emoji should be incorporated into the FTC's required disclosures for sponsored posts across social media platforms. While current disclosure methods the FTC recommends are easily jumbled or lost in other text, using emoji to disclose material connections would streamline disclosure requirements, leveraging an already-popular method of communication to better reach consumers.²⁹ This Note proposes that the FTC adopt an emoji as a preferred method of disclosure for influencer marketing on social media. Part I discusses the rise of influencer marketing, the FTC and its history of regulating sponsored content, and the current state of regulation. Part II explores the proliferation of emoji as a method of communication, and the role of the Unicode Consortium in regulating the adoption of new emoji. Part III makes the case for incorporating emoji as a method of disclosure to bridge compliance gaps, and offers additional recommendations to increase compliance with existing regulations.

²⁴ See *infra* Section II.C.

²⁵ See *infra* Part II.

²⁶ See *infra* Section II.C.

²⁷ See *infra* text accompanying notes 230–32.

²⁸ See *infra* Section II.C.

²⁹ See *infra* Part III.

I. THE RISE OF INFLUENCER MARKETING

This Part discusses influencer marketing and the FTC's evolving approach in providing guidance to companies, marketers, and influencers. Section I.A discusses the Federal Trade Commission Act and the FTC's history of action surrounding influencer marketing. Section I.B discusses the mechanics of influencer marketing, with focus on Instagram as a preferred social media platform. Section I.C evaluates the Fyre Festival and its influencer marketing campaign as a cautionary case study.

A. *The History of Regulation for Endorsement-Based Marketing*

Endorsements have been a staple marketing tool in the United States for nearly a century, with celebrity endorsements rising sharply in popularity in the mid-1970s.³⁰ Celebrities have long played a role in television and print media advertising campaigns, offering their endorsements to promote brands.³¹ In recent years, social media has broadened the playing field, giving value to the voices of anyone with strong opinions and above-average photography skills.³² Meanwhile, celebrities now endorse products through social media, in addition to tried and true advertising media like television or print.³³

As influencers have taken endorsement-based marketing into a new age, regulations have raced to keep up. This Section discusses the history of regulatory tools for endorsement-based marketing.

³⁰ KERRY SEGRAVE, ENDORSEMENTS IN ADVERTISING: A SOCIAL HISTORY 3, 109 (2005).

³¹ *See generally id.*

³² *Cf.* Samone Wheeler, *The Types of Influencers, Platforms, and How to Work with Them*, BLOGLOVIN': INFLUENCE (Aug. 3, 2017), <https://influence.bloglovin.com/the-types-of-influencers-platforms-and-how-to-work-with-them-221d45735d52> [<https://perma.cc/6VTZ-PAFB>] (explaining how influencers are professional social media personalities).

³³ *See generally* Evan Asano, *The Top [Ten] Highest Paid Celebrities on Instagram*, MEDIKIX (Apr. 12, 2017), <http://mediakix.com/2017/04/highest-paid-celebrities-endorsement-rates-on-instagram/> [<https://perma.cc/GT2U-AAGN>].

1. The Federal Trade Commission Act

In 1914, the Federal Trade Commission Act (“FTCA”) was signed into law.³⁴ Originally created in response to public concerns regarding the growth of monopolies and cartels, the FTCA aimed to protect consumers by prohibiting unfair competition,³⁵ and created the FTC to enforce this prohibition.³⁶ Under federal law, the FTC was empowered “to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce.”³⁷

The FTCA was amended in 1938, and extended to prohibit “unfair or deceptive acts or practices in commerce.”³⁸ This marked an important amendment since the Act’s original passage into law.³⁹ The amendment’s primary purpose was to expand consumer protection by allowing the FTC to intervene in a wider variety of situations causing public harm.⁴⁰ Ensuring this flexibility was a large part of early discussions regarding the amendment.⁴¹ The Senate Committee on Interstate Commerce engaged in substantial debate with the FTC regarding the inclusion of the words “acts or practices,” as opposed to “methods,” which had already been used in the FTCA in reference to competition.⁴² The FTC found that, while “methods” evoked a pattern of behavior that might be more

³⁴ See *Our History*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/our-history> [https://perma.cc/HC2Z-ARAX] (last visited Dec. 27, 2017).

³⁵ See ADDRESS BY PRESIDENT WOODROW WILSON BEFORE A JOINT SESSION OF CONGRESS ON ADDITIONAL LEGISLATION FOR THE CONTROL OF TRUSTS AND MONOPOLIES, H.R. DOC. NO. 63-625, at 3–6 (2d Sess. 1914), *reprinted in* THE LEGISLATIVE HISTORY OF THE FEDERAL ANTI-TRUST LAWS AND RELATED STATUTES 3746–47 (Earl W. Kintner ed., 1982).

³⁶ See generally 15 U.S.C. § 41 (2012) (establishing the FTC).

³⁷ *Id.* § 45(a)(2).

³⁸ Federal Trade Commission Act, ch. 40, sec. 3, § 5(a), 52 Stat. 111 (1938).

³⁹ See *To Amend the Federal Trade Commission Act: Hearings on S. 3744 Before the Comm. on Interstate Commerce*, 74th Cong. 10 (1936) (statement of Ewin L. Davis, Member, Federal Trade Commission).

⁴⁰ See *id.* at 23 (“[S]ince the prime purpose of this amendment is the protection of the public, the Commission should have such discretion that it could stop a dangerous misleading act before it has been pursued far enough by the offender to constitute a plan or method of business.”).

⁴¹ See generally *id.* (discussing the need to amend the FTCA).

⁴² See *id.* at 19–24.

difficult to prove, the phrase “acts or practices” allowed the FTC greater latitude to intervene.⁴³

The FTCA defines “unfair” acts or practices as those that “cause[] or [are] 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.”⁴⁴ Today, the FTC’s primary mission is to protect consumers by preventing unfair or deceptive business practices.⁴⁵ The FTC accomplishes this primarily by using its rulemaking authority to carry out the provisions of the FTCA.⁴⁶

In 1975, the FTC adopted its first guide regarding the use of testimonials and endorsements in advertising.⁴⁷ In 2009, the guide was revised to provide additional guidance relevant for new media, including social media.⁴⁸ An “endorsement” is defined as “any advertising message . . . that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences” of the endorser.⁴⁹ A statement is considered an endorsement “even if the views expressed by [the endorser] are identical to those of the sponsoring advertiser”—which means that even if the endorser genuinely believes in the product being endorsed, the statement is

⁴³ *Id.* at 21 (“[W]e think it would be inadvisable to use the word ‘methods’ in this connection . . . we think it would be construed as more restrictive than the term ‘unfair methods of competition[,]’ as originally used, and would still subject the Commission and consequently the Government to a constant heavy expense of meeting that issue.”).

⁴⁴ 15 U.S.C. § 45(n) (2012).

⁴⁵ *See About the FTC*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc> [<https://perma.cc/WZ6S-YQN8>] (last visited Dec. 5, 2017).

⁴⁶ *Cf.* 15 U.S.C. § 46(g).

⁴⁷ *See* Guides Concerning the Use of Endorsements and Testimonials in Advertising, 40 Fed. Reg. 22,127 (May 21, 1975) (codified at 16 C.F.R. pt. 255); *see also* 16 C.F.R. §§ 255.0–255.5 (2017) (showing the most recent finalized codification of the FTC’s endorsement rules).

⁴⁸ *See* Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,124, 53,125 (Oct. 15, 2009) (codified at 16 C.F.R. pt. 255); *see also supra* note 1.

⁴⁹ 16 C.F.R. § 255.0(b). For clarity, “endorser” is the language used by the FTC. *See id.* (“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.”). An “influencer” can be an endorser (for example, if they post sponsored content), but an endorser is not necessarily an influencer.

still considered an endorsement by the FTC.⁵⁰ An endorser can be an individual, a group, or another institution.⁵¹

The FTC further provides that “[w]hen there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement . . . such connection must be fully disclosed.”⁵² The FTC reasons that knowing whether the endorser received compensation from the brand or product being endorsed, or whether the endorser has another relationship with the company that the average consumer might not know about, impacts the weight a consumer gives to an endorsement.⁵³

The FTC defines a “material connection” primarily by way of examples.⁵⁴ Generally, an endorser is said to have such a connection to a brand, product, or company when some condition is present that an average viewer would not reasonably expect.⁵⁵ For instance, an endorser need not disclose that they were paid to endorse a brand in a television commercial—since such endorsements are generally compensated, the average consumer would reasonably expect it and is therefore not deceived.⁵⁶ Additionally, an endorser need not disclose that they are contractually obligated to use certain products in a public setting, such as on a television interview, so long as no representation is made about the product (aside from using it) within that setting.⁵⁷ An endorser is not deceptively endorsing a product where they are merely using it in public without commenting on it or making any kind of representations about it.⁵⁸

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Disclosure of Material Connections, 16 C.F.R. § 255.5.

⁵³ See *The FTC’s Endorsement Guides: What People Are Asking*, FED. TRADE COMM’N, <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking> [<https://perma.cc/YBX2-Z8U6>] (last visited Dec. 5, 2017).

⁵⁴ 16 C.F.R. § 255.5.

⁵⁵ *Id.*

⁵⁶ *Id.* at ex. 2.

⁵⁷ *Id.* at ex. 3.

⁵⁸ *Id.*

Conversely, in less traditional advertising methods, such as blogs, online message boards, and “street team” guerrilla marketing techniques,⁵⁹ the FTC requires that endorsers disclose their relationship with a brand.⁶⁰ An endorser must disclose when they have received compensation, free merchandise, or any other incentive that might affect the objectivity of their representations.⁶¹ Ostensibly, this is because an average consumer might not be as aware in such situations that, in offering their “organic” opinions about using the product, the endorser is actually marketing on behalf of the company or brand.⁶²

2. FTC Actions Regarding Endorsements

Recently, the FTC has taken an active approach to educate the public on regulations.⁶³ In March 2017, the FTC sent approximately ninety letters to “educate” recipients, including both influencers and marketing teams at various companies.⁶⁴ Individuals who received letters included Jennifer Lopez,⁶⁵

⁵⁹ *Id.* at exs. 7–9. Guerrilla marketing, which gets its name from guerrilla warfare, relies on low-cost, unconventional strategies, the element of surprise, and reaching out to consumers on a highly personal level. *See What Is Guerrilla Marketing?*, CREATIVE GUERRILLA MARKETING, <http://www.creativeguerrillamarketing.com/what-is-guerrilla-marketing/> [<https://perma.cc/HKP6-RY56>] (last visited Dec. 29, 2017); *see also* GUERRILLA MARKETING, <http://gmarketing.com/> [<https://perma.cc/YLD2-ZCYT>] (last visited Dec. 29, 2017). A “street team” generally refers to a marketing strategy that engages consumers via brand ambassadors, who talk directly with consumers (on the street) about the brand or product being promoted. *See, e.g.*, 16 C.F.R. § 255.5, ex. 9.

⁶⁰ *See* 16 C.F.R. § 255.5, exs. 7–9.

⁶¹ *See id.*

⁶² *See id.*

⁶³ *See infra* text accompanying notes 64–84.

⁶⁴ *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/Z74Z-3GH8>]; *see also FTC Reminder: Influencers Must Divulge Ads*, TRUTH IN ADVERT. (Apr. 26, 2017), <https://www.truthinadvertising.org/ftc-reminds-influencers-divulge-social-media-posts-ads/> [<https://perma.cc/8X9M-699Y>].

⁶⁵ *See* C. Ryan Barber, *Who Got Those Social ‘Influencer’ Letters from the FTC? Read the Full List*, NAT’L L.J. (May 5, 2017), <http://www.law.com/nationallawjournal/almID/1202785302263/> [<https://perma.cc/7TGW-BBSV>]; Letter from Mary K. Engle, Assoc. Dir., Fed. Trade Comm’n, to Jennifer Lopez (Mar. 20, 2017) (on file with LAW.COM). Jennifer Lopez is an American recording artist, actress, dancer, and fashion designer. *Jennifer Lopez*, BIOGRAPHY.COM, <https://www.biography.com/people/jennifer-lopez-9542231> [<https://perma.cc/5MM5-JNB8>] (last visited Dec. 29, 2017); *J.Lo*

Lindsay Lohan,⁶⁶ Victoria Beckham,⁶⁷ Sean Combs,⁶⁸ Ciara,⁶⁹ Luke Bryan,⁷⁰ and Naomi Campbell,⁷¹ marketers included representatives from companies including Chanel,⁷² Adidas,⁷³

Designer Profile, Entry in *Designer Profiles*, THINK FASHION, <http://www.thinkfashion.com/designer-brands/designer-profiles/jlo.html?atext=J.Lo> [<https://perma.cc/LS2B-4VFW>] (last visited Feb. 24, 2018).

⁶⁶ Letter from Mary K. Engle, Assoc. Dir., Fed. Trade Comm'n, to Lindsey [sic] Lohan (Mar. 20, 2017) (on file with LAW.COM). Lindsay Lohan is an American actress, known for her breakout role in the 2004 film *Mean Girls*. *Lindsay Lohan*, BIOGRAPHY.COM, <https://www.biography.com/people/lindsay-lohan-16599978> [<https://perma.cc/4PPB-U2DV>] (last visited Dec. 29, 2017).

⁶⁷ Letter from Mary K. Engle, Assoc. Dir., Fed. Trade Comm'n, to Victoria Beckham (Mar. 20, 2017) (on file with LAW.COM). Victoria Beckham is a British businesswoman, fashion designer, and model, who rose to fame as a member of the 1990s all-female pop group, the Spice Girls. *Victoria Beckham*, BIOGRAPHY.COM, <https://www.biography.com/people/victoria-beckham-485406> [<https://perma.cc/447S-PES6>] (last visited Dec. 29, 2017). She is also married to professional soccer player David Beckham. *Id.*

⁶⁸ Letter from Mary K. Engle, Assoc. Dir., Fed. Trade Comm'n, to Sean Combs (Mar. 20, 2017) (on file with LAW.COM). Sean Combs, also known as "P. Diddy," is an American recording artist, music producer, and entrepreneur. *Sean "P Diddy" Combs*, BIOGRAPHY.COM, <https://www.biography.com/people/sean-puffy-combs-9542180> [<https://perma.cc/V4N9-MK4Q>] (last visited Dec. 29, 2017).

⁶⁹ Letter from Mary K. Engle, Assoc. Dir., Fed. Trade Comm'n, to Ciara Princess Wilson (Mar. 20, 2017) (on file with LAW.COM). Ciara is an R&B singer-songwriter and dancer. *Ciara*, BIOGRAPHY.COM, <https://www.biography.com/people/ciara-21330599> [<https://perma.cc/V9WL-XUNZ>] (last visited Dec. 29, 2017). She is also married to NFL star quarterback Russell Wilson. *Id.*

⁷⁰ Letter from Mary K. Engle, Assoc. Dir., Fed. Trade Comm'n, to Luke Bryan (Mar. 20, 2017) (on file with LAW.COM). Luke Bryan is a country music singer-songwriter. *Luke Bryan*, BIOGRAPHY.COM, <https://www.biography.com/people/luke-bryan> [<https://perma.cc/9QED-N3KJ>] (last visited Dec. 29, 2017).

⁷¹ Letter from Mary K. Engle, Assoc. Dir., Fed. Trade Comm'n, to Naomi Campbell (Mar. 20, 2017) (on file with LAW.COM). Naomi Campbell is a British supermodel. *Naomi Campbell*, BIOGRAPHY.COM, <https://www.biography.com/people/naomi-campbell-16243293> [<https://perma.cc/8CSY-Q9C3>] (last visited Dec. 29, 2017).

⁷² Letter from Mary K. Engle, Assoc. Dir., Fed. Trade Comm'n, to John Galantic, President & Chief Operating Officer, Chanel USA (Mar. 20, 2017) (on file with LAW.COM). Chanel is an international fashion house, specializing in luxury apparel, cosmetics, and perfume. *See Chanel, Inc.*, VAULT, <http://www.vault.com/company-profiles/personal-care/chanel,-inc/company-overview> [<https://perma.cc/9KUI-XJHR>] (last visited Dec. 29, 2017); *see also* CHANEL, <http://www.chanel.com/> [<https://perma.cc/K6YW-V2GB>] (last visited Dec. 29, 2017).

⁷³ Letter from Mary K. Engle, Assoc. Dir., Fed. Trade Comm'n, to Mark King, President, Adidas Grp. N. Am. (Mar. 20, 2017) (on file with LAW.COM). Adidas is an athletic company and brand, selling shoes, apparel, and equipment in more than 160 countries. *Adidas North America, Inc.*, VAULT, <http://www.vault.com/company-profiles/general-consumer-products/adidas/company-overview.aspx>

Cabela's,⁷⁴ Johnson & Johnson,⁷⁵ and Dunkin' Donuts.⁷⁶ Each letter identified specific posts on social media where the influencer failed to properly disclose their material connection to the brand being promoted.⁷⁷ The letters also included copies of the FTC's endorsement guidelines FAQ,⁷⁸ and additional educational material to educate recipients regarding proper disclosure requirements.⁷⁹ For marketers, the letters also recommended evaluating the influencer's post against any existing company social media

[<https://perma.cc/JD7W-VBJQ>] (last visited Dec. 29, 2017); *see also* ADIDAS, <http://www.adidas.com/us/> [<https://perma.cc/C5R6-789M>] (last visited Dec. 29, 2017).

⁷⁴ Letter from Mary K. Engle, Assoc. Dir., Fed. Trade Comm'n, to Thomas L. Millner, Chief Exec. Officer, Cabela's, Inc. (Mar. 20, 2017) (on file with LAW.COM). Cabela's is a retailer of outdoor sporting goods, operating primarily in the United States and Canada. *See Cabela's Incorporated*, VAULT, <http://www.vault.com/company-profiles/retail/cabelas-incorporated/company-overview.aspx> [<https://perma.cc/5XL2-PVJY>] (last visited Dec. 29, 2017); *see also* CABELA'S, <http://www.cabelas.com/> [<https://perma.cc/Y9HH-JDBH>] (last visited Dec. 29, 2017).

⁷⁵ Letter from Mary K. Engle, Assoc. Dir., Fed. Trade Comm'n, to Alex Gorsky, Chairman & Chief Exec. Officer, Johnson & Johnson (Mar. 20, 2017) (on file with LAW.COM). Johnson & Johnson is a leading corporation in the personal care, medical device, and pharmaceutical industries. *See Johnson & Johnson*, VAULT, <http://www.vault.com/company-profiles/personal-care/johnson-johnson/company-overview.aspx> [<https://perma.cc/D6BZ-NPDU>] (last visited Dec. 29, 2017); *see also* JOHNSON & JOHNSON, <https://www.jnj.com/> [<https://perma.cc/82FW-VMA5>] (last visited Dec. 29, 2017).

⁷⁶ Letter from Mary K. Engle, Assoc. Dir., Fed. Trade Comm'n, to Nigel Travis, Chief Exec. Officer, Dunkin' Brands Grp., Inc. (Mar. 20, 2017) (on file with LAW.COM). Dunkin' Donuts, part of Dunkin' Brands Group, Inc., is a quick-service restaurant franchise, serving coffee and baked goods. *See Profile: Dunkin' Brands Group Inc (DNKN.O)*, REUTERS, <https://www.reuters.com/finance/stocks/companyProfile/DNKN.O> [<https://perma.cc/GJD4-XXKT>] (last visited Dec. 29, 2017); *see also* DUNKIN' DONUTS, <https://www.dunkindonuts.com/en> [<https://perma.cc/37T6-636Y>] (last visited Dec. 29, 2017).

⁷⁷ *Cf.* Letter from Mary K. Engle, Assoc. Dir., Fed. Trade Comm'n, to {Exec.} (Apr. 19, 2017) (on file with FED. TRADE COMM'N) (representing the FTC's template educational letter to marketers); Letter from Mary K. Engle, Assoc. Dir., Fed. Trade Comm'n, to {Influencer} (Apr. 19, 2017) (on file with FED. TRADE COMM'N) (representing the FTC's template educational letter to social media influencers).

⁷⁸ *Cf.* Letter from Mary K. Engle to {Exec.}, *supra* note 77; Letter from Mary K. Engle to {Influencer}, *supra* note 77. *See generally infra* Section I.A.4 (discussing the endorsement guidelines FAQ in more detail).

⁷⁹ *Cf.* Letter from Mary K. Engle to {Exec.}, *supra* note 77; Letter from Mary K. Engle to {Influencer}, *supra* note 77.

policies, or more foundationally, implementing such a policy and taking care to include provisions that offer guidance to endorsers.⁸⁰

On September 6, 2017, the FTC sent follow-up correspondence to approximately twenty-one influencers, all of whom had previously been sent the educational letter in March 2017.⁸¹ The September 2017 letters identify recipients' specific Instagram posts that have inadequate disclosure of material connections—either the post does not disclose at all, attempts disclosure via “Thank you [Brand],” or attempts disclosure, but not until past line three of the description, after the viewer clicks “more.”⁸² In addition, the letters requested a written response by September 30, 2017 advising the FTC of whether the influencer has a material connection with the brands or businesses mentioned in the post.⁸³ If they do, it asks what actions the influencer will take to ensure that their business relationships are clearly disclosed in the future.⁸⁴

3. Recent FTC Actions

Generally, the FTC has cracked down most on companies using careless or deceptive tactics in their influencer marketing campaigns.⁸⁵ Until recently, FTC complaints have generally left individual influencers unscathed.⁸⁶ Influencer marketing campaigns on a variety of social media platforms have been the

⁸⁰ Cf. Letter from Mary K. Engle to {Exec.}, *supra* note 77.

⁸¹ See *CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers*, FED. TRADE COMM'N (Sept. 7, 2017), <https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against> [<https://perma.cc/58AF-38E5>]; see also Katie Notopoulos, *[Twenty-One] Celebrities Just Got a Harsh Warning About Instagram Ads*, BUZZFEED NEWS (Sept. 14, 2017, 5:38 PM), <https://www.buzzfeed.com/katienotopoulos/ftc-cracks-down-harder-on-celebrity-instagram-ads> [<https://perma.cc/867A-4VPS>] (listing the twenty-one individuals who received the September 2017 FTC letter, including Lindsay Lohan, Ciara, and Naomi Campbell).

⁸² Letter from Mary K. Engle, Assoc. Dir., Fed. Trade Comm'n, to {Name} (Sept. 6, 2017) (on file with FED. TRADE COMM'N).

⁸³ See *id.*

⁸⁴ See *id.*

⁸⁵ See *infra* text accompanying notes 87–122.

⁸⁶ The FTC's complaint against the two social media influencers behind virtual gambling website CSGO Lotto marked their first complaint against individual influencers. See *CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers*, *supra* note 81.

subject of FTC complaints. For example, in 2012, marketing firm Deutsch LA worked with Sony to promote the release of the PlayStation Vita, a new video game console.⁸⁷ As part of their promotional strategy, Deutsch LA circulated a company-wide email directing its employees to tweet about the product using “#gamechanger” to generate buzz ahead of the campaign launch.⁸⁸ However, it did not direct employees to disclose that they were promoting the product as members of Sony’s advertising agency.⁸⁹ In their complaint, the FTC found this practice misleading because the tweets did not disclose the employment relationship, giving the appearance that they were coming from regular customers.⁹⁰

A couple of recent influencer marketing campaigns leveraging YouTube influencers have also caught the FTC’s attention. Video game and entertainment marketing company Machinima ran a campaign to promote the Xbox One video game console.⁹¹ Machinima paid two video game influencers thousands of dollars in exchange for content containing positive reviews of the Xbox One on their YouTube channels.⁹² In addition, Machinima also devised an incentive program, promising to pay other influencers

⁸⁷ See *Sony Computer Entertainment America to Provide Consumer Refunds to Settle FTC Charges over Misleading Ads for PlayStation Vita Gaming Console*, FED. TRADE COMM’N (Nov. 25, 2014), <https://www.ftc.gov/news-events/press-releases/2014/11/sony-computer-entertainment-america-provide-consumer-refunds> [https://perma.cc/44UT-VNMQ].

⁸⁸ See *id.*

⁸⁹ See Michelle Castillo, *FTC: No, Agencies Can’t Ask Staffers to Casually Tweet Nice Things About Clients*, ADWEEK (Dec. 4, 2014), <http://www.adweek.com/digital/ftc-no-agencies-cant-ask-staffers-casually-tweet-nice-things-about-clients-161755/#/> [https://perma.cc/8UZM-VDH9]; Maureen Morrison, *FTC Calls Out Sony—and Deutsch LA—for Deceptive Advertising*, ADAGE (Nov. 25, 2014), <http://adage.com/article/news/ftc-sony-deutsch-la-deceived-consumers/296004/> [https://perma.cc/4MR3-2EMR].

⁹⁰ Complaint at 5, *In re Deutsch LA, Inc.*, No. C-4515 (F.T.C. Mar. 24, 2015), FTC Matter/File No. 122-3252, https://www.ftc.gov/system/files/documents/cases/141125_deutschmpt.pdf [https://perma.cc/M8QA-GKEC].

⁹¹ See *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/2AAL-ALEB].

⁹² See Todd Spangler, *Machinima Settles FTC Charges over ‘Deceptive’ YouTube Videos Touting Xbox*, VARIETY (Sept. 2, 2015, 3:10 PM), <http://variety.com/2015/digital/news/machinima-ftc-deceptive-youtube-xbox-videos-1201584521/> [https://perma.cc/CX5S-FRQF].

one dollar for every one thousand views of whatever content they posted promoting the Xbox One.⁹³ The influencers produced over three hundred videos, generating more than thirty million views in the span of about a month-and-a-half.⁹⁴ The FTC cited the influencers' failure to disclose their relationship as a deceptive practice because it misled viewers into thinking that the influencers' positive statements were impartial.⁹⁵

In 2016, Warner Brothers similarly came under fire for a marketing campaign utilizing YouTube influencers. Warner Brothers worked with an advertising agency that coordinated with several social media influencers to promote the video game *Middle Earth: Shadow of Mordor*.⁹⁶ As part of the deal, the influencers agreed to certain stipulations regarding the content of their postings.⁹⁷ The influencers, including YouTube star PewDiePie,⁹⁸

⁹³ *Id.* The total payout per influencer was capped at twenty-five thousand dollars. *Id.*

⁹⁴ Complaint at 4, *In re Machinima, Inc.*, No. C-4569 (F.T.C. Mar. 16, 2016), FTC Matter/File No. 142-3090 https://www.ftc.gov/system/files/documents/cases/150902_machinima-cmpt.pdf [<https://perma.cc/G9KG-E9WS>].

⁹⁵ *Id.* at 4–5.

⁹⁶ Complaint at 1, *In re Warner Bros. Home Entm't, Inc.*, No. C-4595 (F.T.C. Nov. 17, 2016), FTC Matter/File No. 152-3034, <https://www.ftc.gov/system/files/documents/cases/160711warnerbroscmpt.pdf> [<https://perma.cc/XV4P-N4BC>]; *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/K3BV-K7KY>].

⁹⁷ Megan Geuss, *FTC: Warner Bros. Paid YouTubers for Positive Reviews*, ARS TECHNICA (July 11, 2016, 3:10 PM), <https://arstechnica.com/tech-policy/2016/07/ftc-says-warner-bros-paid-youtubers-to-promote-shadow-of-mordor/> [<https://perma.cc/C85V-5EHF>].

⁹⁸ Felix Kjellberg, known by his username PewDiePie, is an internet personality whose YouTube channel currently has over fifty-eight million subscribers. *See* PewDiePie, YOUTUBE, <https://www.youtube.com/user/PewDiePie/> [<https://perma.cc/4TBC-DYPA>] (last visited Dec. 29, 2017). Time Magazine named Kjellberg one of the world's "[One-Hundred] Most Influential People" in 2016. *See* Trey Parker, *Felix Kjellberg (a.k.a. PewDiePie)*, TIME (Apr. 21, 2016), <http://time.com/collection-post/4302406/felix-kjellberg-pewdiepie-2016-time-100/> [<https://perma.cc/Q9YA-9SBT>]. Despite posting multiple videos in early 2017 containing racist and anti-Semitic content, PewDiePie remains one of the highest-paid YouTube stars, and maintains the most-subscribed channel on the site. *See* Madeline Berg, *How YouTube's PewDiePie Made [Twelve] Million [Dollars] This Year Despite Racist Videos*, FORBES (Dec. 7, 2017), <https://www.forbes.com/sites/maddieberg/2017/12/07/how-youtubes-pewdiepie-made-12-million-this-year-despite-racist-videos/#51bbf6f764e9> [<https://perma.cc/YT92-WCPU>].

were required to post positive reviews about the game, and to include “a strong verbal call-to-action” to click a link taking the viewer to the game’s website.⁹⁹ They were not permitted to show any bugs or glitches experienced during gameplay, nor offer “any negative sentiments about the game, Warner Bros., or its affiliates.”¹⁰⁰

Warner Brothers also instructed the influencers to disclose the paid relationship in the information box below the video.¹⁰¹ Of the influencers who were part of the promotion, only PewDiePie actually disclosed that the video was sponsored—doing so, however, “below the fold,” with the disclosure visible only after the viewer clicked “show more.”¹⁰² Deeming this insufficient disclosure, the FTC filed a complaint against Warner Brothers.¹⁰³ The FTC noted that the videos were especially deceptive because the lack of disclosure gave an impression that the reviews reflected the independent opinions of the influencers.¹⁰⁴

A March 2015 Instagram influencer marketing campaign launched by Lord & Taylor also became the subject of an FTC complaint.¹⁰⁵ To promote a new women’s fashion collection, Lord & Taylor sent a dress—later known as the “Paisley Asymmetrical

⁹⁹ Geuss, *supra* note 97 (quoting Warner Bros.’ criteria for paid influencer advertising about their game).

¹⁰⁰ *Id.*

¹⁰¹ See Rich McCormick, *PewDiePie and Other YouTubers Took Money from Warner Bros. for Positive Game Reviews*, VERGE (July 12, 2016, 12:09 AM), <https://www.theverge.com/2016/7/12/12157310/pewdiepie-youtubers-sponsored-videos-ftc-warner-bros> [<https://perma.cc/FPN3-LRUL>].

¹⁰² See *id.*; PewDiePie, *Shadow of Mordor - Gameplay - Part [One] (Gamescom Demo) Ultimate Orc Slaying!*, YOUTUBE (Sept. 4, 2014), <https://www.youtube.com/watch?v=g-wdRroa4ms> [<https://perma.cc/92FB-LQQ9>] (indicating “[t]his video was sponsored by Warner Brother [sic]” only after the viewer clicks “show more”).

¹⁰³ Complaint, *In re Warner Bros. Home Entm’t, Inc.*, *supra* note 96. The YouTube influencers produced approximately thirty videos to promote the campaign, which “were viewed over 5.5 million times by consumers, and were publicly available for over a year” before the FTC filed a complaint. *Id.* at 3.

¹⁰⁴ See *id.* at 3–4.

¹⁰⁵ Complaint at 1, *In re Lord & Taylor, LLC*, No. C-4576 (F.T.C. May 20, 2016), FTC Matter/File No. 152-3181, <https://www.ftc.gov/system/files/documents/cases/1605231ordtaylorempt.pdf> [<https://perma.cc/3Z6X-Q35Y>]. Over the course of one weekend, the “campaign reached 11.4 million individual Instagram users,” and generated upwards of 328,000 instances of user engagement (i.e., likes, comments, re-postings) with the Lord & Taylor Instagram handle. *Id.* at 2.

Dress”—to fifty Instagram fashion influencers.¹⁰⁶ Lord & Taylor paid the influencers between one thousand and four thousand dollars each to post a photo of themselves wearing the dress, styled in a manner of their choice, and tagged with the “@lordandtaylor” Instagram handle¹⁰⁷ and “#DesignLab” hashtag.¹⁰⁸ Additionally, Lord & Taylor preapproved the posts to ensure they were properly tagged, and made “stylistic edits” as desired to the influencers’ captions.¹⁰⁹ The campaign was extremely effective—“[t]he posts reached more than [eleven] million Instagram users and the dress

¹⁰⁶ *Id.* at 2.

¹⁰⁷ “Handle” generally refers to an account’s username on a social media platform. *See Noun*, Section 2.1 of *Definition of Handle*, ENG. OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/handle> [<https://perma.cc/EB8V-ED2M>] (last visited Jan. 2, 2018) (defining “handle” as a noun meaning “[a] person’s username on an online forum or social media site”). On many platforms, this is distinguished from the user’s actual name. *Cf. Edit Your Profile*, PINTEREST HELP CTR., <https://help.pinterest.com/en/articles/edit-your-profile#Web> [<https://perma.cc/VCX2-Q6S2>] (last visited Jan. 2, 2018); *How Do I Update Profile Information Like My Name, Username and Email?*, INSTAGRAM HELP CTR., https://help.instagram.com/583107688369069?helpref=uf_permalink [<https://perma.cc/D8R6-3RWT>] (last visited Jan. 2, 2018); *How to Customize Your Profile*, TWITTER HELP CTR., <https://help.twitter.com/en/managing-your-account/how-to-customize-your-profile> [<https://perma.cc/5999-M6SP>] (last visited Jan. 2, 2018) (“You can customize your profile by selecting unique profile and header images, adding a name, bio, location, birthday, website and theme color, and by pinning a Tweet that other people will see when they visit your profile.”). Other users can “tag” a user by mentioning them in a post or message, by typing in their username preceded by “@.” *See How Do I Mention Someone on Instagram?*, INSTAGRAM HELP CTR., https://help.instagram.com/1422266748076581?helpref=uf_permalink [<https://perma.cc/9BP3-P32V>] (last visited Jan. 2, 2018) (“To mention someone, type @ followed immediately by their username (ex: ‘great photo, @shayne!’.”); *How to Post a Mention*, Section of *About Replies and Mentions*, TWITTER HELP CTR., <https://help.twitter.com/en/using-twitter/mentions-and-replies> [<https://perma.cc/3ME3-Z95Y>] (explaining that to mention another user in a post, “[t]ype the ‘@’ symbol before the username(s) when addressing a particular account(s). Example: ‘I’m Tweeting on @Twitter!’”).

¹⁰⁸ *See Lord & Taylor Settles FTC Charges It Deceived Consumers Through Paid Article in an Online Fashion Magazine and Paid Instagram Posts by [Fifty] “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/P59C-MTE6>]. The campaign’s hashtag, “#DesignLab,” refers to the name of Lord & Taylor’s then-new women’s apparel line. *See Ad or Not? That Paisley Asymmetrical Dress on Instagram*, TRUTH IN ADVERT. (Mar. 21, 2016), <https://www.truthinadvertising.org/ad-not-paisley-asymmetrical-dress-saw-instagram/> [<https://perma.cc/BL9E-53UR>].

¹⁰⁹ *See* Complaint at 2, *In re* Lord & Taylor, LLC, *supra* note 105.

quickly sold out.”¹¹⁰ However, none of the influencers disclosed that Lord & Taylor had compensated them for the post.¹¹¹ In their subsequent complaint, the FTC alleged that, by allowing the influencers to post their photos wearing the dress without disclosing that they had received compensation, Lord & Taylor had engaged in deceptive marketing practices.¹¹² Without including proper disclosures, the FTC reasoned, the posts gave consumers the impression that they “reflected the independent statements of impartial fashion influencers.”¹¹³

In 2017, the FTC settled its first-ever complaint against individual social media influencers.¹¹⁴ Trevor “TmarTn” Martin¹¹⁵ and Thomas “Syndicate” Cassell,¹¹⁶ two influencers who each have a large following on YouTube, used social media to promote CSGO Lotto, a web site offering consumers the opportunity to gamble using a virtual currency.¹¹⁷ Martin and Cassell posted

¹¹⁰ *Ad or Not? That Paisley Asymmetrical Dress on Instagram*, *supra* note 108.

¹¹¹ Complaint at 2, *In re Lord & Taylor, LLC*, *supra* note 105.

¹¹² *See id.* at 3.

¹¹³ *See id.*

¹¹⁴ *See CSGO Lotto Owners Settle FTC’s First-Ever Complaint Against Individual Social Media Influencers*, *supra* note 81.

¹¹⁵ Trevor Martin is an American YouTuber, maintaining two channels with 2.7 to 3.3 million subscribers each. *See* TmarTn, YOUTUBE, <https://www.youtube.com/user/TmarTn> [<https://perma.cc/7MBS-4UME>] (last visited Dec. 30, 2017); TmarTn2, YOUTUBE, <https://www.youtube.com/user/TmarTn2> [<https://perma.cc/3HEW-82LR>] (last visited Dec. 30, 2017). Martin is best known for his video game commentaries, where he will play a video game and provide tips and tricks as he plays. *See* Don Dodson, *Champaign Native Turns Gaming Skills into Lucrative YouTube Career*, NEWS-GAZETTE (Jan. 2, 2014, 7:00 AM), <http://www.news-gazette.com/news/local/2014-01-02/champaign-native-turns-gaming-skills-lucrative-youtube-career.html> [<https://perma.cc/Y6WH-ALA3>].

¹¹⁶ Thomas Cassell, known as “Syndicate,” is a British YouTuber and vlogger, whose content largely covers video games and gameplay commentary. *See* Stuart Cullen, *Multi-Millionaire YouTuber Syndicate Hits [Ten] Million Subscribers to Confirm Status as the Rock Star Vlogger of the Gaming World*, SCOTTISH SUN (July 20, 2017, 8:04 PM), <https://www.thescottishsun.co.uk/news/1311467/syndicate-youtube-subscribers-vlogger-resonate-glasgow/> [<https://perma.cc/N24Z-9KNX>]. His YouTube channel, “The Syndicate Project,” has over ten million subscribers. *See* TheSyndicateProject, YOUTUBE, <https://www.youtube.com/user/TheSyndicateProject> [<https://perma.cc/U8MQ-F22B>] (last visited Dec. 30, 2017). His other channel, “Life of Tom,” is a daily vlog and has over 2.5 million subscribers. *See* Life of Tom, YOUTUBE, <https://www.youtube.com/user/SyndicateCentral> [<https://perma.cc/Q3AN-3Q3X>] (last visited Dec. 30, 2017).

¹¹⁷ Complaint at 2, *In re CSGOLotto*, No. C-4632 (F.T.C. Sept. 7, 2017), FTC Matter/File No. 162-3184, https://www.ftc.gov/system/files/documents/cases/1623184_

betting videos, where they would record themselves gambling and winning large payouts using the service.¹¹⁸ However, Martin and Cassell failed to disclose that they were actually the president and vice president, respectively, of CSGO Lotto.¹¹⁹ Accordingly, the FTC alleged violations of section 5(a) of the FTCA, finding that Martin and Cassell had deliberately misrepresented their relationship with CSGO Lotto through these videos.¹²⁰

As part of the settlement in each of these cases, the FTC required the respondent to refrain from engaging in similar practices in the future.¹²¹ Additionally, the respondent was required to participate in a monitoring program, allowing the FTC to review

csgolotto_complaint.pdf [https://perma.cc/5QAY-5NRU]. “CSGO” refers to *Counter-Strike: Global Offensive*, a multiplayer first-person shooter game available on several platforms, including PlayStation 3 and Xbox 360. See COUNTER-STRIKE: GLOBAL OFFENSIVE, <http://blog.counter-strike.net/> [https://perma.cc/F6CQ-5BUS] (last visited Dec. 30, 2017) (providing the main information hub for that particular game in the *Counter-Strike* series); CS:GO FAQ, <http://blog.counter-strike.net/index.php/facts/> [https://perma.cc/49M6-UBLB] (last visited Dec. 30, 2017). Although the CSGO Lotto site appears defunct, the company’s promotional giveaways and other “gambling” events can be found on their Twitter account. See CSGO LOTTO, <http://csgolotto.info/> [https://perma.cc/Z2BU-FQRR] (last visited Dec. 30, 2017) (showing “CSGOLOTTO” and no other text); CSGOLotto (@CSGOLotto), TWITTER, <https://twitter.com/csgolotto> [https://perma.cc/CG4S-733H] (last visited Dec. 30, 2017).

¹¹⁸ Allegra Frank, *Counter-Strike Gambling Scandal Comes to an End with FTC Settlement*, POLYGON (Sept. 7, 2017, 7:26 PM), <https://www.polygon.com/2017/9/7/16271520/csgo-lotto-scandal-counter-strike-betting-ftc-endorsement-guidelines> [https://perma.cc/7CDV-3MAY].

¹¹⁹ See Complaint, *In re CSGOLotto*, *supra* note 117, at 5.

¹²⁰ See *id.* at 6.

¹²¹ Decision and Order at 3, *In re CSGOLotto*, No. C-4632 (F.T.C. Sept. 7, 2017), FTC Matter/File No. 162-3184, https://www.ftc.gov/system/files/documents/cases/1623184_csgolotto_agreement_and_decision_and_order.pdf [https://perma.cc/SMX4-U5S2]; Decision and Order at 3, *In re Warner Bros. Home Entm’t, Inc.*, No. C-4595 (F.T.C. Nov. 17, 2016), FTC Matter/File No. 152-3034, <https://www.ftc.gov/system/files/documents/cases/160711warnerbroso.pdf> [https://perma.cc/57AX-4T7G]; Decision and Order at 3, *In re Lord & Taylor, LLC*, No. C-4576 (F.T.C. May 20, 2016), FTC Matter/File No. 152-3181, <https://www.ftc.gov/system/files/documents/cases/160523lordtaylordo.pdf> [https://perma.cc/3T3V-4YMY]; Decision and Order at 3, *In re Machinima, Inc.*, No. C-4569 (F.T.C. Mar. 16, 2016), FTC Matter/File No. 142-3090, <https://www.ftc.gov/system/files/documents/cases/160317machinimado.pdf> [https://perma.cc/29TY-E2KQ]; Decision and Order at 4, *In re Deutsch LA, Inc.*, No. C-4515 (F.T.C. Mar. 24, 2015), FTC Matter/File No. 122-3252, <https://www.ftc.gov/system/files/documents/cases/141125deutschagree.pdf> [https://perma.cc/GJE8-ZVM8].

their marketing materials to ensure compliance with endorsement guidelines.¹²²

4. What Constitutes Proper Disclosure?

Section 255.5 of the FTC's endorsement guideline regulations, as codified in the Code of Federal Regulations, says that proper disclosure of a material connection between an endorser and an advertiser must be clear and conspicuous.¹²³ The endorser must let consumers know that either: (a) the endorser was compensated or promised compensation in exchange for their endorsement, or (b) the endorser knew or had reason to know that they would receive a benefit in exchange for their favorable endorsement.¹²⁴ Whether disclosure is appropriate or sufficient largely depends on the medium of the endorsement.¹²⁵ To an extent, influencers and advertisers have flexibility to use their discretion.¹²⁶ As long as the disclosure conveys the necessary information to consumers, there

¹²² Decision and Order at 8, *In re CSGOLotto*, *supra* note 121; Decision and Order at 5, *In re Warner Bros. Home Entm't, Inc.*, *supra* note 121; Decision and Order at 5, *In re Lord & Taylor, LLC*, *supra* note 121; Decision and Order at 5, *In re Machinima, Inc.*, *supra* note 121; Decision and Order at 5, *In re Deutsch LA, Inc.*, *supra* note 121.

¹²³ Disclosure of Material Connections, 16 C.F.R. § 255.5 (2017).

¹²⁴ *See id.*

¹²⁵ *See id.* For example, on Twitter, due to its character limit, disclosure may take the form of hashtags. *The FTC's Endorsement Guides: What People Are Asking*, *supra* note 53 ("Starting a tweet with 'Ad:' or '#ad'"—which takes only [three] characters—would likely be effective."). On Instagram, disclosure may take the form of hashtags or other explanatory language, but should appear towards the beginning of the caption so the user can view it without clicking "more." *See id.* When people view Instagram streams on most smartphones, descriptions more than four lines long are truncated, with only the first three lines displayed. To see the rest, you have to click "more." If an Instagram post makes an endorsement through the picture or the first three lines of the description, any required disclosure should be presented without having to click "more." *Id.* On YouTube, disclosure may be included in the caption text before the viewer clicks "more"; however, the FTC has stated that ideally, a disclosure statement should be part of the video itself, because the videos are the main content featured on YouTube and it is possible that a viewer may not read the video's caption. *See id.* ("[C]onsumers can easily miss disclosures in the video description. Many people might watch the video without even seeing the description page, and those who do might not read the disclosure. The disclosure has the most chance of being clear and prominent if it's included in the video itself. That's not to say that you couldn't have disclosures in both the video and the description.").

¹²⁶ *See* 16 C.F.R. § 255.5.

is no specifically mandated language or typeface required for the disclosure.¹²⁷

Over the years, the FTC has informally narrowed these guidelines. In September 2017, the FTC announced that it had made updates to its endorsement guidelines FAQ, titled “What People Are Asking” (“the FAQ”).¹²⁸ Last updated in 2015, the FAQ clarifies the FTC’s expectations regarding what constitutes “clear and conspicuous” disclosure of material connections.¹²⁹ The updated September 2017 FAQ also broadens the list of situations where disclosure is needed. For example, the FTC notes that an endorsement can be “aspirational”—in other words, influencers must disclose that they were paid even if they have not used or tried the product they are writing about.¹³⁰

Acknowledging the increased use of social media as an influencer marketing tool, the FTC offers some specific recommendations regarding hashtags and the word choices used to make material connection disclosures.¹³¹ Hashtags are a symbolic and common method of disclosure, widely used in influencer marketing on both Twitter and Instagram, and the FTC’s guidance in the FAQ reflects a variety of commonly used tags.¹³² For example, the FTC notes that “#Thankyou” or “Thank you [Company] for the product”¹³³ are ambiguous and insufficient to explain the relationship between the author and the company.¹³⁴ “[Brand] asked me to try their product”¹³⁵ is also ambiguous,

¹²⁷ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,124, 53,130 n.55 (Oct. 15, 2009) (codified at 16 C.F.R. pt. 255).

¹²⁸ See *The FTC’s Endorsement Guides: What People Are Asking*, *supra* note 53.

¹²⁹ See *id.*

¹³⁰ See *id.*

¹³¹ See *infra* text accompanying notes 132–39.

¹³² See *The FTC’s Endorsement Guides: What People Are Asking*, *supra* note 53.

¹³³ See, e.g., Letter from Mary K. Engle to Jennifer Lopez, *supra* note 65 (showing a since-removed Instagram post by Jennifer Lopez, captioned “#TBT to my Birthday weekend in Vegas!! Thanks again @vodkabeluga #vodkabeluga”); Kendall Jenner (@kendalljenner), INSTAGRAM (May 20, 2017), <https://www.instagram.com/p/BUU7P7zDvOS/> [<https://perma.cc/4LUS-A3RP>] (“[T]hank you @chopard @jenatkinhair @lmaryphillips @marnixmarni @giambattistavalliparis ❤️❤️.”).

¹³⁴ See *The FTC’s Endorsement Guides: What People Are Asking*, *supra* note 53.

¹³⁵ See, e.g., Valentina Vignali (@valentinavignali), INSTAGRAM (Nov. 6, 2016), <https://www.instagram.com/p/BMeihtVhO4S/> [<https://perma.cc/84HK-8KCB>] (“I’m trying the new chewable @hairburst hearts! Simply chew two hearts per day to give your

because without context, it is unclear whether the influencer received the merchandise for free.¹³⁶ “[Brand]ad” is also considered unclear, because in most cases it is difficult to read and therefore, difficult to understand.¹³⁷ In contrast, “Thank you [Company] for the *free* product” is clearer because it highlights the compensated nature of the post vis-à-vis the receipt of the free item.¹³⁸ Using “#ad” on its own is also sufficient, so long as it appears towards the beginning of the description text, and is uncluttered by other text, links, and hashtags.¹³⁹

For influencers who are brand ambassadors or company employees, the FTC offers slightly different recommendations regarding hashtags. While “#ambassador” or “#employee” are ambiguous and too general, “[Brand]ambassador” or “[Brand]employee” are clearer because it specifies the material connection and makes it easier for consumers to understand.¹⁴⁰ The FTC also suggests incorporating “My employer’s product . . .” or “My company’s product . . .” into the description as the clearest way to explain an endorsement on behalf of an employer, because it discloses the relationship even if the average consumer would not know that the employer produces a particular product or brand.¹⁴¹

The location of a disclosure within a post is also important for influencers to consider. For Instagram, the disclosure should

hair all the vital ingredients it needs. Hairburst will protect your hair this winter and will reduce breakages. Order now from 🍷 hairburst.com #Hairburst #HealtyHair #LoveIt #Ad . . .”). When the FTC sent its educational letters to both Hairburst and Valentina Vignali, “#Ad” was absent from the caption. *See* Letter from Mary K. Engle, Assoc. Dir., Fed. Trade Comm’n, to Valentina Vignali (Mar. 20, 2017) (on file with LAW.COM).

¹³⁶ *See The FTC’s Endorsement Guides: What People Are Asking*, *supra* note 53.

¹³⁷ *See id.*

¹³⁸ *Id.* (emphasis added).

¹³⁹ *See id.*

¹⁴⁰ *See id.* A 2017 Instagram post by Kendall Jenner is a good example of how this type of disclosure can be used effectively. *See* Kendall Jenner (@kendalljenner), INSTAGRAM (May 31, 2017), <https://www.instagram.com/p/BUw05XIDCzT/> [<https://perma.cc/E2ZB-35FH>] (caption reading “officially joining the adidas fam! @adidasoriginals #adidasAmbassador #adidasOriginals” accompanied by a photo of Jenner wearing an Adidas tracksuit, sitting in a golf cart in front of a wall painted with the Adidas logo and the phrase “WELCOME TO THE FAMILY”).

¹⁴¹ *See The FTC’s Endorsement Guides: What People Are Asking*, *supra* note 53; *see also* note 126.

appear within the first three lines of the description; it should not require clicking “more” to see the disclosure.¹⁴² Disclosure does not have to be in the very beginning, but putting it in the middle or at the end might make it less clear.¹⁴³ The FTC also mentions that using a built-in disclosure tool provided by the social media platform is not necessarily sufficient disclosure.¹⁴⁴ The burden of disclosing is on the influencer and the brand, not the platform.¹⁴⁵ Rather, the FTC will still evaluate the disclosure based on several factors, including: the placement of the disclosure, whether the text is in “a simple-to-read font with a contrasting background,” and whether the wording is easily “understandable to the ordinary reader.”¹⁴⁶

The updated FAQ also clarifies some avenues by which reviewers might have previously tried to evade disclosure requirements.¹⁴⁷ Disclosure is required even if the reviewer posts on a different platform than directed—for example, if the company asks the reviewer to post on Twitter, disclosure is still required even if the reviewer later posts on Instagram too.¹⁴⁸ Additionally, “likes” on social media could be subject to FTC action depending on the overall impression given to consumers.¹⁴⁹ While the FTC

¹⁴² See *The FTC’s Endorsement Guides: What People Are Asking*, *supra* note 53.

¹⁴³ See *id.*

¹⁴⁴ See *id.* The FTC’s guidance in this regard is particularly interesting, since it comes on the heels of Instagram’s decision to add a “paid partnership with” sub-header on sponsored posts, specifically to help influencers comply with the FTC disclosure guidelines. See Todd Spangler, *Instagram Will Add ‘Paid Partnership’ Tag to Sponsored Posts, After FTC’s Warnings to Celebrity Users*, VARIETY (June 14, 2017, 3:28 PM), <http://variety.com/2017/digital/news/instagram-paid-partnership-tag-sponsored-ftc-celebrity-warning-1202466310/> [<https://perma.cc/HHD6-MHSH>].

¹⁴⁵ See *The FTC’s Endorsement Guides: What People Are Asking*, *supra* note 53.





¹⁴⁶ See *id.*

¹⁴⁷ See *id.*

¹⁴⁸ See *id.*

¹⁴⁹ See *id.* Clicking the “like” button, a functionality popularized on Facebook and Instagram, is a way that users can show their reaction to another user’s post. See *How Do I Like a Photo or Video?*, INSTAGRAM HELP CTR., https://help.instagram.com/459307087443937?helpref=uf_permalink [<https://perma.cc/7UNY-466V>] (last visited Feb. 11, 2018); *What Does It Mean to “Like” Something?*, FACEBOOK HELP CTR., https://www.facebook.com/help/110920455663362?helpref=uf_permalink [<https://perma.cc/2XQ2-CQM7>] (last visited Feb. 11, 2018). As some have observed, clicking “like” can communicate a variety of messages, intentionally or unintentionally. See Nicolas DiDomizio, *Here’s What a ‘Like’ Really Means on Every Social Media*

acknowledges that there is no avenue for disclosure by merely liking a post, it warns that advertisers should not encourage endorsements using this feature, presumably in situations where they are attempting to skirt the guidelines.¹⁵⁰

It might be argued that the FTC's gradual narrowing of the once overly generalized disclosure mandate has caused more confusion than it has alleviated. At the same time, social media and other methods of communication continue to change. In September 2016, influencer marketing company IZEA petitioned the Unicode Consortium¹⁵¹ to create a new emoji.¹⁵² The proposed design would include “#AD” on a styled, colored background. Examples include , , , and .¹⁵³ The emoji would serve a practical purpose—to allow influencers to clearly and conspicuously disclose when a post has been sponsored, or when they have other material connections to the promoted brand.¹⁵⁴

B. *What Is Influencer Marketing, and Why Does It Matter?*

Influencer marketing “leverages the power of a social media ‘influencer’ . . . to expose a brand or product to the influencer’s

Platform, MIC (July 8, 2015), <https://mic.com/articles/121747/13-things-you-re-really-saying-with-all-those-social-media-likes#.0QS729etM> [https://perma.cc/PV9U-YDWX]. Additionally, the overall value of likes as a user engagement metric has come into question amid the rise of “bots”—fake social media accounts created to artificially boost influencers’ user engagement. See, e.g., Sapna Maheshwari, *How Bots Are Inflating Instagram Egos*, N.Y. TIMES (June 6, 2017), <https://www.nytimes.com/2017/06/06/business/media/instagram-bots.html> [https://perma.cc/NHY8-NEVF]; Kari Paul, *Does the ‘Like’ Mean Anything Anymore?*, SELECT ALL (May 5, 2016, 9:17 AM), <http://nymag.com/selectall/2016/05/does-the-like-mean-anything-anymore.html> [https://perma.cc/2TPC-2BNW].

¹⁵⁰ See *The FTC’s Endorsement Guides: What People Are Asking*, *supra* note 53.

¹⁵¹ The Unicode Consortium is a non-profit corporation. See *The Unicode Consortium*, UNICODE, <http://unicode.org/consortium/consort.html> [https://perma.cc/ZK2Q-A3T2] (last visited Feb. 14, 2017). The Unicode Consortium’s main interest is in developing, maintaining, and promoting the Unicode Standard, a system of text representation used by virtually all modern software products and operating systems. See *infra* notes 254–57 and accompanying text.

¹⁵² See *IZEA Petitions the Unicode Consortium to Create #AD Emoji*, IZEA (Sept. 26, 2016), <https://izea.com/2016/09/26/emoji/> [https://perma.cc/TL4R-Z5N6].

¹⁵³ See *id.*

¹⁵⁴ See *id.*

large follower base.”¹⁵⁵ An influencer is usually an Instagrammer, YouTuber, blogger, or “vlogger”¹⁵⁶ with “digital clout”: In other words, an individual using a media platform who is considered a thought leader, and whose content effectively influences the opinions (and often, purchasing decisions) of their followers.¹⁵⁷ Influencers often have an interest in a particular niche or topic, and create content based on their interest in that topic.¹⁵⁸ Some popular topics include travel, fashion, beauty, and tech.¹⁵⁹

Many influencers have strong, loyal relationships with their followers, who value their recommendations based on a perceived level of authenticity,¹⁶⁰ knowledge of similar products, and

¹⁵⁵ *What Is Influencer Marketing? How Can It Help My Brand?*, Section of *What Is Influencer Marketing?*, MEDIKIX (Feb. 1, 2016), <http://mediakix.com/2016/02/what-is-influencer-marketing/#gs.fbXLdWA> [<https://perma.cc/X9N2-GTK2>]. Followers are users on a social media platform who subscribe to another user’s content, posts, Tweets, or updates. See, e.g., *How Do I Find People I Know to Follow on Instagram?*, INSTAGRAM HELP CTR., https://help.instagram.com/195069860617299?helpref=uf_permalink [<https://perma.cc/G3PT-MXUM>] (last visited Dec. 30, 2017); *How Do I Find People I Might Like to Follow?*, INSTAGRAM HELP CTR., https://help.instagram.com/741619032578266?helpref=uf_permalink [<https://perma.cc/7Z79-MBF3>] (last visited Dec. 30, 2017); *What Are Followers*, Section of *Following FAQs*, TWITTER HELP CTR., <https://help.twitter.com/en/using-twitter/following-faqs> [<https://perma.cc/M4UT-J239>] (last visited Dec. 30, 2017); *Who Can Follow Me?*, FACEBOOK HELP CTR., https://www.facebook.com/help/201148673283205?helpref=uf_permalink [<https://perma.cc/LHY7-TJKD>] (last visited Dec. 30, 2017).

¹⁵⁶ A vlogger—short for “video blogger”—maintains a blog that uses video content to capture and share the vlogger’s everyday life. See *What Is Vlogging and How Is It Shaping Digital Media?*, Section of *What Is Vlogging? Definition, History, & Impact on Media*, MEDIKIX (Dec. 1, 2016), <http://mediakix.com/2016/12/what-is-vlogging-definition-examples-history/> [<https://perma.cc/36JP-A2JV>].

¹⁵⁷ See Wheeler, *supra* note 32.

¹⁵⁸ See generally *Top Influencers in Every Niche*, IZEA (Nov. 1, 2017), <https://izea.com/2017/11/01/top-influencers-2017/> [<https://perma.cc/T7NR-D8C8>].

¹⁵⁹ See *id.*

¹⁶⁰ Authenticity is especially important to teenagers; in a study conducted by Variety in 2014, respondents ages thirteen to seventeen found a selection of YouTube stars significantly more appealing than a selection of traditional Hollywood celebrities or pop stars. See Susanne Ault, *Survey: YouTube Stars More Popular than Mainstream Celebs Among U.S. Teens*, VARIETY (Aug. 5, 2014, 9:00 AM), <http://variety.com/2014/digital/news/survey-youtube-stars-more-popular-than-mainstream-celebs-among-u-s-teens-1201275245/> [<https://perma.cc/3R4N-J9XH>] (“[T]eens enjoy an intimate and authentic experience with YouTube celebrities, who aren’t subject to image strategies carefully orchestrated by PR pros. Teens also say they appreciate YouTube stars’ more candid sense of humor, lack of filter and risk-taking spirit, behaviors often curbed by Hollywood handlers.”). The respondents also scored the YouTube stars significantly

expertise.¹⁶¹ These relationships ensure that audiences are more likely to pay attention to an endorsed brand or product—and more importantly, that they are more likely to take action prompted by the influencer’s recommendation and endorsement.¹⁶² This also makes working with an influencer particularly valuable for a brand looking to conduct a targeted marketing campaign.¹⁶³ Ideally, the influencer has amassed a following in a certain demographic or with a common interest.¹⁶⁴ Brands and companies who work with influencers are able to leverage that powerful combination of loyalty and commonality to market a product to a receptive, targeted audience.¹⁶⁵

higher in categories “considered to have the highest correlation to influencing purchases among teens.” *See id.*

¹⁶¹ *See What Is Influencer Marketing?*, *supra* note 155. For example, Cassey Ho is a fitness influencer, whose fitness empire, Blogilates, includes DVDs, books, and athletic apparel. *See The [Twenty-Five] Most Influential People on the Internet*, TIME (June 26, 2017), <http://time.com/4815217/most-influential-people-internet/> [<https://perma.cc/NK9C-UTGR>]. Her YouTube channel has nearly four million subscribers. *See* Blogilates, YOUTUBE, <https://www.youtube.com/channel/UCIJwWYOfsCfz6PjxbONYXSg> [<https://perma.cc/9UEN-N89Q>] (last visited Jan. 2, 2018). Ho’s Instagram account, which features short workout videos, and inspirational photos and stories of her own body image struggles, has approximately 1.4 million followers. *See* Cassey Ho (@blogilates), INSTAGRAM, <https://www.instagram.com/blogilates/> [<https://perma.cc/4VNH-TQZE>] (last visited Jan. 2, 2018). Ho has posted sponsored content for Aerie, a lingerie brand created by American Eagle, which markets itself as a body-positive brand for “real” women and features unretouched photos of their models. *See* Cassey Ho (@blogilates), INSTAGRAM (Oct. 4, 2017), <https://www.instagram.com/p/BZ1Ua7tBYyf/> [<https://perma.cc/HK6C-J5VJ>]; Cassey Ho (@blogilates), TWITTER (Apr. 28, 2016, 10:51 AM), <https://twitter.com/blogilates/status/725713959660052480> [<https://perma.cc/S6V7-PEMW>]; *Aerie X Darling Retreat*, AM. EAGLE BLOG (Oct. 15, 2017), <http://blog.ae.com/2017/10/15/aerie-x-darling-retreat/> [<https://perma.cc/9AVQ-ZQWM>].

¹⁶² *See Why Influencer Marketing Works*, Section of *What Is Influencer Marketing?*, *supra* note 155.

¹⁶³ *See How Do You Define an Influencer?*, HYPR (Nov. 16, 2017), <https://hyprbrands.com/blog/how-do-you-define-an-influencer/> [<https://perma.cc/LX5R-HMTY>].

¹⁶⁴ *See id.*

¹⁶⁵ *See What Is Influencer Marketing?*, *supra* note 155. For example, Adam Gallagher, a New York-based influencer whose content focuses on menswear, has naturally partnered with many menswear brands, including Armani, Timex, and Hugo Boss. *See, e.g.*, Adam Gallagher (@iamgalla), INSTAGRAM (Aug. 2, 2017), <https://www.instagram.com/p/BXS3DJmIYNw/> [<https://perma.cc/8V4R-CWXD>] (endorsing Acqua di Giò by Armani); Adam Gallagher (@iamgalla), INSTAGRAM (Dec. 21, 2017), <https://www.instagram.com/p/Bc-pcbIFfdG/> [<https://perma.cc/VGZ9-8348>] (endorsing the Timex Marlin watch); Adam Gallagher (@iamgalla), INSTAGRAM (Dec. 19, 2017),

Additionally, influencers can also be celebrities in the more traditional sense, who amass large followings via their fame, status in popular culture, or perceived cult of personality.¹⁶⁶ Followers are often drawn to celebrities because they listen to their music, enjoy their movies, or find them attractive or meaningful in some other way.¹⁶⁷ For example, singer Selena Gomez (“Gomez”) is currently the most followed person on Instagram, with over one hundred and thirty million followers.¹⁶⁸ Based on metrics including user engagement,¹⁶⁹ the size of her following, and her frequency of posting, a 2016 calculation estimated that a single promotional post by Gomez is worth approximately \$550,000.¹⁷⁰ The Kardashian/Jenner family also falls squarely into this category, and

<https://www.instagram.com/p/Bc4-ujJFLh4/> [<https://perma.cc/W24H-GFRL>] (endorsing Hugo Boss).

¹⁶⁶ See generally Leah W. Feinman, Note, *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 (2011) (detailing how the Kardashian family of celebrities are used for endorsements).

¹⁶⁷ See Maria Lerario, *Influencer Marketing: Social Influencers [Versus] Celebrity Influencers*, MNI TARGETED MEDIA INC. (2017), <https://www.mni.com/influencer-marketing-social-vs-celebrity-trends.html> [<https://perma.cc/4BGU-HPKF>].

¹⁶⁸ Selena Gomez (@selenagomez), INSTAGRAM, <https://www.instagram.com/selenagomez/> [<https://perma.cc/88H2-HRVN>] (last visited Nov. 20, 2017); see also Christopher Heine, *Selena Gomez’s Social Media Posts Are Evidently Worth \$550,000 Apiece*, ADWEEK (July 19, 2016), <http://www.adweek.com/digital/selena-gomez-social-media-posts-are-evidently-worth-550000-apiece-172552/> [<https://perma.cc/JU8V-KLKL>].

¹⁶⁹ User engagement looks at how users interact with content by analyzing various factors. See Mallory Moyer, *What Is User Engagement?*, MNI TARGETED MEDIA INC. (2017), <https://www.mni.com/what-is-user-engagement-and-what-metrics-measure-it.html> [<https://perma.cc/ZQC6-RWXW>]. In online marketing, some of these factors can include time spent on a website, the number of clicks as the user browses through content, the extent to which users are commenting or otherwise interacting socially with the content, and how far down a user scrolls on a page. See *id.*

¹⁷⁰ See Heine, *supra* note 168; see also Asano, *supra* note 33. The valuation is based on an algorithmic calculation by D’Marie, an analytic company that tracks social media reach. See *FAQs*, D’MARIE, <http://www.dmariearchive.com/FAQs> [<https://perma.cc/UD9K-UQNW>] (last visited Dec. 30, 2017); Heine, *supra* note 168. D’Marie’s algorithm uses “[fifty-six metrics,] including followers, post frequency, engagement, quality of post, click-thru and potential to create sales conversions from . . . social content,” to evaluate the social media reach of influencers and brands. Heine, *supra* note 168.

is well known for using their massive social media following to promote a wide variety of products and services.¹⁷¹

As an industry, influencer marketing is rapidly growing, and now represents billions of dollars in advertising revenue.¹⁷² With 48% of U.S. marketers reporting plans to increase annual spend on influencer marketing, this rapid growth trend is expected to

¹⁷¹ The Kardashian/Jenner clan is known for their inconsistent (at best) habits regarding disclosure of material connections under FTC guidelines. See *Kardashian/Jenner Database*, TRUTH IN ADVERT., <https://www.truthinadvertising.org/kardashianjenner-database/> [<https://perma.cc/94HL-43KJ>] (last visited Nov. 21, 2017) (cataloguing over three hundred instances where members of the Kardashian/Jenner family posted content promoting various companies and brands, without disclosing their relationship with the companies). For example, in posts where disclosure is included, the placement is often incorrect. See, e.g., Kendall Jenner (@kendalljenner), INSTAGRAM (Nov. 22, 2017), <https://www.instagram.com/p/Bb0CSsOjZIS/> [<https://perma.cc/JZ3Q-APRK>] (including “#ad” but at the very end of the caption); Kendall Jenner (@kendalljenner), INSTAGRAM (Dec. 22, 2016), <https://www.instagram.com/p/BOVZOXwjehb/> [<https://perma.cc/4RXF-BD25>] (including “#ad” but at the very end of the caption); Kylie Jenner (@kyliejenner), INSTAGRAM (Dec. 7, 2016), <https://www.instagram.com/p/BNu2s05BPZH/> [<https://perma.cc/V7BX-KEDQ>] (including “#ad” but buried at the end of the caption, in between other hashtags); Kim Kardashian (@kimkardashian), INSTAGRAM (Mar. 27, 2017), <https://www.instagram.com/p/BSJXyFY1d29/> [<https://perma.cc/YM5Y-GAKE>] (including “#ad” but at the very end of the caption); Kourtney Kardashian (@kourtneykardash), INSTAGRAM (July 16, 2017), <https://www.instagram.com/p/BWnZ85uDJLn/> [<https://perma.cc/M975-K8FK>] (including “#ad” but buried in the middle of the caption). There is also evidence that some posts have been edited later to comply with FTC disclosure requirements. See, e.g., *Comparison-Kim-and-Jet-Lux-Life-One*, TRUTH IN ADVERT., <https://www.truthinadvertising.org/wp-content/uploads/2017/09/Comparison-Kim-and-Jet-Lux-Life-1.jpg> [<https://perma.cc/UU5L-W5CD>] (last visited Jan. 7, 2018) (showing a screenshot of an original version of a post by Kim Kardashian, where “#ad” was absent, compared with a later version where “#ad” was added, but to the middle of the caption); Kim Kardashian (@kimkardashian), INSTAGRAM (Feb. 13, 2017), <https://www.instagram.com/p/BQefT1hFwSL/> [<https://perma.cc/W872-JZCU>] (showing “#ad” at the very beginning of the post’s caption, edited from prior versions); *Khloe-Christofle-One*, TRUTH IN ADVERT., <https://www.truthinadvertising.org/wp-content/uploads/2017/09/Khloe-Christofle-1.png> [<https://perma.cc/JR4E-JF2T>] (last visited Jan. 7, 2017) (showing a screenshot of an original version of a post by Khloe Kardashian, where the ambiguous “#Partner” was used to give disclosure); Khloe Kardashian (@khloekardashian), INSTAGRAM (Nov. 11, 2016), <https://www.instagram.com/p/BMsHjqMBtjw/> [<https://perma.cc/D5LK-NNA2>] (showing “#Ad” at the very beginning of the post’s caption, edited from a prior version that led with the ambiguous “#Partner”).

¹⁷² *The Top [Ten] Biggest Influencer Marketing Statistics for 2016 [Infographic]*, MEDIAXIX (Sept. 8, 2016), <http://mediakix.com/2016/09/10-top-influencer-marketing-statistics-for-2016-infographic/#gs.qCuWO5k> [<https://perma.cc/5N6S-LQJL>].

continue.¹⁷³ Moreover, influencer marketing produces results. A 2015 market study by Schlesinger Associates for Augure found that “84% of marketing and communications professionals worldwide expected to launch” an influencer marketing campaign within the coming year—and of those who had already done so, 81% found the use effective.¹⁷⁴ Instagram is an especially powerful influencer marketing platform, well-suited due to its image-heavy interface.¹⁷⁵ Instagram influencers reach a potentially gigantic audience; as of September 2017, the platform boasts over 800 million users, with 500 million of them using the platform daily.¹⁷⁶ On Instagram alone, worldwide influencer marketing revenues were estimated to have exceeded \$570 million in 2016.¹⁷⁷

Influencer marketing is powerful because it surmounts some of the obstacles faced by traditional advertising.¹⁷⁸ In 2016, it was estimated that over 69.8 million Americans used an ad blocker¹⁷⁹ on their computer’s browser—a number that was expected to increase by 24% in 2017.¹⁸⁰ Additionally, as of October 2016, two-thirds of millennials—a demographic coveted by marketers¹⁸¹—

¹⁷³ See *Marketers to Boost Influencer Budgets in 2017*, EMARKETER (Dec. 13, 2016), <https://www.emarketer.com/Article/Marketers-Boost-Influencer-Budgets-2017/1014845> [<https://perma.cc/3PYW-53WA>].

¹⁷⁴ *Marketers Pair Up with Influencers—and It Works*, EMARKETER (July 9, 2015), <https://www.emarketer.com/Article/Marketers-Pair-Up-with-Influencersand-Works/1012709> [<https://perma.cc/PH7S-LPJY>].

¹⁷⁵ *Top Influencers in Every Niche*, *supra* note 158 (“With Instagram being highly visual, it’s no surprise it’s an influencers [sic] paradise.”).

¹⁷⁶ Kevin Systrom, *Strengthening Our Commitment to Safety and Kindness for 800 Million*, INSTAGRAM PRESS (Sept. 26, 2017), <https://instagram-press.com/blog/2017/09/26/strengthening-our-commitment-to-safety-and-kindness-for-800-million/> [<https://perma.cc/GEP7-7AJ3>]. Kevin Systrom is the Co-Founder and CEO of Instagram. See *id.*

¹⁷⁷ *Marketers to Boost Influencer Budgets in 2017*, *supra* note 173.

¹⁷⁸ See *infra* text accompanying notes 179–85.

¹⁷⁹ An ad blocker is any kind of technology that prevents advertisements from loading when a user visits a website. See *What Is Ad Blocking?*, INTERACTIVE ADVERT. BUREAU, <https://www.iab.com/what-is-ad-blocking/> [<https://perma.cc/FC97-X4E9>] (last visited Feb. 17, 2018).

¹⁸⁰ *US Ad Blocking to Jump by Double Digits This Year*, EMARKETER (June 21, 2016), <https://www.emarketer.com/Article/US-Ad-Blocking-Jump-by-Double-Digits-This-Year/1014111?ecid=NL1001> [<https://perma.cc/4VNW-Q72Q>].

¹⁸¹ See Kelly Ehlers, *May We Have Your Attention: Marketing to Millennials*, FORBES (June 27, 2017, 10:00 AM), <https://www.forbes.com/sites/yec/2017/06/27/may-we-have-your-attention-marketing-to-millennials/#200404ca1d2f> [<https://perma.cc/8CE4-C4U7>].

use an ad blocker on their desktop or mobile device.¹⁸² By directly engaging with targeted groups of consumers, influencer marketing allows a brand to tell its story through an influencer’s content, and avoid being cancelled out by ad blockers.¹⁸³

Finally, influencer marketing breaks through the wall of skepticism¹⁸⁴ that consumers typically have when viewing traditional advertisements. Influencer marketing accomplishes this by masquerading sponsored content as an influencer’s authentic content. Studies have shown that “84% of consumers claim to trust peer recommendations, compared to only 62% claiming that they trust traditional advertisements.”¹⁸⁵ The high level of trust that consumers place in social media endorsements cannot be taken lightly—it can have potentially disastrous consequences, especially

¹⁸² *Most Millennials Have Installed Ad Blockers*, EMARKETER (Oct. 13, 2016), <https://www.emarketer.com/Article/Most-Millennials-Have-Installed-Ad-Blockers/1014592> [<https://perma.cc/GC3D-TYSL>].

¹⁸³ See Erin Nederbo, *Attacking Ad Blockers with Social Media*, SPROUT SOCIAL (Apr. 7, 2016), <https://sproutsocial.com/insights/attacking-ad-blockers/> [<https://perma.cc/R7GB-HY8B>]. The rise of these alternative advertising strategies has naturally raised concerns that, eventually, advertisements and sponsored content will become indistinguishable from genuine content—a merging that arguably has already happened. See generally David A. Hyman et al., *Going Native: Can Consumers Recognize Native Advertising? Does It Matter?*, 19 YALE J. L. & TECH. 77 (2017); Andrew Griffin, *Here’s Why You Should Delete AdBlock Right Now*, INDEPENDENT (May 20, 2015, 2:58 PM), <http://www.independent.co.uk/voices/comment/heres-why-you-should-delete-adblock-right-now-10264083.html> [<https://perma.cc/TF8P-83LZ>] (arguing that the rise of ad blockers will deteriorate revenue streams, and eventually the Internet, because “ads [will] have to be so indistinguishable from proper, genuine content that ad blocking technology can’t tell the difference. The problem is that for ads to get that subtle, they’d no longer be distinguishable by humans, either. And if this happens, then nobody will read anything on a site they know anybody can pay to write stories in.”); Kevin O’Keeffe, *John Oliver Takes on Native Advertising, Journalism’s Raisin Cookie*, ATLANTIC (Aug. 4, 2014), <https://www.theatlantic.com/entertainment/archive/2014/08/john-oliver-takes-on-native-advertising-journalisms-raisin-cookie/375513/> [<https://perma.cc/5EUC-H2HY>].

¹⁸⁴ See Pauline de Pechpeyrou & Philippe Odou, *Consumer Skepticism and Promotion Effectiveness*, RECHERCHE ET APPLICATIONS EN MARKETING, June 2012, at 1, 3 (“Studies in the field of advertising have . . . highlighted a ‘skepticism’ variable, a product of the consumer’s experience and education. As they tend to be wary of advertising claims, skeptical consumers have a more unfavorable attitude towards advertising messages and are less influenced by them, even avoiding them completely.” (citations omitted)).

¹⁸⁵ Mobile Growth Agency, *Don’t Get Fyred! Balancing the Risks and Rewards of Influencer Campaigns*, MEDIUM (July 21, 2017), <https://medium.com/@TMGA/dont-get-fyred-balancing-the-risks-and-rewards-of-influencer-campaigns-8958e4b12bb7> [<https://perma.cc/U9YU-WGP6>].

where the object of an endorsement is inaccurate or even fraudulent.¹⁸⁶

There are polarizing views in the influencer and advertising communities regarding the FTC's disclosure requirements.¹⁸⁷ A faction of influencers feel that disclosure is important as a matter of honesty and transparency with their followers.¹⁸⁸ Other influencers oppose disclosure—especially when a post reflects their actual opinions about a brand or product—because of the negative feedback it can generate with followers.¹⁸⁹ There is also the observation that disclosure can lead to lower levels of user

¹⁸⁶ See, e.g., Sam Levin, *Fyre Festival: Social Media 'Influencers' Traded Posts for Lavish Perks*, GUARDIAN (May 1, 2017), <https://www.theguardian.com/culture/2017/may/01/fyre-festival-social-media-influencers-paid-content> [https://perma.cc/VZB7-U8FH]; Spangler, *supra* note 92.

¹⁸⁷ See *Influencers Sound Off on Why They Do Not Want to Disclose Sponsored Posts*, FASHION L. (Oct. 13, 2017), <http://www.thefashionlaw.com/home/influencers-sound-off-on-why-they-do-not-want-to-disclose-sponsored-posts> [https://perma.cc/3TAJ-TDRC].

¹⁸⁸ See, e.g., Alex Ditty, *How Influencers Think About FTC Disclosures*, SEEN (Oct. 31, 2017, 10:30 AM), <http://blog.seenmoment.com/how-influencers-think-about-ftc-disclosures> [https://perma.cc/3YSC-2CK4] (“[Instagram influencer Elise] Swopes is all for FTC enforcement on the brands and individuals who aren’t playing by those rules because it puts everyone on the same playing field. ‘It definitely puts a bad taste in your mouth when someone has millions of followers and they’re not [including the disclosures] and tricking everybody’” (second alteration in original) (quoting Elise Swopes)); Hazel Sheffield, *How Instagram Became One Giant Ad*, VICE (Nov. 10, 2016, 7:00 PM), https://www.vice.com/en_nz/article/qbn33w/why-instagram-is-making-you-poor [https://perma.cc/UL4J-7CTS] (“‘I will never lie about when I’ve been paid to create content, because that would imply shame and I’m really not ashamed to admit that I’m paid to work,’ [Pandora Sykes, fashion features editor for the Sunday Times,] says.”); *Influencers Sound Off on Why They Do Not Want to Disclose Sponsored Posts*, *supra* note 187 (“As [fashion influencer] BryanBoy, one of the influencers that has been vocal about his practice of disclosing everything from sponsored posts to gifts from brands [reports,] ‘My readers respect me more by when disclosing I’m getting a check.’ His response to bloggers that do not like disclosing sponsored posts or free gifts from brands? ‘If you don’t want to feel icky then don’t get paid, plain and simple.’”).

¹⁸⁹ See Kali Hays, *Influencers Still Can’t Get Behind Disclosing Paid Posts*, WWD (Oct. 12, 2017), <http://wwd.com/business-news/media/influencers-the-12ish-style-scout-sixteen-hummingbird-high-still-cant-get-behind-disclosing-paid-posts-11026614/> [https://perma.cc/Z73Z-WLJC] (“‘I hate telling people things are sponsored, especially when I really love the brand,’ [Katie] Sturino[, founder of blog *The 12ish Style* and the host of *Project Runway* spin-off web series *Behind the Seams*,] said to an audience of brand representatives and other influencer types that groaned and nodded their assent. ‘Immediately it just feels like, “Ugh, she’s just getting a paycheck.” Everyone tries to work with brands that they feel good about.’”).

engagement.¹⁹⁰ This may explain why three-in-ten influencers reported having been asked by a client or marketer not to disclose the sponsored nature of a post.¹⁹¹

C. *The Fyre Festival: A Case for Clear and Conspicuous Disclosure*

In a slide deck designed for presentation to potential investors, Fyre Media described their premier event, the Fyre Festival (“the Festival”), as the “cultural experience of the decade.”¹⁹² Company co-founders Billy McFarland and Jeffrey Atkins (known as “Ja Rule”) pitched the Fyre Festival to investors as a two-weekend music festival to be attended by approximately forty thousand people.¹⁹³ The Festival was to be held in Great Exuma, a remote island in the Bahamas advertised as once having been owned by Pablo Escobar.¹⁹⁴ Musical performances were slated to include Major Lazer,¹⁹⁵ Migos,¹⁹⁶ and Blink-182,¹⁹⁷ among others.¹⁹⁸ The

¹⁹⁰ See *id.* (“Michelle Lopez, who has 122,000 Instagram followers and founded food blog Hummingbird High, admitted that she’s seen backlash to sponsored posts. ‘If your voice gets too erased, the audience can tell and the content tanks,’ Lopez said.”); Sheffield, *supra* note 188 (“Influencers report lower levels of engagement for posts marked #spon or #ad because they destroy that sense of being spoken to by someone the user trusts. Would India[, an unspecified writer for a women’s lifestyle website,] have bought the dress if she’d seen it in a sponsored post? ‘Probably not. It would have put me off.’”).

¹⁹¹ See McCarthy, *supra* note 15.

¹⁹² Nick Bilton, *Exclusive: The Leaked Fyre Festival Pitch Deck Is Beyond Parody*, VANITY FAIR (May 1, 2017, 6:03 PM), <https://www.vanityfair.com/news/2017/05/fyre-festival-pitch-deck> [<https://perma.cc/7SJY-264X>]; see also Colin Moynihan, *Organizer of Failed Fyre Festival Pleads Guilty to Fraud*, N.Y. TIMES (Mar. 6, 2018, 8:36 PM), <https://www.nytimes.com/2018/03/06/arts/organizer-of-failed-fyre-festival-pleads-guilty-to-fraud.html> [<https://perma.cc/QC85-6DP3>].

¹⁹³ See Bilton, *supra* note 192.

¹⁹⁴ See Fyre Festival, *Announcing Fyre Festival*, YOUTUBE (Jan. 12, 2017), <https://www.youtube.com/watch?v=mz5kY3RsmKo> [<https://perma.cc/JJ5V-UVKK>].

¹⁹⁵ See Gail Mitchell, *Major Lazer Joins G.O.O.D. Music Family for First Fyre Festival*, BILLBOARD (Jan. 11, 2017), <https://www.billboard.com/articles/columns/music-festivals/7654386/major-lazer-good-music-fyre-festival> [<https://perma.cc/LC66-EU36>]; see also *Major Lazer*, BILLBOARD, <https://www.billboard.com/music/major-lazer> [<https://perma.cc/A6J5-8N83>] (last visited Feb. 17, 2018).

¹⁹⁶ See Ashley Lyle, *Fyre Festival Adds Lil Yachty, Migos & Blink-182 to Lineup*, BILLBOARD (Mar. 7, 2017), <https://www.billboard.com/articles/columns/hip-hop/7717090/fyre-festival-migos-lil-yachty-blink-182> [<https://perma.cc/VX6H-AG6P>]; see also Anna Gaca, *A Comprehensive Timeline of Fyre Festival’s Ongoing Disaster*, SPIN

event was marketed as a “journey and a destination, a place where music, culture, and food combine, igniting our curiosities and our passions over two weekends on one of the most sought after and secluded islands in the world.”¹⁹⁹ There was even the promise of a “real-life treasure hunt,” offering the winner jewelry, watches, and oceanfront property valued at up to one million dollars.²⁰⁰ The advertising featured a bevy of supermodels clad in bathing suits, dancing along picturesque beaches and sunbathing on boats.²⁰¹ Tickets were priced in the thousands of dollars, with some paying up to six figures for VIP packages with the promise of ultra-luxurious accommodations.²⁰²

To raise the event’s profile, Fyre Media enlisted the help of over four hundred public figures, comprising a list of supermodels, DJs, athletes, and reality television stars.²⁰³ In exchange for tiers of compensation ranging into the hundreds of thousands of dollars, these influencers—referred to as “Fyre Starters”—engaged in a

(May 3, 2017), <https://www.spin.com/2017/05/fyre-festival-disaster-timeline/> [<https://perma.cc/NRN6-GS4A>]; *Migos*, BILLBOARD, <https://www.billboard.com/music/migos> [<https://perma.cc/EB5N-LKQV>] (last visited Mar. 1, 2018).

¹⁹⁷ See Lyle, *supra* note 196; see also *Blink-182*, BILLBOARD, <https://www.billboard.com/music/blink-182> [<https://perma.cc/C8QF-4XN6>] (last visited Feb. 17, 2018).

¹⁹⁸ Dave Brooks, *Blink-182 Cancels Fyre Festival Headlining Appearance*, BILLBOARD (Apr. 27, 2017, 11:05 PM), <http://www.billboard.com/articles/business/7776282/blink-182-cancels-fyre-festival> [<https://perma.cc/RL82-GPGS>].

¹⁹⁹ Fyre Festival, *Welcome to Fyre Festival*, MEDIUM (Apr. 15, 2017), <https://medium.com/@fyrefestival/welcome-to-fyre-festival-c8a565cd401> [<https://perma.cc/7P7X-S3V2>]; see also Bilton, *supra* note 192.

²⁰⁰ Gaca, *supra* note 196.

²⁰¹ See Fyre Festival, *supra* note 194.

²⁰² See Brooks, *supra* note 198; see also Joe Coscarelli et al., *In Wreckage of the Fyre Festival, Fury, Lawsuits and an Inquiry*, N.Y. TIMES (May 21, 2017), <https://www.nytimes.com/2017/05/21/arts/music/fyre-festival-billy-mcfarland-ja-rule-criminal-investigation.html> [<https://perma.cc/AE5X-QTMT>] (“Ticket packages included the [four hundred thousand dollar] ‘Artist’s Palace,’ with four beds, eight V.I.P. tickets and dinner with one festival performer.”).

²⁰³ See Bilton, *supra* note 192; Andrew Flanagan, *How Fyre’s Organizers Used ‘Influencers’ to Market a Festival that Didn’t Exist*, NPR (May 2, 2017, 1:39 PM), <http://www.npr.org/sections/therecord/2017/05/02/526561561/how-fyres-organizers-used-influencers-to-market-a-festival-that-didnt-exist> [<https://perma.cc/X4BB-AD27>]. Some of the influencers included YouTube vlogger Marcus Butler, 2014 Miss Universe titleholder Paulina Vega, NFL players Chris Harris, Jr. and Chris Johnson, and supermodels like Kendall Jenner, Emily Ratajowski, Chanel Iman, Rose Bertram, and Bella Hadid. See Bilton, *supra* note 192.

coordinated marketing campaign via social media.²⁰⁴ On December 12, 2016, the Fyre Starters posted a mysterious, nondescript orange square on their social media accounts.²⁰⁵ Additional posts featured glossy photos of Bella Hadid, Emily Ratajkowski, Rose Bertram, and other supermodels frolicking on a beach.²⁰⁶ The descriptive text accompanying many of the Fyre Starters' posts gave the impression that this was to be a star-studded event, the veritable Coachella²⁰⁷ of the Bahamas.²⁰⁸

²⁰⁴ See Bilton, *supra* note 192; Brooks, *supra* note 198.

²⁰⁵ Bryan Burrough, *Fyre Festival: Anatomy of a Millennial Marketing Fiasco Waiting to Happen*, VANITY FAIR (Aug. 2017), <https://www.vanityfair.com/news/2017/06/fyre-festival-billy-mcfarland-millennial-marketing-fiasco> [<https://perma.cc/CP9L-3MCD>].

²⁰⁶ Kristina Rodulfo, *How Bella Hadid, Emily Ratajkowski, and More Models Vacation in the Bahamas Together*, ELLE (Dec. 12, 2016), <http://www.elle.com/culture/celebrities/news/a41378/bella-hadid-emily-ratajkowski-models-bahamas-trip/> [<https://perma.cc/P8UM-ASYX>]. Fyre Media used images from the photoshoot in their promotional YouTube video to draw people to the Festival, but also ostensibly to give an impression that going to the Festival would allow attendees to hang out with and vacation like supermodels. See Fyre Festival, *supra* note 194. Photos from the models' weekend in the Bahamas for the photo shoot were widely posted on their individual Instagram accounts, giving Fyre Media yet another bite at the influencer marketing apple. See, e.g., Alessandra Ambrosio (@alessandraambrosio), INSTAGRAM (Dec. 12, 2016), <https://www.instagram.com/p/BN69NzKh2KO/> [<https://perma.cc/4NT7-P8PB>]; Hailey Baldwin (@haileybaldwin), INSTAGRAM (Dec. 12, 2016), <https://www.instagram.com/p/BN7PjXxhy57/> [<https://perma.cc/WQ4M-8BX6>]; Rose Bertram (@rose_bertram), INSTAGRAM (Dec. 11, 2016), <https://www.instagram.com/p/BN5FCAOGae/> [<https://perma.cc/4ZL9-35W3>]; Bella Hadid (@bellahadid), INSTAGRAM (Dec. 11, 2016), <https://www.instagram.com/p/BN44acmA638/> [<https://perma.cc/KQ96-87X3>]; Emily Ratajkowski (@emrata), INSTAGRAM (Dec. 11, 2016), https://www.instagram.com/p/BN4iHFKDH_g/ [<https://perma.cc/A66S-DMGS>]. All of this goes to the heart of why the Festival's marketing campaign was so effective—because consumers targeted by influencer marketing are so drawn to emulating the appealing lifestyle that influencers post about in their social media feeds, they are more likely to make purchasing decisions based on their suggestions. See *What Is Influencer Marketing?*, *supra* note 155.

²⁰⁷ The Coachella Valley Music and Arts Festival (commonly referred to as simply “Coachella”) is an annual music and arts festival held over several weekends in Southern California. See COACHELLA, <https://www.coachella.com/home/> [<https://perma.cc/W6H8-9PJH>] (last visited Dec. 29, 2017). In 2017, Coachella was attended by approximately 250,000 people, and grossed \$114 million in revenues. See Dave Brooks, *Coachella Grossed Record-Breaking \$114 Million this Year*, BILLBOARD (Oct. 18, 2017), <https://www.billboard.com/articles/business/8005736/coachella-festival-2017-114-million-gross> [<https://perma.cc/XAG2-H43S>].

²⁰⁸ See, e.g., Rose Bertram (@rose_bertram), INSTAGRAM (Dec. 12, 2016), <https://www.instagram.com/p/BN7uhYSAQEz/> [<https://perma.cc/57EV-PLSB>] (“Excited to announce #fyrefestival Join me there! @fyrefestival 🦋🦋🦋 www.fyrefestival.com[.]”). Many Fyre Starters quickly deleted their posts when news of

On April 27, 2017, attendees who arrived in Exuma to attend the Fyre Festival were met with horrifying conditions, later described as resembling a page from *The Hunger Games* or *Lord of the Flies*.²⁰⁹ The festival site allegedly lacked the infrastructure necessary to support an event of Fyre Festival's size; certain parts of the site allegedly lacked basic necessities including running water.²¹⁰ Instead of luxury accommodations, attendees were allegedly presented with empty, unfurnished tents bearing strong resemblance to those used following natural disasters.²¹¹ Meanwhile, attendees who were stranded on the island began signaling for help via social media. On Reddit, a photo of a "sad cheese sandwich" served in a Styrofoam box seemed emblematic of the bait-and-switch felt by festival attendees, and quickly went viral on other social media platforms.²¹² Another photo of the "Concierge" showed a shoddily constructed wooden booth, structured similar to a childhood lemonade stand, with no festival

festival conditions began to surface. See Edgar Alvarez, *Instagram Influencers Fanned the Flames of Fyre Festival Hype*, ENGADGET (May 10, 2017), <https://www.engadget.com/2017/05/10/fyre-festival-instagram-influencers-kendall-jenner/> [https://perma.cc/4NJY-WNEW] ("Kendall Jenner, for example, reportedly received \$250,000 from Fyre Festival organizers to endorse the event on her account, although she never disclosed in her now-deleted post that it was an advertisement. Neither did her fellow influencers.").

²⁰⁹ *Fyre Festival Is Facing [Nine] Lawsuits, FBI Investigation, Organizer Arrested*, FASHION L. (July 3, 2017), <http://www.thefashionlaw.com/home/a-list-of-all-of-the-fyre-festival-lawsuits-that-have-been-filed-so-far> [https://perma.cc/E2YF-26Y7]. See generally LORD OF THE FLIES (Metro Goldwyn Mayer 1990); THE HUNGER GAMES (Lionsgate 2012). Both *Lord of the Flies* and *The Hunger Games* depict survival-of-the-fittest scenarios under dangerous conditions. See *Lord of the Flies (1990)*, IMDB, <http://www.imdb.com/title/tt0100054/> [https://perma.cc/NJ23-2AKQ] (last visited Mar. 19, 2018); *The Hunger Games (2012)*, IMDB, <http://www.imdb.com/title/tt1392170/> [https://perma.cc/VRE3-8LK2] (last visited Mar. 19, 2018).

²¹⁰ See Class Action Complaint at 20, *Herlihy v. Fyre Media, Inc.*, No. 1:17-cv-03296 (S.D.N.Y. May 3, 2017).

²¹¹ See First Amended Class Action Complaint at 7, *Jutla v. Fyre Media, Inc.*, No. 1:17-cv-03541-ER (S.D.N.Y. June 13, 2017); Class Action Complaint at 7, *Chinery v. Fyre Media, Inc.*, No. BC659938 (Cal. Super. Ct. May 2, 2017).

²¹² Trevor DeHaas (@trev4president), TWITTER (Apr. 27, 2017, 9:00 PM), <https://twitter.com/trev4president/status/857776562615308288> [https://perma.cc/D9H9-M7HR]; see also Kate Taylor, *People Paid \$12,000 to Go to a Music Festival with Beachside Barbecues and Champagne Brunches—and All They Got Were These Sad Cheese Sandwiches*, BUS. INSIDER (Apr. 28, 2017, 2:23 PM), <http://www.businessinsider.com/fyre-festival-guests-got-cheese-and-bread-after-starr-catering-cancels-2017-4> [https://perma.cc/E8LE-GN9C].

staff in sight.²¹³ There were no musical performances to speak of; some had already cancelled as information regarding the conditions on Exuma began to surface.²¹⁴ By all accounts, the event was a spectacular failure.²¹⁵

Numerous class-action lawsuits followed almost immediately, asserting claims for breach of contract, fraud, and negligent misrepresentation, among others.²¹⁶ The failed festival also became the focus of a criminal investigation by the U.S. attorney's office for the Southern District of New York and the FBI.²¹⁷ In July 2017, McFarland was arrested on charges of wire fraud.²¹⁸ McFarland subsequently plead guilty to both counts, admitting that he had defrauded investors and falsified financial documents to secure funding for the Fyre Festival.²¹⁹ He accepted a twenty-six million

²¹³ William N. Finley, IV (@WNFIV), TWITTER (Apr. 27, 2017, 6:54 PM), <https://twitter.com/WNFIV/status/857775041467035649> [<https://perma.cc/53CF-6RW5>].

²¹⁴ See Brooks, *supra* note 198.

²¹⁵ Subsequently, many have even used the Fyre Festival as a comparative moniker for an expensive, but shoddily executed, bait-and-switch event. See, e.g., Hannah Gold, *Welcome to the Fyre Festival, But for Cheese*, JEZEBEL (Aug. 14, 2017, 11:41 PM), <https://jezebel.com/welcome-to-fyre-festival-but-for-cheese-1797847325> [<https://perma.cc/U5ZV-DYC8>]; Hunter Harris, *A Classical Music Festival Just Had Its Very Own Fyre Festival-Like Implosion in Rhode Island*, VULTURE (Sept. 14, 2017, 4:48 PM), <http://www.vulture.com/2017/09/heres-the-fyre-festival-of-classical-music.html> [<https://perma.cc/46E7-TJE9>]; Kristin McNamara, *This Party Is Being Dubbed the 'Fyre Festival of Fashion Week'*, PAGE SIX (Sept. 14, 2017, 3:29 PM), <https://pagesix.com/2017/09/14/this-party-is-being-dubbed-the-fyre-festival-of-fashion-week/> [<https://perma.cc/BK4M-Z3UK>]; Chris Perez, *'Fyre Festival' of Pizza Parties Offers Refunds After Small Slice Disaster*, N.Y. POST (Sept. 13, 2017, 6:27 PM), <http://nypost.com/2017/09/13/fyre-festival-of-pizza-parties-offers-refunds-after-small-slice-disaster/> [<https://perma.cc/S6QL-VDF3>]; Michelle Robertson, *SF Startup, the 'Fyre Festival of Wireless Earbuds,' Shatters*, SFGATE (Aug. 28, 2017, 5:32 PM), <http://www.sfgate.com/business/article/SF-startup-Konoa-wireless-earbuds-shatters-12087425.php> [<https://perma.cc/77S3-7R7L>].

²¹⁶ *Fyre Festival is Facing [Nine Lawsuits]*, *supra* note 209.

²¹⁷ See Coscarelli et al., *supra* note 202.

²¹⁸ Paula Parisi, *Fyre Festival Organizer Billy McFarland Released from Jail on [Three Hundred Thousand Dollar] Bond*, VARIETY (July 1, 2017, 2:07 PM), <http://variety.com/2017/biz/news/fyre-festival-organizer-billy-mcfarland-released-from-jail-on-300000-bond-1202486061/> [<https://perma.cc/YL5U-FYTJ>]. See generally Sealed Complaint, United States v. McFarland, No. 1:17-mj-04988-UA (S.D.N.Y. June 30, 2017).

²¹⁹ See Richard Gonzales, *Fyre Festival Promoter Billy McFarland Pleads Guilty to Fraud*, NPR (Mar. 6, 2018), <https://www.npr.org/sections/thetwo-way/2018/03/06/591366152/fyre-festival-promoter-billy-mcfarland-pleads-guilty-to-fraud> [<https://perma.cc/8WW4-E6HC>].

dollar forfeiture and is expected to face an approximately eight to ten year prison sentence.²²⁰

Beneath the colossal failure of the Fyre Festival is perhaps the ultimate example of influencer marketing at its most coordinated.²²¹ It has been playfully noted that, while the rest of the event may have been a catastrophe, the influencer marketing campaign that promoted it was terrific, and even worth emulating.²²² The Festival's influencer marketing campaign set expectations sky high—many arrived at the Festival believing they would have an exclusive luxury experience, largely driven by images seen on YouTube and Instagram.²²³

In view of how powerful the influencer marketing campaign was, it was speculated whether the Fyre Starters might be held accountable via lawsuit.²²⁴ In a few of the class action complaints,

²²⁰ See Paula Parisi, *Fyre Fallout: How Much Prison Time—and Debt—Is Festival Founder Billy McFarland Really Looking At?*, VARIETY (Mar. 20, 2018), <http://variety.com/2018/biz/news/fyre-fallout-how-much-prison-time-debt-is-festival-founder-billy-mcfarland-looking-at-1202731046/> [<https://perma.cc/2H8U-TCKN>].

²²¹ See Burrough, *supra* note 205 (quoting an unnamed source: “[I]t was perfectly executed. It’s one of the greatest social-media campaigns I’ve ever seen. They got the most beautiful women in the world, with the largest social following. And then the photo shoot It was just incredible.”).

²²² See Fanatics Media, *No, the Fyre Festival Wasn’t the Fault of Influencer Marketing*, YOUTUBE (May 7, 2017), <https://www.youtube.com/watch?v=LNP1eBdPSw0> [<https://perma.cc/QLB9-SBQJ>] (“The one thing that *worked* was influencer marketing. Look what it did . . . if you look at what these guys were able to do, if they don’t end up in prison, somebody should hire them to do their influencer marketing.”).

²²³ Eric Levenson & Deborah Bloom, *Fyre Festival: When a [Twelve Thousand Dollar] Luxury Festival in Paradise Turns into Chaos*, CNN (Apr. 29, 2017, 1:50 PM), <http://www.cnn.com/2017/04/28/entertainment/fyre-festival-disaster-trnd/index.html> [<https://perma.cc/67U9-4X44>] (“If you turned up at the Fyre Festival wooed by its ads—and many, many fans did—you’d think you were in for a weekend of top-notch acts playing for your entertainment, as models in bikinis paraded around and private jets and yachts ferried you to and from the beautiful Caribbean paradise. Everything any good millennial needs for a strong Instagram post.”).

²²⁴ See Josh Dickey, *‘Social Influencers’ Who Hyped Fyre Festival Could Be the Next Legal Target*, MASHABLE (May 13, 2017), http://mashable.com/2017/05/13/fyre-festival-social-influencers-lawsuit/#Am_Sx4yDbkqM [<https://perma.cc/2PDY-GKHF>]. “Mark Geragos, the Los Angeles-based power attorney behind the leading class action suit against organizers of the infamous Fyre Festival, now says his firm is investigating whether social media ‘influencers’ who hyped the disastrous event could be dragged into the ever-expanding web of lawsuits.” *Id.*

the plaintiffs mention Fyre Media's use of influencer marketing,²²⁵ and the disproportionate amount that Fyre Media spent to compensate the Fyre Starters.²²⁶ One specifically notes the failure on the part of nearly all of the Fyre Starters to properly disclose that they were compensated to post on social media about the event,²²⁷ though none of the complaints actually go so far as to name the influencers as defendants. Additionally, some have blasted the FTC's failure to hold any of the influencers accountable.²²⁸ It is worth considering whether proper material connections disclosures might have affected the influencer marketing campaign, and the impact it clearly had on ticket sales.

II. THE DEVELOPMENT OF EMOJI

The Fyre Festival's influencer marketing campaign highlights the importance of clear and conspicuous disclosure, and the need for streamlined, bold solutions to simplify disclosure methods. Though IZEA's proposal²²⁹ has yet to gain traction, there are many reasons why using emoji could be a viable disclosure method. There are over six billion emoji sent every day.²³⁰ With an estimated ninety-two percent of people online using emoji—a third

²²⁵ See Class Action Complaint at 5, *Daly v. McFarland*, No. 1:17-cv-03461 (S.D.N.Y. May 9, 2017) ("As part of Defendants' marketing efforts, Defendants' employed so-called online 'influencers'—including Rose Bertram, Kendall Jenner, Bella Hadid, and Emily Ratajkowski—to use social media to generate ticket sales, and created extravagant websites and mock-ups of the luxurious villas in which attendees would be staying.").

²²⁶ Burrough, *supra* note 205 ("Probably the largest outlay, a reported \$250,000, went to the model and reality-television star Kendall Jenner, whom [Fyre Media CEO and co-founder Billy] McFarland had long admired.").

²²⁷ Class Action Complaint at 5–6, *Chinery v. Fyre Media, Inc.*, *supra* note 211.

²²⁸ See Paul Armstrong, *The Fyre Festival Fiasco Is What You Get When Influencers Sell Their Souls*, *FORBES* (May 1, 2017, 9:10 AM), <https://www.forbes.com/sites/paularmstrongtech/2017/05/01/the-fyre-island-fiasco-is-what-you-get-when-influencers-sell-their-souls/#e5b2d3436399> [<https://perma.cc/P2WK-LLN9>]; David Murphy, *Fyre Festival, Social Media, and the Dark Side of Influencer Marketing*, *INT'L NEWS MEDIA ASS'N* (May 8, 2017), <https://www.inma.org/blogs/ideas/post.cfm/fyre-festival-social-media-and-the-dark-side-of-influencer-marketing> [<https://perma.cc/HB4C-ZZ9R>].

²²⁹ See *IZEA Petitions the Unicode Consortium to Create #AD Emoji*, *supra* note 152.

²³⁰ See *Welcome to Macintosh: 🍏 The Gatekeepers*, Mark Bramhill (Sept. 1, 2017) (downloaded using Apple Podcasts).

of whom doing so daily²³¹—emoji have rapidly become a mainstay of communication in the digital age.²³²

This Part discusses the origin and development of emoji. Section II.A provides a brief history of emoji, and looks at the role of the Unicode Consortium in selecting and maintaining emoji. Section II.B discusses the requirements for proposing new emoji, as set forth by the Unicode Consortium. Finally, Section II.C looks at the evolving ways emoji are used to communicate.

A. A Brief History of Emoji, and the Unicode Consortium as Gatekeepers

Emoji were first created in the late 1990s by Shigetaku Kurita (“Kurita”), an engineer at NTT DoCoMo, a Japanese phone company.²³³ The name is a compound of the Japanese words “e,” meaning “picture”; “mo” meaning “writing”; and “ji” meaning “character.”²³⁴ The original emoji, a set of 176 black-and-white characters, were designed to be used in iMode, NTT DoCoMo’s first Internet service.²³⁵ Because the screens on cell phones in 1999 were not yet capable of displaying photos, the original emoji symbols were extremely simplified.²³⁶ Each twelve-pixel-by-twelve-pixel symbol corresponded to a unique two-byte code on the Shift-JIS encoding scheme,²³⁷ becoming part of the character

²³¹ Clive Thompson, *The Emoji Is the Birth of a New Type of Language (No Joke)*, WIRED (Apr. 19, 2016, 5:27 AM), <https://www.wired.com/2016/04/the-science-of-emoji/> [<https://perma.cc/LP54-FW9W>].

²³² *See id.*

²³³ Ravi Somaiya, *The History of Emoji*, VICE NEWS (Oct. 28, 2016), <https://news.vice.com/story/heres-what-the-very-first-emoji-looked-like> [<https://perma.cc/W4CZ-GZ5P>].

²³⁴ *Unicode® Technical Standard #51: Unicode Emoji*, UNICODE (May 18, 2017), <http://www.unicode.org/reports/tr51> [<https://perma.cc/39K8-LYTT>].

²³⁵ *See Somaiya, supra* note 233.

²³⁶ *Id.*

²³⁷ Shift-JIS encoding is a character encoding system, originally developed for the Japanese language. *See IBM-943 and IBM-932*, IBM KNOWLEDGE CTR., https://www.ibm.com/support/knowledgecenter/en/ssw_aix_71/com.ibm.aix.nlsgdrf/ibm-943_ibm-932.htm [<https://perma.cc/E3HV-5EBM>] (“Each of the Japanese IBM® PC code sets are an encoding consisting of single-byte and multibyte coded characters. The encoding is based on the IBM PC code set and places the JIS characters in shifted positions. This is referred to as *Shift-JIS* or *SJIS*.”). Today, it has fallen largely out of use; as of April 2018, only 0.6% of websites use Shift-JIS encoding. *See Historical Trends in*

set that already came preloaded on all NTT DoCoMo phones.²³⁸ The designs drew inspiration from lots of graphic sources, including manga,²³⁹ kanji,²⁴⁰ and even the pictograms created to depict the various sporting events at the 1964 Olympic Games in Tokyo, Japan.²⁴¹ The idea, Kurita said, was that these pictograms would allow users to avoid miscommunication via the sheer brevity of text messaging, by contextualizing a word or phrase with the inclusion of a symbol or tiny image.²⁴²

By the early 2000s, emoji were becoming extremely popular among Japanese users, to the point where other Japanese cell phone carriers were interested in offering them to their customers.²⁴³ The other carriers, however, were inconsistent in assigning the same codes²⁴⁴ to particular characters—which meant that, in some cases, the sender might send one emoji, and the

the Usage of Character Encodings for Websites, W3TECHS, https://w3techs.com/technologies/history_overview/character_encoding [<https://perma.cc/4DKG-ZXR2>] (last visited Apr. 27, 2018).

²³⁸ See Jeff Blagdon, *How Emoji Conquered the World*, VERGE (Mar. 4, 2013, 11:46 AM), <https://www.theverge.com/2013/3/4/3966140/how-emoji-conquered-the-world> [<https://perma.cc/HUL2-DKSK>].

²³⁹ Manga refers to Japanese cartoons, comics, and animation. See *A Short History of Japanese Manga*, WIDEWALLS (Sept. 24, 2016), <http://www.widewalls.ch/japanese-manga-comics-history/> [<https://perma.cc/LDH4-YHLS>]. They have a uniquely identifiable aesthetic and in recent years have become popular worldwide. See *id.*

²⁴⁰ Kanji is the set of typographic symbols, adopted from Chinese characters, that are used in the Japanese writing system. See *Definition of Kanji*, ENG. OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/kanji> [<https://perma.cc/R6PR-7NQA>] (last visited Apr. 26, 2018).

²⁴¹ See Somaiya, *supra* note 233.

²⁴² See *id.*

²⁴³ See *id.*; *Welcome to Macintosh: 🍏 Will You Be My Emoji?*, Mark Bramhill (Aug. 18, 2017) (downloaded using Apple Podcasts) [hereinafter *Will You Be My Emoji?*].

²⁴⁴ Computers and other electronic devices can display sets of characters using systems of codes, called character encodings. See *What Is Unicode?*, UNICODE, <http://www.unicode.org/standard/WhatIsUnicode.html> [<https://perma.cc/CY7G-TRZJ>] (last visited Jan. 6, 2018). A character encoding system will assign a unique numeric code to each letter or symbol being displayed. See *id.* For computers to display different languages, the computer must support that language's character encoding system—which becomes problematic where, for example, two different character encoding systems use the same numeric code for different characters, or alternatively, use different numbers for the same character. See *id.* The widespread adoption of Unicode, a character encoding system that supports most written languages worldwide, has largely addressed this issue. See *id.*

recipient would see a completely different one.²⁴⁵ The need for a standardized coding system for emoji became apparent, and in 2005 Japan's cell phone carriers began mapping incoming signals to their own character sets, allowing cross-carrier messages between Japanese cell phones to result in the same emoji being received as the one originally sent.²⁴⁶

Emoji remained exclusive to Japan until the late 2000s, when Google began talks to expand its free email service, Gmail, to Japan.²⁴⁷ At around the same time, Apple also expressed interest in adding emoji to the text messaging application for the iPhone.²⁴⁸ To facilitate the process, emoji were adopted into Unicode, a universal character encoding system used by most of the world's software providers and widely considered the industry standard.²⁴⁹ Consequently, the Unicode Consortium—comprised of a group of individuals and member organizations consisting of tech companies, social media companies, academics, and even the governments of a few small countries²⁵⁰—became the stewards of emoji.²⁵¹ The Unicode Consortium's Emoji Subcommittee (the “Emoji Subcommittee”) bears the responsibility for evaluating

²⁴⁵ See *Will You Be My Emoji?*, *supra* note 243.

²⁴⁶ See Blagdon, *supra* note 238; see also *Will You Be My Emoji?*, *supra* note 243.

²⁴⁷ See *Will You Be My Emoji?*, *supra* note 243.

²⁴⁸ See *id.*; see also Adam Sternbergh, *Smile, You're Speaking Emoji*, N.Y. MAG. (Nov. 16, 2014), <http://nymag.com/daily/intelligencer/2014/11/emojis-rapid-evolution.html> [<https://perma.cc/896Z-AXWP>].

²⁴⁹ See Blagdon, *supra* note 238; see also *Will You Be My Emoji?*, *supra* note 243.

²⁵⁰ See *The Unicode Consortium Members*, UNICODE, <http://www.unicode.org/consortium/members.html> [<https://perma.cc/434A-CVQK>] (last visited Dec. 5, 2017). Member entities with full voting power include Adobe, Apple, Facebook, Google, Huawei Technologies, IBM, Microsoft, Netflix, Oracle, SAP, and the Sultanate of Oman's Ministry of Aqwaf and Religious Affairs. See *id.* Institutional member entities, which receive a vote each in technical committees but no vote in board or full membership meetings, include the governments of Bangladesh, India, Tamil Nadu, and the University of California, Berkeley. See *id.*; see also *Membership Levels and Fees*, UNICODE, <http://www.unicode.org/consortium/levels.html> [<https://perma.cc/AQH2-3FWZ>] (last visited Dec. 30, 2017). Finally, Monotype Imaging and Emojipedia are supporting members, receiving half a vote each in technical committees and no vote in board or full membership meetings. See *Membership Levels and Fees*, *supra*; *The Unicode Consortium Members*, *supra*.

²⁵¹ See *Unicode® Technical Standard #51: Unicode Emoji*, *supra* note 234.

proposals for new emoji and deciding whether new ones should be adopted.²⁵²

While emoji are incredibly popular, they comprise just one part of the Unicode Consortium's mission.²⁵³ The Unicode Consortium is a non-profit corporation that focuses chiefly on software internalization standards and data.²⁵⁴ The organization was founded in 1988 by software engineers Joe Becker of Xerox Corporation, Lee Collins who was then with Xerox, and Mark Davis, then of Apple Corporation, and currently, the sitting President of Unicode and Co-Chair of the Emoji Subcommittee.²⁵⁵ Its main interest is in developing, maintaining, and promoting the Unicode Standard, a system of text representation in virtually all modern software products and operating systems.²⁵⁶ Unicode accomplishes this Herculean task by analyzing languages—even obscure and infrequently used ones, like medieval Cornish—and applying their coding system to make them available on devices around the world.²⁵⁷ While the idea of standardizing emoji falls readily within Unicode's purview, the ubiquity of emoji has shined a bright spotlight on an organization that has previously operated with little attention, fanfare, or accountability.

²⁵² See *Submitting Emoji Proposals*, UNICODE, <http://www.unicode.org/emoji/selection.html> [<https://perma.cc/P2SK-GUS6>] (last visited Oct. 30, 2017).

²⁵³ Brian Feldman, *Emoji Are Tearing the Unicode Consortium Apart*, N.Y. MAG. (Apr. 27, 2016, 8:55 AM), <http://nymag.com/selectall/2016/04/emoji-are-tearing-the-unicode-consortium-apart.html> [<https://perma.cc/S2A6-245F>].

²⁵⁴ See *The Unicode Consortium*, *supra* note 151.

²⁵⁵ *Early Years of Unicode*, UNICODE, <http://www.unicode.org/history/earlyyears.html> [<https://perma.cc/HQP9-9SJJ>] (last visited Mar. 2, 2018); *Unicode Directors, Officers and Staff*, UNICODE, <http://www.unicode.org/consortium/directors.html> [<https://perma.cc/UA6Q-8MLH>] (last updated Nov. 21, 2017).

²⁵⁶ See *The Unicode Consortium*, *supra* note 151.

²⁵⁷ See Charlie Warzel, *Inside "Emojigeddon": The Fight Over the Future of the Unicode Consortium*, BUZZFEED NEWS (Apr. 26, 2016, 2:54 PM), https://www.buzzfeed.com/charliwarzel/inside-emojigeddon-the-fight-over-the-future-of-the-unicode?utm_term=.fu6K0qrz7#.ldGO7IDpY [<https://perma.cc/4XKS-KLRZ>].

B. Procedures for Proposing the Addition of New Emoji

Emoji as we know them today have evolved considerably from Shigetaku Kurita's original set.²⁵⁸ To account for the many ways people have sought to supplement textual communication, over the years, new emoji have been added to the library.²⁵⁹ Version 11.0 includes over 2,700 unique emoji.²⁶⁰ New emoji are adopted via the Emoji Subcommittee of the Unicode Consortium, who make decisions internally based on perceived areas of need, or based on proposals received from the general public.²⁶¹

Per the requirements of Unicode's Emoji Subcommittee, proposals for new emoji must have six parts: identification, images, selection factors for inclusion, selection factors for exclusion, sort location, and any other information the submitter wishes to provide.²⁶² Identification and images are fairly straightforward; the submitter must offer a short name, keywords, and sample images for the proposed emoji, to give the Emoji Subcommittee an idea of how the emoji might be displayed.²⁶³ For sort location, the submitter must indicate where in the emoji catalog the new emoji might appear; for example, if the proposed

²⁵⁸ See Somaiya, *supra* note 233 (showing the original set of 176, 12-by-12 pixel emoji). The impact of the original emoji designs has been deeply felt—so much so, that in 2016, New York's Museum of Modern Art added the NTT DoCoMo emoji set to its collection. See Paul Galloway, *The Original Emoji Set Has Been Added to the Museum of Modern Art's Collection*, MoMA (Oct. 26, 2016), <https://stories.moma.org/the-original-emoji-set-has-been-added-to-the-museum-of-modern-arts-collection-c6060e141f61> [<https://perma.cc/3U9X-Y4UH>] (“Today's emoji . . . have evolved far beyond Kurita's original 176 designs However, the DNA for today's set is clearly present in Kurita's humble, pixelated, seminal emoji.”).

²⁵⁹ See J.J. O'Donoghue, *Emoji: The Evolution of Emoticons*, JAPAN TIMES (Sept. 17, 2016), <https://www.japantimes.co.jp/life/2016/09/17/digital/emoji-evolution-emoticons/#.We08VluPLX4> [<https://perma.cc/6UCA-T3K5>] (“Neil Cohn, a linguist and cognitive scientist who studies how our brains process images at the Tilburg Center for Cognition and Communication at Tilburg University in the Netherlands,” said “emoji, which he calls an ‘external vocabulary,’ essentially compensate for a lack of gesture and intonation in written texts.”).

²⁶⁰ See *Full Emoji List, v11.0*, UNICODE, <http://www.unicode.org/emoji/charts/full-emoji-list.html> [<https://perma.cc/C3WZ-R4PS>] (last visited Mar. 2, 2018).

²⁶¹ See *Submitting Emoji Proposals*, *supra* note 252.

²⁶² *Id.*

²⁶³ See *id.*

emoji were a flamingo, the proposed sort location might be in the “Animals & Nature” category, after the “owl” 🦉 emoji.²⁶⁴

The most involved portions of the proposal are the selection factors for inclusion, and the selection factors for exclusion. The former asks the submitter to address reasons and provide evidence supporting the addition of the proposed emoji; the latter asks the submitter to address reasons the emoji might not be adopted.²⁶⁵ These factors are arguably the most important parts of a new emoji proposal, due largely to the permanent nature of emoji adoption—once new emoji are added, they are never retired from Unicode.²⁶⁶

The Emoji Subcommittee weighs several selection factors for inclusion in proposals for new emoji, including compatibility, image distinctiveness, completeness, how frequently the emoji has been requested, and expected usage level.²⁶⁷ Compatibility looks at whether the emoji is needed to be compatible with highly-used emoji in existing systems. For example, if the proposed emoji were of a dumpling, it would be important to note if another platform²⁶⁸ had offered its own proprietary dumpling emoji-equivalent that was highly used, making the argument in favor of a compatible emoji available through Unicode.²⁶⁹ Image distinctiveness assesses whether the emoji can be represented through a recognizable image that can be easily differentiated from existing emoji—for example, an emoji for “stew” might be difficult to distinguish from the existing “pot of food” emoji, 🍲, especially due to the small size.²⁷⁰ Completeness, a minimally weighted factor, evaluates whether the proposed emoji would fill a gap in an existing type of

²⁶⁴ See *id.*

²⁶⁵ *Id.*

²⁶⁶ *Emoji & Pictographs*, Section of *FAQ*, UNICODE, http://www.unicode.org/faq/emoji_dingbats.html [<https://perma.cc/J6ME-K979>] (last visited June 26, 2017).

²⁶⁷ *Submitting Emoji Proposals*, *supra* note 252.

²⁶⁸ For example, prior to Unicode’s adoption of the “dumpling” emoji, 🥟, there were in fact over one hundred dumpling stickers available on Line, a mobile app that has gained popularity in Asia. See JENNIFER 8. LEE ET AL., DUMPLING EMOJI SUBMISSION, at *2 (2016), <http://www.unicode.org/L2/L2016/16024-dumpling-emoji.pdf> [<https://perma.cc/UP7L-LADN>].

²⁶⁹ See *Submitting Emoji Proposals*, *supra* note 252.

²⁷⁰ See *id.*

emoji.²⁷¹ Frequency requested weighs the extent to which the emoji is requested,²⁷² taking into account commercial petitions, bots, duplicate votes via petition, and other factors that can skew such a calculation.²⁷³

Expected usage level—and its sub-factor, frequency—is “the most important factor for inclusion.”²⁷⁴ This factor evaluates all the ways the proposed emoji might be used.²⁷⁵ The extent to which the submitter anticipates the emoji will be used worldwide is critical.²⁷⁶ This can be shown by using trend aggregators, such as the frequency of Google searches for a particular word,²⁷⁷ or the frequency with which a hashtag is used on Twitter or Instagram.²⁷⁸ Essentially, this means that the overall concept must already be popular when it is proposed.²⁷⁹

After reviewing the inclusion factors, the Emoji Subcommittee evaluates the exclusion factors, any of which can weigh against the adoption of an emoji.²⁸⁰ These factors are a bit narrower, and look at whether the new emoji is overly specific, open-ended, already representable, transient, or justified by a faulty comparison to existing emoji.²⁸¹ They also look at whether the proposed emoji is essentially a logo, brand, or image of a specific person or a deity, all of which Unicode has determined render a concept unsuitable

²⁷¹ See *id.* A notable example is the recent addition of five emoji, including the “scorpion,” 🐍, which effectively completed the set of emoji representing zodiac signs. See *id.*

²⁷² Reviewing Google search and Twitter trends are common sources of evidence that a particular emoji is being “requested” by the public. See, e.g., MARK BRAMHILL, PROPOSAL FOR PERSON MEDITATING EMOJI (2016), <http://www.unicode.org/L2/L2016/16279-person-meditating.pdf> [<https://perma.cc/P4HH-9W54>]; AVIV OVADYA & ASHWINI ORUGANTI, BROCCOLI EMOJI SUBMISSION (2016), <http://www.unicode.org/L2/L2016/16375-broccoli-emoji.pdf> [<https://perma.cc/YY98-K2LQ>].

²⁷³ See *Submitting Emoji Proposals*, *supra* note 252. Submitting a petition is actually considered an undesirable strategy because it does not demonstrate current actual demand; rather, it shows the submitter’s affirmative campaigning in support of an emoji. See *Will You Be My Emoji?*, *supra* note 243.

²⁷⁴ *Submitting Emoji Proposals*, *supra* note 252.

²⁷⁵ See *id.*

²⁷⁶ See *id.*

²⁷⁷ See, e.g., LEE ET AL., *supra* note 269.

²⁷⁸ See, e.g., BRAMHILL, *supra* note 272.

²⁷⁹ *Will You Be My Emoji?*, *supra* note 243.

²⁸⁰ *Submitting Emoji Proposals*, *supra* note 252.

²⁸¹ See *id.*

for encoding as an emoji character.²⁸² Specificity is especially important for emoji proposals; new emoji must distinctively convey an overarching concept, without creating excessive or unnecessary variations of something already existing.²⁸³ For example, requesting a general “dinosaur” emoji might not be distinctive enough.²⁸⁴ Conversely, requesting a “triceratops” emoji, in view of the recent availability of the “tyrannosaurus rex” 🦖 and “brontosaurus” 🦕 emoji, might be considered overly specific without further justification for adding a third type of dinosaur emoji.²⁸⁵

After passing the Emoji Subcommittee, proposals are forwarded to the Unicode Technical Committee (“UTC”) for further consideration.²⁸⁶ The UTC then narrows the proposed emoji to a list of provisional candidates, which are added to a prioritized list for reevaluation the following year.²⁸⁷ This list is narrowed even further before it is distributed to vendors—Apple, Facebook, Google, and other platforms—who then begin work on their own proprietary emoji designs for the new characters.²⁸⁸ Finally, a corresponding character code for each new emoji is added into Unicode.²⁸⁹ After vendors push software updates, the new emoji finally appear on consumer devices for use.²⁹⁰ From start to finish, the approval process takes approximately a year-and-a-half.²⁹¹

²⁸² *See id.*; *Will You Be My Emoji?*, *supra* note 243.

²⁸³ *Will You Be My Emoji?*, *supra* note 243.

²⁸⁴ *See id.*

²⁸⁵ *Cf. So You Want to Propose an Emoji to Unicode? Here’s How . . .*, EMOJIONE (June 14, 2017), <https://www.emojione.com/blog/so-you-want-to-propose-an-emoji-to-unicode-heres-how> [<https://perma.cc/37JU-GCR4>] (“Want a cookie? Of course you do. But you can’t have a ‘Chocolate Chip’ emoji cookie as well as a ‘Peanut Butter’ cookie, and why not an ‘Oatmeal Raisin’ while we’re at it?”).

²⁸⁶ *Will You Be My Emoji?*, *supra* note 243.

²⁸⁷ *See id.*

²⁸⁸ *See id.*

²⁸⁹ *See Emoji & Pictographs*, *supra* note 266.

²⁹⁰ *Will You Be My Emoji?*, *supra* note 243.

²⁹¹ *See Submitting Emoji Proposals*, *supra* note 252.

C. *Emoji as an Evolving Part of the Cultural Lexicon*

Using tiny images is hardly an innovation in human language; linguists will readily point to the use of hieroglyphs and cuneiform in early Mesopotamia as a method of communicating.²⁹² The popularity of emoji might generally be explained by their ability to supplement written text,²⁹³ a large part of communicating meaning lies in intonation, gesturing, and other nonverbal cues, and emoji adeptly demonstrate all of that in an astonishing economy of characters.²⁹⁴

There is debate as to what extent emoji constitutes a new language.²⁹⁵ Since emoji are largely “content signifiers,”²⁹⁶ it is challenging to communicate entirely in emoji without grammar and syntax to tie a phrase or sentence together.²⁹⁷ Nevertheless, the

²⁹² Alice Robb, *How Using Emoji Makes Us Less Emotional*, NEW REPUBLIC (July 7, 2014), <https://newrepublic.com/article/118562/emoticons-effect-way-we-communicate-linguists-study-effects> [<https://perma.cc/8MVD-G22M>] (“Emoji could even mark a return to a more pictographic script. Our earliest examples of writing come from the pictographic hieroglyphs and cuneiform inscriptions from Mesopotamia around [five thousand] years ago. It was only around 1,200 BC that the Phoenicians developed the first alphabetic writing system.”).

²⁹³ See *id.* (quoting linguist Ben Zimmer: “It’s a recurrence of a very old impulse,” he said. “I don’t see it as a threat to written language, but as an enrichment. The punctuation that we use to express emotion is rather limited. We’ve got the question mark and the exclamation point, which don’t get you very far if you want to express things like sarcasm or irony in written form.”).

²⁹⁴ Thompson, *supra* note 231 (“Emoji assist in a peculiarly modern task: conveying emotional nuance in short, online utterances.”).

²⁹⁵ See Somaiya, *supra* note 233 (regarding whether emoji is a form of language, quoting engineer Shigetaku Kurita: “It may be separate from language. One can now communicate through the use of just letters. You can send emoji to foreigners and understand each other. So it is a new letter system. But there is no way to ‘read’ it. It’s not a language in that way.”); Thompson, *supra* note 231.

²⁹⁶ Samantha Lee, *What Communicating Only in Emoji Taught Me About Language in the Digital Age*, QUARTZ (Aug. 31, 2016), <https://qz.com/765945/emojis-forever-or-whatever-im-a-poet/> [<https://perma.cc/24A3-U2S2>] (“The thing I perhaps missed most was grammar. As it turns out, the majority of emojis are, frustratingly, ‘content signifiers.’ The ‘pig snout,’ [🐷], the ‘woman in red,’ [👩], the ‘setting sun,’ [🌇]: these represent nouns and verbs, but I lacked a basic structure to tie them all together.”).

²⁹⁷ This might explain the reason that more than half of the strings of emoji that people use are repetitious. See O’Donoghue, *supra* note 259 (“[Linguist Gretchen] McCulloch notes that . . . [this practice] is ‘vanishingly rare with words.’ For example, most people are never simply happy, but rather 😄😄😄; likewise, most folk are 🍻🍻🍻, not just thirsty.”). In this respect, some linguists have compared emoji to pidgin, a type of language birthed out of necessity between two populations with no common language.

uses for emoji are growing beyond cheerful supplements to our tweets and text messages. In fact, a recent study conducted by Instagram suggests that, in some instances, emoji are replacing aspects of our communication entirely.²⁹⁸ For example, the “face with tears of joy” emoji, 😄,²⁹⁹ often takes the place of “LOL” and its variants.³⁰⁰

The idea that a word or phrase could be substituted with an emoji is powerful—and evidently, not lost on technology companies and social media platforms.³⁰¹ In May 2015, Instagram introduced emoji hashtags, allowing users even more character options to categorize posts.³⁰² The popular money app Venmo also incorporated an “emoji autocomplete” feature, allowing users to easily add emoji to payment notes when sending money to other users after finding that close to twenty-five percent of all payment notes on the app used emoji.³⁰³ The following year, Apple upped the ante, introducing a similar “predictive emoji” feature that incorporated emoji substitutions into its predictive text feature on

See Lee, *supra* note 296 (“The rudimentary language typically lacks plural markers and functions exclusively in the present tense. Without conceptual words like ‘very,’ ideas are intensified by repetition: ‘extremely quick’ becomes ‘quickquick.’”).

²⁹⁸ Instagram Engineering, *Emojineering Part [One]: Machine Learning for Emoji Trends*, MEDIUM (Apr. 30, 2015), <https://engineering.instagram.com/emojineering-part-1-machine-learning-for-emoji-trendsmachine-learning-for-emoji-trends-7f5f9cb979ad> [<https://perma.cc/88XF-VVQR>].

²⁹⁹ Incidentally, the “face with tears of joy” emoji, 😄, was also the most popular emoji used on Twitter in 2017. *Emojitracker: Realtime Emoji Use on Twitter*, EMOJITRACKER, <http://emojitracker.com/> [<https://perma.cc/G7QN-EEJ9>] (last visited Dec. 5, 2017).

³⁰⁰ *See* Instagram Engineering, *supra* note 298 (“Emoji usage is shifting the people’s vocabulary on Instagram and becoming an important means of expression: their use is anti-correlated with internet slang like ‘lol’ [an acronym meaning ‘laughing out loud’] and ‘xoxo.’”).

³⁰¹ *See infra* text accompanying notes 302–07.

³⁰² *See* Instagram Engineering, *Emojineering Part II: Implementing Hashtag Emoji*, MEDIUM (May 6, 2015), <https://engineering.instagram.com/emojineering-part-ii-implementing-hashtag-emoji-7b653b221c82> [<https://perma.cc/38PT-SRPN>].

³⁰³ *See* Dasmer Singh, *Introducing Emoji Autocomplete*, OFFICIAL VENMO BLOG (May 14, 2015), <http://blog.venmo.com/hf2t3h4x98p5e13z82pl8j66ngcmry/2015/5/14/introducing-emoji-autocomplete> [<https://perma.cc/R9ER-UDA7>]. A 2015 article analyzing the payment notes from over eight hundred thousand Venmo transactions made over the course of one week yielded some interesting insight into the ways Venmo users communicate with emoji. *See* Zach Wener-Fligner, *The Emoji of Venmo: Food, Booze, Partying, and, Occasionally, Rent*, QUARTZ (Mar. 20, 2015), <https://qz.com/359903/the-emoji-of-venmo/> [<https://perma.cc/DZC5-KKN2>].

the iPhone's Messaging app.³⁰⁴ For example, typing the word “love” will now trigger some suggested options that now include the “red heart” ❤️ emoji.³⁰⁵ Additionally, once a message is typed out, a user can select words that iOS 10³⁰⁶ has identified and replace them with their corresponding emoji equivalents.³⁰⁷

In recent years, there has been an uptick in companies using emoji to communicate directly with consumers, especially those following them on social media.³⁰⁸ A 2015 study conducted by social media analytics firm SocialBakers estimated that “[s]ix in [ten] of the [five hundred] most followed brands online used emoji[] in [their] tweets in the fourth quarter of [that year].”³⁰⁹ Whether they knew it or not, those brands likely received an added benefit—a 2016 experiment, conducted by online advertising agency Wordstream, found that tweets containing emoji got 25.4% higher audience engagement than those without emoji.³¹⁰ In

³⁰⁴ Matt Burgess, *How to Use iOS 10's New Emoji Features*, WIRED UK (Sept. 15, 2016), <http://www.wired.co.uk/article/ios-10-emoji-how-to-use-big-emoji-predictive> [https://perma.cc/U2Z3-HAWW].

³⁰⁵ Cf. Mitchel Broussard, *Messages in iOS 10: How to Use Emoji Replacement and Prediction*, MACRUMORS (Sept. 10, 2016), <https://www.macrumors.com/how-to/ios-10-messages-emoji/> [https://perma.cc/L4FA-QU48] (“In iOS 10, Apple is making it even easier to use emojis with an all-new replacement and predictive system that replaces key words and phrases with relevant emoji characters.”).

³⁰⁶ Apple released iOS 10, the mobile operating system for the iPhone, in 2016. See Vlad Savov, *Apple Announces iOS 10 with [Ten] Major Features and Redesigns*, VERGE (June 13, 2016, 1:50 PM), <https://www.theverge.com/2016/6/13/11921068/apple-ios-10-announced-new-iphone-features-wwdc-2016> [https://perma.cc/TU64-FV7V].

³⁰⁷ See *id.*

³⁰⁸ See *infra* text accompanying notes 309–14.

³⁰⁹ Jordan Valinsky, *Brands Are Using Emojis More than Ever, Research Confirms*, DIGIDAY (Mar. 1, 2016), <https://digiday.com/marketing/brands-using-emojis-ever-research-confirms/> [https://perma.cc/BWL3-DBXY].

³¹⁰ Kimberlee Morrison, *This Is Why You Should Use Emojis to Boost Engagement on Social Media Ads*, ADWEEK (Jan. 29, 2016), <http://www.adweek.com/digital/this-is-why-you-should-use-emojis-to-boost-engagement-on-social-media-ads/> [https://perma.cc/UG8N-6HBH]. The usefulness of emoji to target consumers was evidently noticed by Twitter—several months later, the social media platform announced that it “would allow emoji keyword targeting for Twitter ads.” Michelle Castillo, *When You Tweet an Emoji, Advertisers Can Now Find You*, CNBC (June 16, 2016, 11:26 AM), <https://www.cnbc.com/2016/06/16/when-you-tweet-an-emoji-advertisers-can-now-find-you.html> [https://perma.cc/B8TS-T2UJ]. For example, if a user's tweet included the “meat on bone” 🍖 or “poultry leg” 🍗 emoji, KFC could decide to target that user and push their ads to Twitter accounts who had used those emoji in their tweets. See *id.*

addition, companies have harnessed the power of emoji for advertising campaigns targeting younger generations.³¹¹ As part of an ad campaign in Puerto Rico, Coca-Cola registered URLs using the Samoan domain “.ws” for emoji characters conveying happiness, and then displayed the domains on giant billboards and bottle labeling.³¹² General Electric launched the promotional website emojiscience.com, featuring an “Emoji Table of Experiments,” a chart modeled off the periodic table of elements that featured icons of emoji linked to educational videos created by popular scientist Bill Nye.³¹³ The irreverent anti-hero movie *Deadpool* even incorporated an emoji pun into their billboard marketing campaign.³¹⁴

The uses for emoji have even expanded beyond text messages. Domino’s Pizza launched an ordering system where users could order a pizza by simply tweeting the pizza emoji, 🍕, at the restaurant.³¹⁵ A bank in the United Kingdom announced the launch

Strategic use of this functionality could give savvy marketing teams a (pun intended) leg up on the competition.


³¹¹ See *infra* text accompanying notes 312–14. Interestingly, while advertisers generally use emoji to target millennials, a recent study shows that approximately seventy-seven percent of users between ages fifty-six and sixty-four use emoji on Facebook Messenger. See Jeremy Burge, *[Seventy-Seven Percent] of [Fifty-Six to Sixty-Four] Year Olds Use Emojis on Messenger*, EMOJIPEDIA (Nov. 17, 2017), <https://blog.emojipedia.org/77-of-56-64-year-olds-use-emojis-on-messenger/> [<https://perma.cc/D6S7-RUG3>].

³¹² See Tim Nudd, *Coke Spreads Happiness Online with Emoji Web Addresses*, ADWEEK (Feb. 19, 2015), <http://www.adweek.com/creativity/coca-cola-spreads-happiness-online-first-emoji-web-addresses-163044/> [<https://perma.cc/3MNN-X9LA>]. The web addresses redirected to Coca-Cola’s Puerto Rico site. Samantha Grossman, *Coke’s New Advertising Strategy Features Emoji*, TIME (Feb. 21, 2015), <http://time.com/3717629/coke-emoji-web-address-ad-campaign/> [<https://perma.cc/9SMS-3ZWL>]. When asked about the campaign, Coca-Cola said that it found that “emoji have become a kind of second language for Coke’s younger consumers,” and that the campaign was a great opportunity to connect with them. See GAVIN LUCAS, *THE STORY OF EMOJI 121* (2016).

³¹³ See *GE Emoji Science*, EMOJISCIENCE.COM, <http://emojiscience.com/> [<https://perma.cc/3E65-VA3T>] (last visited Dec. 5, 2017).


³¹⁴ See Emma Grey Ellis, *The Most Absurd Deadpool Marketing, From Tinder to Obscene Emoji*, WIRED (Feb. 10, 2016, 3:11 PM), <https://www.wired.com/2016/02/deadpool-marketing/> [<https://perma.cc/YN4B-VB2K>]. The billboard used the “skull” 🦴 (as in, “dead”), the “pile of poo” 💩 (simply, “poo”), and a capital letter “L”—a quasi-phonetic “translation” of the movie title using almost entirely emoji. See *id.*

³¹⁵ See Khushbu Shah, *How to Order Domino’s Pizza with a Pizza Emoji*, EATER (May 13, 2015, 9:56 AM), <https://www.eater.com/2015/5/13/8597819/how-to-order-dominos-pizza-emoji> [<https://perma.cc/SQ2N-WV28>].


of the first emoji-only passcode, designed to be “easier to remember and mathematically more secure than traditional passcodes.”³¹⁶ Apple and Android devices even rolled out the first emoji ever with the exclusive purpose of advancing a social cause—an eye inside a speech bubble , designed to allow people who witness bullying to speak out.³¹⁷

Because some of the biggest operating systems and social media platforms have commissioned their own emoji sets, a user’s emoji can look different depending on the platform they are using.³¹⁸ Though Unicode provides a standardized coding system for emoji, it does not design the actual emoji characters.³¹⁹ As previously mentioned, once an emoji is approved to be added by Unicode, it is then circulated to designers at companies like Apple, Twitter, Google, and Microsoft, who design the actual character that will appear on users’ devices when they communicate using their platform.³²⁰ Consequently, the intended meaning behind the

³¹⁶ *Now You Can Log into Your Bank Using Emoji*, INTELLIGENT ENV’T (June 15, 2015), <https://www.intelligentenvironments.com/now-you-can-log-into-your-bank-using-emoji/> [https://perma.cc/6NA2-6FC4].

³¹⁷ See Tim Nudd, *iOS 9’s Puzzling Eye Emoji Is Explained: It’s the First Ever Made for a Social Cause*, ADWEEK (Oct. 22, 2015), <http://www.adweek.com/brand-marketing/first-emoji-ever-made-social-cause-launches-today-its-eye-bullying-167699/> [https://perma.cc/GK9E-CXUM]; see also *How to Use the Emoji*, IWITNESSBULLYING.ORG, <http://iwwitnessbullying.org/how-to-use-the-eye> [https://perma.cc/ZX55-HVJF] (last visited Feb. 15, 2018); #IamAWitness, GOODBY SILVERSTEIN (Oct. 2015), <https://goodbysilverstein.com/work/i-am-a-witness> [https://perma.cc/8GS4-4W8P]. The “eye in speech bubble” emoji, , created based on the logo for the “I Am A Witness” anti-bullying campaign, was actually added through slightly different channels—rather than going through the standard proposal process, Unicode added the emoji to Apple devices using a “zero width joiner.” See Robbie Gonzalez, *The Story Behind That Mysterious Eye Emoji in iOS*, WIRED (Oct. 22, 2015, 9:00 AM), <https://www.wired.com/2015/10/i-am-a-witness-emoji-ios-9/> [https://perma.cc/2GWF-QMM3]. A zero width joiner creates a new emoji by joining at least two characters together in a specific sequence. See *Zero Width Joiner (ZWJ) Emoji*, EMOJIPEDIA, <https://emojipedia.org/zero-width-joiner/> [https://perma.cc/G3J6-QWW4] (last visited Dec. 11, 2017). This mechanic allowed Unicode to fast-track the adoption of the new emoji, with the caveat of limiting its use to Apple and Android devices. See Gonzalez, *supra*; #IamAWitness, *supra*.

³¹⁸ See LUCAS, *supra* note 312, at 19.

³¹⁹ See *Welcome to Macintosh:  Emoji Incarnate*, Mark Bramhill (Sept. 15, 2017) (downloaded using Apple Podcasts).

³²⁰ See *id.*

emoji used can become confused.³²¹ A 2016 study found that, in a selection of the popular “face” emoji, participants interpreted “sentiment” (i.e., how positive or negative the emoji’s meaning was) with consistently low variance only 4.5% of the time.³²² Additionally, when participants rated the same rendering, they disagreed 25% of the time on whether the sentiment was positive, neutral, or negative.³²³ When considering cross-platform emoji symbols, interpretations became even more disparate.³²⁴ For example, while looking at “grinning face with smiling eyes,” participants described Google’s version (🤗) as “blissfully happy,” while Apple’s version (😊) was described as “ready to fight.”³²⁵

The potential for confusion intensifies when platforms unilaterally decide to change the designs of certain characters. For example, in August 2016, Apple quietly changed the design for the “pistol” emoji, from 🖱️ to 🗳️.³²⁶ Interpreted as a decision responding to increased gun violence worldwide,³²⁷ Apple’s decision was nevertheless criticized because of the retroactive impact it would have on prior text messages and other

³²¹ See LUCAS, *supra* note 312, at 19.

³²² HANNAH MILLER ET AL., GROUPLENS RESEARCH, UNIV. OF MINN., “BLISSFULLY HAPPY” OR “READY TO FIGHT”: VARYING INTERPRETATIONS OF EMOJI, at *2 (2016), https://grouplens.org/site-content/uploads/Emoji_Interpretation_Paper.pdf [<https://perma.cc/54SE-2J82>]. Importantly, the study notes its reasoning for limiting the emoji selection to those representing faces—besides the fact that the faces are commonly used, the study hypothesized that “misconstrual would be more likely among these emoji than those that characterize ‘things’ (e.g., an airplane, a balloon, flowers, flags, etc.).” *Id.* at *3.

³²³ See *id.* at *2.

³²⁴ See *id.*

³²⁵ See *id.* Both versions have since been redesigned. See *Beaming Face With Smiling Eyes*, EMOJIPEDIA, <https://emojipedia.org/grinning-face-with-smiling-eyes/> [<https://perma.cc/XY3S-GBBH>] (last visited Apr. 26, 2018).

³²⁶ See Heather Kelly, *Apple Replaces the Pistol Emoji with a Water Gun*, CNN (Aug. 2, 2016, 8:07 AM), <http://money.cnn.com/2016/08/01/technology/apple-pistol-emoji/> [<https://perma.cc/7XML-AF6X>]; *Apple Adds More Gender Diverse Emoji in iOS 10*, APPLE NEWSROOM (Aug. 1, 2016), <https://www.apple.com/newsroom/2016/08/apple-adds-more-gender-diverse-emoji-in-ios-10.html> [<https://perma.cc/EWS9-NY45>] (indicating a forthcoming updated design for the “pistol” emoji, but without additional explanation).

³²⁷ Kelly, *supra* note 326. Prior to the change, uses of the pistol and other weapon emojis had led to arrests, with a French court even ruling that the “pistol emoji could constitute a death threat, sentencing a man to three months in prison for texting the gun to his ex-girlfriend.” *Id.*

communications containing the emoji.³²⁸ Furthermore, the change caused Apple’s “pistol” to differ even more dramatically from the images shown on other platforms, even triggering a warning on Emojipedia³²⁹ to “[u]se with caution.”³³⁰

Nevertheless, there are some consistencies in the ways people use emoji. A 2015 study found that, after analyzing about seventy thousand tweets across thirteen languages, the inclusion of emoji generally added a positive nuance or tone, even where the message itself was otherwise negative.³³¹ Linguists have also found that generally, emoji appear at the end of messages, as opposed to the

³²⁸ See, e.g., Rob Price, *There’s a Huge Problem with Apple’s Plan to Combat Gun Violence by Changing an Emoji*, BUS. INSIDER UK (Aug. 2, 2016, 7:52 AM), <http://www.thisinsider.com/apple-change-pistol-emoji-toy-confusion-precedent-meaning-retroactive-2016-8> [<https://perma.cc/F6VH-U9XN>]. Subsequently, Apple’s response to public outcry when a redesign is perceived to alter an emoji’s commonly accepted use has been more receptive—for example, in November 2016, Apple received swift backlash when it contemplated changing the design for the “peach” emoji. See Madison Malone Kircher, *Emergency: Apple’s New Peach Emoji Doesn’t Look Like a Butt (But We Are Getting a Face Palm)*, N.Y. MAG. (Nov. 1, 2016, 9:39 AM), <http://nymag.com/selectall/2016/11/new-ios-10-2-emoji-peach-emoji-doesnt-look-like-a-butt.html> [<https://perma.cc/96HZ-XSKM>]. While the redesign appeared to make the emoji look more “peach-like” (🍑), studies showed that the peach emoji was very rarely used to refer to actual fruit. See *How We Really Use the Peach*, EMOJIPEDIA (Dec. 16, 2016), <https://blog.emojipedia.org/how-we-really-use-the-peach/> [<https://perma.cc/5MK9-E2BB>] (finding in a random sample of tweets containing the peach emoji that “33% of tweets use[d] 🍑 as shorthand for butt . . . 27% have sexual connotations,” and “[o]nly 7% refer to the fruit”). Whatever the reason, Apple reversed course two weeks later. See Alex Fitzpatrick, *Apple Just Saved the Peach Emoji*, TIME (Nov. 15, 2016), <http://time.com/4572130/apple-peach-emoji-butt-iphone/> [<https://perma.cc/PK9M-5NDY>].

³²⁹ Created by Jeremy Burge in 2013, Emojipedia is a well-regarded encyclopedia of emoji, cataloging their widely accepted meanings, cross-platform variations, emoji-related news, and a variety of other information. See Rob Price, *This [Thirty-One]-Year-Old Australian Accidentally Built a Huge Empire by Cataloging All the World’s Emojis*, BUS. INSIDER UK (Jan. 17, 2016, 1:00 PM), <http://uk.businessinsider.com/emojipedia-jeremy-burge-emoji-encyclopedia-profile-2016-1?IR=T> [<https://perma.cc/K2SU-SS6C>]. Emojipedia is a voting member of the Unicode Consortium. See *The Unicode Consortium Members*, *supra* note 250. Burge is also an individual member of the Unicode Consortium, and is currently Co-Chair of the Emoji Subcommittee. See *id.*; *Unicode Directors, Officers and Staff*, *supra* note 255.

³³⁰ *Pistol*, EMOJIPEDIA, <https://emojipedia.org/pistol/> [<https://perma.cc/693K-BU48>] (last visited Dec. 5, 2017).

³³¹ See PETRA KRALJ NOVAK ET AL., PLOS ONE, SENTIMENT OF EMOJIS, at *1, *3, *8 (2015), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0144296> [<https://perma.cc/6MDM-NS94>].

middle or the very beginning.³³² Furthermore, even when emoji appear in the middle of text, they tend to separate complete thoughts, similar to punctuation.³³³

For many, emoji have become an everyday communication tool.³³⁴ As the international uses for emoji continue to build and evolve, the time is ripe for society to leverage the popularity of emoji in new, powerful ways.

III. THE CASE FOR DISCLOSURE VIA EMOJI, AND OTHER SUGGESTED IMPROVEMENTS FOR DISCLOSURE

This Part proposes several solutions to increase disclosure of material connections in influencer marketing. Section III.A proposes the adoption of a dedicated emoji as a preferred method of material connections disclosure. Section III.B discusses both the advantages and possible difficulties underlying the adoption of a disclosure emoji. Finally, Section III.C offers additional recommendations to increase voluntary compliance with FTC regulations regarding endorsements.

A. Proposal for the Adoption of a Dedicated Emoji for Disclosing Material Connections

Despite efforts to keep pace with social media's ever-evolving uses, the FTC needs to consider new, creative solutions to facilitate disclosure compliance. The FTC has considerable latitude under the FTCA to protect consumers by curbing unfair or deceptive business practices, and promoting clarity and transparency in advertising.³³⁵ Adopting an emoji to disclose material connections in social media endorsements is a modern innovation that would

³³² Katy Steinmetz, *Time Exclusive: Here Are Rules of Using Emoji You Didn't Know You Were Following*, TIME (July 17, 2014), <http://time.com/2993508/emoji-rules-tweets/> [<https://perma.cc/2HCS-APAW>].

³³³ See MARCEL DANESI, *THE SEMIOTICS OF EMOJI* 55–56 (2017); Steinmetz, *supra* note 332.

³³⁴ See Somaiya, *supra* note 233 (regarding how emoji might develop in the coming years, quoting Shigetaku Kurita: “Emoji has become increasingly popular abroad these past few years. But that all is old news in Japan. Emoji was a hit in Japan over [ten] years ago. It has become standard in Japan. It is a norm and there is nothing special about it—it is now a language that people use on an everyday basis.”).

³³⁵ See *supra* Section I.A.1.

clarify and standardize requirements for disclosure. A disclosure emoji would leverage a communicative behavior that influencers are already inclined to use anyway.³³⁶ Adding such a powerful, ubiquitous tool to the disclosure toolbox would increase voluntary compliance, preventing future Fyre Festivals—or, at least, mitigating them—by keeping consumers better informed.

The capacity for emoji to bridge language barriers eliminates the need for disclosure in a particular language. On an extremely basic level, emoji are symbols.³³⁷ Using symbols to communicate essential information, especially across languages, is not a new concept; there are numerous symbolic conventions throughout the world that we use to convey meaning.³³⁸ There are also plenty of symbols—such as \$, §, ¶, ™, and ®—that convey meaning with legal significance.³³⁹ Throughout history, symbols are created as shorthand for meaning that would be otherwise cumbersome to convey with ordinary text.³⁴⁰ A “disclosure emoji,” no matter the

³³⁶ For example, most of the supermodels who posted on Instagram about their photoshoot for the Fyre Festival marketing campaign used emojis in the accompanying captions. See *supra* note 206 (listing social media posts by influencers that also contain emoji).

³³⁷ In fact, Wingdings and other font software comprised entirely of symbols and shapes are cited as the conceptual predecessors to emoji. See LUCAS, *supra* note 312, at 10–11.

³³⁸ See ISO CENT. SECRETARIAT, INT’L ORG. FOR STANDARDIZATION, THE INTERNATIONAL LANGUAGE OF ISO GRAPHICAL SYMBOLS 1 (2013), https://www.iso.org/files/live/sites/isoorg/files/archive/pdf/en/graphical-symbols_booklet.pdf [<https://perma.cc/3ENG-J3YN>].

³³⁹ See KEITH HOUSTON, SHADY CHARACTERS: THE SECRET LIFE OF PUNCTUATION 3 (2013) (explaining that ¶, also known as the pilcrow, “crop[s] up with surprising frequency . . . teaming up with the section symbol in legal documents to form picturesque arrangements such as §3, ¶7”); Christopher Beam, *Where Do Currency Symbols Come from?*, SLATE (July 15, 2010, 6:33 PM), http://www.slate.com/articles/news_and_politics/explainer/2010/07/_.html [<https://perma.cc/MZM8-7KXE>] (briefly citing the historical evolution of many symbols used to represent currency, including the United States dollar, the British pound, and the European Union’s euro); *Trademark Symbols*, Part of *Fact Sheets Introduction to Trademarks*, Section of *About INTA*, INT’L TRADEMARK ASS’N, <http://www.inta.org/TrademarkBasics/FactSheets/Pages/TrademarkSymbolsFactSheet.aspx> [<https://perma.cc/5JF8-PGNV>] (last visited Jan. 8, 2018) (explaining briefly what the ™ and ® symbols mean, and how they should be used to provide notice of rights to a trademark).

³⁴⁰ See, e.g., William F. Allman, *The Accidental History of the @ Symbol*, SMITHSONIAN MAG. (Sept. 2012), <https://www.smithsonianmag.com/science-nature/the-accidental-history-of-the-symbol-18054936/> [<https://perma.cc/4REZ-32CW>] (presenting

design, if used often enough could easily become part of the cultural lexicon, understood to mean that a post has been sponsored.

The universality and permanence of emoji would also simplify disclosure across many social media platforms. Since the interface of every social media platform is different, there is no uniform disclosure method that works across all of them. Emoji can easily be incorporated into Instagram captions, tweets, Facebook posts, and on-screen text in YouTube videos.³⁴¹ Having a dedicated emoji to disclose sponsored content would therefore eliminate the necessity for disclosure tags, which have been created by some social media platforms, and which the FTC feels are unreliable anyway. Furthermore, emoji are used worldwide,³⁴² and are never removed from the Unicode Standard once adopted.³⁴³ This would ensure that users could continue using a disclosure emoji for the foreseeable future.

a theory that “@” was created by medieval monks, who wanted a shorter way to represent the Latin word “ad,” meaning “toward”); Beam, *supra* note 339; Origin of Everything, *Where Does the #Hashtag Symbol Come From?*, PBS DIGITAL STUDIOS (Oct. 3, 2017), <http://www.pbs.org/video/where-does-the-hashtag-symbol-come-from-vtyi5h/> [<https://perma.cc/VC3D-JPS7>] (explaining that “#” evolved from the Roman abbreviation “lb,” to stand for “libra pondo” or “pound by weight”).

³⁴¹ Emoji can be typed just like regular text, and Facebook, Twitter, Instagram, and Snapchat all support emoji in their text captions. On YouTube, emoji can be added to on-screen text captions.

³⁴² See *Emoji & Pictographs*, *supra* note 266 (“At this point, nearly [ninety percent] of all text data created and interchanged on the [I]nternet is already in Unicode . . . and that percentage keeps growing.”).

³⁴³ See *id.* (“[E]moji can have and take on different meanings. For example, U+1F336 HOT PEPPER [pictured by Apple as 🌶️] is a plant symbol that represents a food item commonly called a hot pepper or a chili pepper. It’s also frequently used as a menu symbol to indicate the degree of spiciness in menu items, like the stars used in movie reviews. It could take on another entirely different meaning in the future, but even if it does, it will remain stable as the encoded character U+1F336, with that same numeric value and with the ‘HOT PEPPER’ name, so anybody could still look it up in the standard, and could interchange it accurately via whatever future version of software and hardware might be involved in exchanging textual data.”).

B. Advantages and Potential Difficulties Underlying Disclosure via Emoji

Adopting an emoji to disclose material connections would set an important precedent, and it is arguable that doing so could create the potential for overdependency on one form of technology. Adopting a disclosure emoji would ostensibly require the FTC to draft a proposal to the Unicode Consortium, placing a large decision in Unicode's hands.³⁴⁴ Once adopted, if a disclosure emoji were to become popular to the point of being a preferred disclosure method, this could create a dependence on Unicode's continuous global adoption and seamless maintenance.³⁴⁵ This is further complicated by the fact that emoji are controlled by the Unicode Consortium, which is itself governed by a board whose members have interests in social media and technology companies.³⁴⁶ Altogether, this could force Unicode to bear a heavy burden that it was not designed for and could not have reasonably anticipated.

These problems diminish, however, in view of technology's rapid pace. Communication trends have changed dramatically within the last few decades alone—instant messaging platforms have come and gone,³⁴⁷ entire social media networks have fallen in and out of favor.³⁴⁸ Though emoji are a permanent fixture of the Unicode Standard, it is impossible to say how long society's enchantment with emoji will sustain itself. Adopting emoji while they remain in such widespread use is an effective solution in the interim, as this would take advantage of a communication phenomenon at its height of popularity. Even if emoji should fall

³⁴⁴ See generally *supra* Section II.B.

³⁴⁵ See generally *supra* Section II.B.

³⁴⁶ See *supra* note 250 and accompanying text.

³⁴⁷ See Josh Constine, *AOL Instant Messenger Is Shutting Down After [Twenty] Years*, TECHCRUNCH (Oct. 6, 2017), <https://techcrunch.com/2017/10/06/aol-instant-messenger-shut-down/> [<https://perma.cc/9CN3-XMER>].

³⁴⁸ See, e.g., Seth Fiegerman, *Inside the Failure of Google+, a Very Expensive Attempt to Unseat Facebook*, MASHABLE (Aug. 2, 2015), <http://mashable.com/2015/08/02/google-plus-history/#3uKPXbQWbsqn> [<https://perma.cc/YN4L-C8RP>]; Felix Gillette, *The Rise and Inglorious Fall of Myspace*, BLOOMBERG (June 22, 2011, 11:01 PM), <https://www.bloomberg.com/news/articles/2011-06-22/the-rise-and-inglorious-fall-of-myspace> [<https://perma.cc/D5BG-JCQS>]; Robert McMillan, *The Friendster Autopsy: How a Social Network Dies*, WIRED (Feb. 27, 2013, 2:58 PM), <https://www.wired.com/2013/02/friendster-autopsy/> [<https://perma.cc/ET93-A2FN>].

out of use, adopting a disclosure emoji is, at worst, a no-loss stopgap measure that strategically positions the FTC to utilize new communication trends as they are introduced.

It might also seem that current disclosure methods are already easy to comply with—including something as simple as “#ad” in a tweet or Instagram post is straightforward enough.³⁴⁹ Incidentally, hashtags serve a unique functional purpose of their own; they allow us to categorize messages, using relevant keywords to allow other users to see other messages discussing a similar subject.³⁵⁰ Using “#ad” therefore discloses sponsored content, but it also serves an additional purpose (intentionally or not)—tying together a large swath of sponsored content and making it readily accessible.³⁵¹

By this logic, the view that something as short as “#ad” is already easy to include misses the point. It is unlikely that influencers are using “#ad” because disclosure necessitates the functionality of hashtags—they are using “#ad” ostensibly because it contains few characters, is recognized by consumers, and is perhaps the most succinct disclosure method that the FTC approves.³⁵² Therefore, assuming *arguendo* that consumers notice “#ad” when it is used and understand that its presence in a post means that the author has some material connection with the post’s subject, we find that, at its most basic level, “#ad” is already operating as a makeshift “symbol.”³⁵³ In other words, “#ad” is just doing the work in three characters that an emoji could accomplish in one.

Thinking back to the requirements for proposing a new emoji, especially image distinctiveness,³⁵⁴ there is the question of when a potential design might become sufficiently recognizable to be

³⁴⁹ See generally *supra* Section I.A.4.

³⁵⁰ See generally Pandell, *supra* note 6.

³⁵¹ See *id.* For example, when a user clicks on “#ad” in an Instagram post caption, they will see all of the Instagram posts that have used that tag, and therefore see all of the sponsored content that has been disclosed using “#ad.” See *id.*

³⁵² See generally *supra* Section I.A.4.

³⁵³ The recognizability of “#ad” is strong enough that IZEA incorporated it into the design for their proposed disclosure emoji. See *IZEA Petitions the Unicode Consortium to Create #AD Emoji*, *supra* note 152.

³⁵⁴ See *supra* notes 267–85 and accompanying text.

authoritative. Even if a disclosure emoji would fulfill a practical need, its purpose and usefulness is limited if people do not understand what it is. This is further complicated by the fact that a disclosure emoji would be conceptual, rather than a pictorial representation of a concrete, tangible object. Here, the FTC has two options: (1) similar to the IZEA proposal, it can find a design concept that people are already familiar with and associate with its intended purpose,³⁵⁵ or (2) it can invent its own design concept, promote it, and then advocate for its adoption as an emoji.

If the FTC decides to take the second route, it would still be advisable for the public to have at least minimal exposure to the design before it is released as an emoji. On this point, the FTC may find the Ad Council's "I Am A Witness" Campaign instructive.³⁵⁶ The Ad Council³⁵⁷ launched the campaign in October 2015.³⁵⁸ As part of the campaign launch, the campaign's "eye in speech bubble" 👁 emoji began quietly appearing on Apple and Android devices.³⁵⁹ The emoji's debut was described as "puzzling," "weird," and "mysterious"—it was simply not obvious what the symbol was supposed to mean or be used for.³⁶⁰ Although a viral video may have brought the campaign back into the national conversation in recent months, it is unclear to what extent the anti-bullying emoji is used, or what effect, if any, the emoji has had on anti-bullying efforts.³⁶¹ Therefore, a promotional effort in the few

³⁵⁵ See IZEA Petitions the Unicode Consortium to Create #AD Emoji, *supra* note 152.

³⁵⁶ See *How to Use the Emoji*, *supra* note 317.

³⁵⁷ AD COUNCIL, <https://www.adcouncil.org/> [<https://perma.cc/NB5W-5XGE>] (last visited Dec. 29, 2017). Founded in 1941, the Ad Council is a nonprofit organization and the leading producer of public service communications in the United States. See *The Story of the Ad Council*, AD COUNCIL, <https://www.adcouncil.org/About-Us/The-Story-of-the-Ad-Council> [<https://perma.cc/6GUS-SSTW>] (last visited Feb. 16, 2018).

³⁵⁸ See Gonzalez, *supra* note 317; see also *How to Use the Emoji*, *supra* note 317.

³⁵⁹ See Gonzalez, *supra* note 317; see also note 317 and accompanying text.

³⁶⁰ See Gonzalez, *supra* note 317; Nudd, *supra* note 312; Alina Selyukh, *Fighting Online Bullying, One Emoji at a Time*, NPR (Oct. 23, 2015, 2:58 PM), <https://www.npr.org/sections/alltechconsidered/2015/10/23/450941822/fighting-online-bullying-one-emoji-at-a-time> [<https://perma.cc/4BTS-UQQC>].

³⁶¹ See Arriane LeBeau, *Emoji Driven Anti-Bullying Campaign Called 'I Am a Witness'*, 13NEWS NOW.COM (Dec. 11, 2017, 6:21 PM), <http://www.13newsnow.com/news/community/emoji-driven-anti-bullying-campaign-called-i-am-a-witness/498651185> [<https://perma.cc/M5SX-LGMS>] (discussing the viral video of Tennessee middle school

months leading up to a disclosure emoji's official release—logically, after final approval, once a design concept has been finalized³⁶²—would communicate the new emoji's purpose and encourage use.

C. Additional Recommendations to Increase Voluntary Compliance with Material Connections Disclosure Requirements

In addition to streamlining disclosure methods, there are other steps that the FTC can take to increase voluntary compliance from the public. One of the biggest problems with current methods of disclosure is that, beyond receiving strongly-worded letters from the FTC, influencers are not incentivized to care about disclosure requirements.³⁶³ For example, it has been observed that with regard to sponsored content, the fashion industry tends to “treat[] the issue of transparency . . . as little more than optional, as opposed to legally required and ethically advisable.”³⁶⁴ Besides *CSGO Lotto*, the FTC has yet to take any real action against deceptive influencer marketers.³⁶⁵ It does not make an example of—or take even a minimal hand-slap action against—some of the worst offenders who consistently fail to disclose. The FTC does not openly disclose the names of the individuals it sends the “Dear Influencer” letters to.³⁶⁶ Meanwhile, watchdog groups such as Truth in Advertising have taken a more aggressive approach, singling out

student Keaton Jones and tying in the “I Am A Witness” campaign); Selyukh, *supra* note 360.

³⁶² See *supra* notes 286–91 and accompanying text.

³⁶³ Influencers favoring disclosure cite their desire to be transparent with their followers; conversely, influencers against disclosure cite lower user engagement and lack of authenticity. See *generally* text accompanying notes 187–91. In both cases, these views appear unrelated to any messaging from the FTC. See *generally* text accompanying notes 187–91.

³⁶⁴ *Why Does the Fashion Industry Treat Truth-in-Advertising as Optional?*, FASHION L. (Nov. 13, 2017), <http://www.thefashionlaw.com/home/why-does-the-fashion-industry-treat-truth-in-advertising-as-optional> [<https://perma.cc/9NAS-XGAD>].

³⁶⁵ See *FTC Social Media Actions*, TRUTH IN ADVERT., <https://www.truthinadvertising.org/ftc-social-media-actions/> [<https://perma.cc/SJ29-YC86>].

³⁶⁶ Although there is no explanation available as to why the FTC did not openly disclose the recipients of their educational and warning letters, the names of recent recipients have come out via a Freedom of Information Act request. See *Who Got Those Social ‘Influencer’ Letters From the FTC?*, *supra* note 65.

the Kardashians and others who frequently post sponsored content without disclosures, with mixed results.³⁶⁷

Another message that remains absent from the FTC's approach to regulating influencer marketing is the idea that failure to disclose paid relationships will breed consumer distrust over time, effectively damaging influencers' brands.³⁶⁸ This might be less meaningful to those like the Kardashians, whose massive cult of celebrity makes the potential threat of a forty thousand dollars penalty and brief spate of bad publicity seem almost quaint.³⁶⁹ However, for influencers who have expended significant effort carefully crafting their image and building a following over time, it should be impressed upon them that even one deceptive post (intentionally or not) could cause irreparable damage via reputational harm. With so much focus on protecting consumers by obligating influencers to be up front when money changes hands, the FTC ignores what might be the most effective message of all. Disclosure shouldn't just be "standard practice"—it's crucial to

³⁶⁷ See *Ad Watchdog TINA.org Follows Up on Kardashians' Deceptive Advertising*, TRUTH IN ADVERT. (Sept. 26, 2017), <https://www.truthinadvertising.org/ad-watchdog-tina-org-follows-kardashians-deceptive-advertising/> [<https://perma.cc/9QQT-R6KU>] (finding in a follow-up sample of more than two hundred posts from Instagram, Facebook, and Snapchat, that while some posts had been revised to meet guidelines, many still fell short of the FTC's "clear and conspicuous" standard); *Exposure Without Disclosure: Cashing in with the Kardashians*, TRUTH IN ADVERT. (Aug. 22, 2016), <https://www.truthinadvertising.org/exposure-without-disclosure-cashing-kardashians/> [<https://perma.cc/33MX-DQZD>] (reporting that "only about [twenty percent] of [offending] posts had been corrected with the addition of #ad," following a direct letter to the Kardashian/Jenner family notifying them of their deceptive marketing campaigns).

³⁶⁸ See Vanessa Friedman, *The Rise and (Maybe) Fall of Influencers*, N.Y. TIMES (May 10, 2017), <https://www.nytimes.com/2017/05/10/fashion/kendall-jenner-fyre-festival-pepsi-bella-hadid-influencers.html> [<https://perma.cc/2DT8-EDEW>] ("It is increasingly clear that a disconnect exists between the imperative to make as much money as possible out of your influence as fast as possible, and the need to be highly selective about how you wield your influence in order to preserve its equity.").

³⁶⁹ See Davis Richardson, *Blame the Fyre Festival Fiasco on the Plague of Celebrity Influencers*, WIRED (May 4, 2017, 10:30 AM), <https://www.wired.com/2017/05/blame-fyre-festival-fiasco-plague-celebrity-influencers/> [<https://perma.cc/2AQF-R3YM>] (noting that the Kardashians seem "mostly undeterred" by Truth in Advertising's direct approach, and the \$40,000 penalty imposed under the FTCA).

maintain the following that gives influencers their influence in the first place.³⁷⁰

Finally, although adopting an emoji would eliminate the need for disclosure tags on social media, it is advisable that the FTC take a collaborative approach, coordinating its education and enforcement strategies with social media platforms and the Unicode Consortium. Future guidance from the FTC will be most effective if the FTC can demonstrate a deeper understanding of the way consumers behave online. For example, the FTC and the public at large might be better served if Instagram offered a functionality that the FTC felt clearly communicated material connections to consumers.³⁷¹ Pursuing a proactive approach, rather than simply cautioning influencers that a “paid partnership” tag on Instagram is insufficient,³⁷² will signal that the FTC is interested in working collaboratively towards solutions, rather than merely identifying potential problems. Coordinating efforts with social media platforms and the Unicode Consortium will provide the FTC with valuable information regarding consumers’ online behaviors, and in the long run will lead to disclosure options that are common sense and not overly burdensome.

CONCLUSION

This Note’s proposed approaches would ease influencers’ and marketers’ existing obligations for disclosing material connections, and incentivize voluntary compliance. The FTC has considerable latitude under the FTCA to implement policies that protect consumers by promoting fair business practices. By reducing disclosure requirements to the inclusion of one symbol, the FTC could leverage the popularity of emoji to convey valuable

³⁷⁰ See Friedman, *supra* note 368 (“[B]eing an Influencer means you are often thought of as a ‘friend’ by your followers. And that comes with a host of expectations that may not attach to a more traditional kind of talent. ‘Youth culture can see through anything they think is inauthentic,’ Ms. [Lucie] Greene[, worldwide director of the Innovation Group at J. Walter Thompson,] said. And because followers have what at least seems to be direct access to their ‘friend’ on Twitter or Instagram, they can respond directly. Also publicly.”).

³⁷¹ See *supra* note 144 and accompanying text.

³⁷² See *supra* note 144 and accompanying text.

information to protect consumers. Adopting an emoji will also set important precedent for the FTC to leverage new communication trends, if and when they become popular. Finally, promoting transparency as an authentic, ethically advisable part of influencer marketing will allow consumers to make informed decisions about the content they view online, rehabilitating public trust.