

CGI SOCIAL MEDIA INFLUENCERS & DECEPTIVE MARKETING

Katie Healy

This article analyzes the use of influencer marketing in relation to the misleading advertising provisions of the Competition Act. It focuses on the new practice of using computer generated images (CGI) of human-like avatars. These avatars have millions of followers on social media and post content in which they look and behave like human influencers. This paper argues that from a competition law standpoint, advertisements involving CGI influencers can be problematic because they run the risk of misleading consumers. This paper discusses the potential for misleading advertising practices to arise in two key arenas. First, deception may arise when influencers fail to disclose their material connections to the brands for which they are advertising. Second, endorsements by CGI influencers are cause for concern because these avatars cannot provide a genuine review of the merits of a given product.

L'auteure analyse le recours au marketing d'influence en ce qu'il a trait aux dispositions de la Loi sur la concurrence portant sur la publicité trompeuse. Elle axe l'article sur la nouvelle pratique fondée sur la génération d'images par ordinateur d'avatars ayant des traits humains. Ces avatars sont suivis pas des millions de personnes sur les médias sociaux et publient du contenu dans lequel ils se présentent et agissent comme des influenceurs humains. L'auteure soutient que du point de vue de la concurrence, les publicités qui comportent des influenceurs qui sont des images générées par ordinateur peuvent causer des problèmes, car elles courent le risque de tromper les consommateurs. Elle discute du potentiel de pratiques de publicité trompeuse dans deux domaines principaux. En premier lieu, la tromperie peut survenir lorsque les influenceurs ne révèlent pas leur lien avec les marques pour lesquelles ils font de la publicité. En second lieu, les appuis par des influenceurs qui sont des images générées par ordinateur sont des sources de préoccupations, car ces avatars ne peuvent pas donner un avis réel quant aux mérites d'un produit donné.

Consumer-facing businesses have adopted new marketing strategies in response to the widespread use of social media.¹ One of these strategies involves advertising through social media influencers. Social media influencers are “regular” individuals turned online personalities who generate and share content with their followers through various online platforms.² Influencers often specialize in a particular sector such as fashion, cooking, design, travel.³ Brands compensate influencers to post advertisements on their social media pages, but consumers may struggle to

discern that the content is actually an advertisement. This creates the potential for consumers to be misled.⁴ Thus, a growing problem in the influencer marketing space is the lack of compliance with misleading advertising provisions under the *Competition Act*.⁵ This problem is further confounded with the emergence of computer-generated image (CGI) influencers.

CGI influencers, sometimes called virtual influencers, are a recent phenomenon that operate in a similar way to human influencers—the obvious difference being that CGI influencers are simply avatars. Consider the example of Lil Miquela⁶, a Time’s ranked most influential internet person personality⁷, musician, model, and CGI influencer. She interacts with followers, writes human-like captions, posts pictures with real humans, is a social justice activist, and promotes third party brands.⁸ She has been featured in advertising campaigns by several major brands, including Prada and Calvin Klein.⁹

So, what bearing does an influencer robot have on competition law? The most serious concern is the ability of a CGI influencers to deceive Canadian consumers. The issue of consumer protection is enhanced in instances where CGI influencers are presented in a way that obfuscates their identity, allowing them to masquerade online as humans. The risks are twofold: 1) where the CGI influencer does not disclose material connection to a brand in a sponsored post, the consumer is at risk of being misled because the content appears impartial but is not; and 2) a CGI influencer cannot use a product nor provide an authentic opinion, so it is impossible for a CGI influencer to genuinely endorse a product.

I. CGI INFLUENCERS

Like human influencers, CGI influencers are highly relatable and can have sizable followings on social media. CGI influencers are inherently relatable because of their eerily realistic appearance. Technology is such that consumers may view a photo of a CGI influencer and fail to recognize that the “person” in the image is not a real human.¹⁰ CGI influencers are intended to be as realistic as possible, not only in their appearance but also in their online personas. A study examining the similarities between Lil Miquela and a comparable human influencer found that Lil Miquela aims to appear human-like by posting highly-relatable content with which her followers can empathize.¹¹ Her social media platform deliberately blurs the line between human and robot. Indeed, her CGI identity was not revealed for some two years after her emergence, a period during which legitimate questions about her realness arose.¹² “Shudu” is another virtual model whose

nature was initially kept hidden by her creator. Her creator explained, “CGI and 3D artists aim for absolute realism... If she was convincing people, I was on the right track. To perpetuate that she was real was part of my learning process.”¹³ Comments on the avatar’s posts also suggest that consumers believe in the realism of the avatar, with millions of social media users engaging with her content as if she was a human being.

Since social media influencer campaigns are effective in reaching a group of target consumers, brands can use realistic CGI influencers to accomplish the same results. The use of CGI influencers offers a number of benefits to companies. For instance, CGI allows an advertiser to generate a photo with any backdrop and avoid costs by not hiring models, photographers, stylists, nor paying to rent out a location.¹⁴ In addition, brands can avoid the volatility of human influencers who may speak or behave in a way that does not align with the brand’s values and may damage the brand’s intangibles.¹⁵ However, along with these practical benefits of employing CGI influencers comes the serious risk of violating misleading advertising provisions.

II. HUMAN SOCIAL MEDIA INFLUENCERS

Both human and CGI influencers have a similar ability to offend the misleading advertising provisions of the *Competition Act*, so before delving in to the legal issues raised specifically by CGI influencers, it is useful to understand the phenomenon of human social media influencers, out of which Lil Miquela and the like were born.

i) Human Influencer Marketing

Influencers are perfectly positioned to connect with a target group of engaged consumers. Accordingly, many companies choose to collaborate with influencers for marketing purposes. Influencer marketing is a booming business, both in Canada and worldwide. The industry is currently estimated to be worth \$8 billion USD and projected to reach \$15 billion USD by 2022.¹⁶ A recent report found that up to 75% of Canadian marketers have specific budgets dedicated to influencer and/or content-based marketing.¹⁷ Influencers are compensated by companies to post content that features the brand. These partnerships take on different appearances ranging from formal contracts to more creative structures, such as the influencer receiving a free product from a company in exchange for making a post about the product.¹⁸ Another common structure involves affiliate links, where influencers include a unique link alongside their content. The link is coded such that when a consumer makes a purchase using the link, the company can credit the purchase to the influencer and attribute a commission.¹⁹

Because of their perceived expertise in their given area, consumers regard influencers as a trustworthy source for advice and product recommendations. Research suggests that both the informative value of the influencer's content and the influencer's credibility²⁰ increases follower trust in the influencer's sponsored posts.²¹ This means that influencers who specialize in a particular area have the ability to communicate with a group of likeminded and trusting consumers. Brands should choose to work with influencers who operate within their relevant industry and easily reach a mass number of target consumers. These campaigns can be effective because influencers have the ability to sway consumer purchase decisions by virtue of the trust placed in them by their consumer followers.²²

In addition to the unique ability to reach target consumers, another advantage of influencer marketing is the ability to evade ad blocking software. Nearly half of Canadian consumers employ an ad blocker while using a desktop computer.²³ This significantly affects the ability of marketers to reach consumers through traditional means of advertising²⁴—a problem which can be easily avoided through influencer marketing. Influencer content is not caught by the blocker but instead sought out by the consumer.

Social media influencers clearly grant tactical benefits to 21st century advertisers, but also pose serious concerns from a competition law standpoint, especially with respect to the disclosure and testimonial components of the misleading advertising provisions. Consumers can be misled when influencers do not disclose that their content is actually an advertisement and not authentic content. Consumers may also be misled by testimonial or endorsement-like content where the influencer has not actually used the product they are endorsing. CGI influencers raise many of the same challenges posed by their human counterparts. Thus, before analysing the CGI-specific challenges, this paper will discuss the misleading advertising pitfalls that stem from *both* human and CGI influencers.

III. MISLEADING ADVERTISING

i) Why is misleading advertising a competition law concern?

In consumer-facing industries, advertising is a tool that is necessary to capture market share. Vendors use advertising in attempts to persuade consumers to purchase their particular product rather than the product of competitor.²⁵ Where advertising is not truthful or does not meet disclosure standards, consumers may be swayed to make a choice that they would not otherwise have made. Misleading advertising impairs a consumer's ability to make an informed purchase decision²⁶ which not only causes damage to

the consumer and competing sellers, but also jeopardizes the overall health of the market. Consumers who have been hoodwinked into making a bad purchase by dishonest sellers may lose trust in the “integrity of the free market.”²⁷ To achieve an efficient marketplace, consumers must be empowered to make purchases with the assurance that they are not being misled.²⁸ In addition, honest competitors may lose out on sales to unscrupulous sellers.²⁹ Thus, in Canada, misleading advertising laws provide a mechanism with which regulators can ensure a fair marketplace—for consumers and competing businesses alike.

ii) Regulation in the Digital Economy

Regulation is especially critical in the digital economy where it is not possible for consumers to meet their seller or inspect the product prior to purchase.³⁰ The internet provides consumers with an unprecedented platform to conduct research about a product before buying. Social media in particular enables consumers to seek out product information from influencers to whom they can relate. In the Bureau’s view, “[influencers] act as a curator and a trusted voice for like-minded consumers who do not have the time, expertise or resources to carefully research and navigate every decision.”³¹ However, in seeking out product information, consumers may be exposed to advertisements that are dressed up as unbiased, arms-length information.³² For example, a consumer interested in buying a new item of clothing may use a social media platform to search “#fashion” and stumble upon an influencer’s post featuring their outfit. If the post is actually an undisclosed advertisement for the clothing, the consumer is at risk of being misled. Clearly, paid advertisements elicit a different response from consumers than non-sponsored content.³³ As such, if the consumer had known the seller was behind the information, they may have altered their behaviour accordingly either through declining to purchase or evaluating the product with a more critical eye.³⁴ The Competition Bureau is well aware of the unique risks associated with influencer marketing, evident in the recent release of a digest dedicated to the topic.³⁵

iii) The Competition Act: Canadian Misleading Advertising Legislation

The *Competition Act* has both a civil and criminal regime for misleading advertising. Both regimes target the same type of conduct. In the past, the Competition Bureau has indicated that it will typically opt to bring

proceedings under the civil regime,³⁶ likely because of the practical benefits associated with the lower burden of proof and absence of the *mens rea* requirement.³⁷

The civil provision, s. 74.01(1), provides that a person engages in reviewable conduct if they make a representation to the public that is false or misleading in a material respect.³⁸ In assessing whether a representation is false or misleading, the court will consider the representation's literal meaning and the "general impression" it conveys.³⁹ In regards to materiality, if a representation is so pertinent that it could influence an ordinary citizen's decision to purchase the product, it is sufficiently material.⁴⁰ It is not necessary to establish that a consumer was actually deceived, nor that the representation was made to a consumer who was within Canada.⁴¹

iv) American Legislation

Canadian competition authorities have not yet acted against social media influencers—human or otherwise. Thus, some of this paper's analysis relies on examples from the United States and therefore warrants a brief comment on American legislation. The Federal Trade Commission (FTC), the Competition Bureau's American equivalent, has acted relatively frequently against social media influencers and brands.⁴² At the highest level, American deceptive marketing offences are largely the same as those contained in the *Competition Act*. The misleading advertising provisions of both jurisdictions prohibit representations that are materially deceptive and likely to mislead the public.⁴³

IV. THE IMPORTANCE OF DISCLOSURE

The merits of disclosure are relatively straightforward: in order for the free market to thrive, consumers must be able to evaluate the merits of a good or service and make an informed choice. Undisclosed advertisements threaten the ability of consumers to make informed decisions because consumers may consider the information to be impartial and rely on it to make a choice they otherwise would not have made.⁴⁴ Advertisements that do not clearly disclose the connection between a brand and the advertiser pose harm both to competitors and the marketplace at large.

Consumers who use social media are inundated with content that blurs the line between advertising and editorial content. It is exceedingly difficult for consumers to identify advertisements because many influencer advertisements take the form of native advertising. An example of native advertising may be a recipe posted on a cooking blog that features a

particular kitchen appliance. The post is not only a recipe, but also an advertisement for the kitchen appliance. In situations like this, consumers often struggle to identify advertisements as such because the advertisement is “presented alongside and intermingled non-sponsored content on the same platform.”⁴⁵ Native advertising can be used legitimately, but is problematic where an advertisement too closely resembles a platform’s content.⁴⁶ If the creator of the advertisement does not adequately disclose that the content is an advertisement, consumers could be misled.

i) Disclosure: Canadian Legislation & Guidelines

The Competition Bureau has released clear instructions for all parties engaged in influencer marketing. Influencers must clearly and conspicuously disclose material connections with brands in order to avoid liability for misleading advertising under the *Act*.⁴⁷ A material connection is defined as, “any relationship between an influencer and a company that has the potential to affect how consumers evaluate the influencer’s independence.”⁴⁸ A influencer’s relationship to a brand warranting disclosure may include compensation in any form (including free “gifts”), a personal connection, receiving a discount, or any other benefit.⁴⁹

The Bureau’s guidelines also outline the standards for compliant disclosures. There is no uniform method of disclosure because influencer content encompasses a variety of online platforms, each with their own nuances. However, the Bureau’s guidelines outline standards that can be applied broadly across the web. For instance, influencers must take care that their disclosures are highly visible and consumers do not have to sift through text to uncover the disclosure.⁵⁰ They should also avoid the use of ambiguous disclosure language to ensure that the average consumer will understand and appreciate the meaning of the disclosure. Phrases such as, “Thank You Company X!”, “Ambassador”, “Partner”, “Company X”, “SP”, “Spon,”⁵¹ is not adequate because the existence of a material influencer-brand relationship is not sufficiently clear. It is worth noting that several platforms have built-in disclosure abilities, such as a tag on Instagram which allows users to post sponsored content under the heading “Paid partnership with [XYZ brand].” While these developments may be a step in the right direction, the FTC has indicated that these built-in tools do not necessarily suffice.⁵²

There has not yet been insight from Canadian regulators on the topic of CGI influencers and disclosure. However, CNNMoney reported the comment of an FTC spokesperson who stated, “the FTC doesn’t have specific guidance on CGI influencers, but advertisers using CGI influencer

posts should ensure that the posts are clearly identifiable as advertising.”⁵³ For disclosure purposes, there is nothing inherently different about the types of posts made by CGI influencers than those made by human influencers. The misleading advertising provision applies broadly and extends to all kinds of representations, made by “any means whatsoever,”⁵⁴ suggesting that whether the representation is made by a natural person is immaterial to the disclosure requirement.⁵⁵ Therefore, Canada should adopt the view that CGI influencers are subject to the same disclosure regulations as their human counterparts. There are no distinguishing characteristics tied to CGI influencer posts that warrant a different regulatory approach—with respect to disclosure.

ii) Prevalence of Non-Disclosure

While the Bureau’s guidelines for disclosure are clear, compliance rates are dismal. A 2016 American study approximates that only about half of brands even asked influencers to disclose a material connection.⁵⁶ However, a 2019 Canadian survey indicates that 43% of surveyed consumers are more likely to trust an influencer’s content if they disclose paid advertisements.⁵⁷ So why are non-compliance levels so high? There are at least two explanations for the high level of non-disclosure: ignorance of the law or deliberate deceit. According to a 2018 study, just 23% of Canadian marketers claimed familiarity with the Ad Standards Canada (ASC) guidelines and 28% were not even aware the guidelines existed.⁵⁸ ASC is a self-regulatory body for advertisers and its guidelines on social media influencers have been deemed a useful resource by the Competition Bureau.⁵⁹ With respect to intentional non-compliance, the same 2018 Canadian study found that nearly 3 in 10 content creators have been asked by brands not to disclose the fact of compensation. The study caveats that this rate may be higher, considering the sensitivity of the question.⁶⁰

Although one might assume that because CGI influencers are controlled by a creator or brand, their disclosures would be more likely to be compliant. However, a brief examination of Lil Miquela’s Instagram suggests that this may not be the case. It is not clear whether Lil Miquela has a material connection to the brands she references in her content. The CGI model often tags brands without using any disclosure language.⁶¹ Although this evidence is merely anecdotal, it exemplifies the possibility for CGI influencers to run afoul of disclosure requirements.

iii) Enforcement Efforts: Disclosure

In late December 2019, the Canadian Competition Bureau sent approximately 100 advisory letters to various brands and marketing agencies who engaged in influencer marketing, particularly in the “health and beauty, fashion, technology and travel” sectors.⁶² According to the related press release, the letters advised the recipients to review their marketing practices to ensure compliance.⁶³ This marks the first official action taken with respect to influencer marketing. When considering enforcement of non-disclosures, it is also helpful to refer to the Bureau’s guidance on astroturfing. Astroturfing refers to the practice of a person publishing reviews or ratings that “that masquerade as the authentic experiences and opinions of impartial consumers” without disclosing the compensatory nature of the brand-reviewer relationship.⁶⁴ While influencers’ non-disclosures are not perfectly captured by this definition, in both instances the concern is that consumers will rely on the review as an authentic endorsement. The underlying policy justification of protecting consumers and honest competitors is the same.

The FTC has been relatively active in taking action against brands and influencers.⁶⁵ For instance, in September 2017 the FTC took its inaugural action against individual influencers. Two influencers had promoted their company CGSO Lotto, Inc to followers on YouTube and Twitter without disclosing that they owned the company.⁶⁶ Their ownership of the company was clearly a material connection to the brand. In acting, the FTC aimed to send a message to other influencers that material connections must be clearly and conspicuously disclosed in order to protect consumer purchase decisions.⁶⁷

The FTC has also acted against advertising agencies who administrate a brand-influencer relationship. In response to non-compliant disclosures by YouTube influencers, the FTC investigated Microsoft Corporation, its advertising agency Starcom Media Vest Group, and Machinima, Inc, the network which contracted with the influencers. YouTube influencers were paid by Machinima to endorse Microsoft products but did not attach adequate disclosures to their content. The FTC did not take enforcement action against Microsoft and Starcom but entered into a consent agreement with Machinima.⁶⁸

Despite the FTC’s frequent enforcement activity, a recent example suggests that these actions are not wholly successful in effecting compliance. In 2017, the FTC took action in response to complaints about influencers’ non-disclosure, issuing over ninety warning letters to brands and influencers

regarding non-compliant Instagram posts.⁶⁹ The letters emphasized the importance of disclosing the brand connection in a conspicuous location and addressed insufficient disclosures such as the use of “#sp,” “Thanks [Brand],” and “partner.” To determine the efficacy of the letters, Public Citizen, a consumer advocacy organization, monitored the Instagram accounts of forty-six of the letter recipients over a month-long period.⁷⁰ Public Citizen found that only one influencer consistently used compliant disclosures. In total, 79% of the advertisements posted during the monitoring period failed to comply with FTC disclosure requirements.⁷¹ The FTC sent twenty-one follow up letters demanding a response from the influencer detailing the actions they would be taking to ensure future compliance.⁷² Clearly, the regulation of influencer disclosures have not been mastered by Canada or the United States. The following section proposes solutions to the persistent problems underlying non-compliant and non-existent disclosures. These solutions can apply equally to human influencers and CGI influencers.

iv) Proposed Solutions

Disclosure efficacy i.e., the ability of a consumer to recognize content as an advertisement, is closely connected to language clarity.⁷³ In the Influencer Disclosure Guidelines published by Ad Standards,⁷⁴ referenced by the Competition Bureau, acceptable hashtags include “#ad, #sponsored, #XYZ_Ambassador, #XYZ_Partner (where “XYZ” is the brand name).”⁷⁵ However, research shows that a number of these phrasings are not actually effective at achieving advertising recognition in consumers. Studies show that “sponsored” increases recognition relative to a control by up to 13.5%⁷⁶, and only 33% of consumers grasp the meaning of “#ad”.⁷⁷ Research further suggests that “#PaidAd” is the most effective hashtag at eliciting recognition of sponsorship disclosure.⁷⁸

As advertising recognition is an underlying goal of misleading advertising regulation and a major obstacle to recognition is unclear language, the Competition Bureau should focus its efforts on developing a universal method of disclosure that is not dependent on language. Several American academics endorse this strategy, suggesting the best way to achieve effective disclosure is to forego the language requirement altogether and instead adopt a universal symbol for sponsored posts that could be affixed to content on any platform.⁷⁹ This universal symbol approach is attractive for a number of reasons. First, it eliminates disclosure failures caused by influencers who use ambiguous language. Second, it deals with the problem discussed above, i.e., even when disclosure language is legally compliant, consumers still may not

register the content as an advertisement. A universal symbol would “eliminate the need for disclosure tags on social media” altogether.⁸⁰ The issue of influencers who do not disclose intentionally remains, but this approach would increase consumer protection by eliminating unintentional non-compliance. This solution represents a streamlined approach that could affix to human and CGI influencer posts on every platform.

V. ENDORSEMENT

In this section, endorsement refers to the act of appearing in an advertisement and making a public statement expressing support for the product. With respect to endorsements, the guidance of the Competition Bureau is clear: “when influencers express opinions online, they must be genuine and *based on actual experience*.”⁸¹ For human influencers, this is a straightforward task. But what about virtual influencers who are incapable of experiencing anything?⁸² Even if CGI influencers disclose their brand connections perfectly in every sponsored post, the problem of their inability to endorse persists.

i) Legislation

The CGI endorsement dilemma is analogous to the practice of astroturfing, which refers to “the practice of making commercial representations, such as reviews or testimonials, and having them falsely appear as though they came from legitimate consumer experiences and opinions.” The problem underlying astroturfing and CGI endorsements is the same: reviews and endorsements that masquerade as authentic consumer opinions have the potential to mislead consumers.

While the Competition Bureau has not specifically dealt with CGI endorsements, the Bureau has issued guidance dealing with the problem of astroturfing, stating that, “...consumers are more likely to accept representations about products made by other consumers when apparently based on practical use and conveyed with a candor that may itself vouch for the reliability of the representations.”⁸³ Astroturfing constitutes reviewable conduct under s. 74.01. Guidance for the Bureau notes that where circumstances do not fit within the scope of specific provisions but still constitute misleading advertising, enforcement will be pursued under the general misleading advertising provisions, either the criminal or civil track.⁸⁴ Therefore, a representation relating to a product made by a CGI influencer would fall under section 74.01(a). Section 74.01(a) triggers the “general impression test” to determine whether the impugned representation is materially misleading.⁸⁵ In relation to false reviews, the Bureau has stated, “Insofar as the general

impression is concerned, there can be little doubt that consumer reviews are seen to reflect the authentic experiences of impartial consumers.”⁸⁶ Likewise, when a CGI influencer posts a sponsored advertisement of them with a product, the general impression can be characterized as a genuine endorsement of the product. This is especially true where consumers do not know that the influencer is a CGI. Bureau guidance also notes the existence of an “actual use requirement” in order to avoid liability for misleading advertising.⁸⁷ The rationale is that it can be reasonably expected that “consumers would assume that a third party touting a product had actually used or tested the product before commenting on it.”⁸⁸ Of course, this assumption is only operable where consumers do not know that a CGI influencer is not human. To the extent that consumers *could* believe a CGI influencer is a real person, product representations made by CGI influencers are misleading.

CGI influencer endorsements raise even graver concerns under American law. FTC guidelines mandate that an endorser must have been a “bona fide user” of the endorsed product at the time the endorsement was given.⁸⁹ The *Competition Act* and related Bureau publications do not explicitly contain a bona fide user requirement. However, in guidance directed at influencers, the Bureau has insisted that influencers must “base all reviews and opinions on actual experience.”⁹⁰ Furthermore, the Bureau’s guidance regarding astroturfing clearly demonstrates that representations made about a product that are disguised as legitimate consumer reviews are not permissible.

ii) Commentary

CGI endorsements are especially problematic where it is not clear that the influencer is a computer-generated image. In these instances, consumer deception can occur quite easily. Online, CGI influencers look and behave very similarly to humans. CGI influencers are often portrayed participating in normal activities, such as spending time with friends, eating at restaurants, and travelling. The combination of this online persona with the realistic appearance of the CGI is sufficient to establish the risk that an average consumer could be misled. A similar argument was advanced in response to the practice of using computer generated images of deceased celebrities⁹¹ to endorse products in the American context:

“... CGIs of deceased celebrity endorsers made by dead celebrities deceive consumers, especially if the consumer does not know they are being advertised to by an ‘eerily life-like’ CGI. Digitally resurrected CGI endorsers lack discretion as to whether or not to appear in the advertisement and lend their credibility to the product. Therefore, the extent to which consumers believe such discretion exists constitutes consumer deception.”⁹²

The dead celebrity CGI is arguably less misleading than the CGI influencer endorsement, because the fact of the celebrity's death and corresponding inability to endorse is likely within the public knowledge. Conversely, where the photo of a comparatively unknown CGI influencer appears on a consumer's social media page, the consumer may not have knowledge of the influencer's inability to endorse. In both instances, the concern underlying CGI endorsements is that a consumer *could*⁹³ believe the "person" in the advertisement has chosen to endorse the product. Because this is an impossibility, such endorsements constitute misleading advertising under section 74.01 of the *Competition Act*. Therefore, advertisers should be wary of using CGI influencers to endorse products.

One view in the CGI marketing industry is that CGIs are simply online versions of mannequins—the lifeless figures used to sell clothing in shop windows.⁹⁴ While this analogy may be attractive on the surface, it is predicated on the assumption that a CGI influencer, like a mannequin, is a blank slate. However, this argument ignores the reality that CGI influencers have established personalities and beliefs, interactions with their followers, and ultimately influence over the consumers that follow them. As one journalist writes,

... with Lil Miquela they're trying to win trust and build authenticity by feigning a real life. Indeed, her life on Instagram is completely plausible, but that doesn't change the fact that they want people to *trust* a person who is only ostensibly real. They're creating a human life that's *more human* than any real life can be. Miquela is a perfect blend of fashion taste, opinion, and lifestyle to connect with her audience.⁹⁵

To compare a CGI influencer to a mannequin is to ignore the entire purpose for which creations like Lil Miquela were designed i.e., to connect with a group of target consumers.

iii) Proposed Solutions

Despite the deceptive marketing concerns raised by CGI marketing, the use of CGI influencers offers many practical benefits for businesses. Furthermore, the Competition Bureau has taken a recognized the marketing advantages that advertisers stand to gain by using influencer marketing and acknowledges that there is nothing wrong with (human) influencer marketing as long as disclosure requirements are met.⁹⁶ Therefore, it is worthwhile to discuss potential solutions to the problems raised by CGI influencers that allow businesses to benefit from the new technology while simultaneously achieving consumer protection.

a) Additional Disclosure Requirement

The most obvious solution would be to mandate a disclosure of the fact that the influencer is computer-generated and thus can provide no genuine opinions on the product.⁹⁷ If this solution were adopted, virtual influencer endorsements and testimonials would not actually be endorsements—rather they would be simple advertisements. Requiring an additional CGI-status disclosure raises several of the issues already established with sponsorship disclosure with respect to efficacy and advertising recognition. The disclosure would have to be sufficiently clear to ensure consumers recognized that the CGI influencer cannot make any genuine representations about the product. Consumer protection could be more easily ensured by mandating a uniform method of disclosure for CGI influencers. This additional disclosure requirement would be a step in the direction of ensuring consumers are not unduly influenced by an online personality that is clearly incapable of assessing a product's merits. In addition, adding this requirement would not significantly add to the existing disclosure burden on advertisers and influencers to disclose material connections.

b) Can CGI influencers be considered actors?

Some CGI influencer sponsored content may be in the form of a testimonial which is problematic because CGI influencers cannot give a real testimonial and the testimonial would thereby be misleading. However, section 74.02 of the *Competition Act* permits advertisers to broadcast consumer testimonials in advertisements as long as it accords with the previously made testimonial.⁹⁸ Further the Competition Bureau clarified that this typically permits the use of actors to portray previously-provided testimonials from actual consumers.⁹⁹ This raises the question of whether a CGI influencer can be construed as an actor. That is, whether a CGI influencer can post an advertisement that simply replicates an actual consumer testimonial. The Competition Bureau indicated that the use of actors in this manner may give rise to an inquiry under the Act where “a cosmetic effect is being portrayed or appearance is otherwise material, as it might be, for example, in the case of an advertisement for clothing.” This guidance suggests that the act of wearing a piece of clothing is in itself a testimony to the clothing's attractiveness. This is relevant because social media influencers are often used to market products with cosmetic value (e.g., makeup and clothing) and CGI influencers are frequently used in fashion advertising.¹⁰⁰ Even if disclosure requirements were met and the CGI was simply reciting an actual consumer review, the portrayal of any cosmetic effect is inherently problematic. Furthermore, even if the product does not have aesthetic

qualities, the general impression¹⁰¹ of a CGI posting an actual consumer review must be considered. This analysis is conducted on a fact by fact basis and it is highly dependent on the content.

VI. CONCLUSION

It is clear that competition law authorities are aware of the emerging challenges stemming from the emerging digital economy.¹⁰² It is equally clear that influencers are here to stay. Accordingly, the regulatory approach must adapt in order to protect consumers and promote fair competition. The Competition Bureau has taken a step in the right direction with the creation of the Digital Enforcement Office which is designed to support the Bureau's efforts in the digital economy.¹⁰³ While influencer marketing is a proven method of business growth¹⁰⁴ and offers many benefits, brands and influencers must play by the rules or run the risk of engaging in deceptive marketing. This paper has demonstrated the problems that may arise in relation to influencer disclosures of material connections to brands and advocates for a more uniform method of disclosure which would apply to human and CGI influencers alike. In addition, this paper has argued that, in general, CGI influencers cannot genuinely endorse a product because it is factually impossible. As such, CGI endorsements violate misleading advertising laws. A possible solution to this problem is the introduction of an additional disclosure requirement, mandating that CGI influencers disclose that they are not in fact human and thus cannot lend credibility to the merits of a particular product. The emergence of CGI influencers underscores the need for competition law to adapt to the digitalizing economic landscape.

ENDNOTES

¹ See J Clement, "Number of social network users worldwide from 2010 to 2021 (in billions)" (14 August 2019) online: *Statista* <<https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/>> (in 2018, an estimated 2.65 billion people used social media)

² See Competition Bureau, *The Deceptive Marketing Practices Digest—Volume 4* (Information Bulletin) (June 5, 2018) [*Deceptive Marketing Digest 4*].

³ See Chen Lou & Shupef Yuan, "Influencer Marketing: How Message Value and Credibility Affect Consumer Trust of Branded Content on Social Media", (2019) 19:1 *Journal of Interactive Advertising*, 58-73 <DOI: 10.1080/15252019.2018.1533501>

⁴ See Elizabeth A Casale, "Influencing the FTC to Update Disclosure Rules for the Social Media Era" (2019) 40 *Hamline J Pub L & Pol'y* 1 at 22.

⁵ *Competition Act*, R.S.C., 1985, c. C-34, s 74 [*Competition Act*].

⁶ See **Appendix A**; see also "Miquela (@lilmiquela)", *Instagram*, online: <<https://www.instagram.com/lilmiquela/>>

- ⁷ Time Staff, “25 Most Influential People on the Internet in 2018”, (30 June 2018), online: <<https://time.com/5324130/most-influential-internet/>>
- ⁸ See Emmeline Clein, “Branding Fake Justice for Generation Z”, *The Nation* (16 July 2019), online: <<https://www.thenation.com/article/social-justice-cgi-advertising-brud/>>
- ⁹ See Katie Powers, “Virtual Influencers Are Becoming More Real-Here’s Why Brands Should Be Cautious”, *American Marketing Association* (20 June 2019), online: <<https://www.ama.org/marketing-news/virtual-influencers-are-becoming-more-real-heres-why-brands-should-be-cautious/>> [*American Marketing Association*].
- ¹⁰ See Shaojing Fan et al., “Human Perception of Visual Realism for Photo and Computer-Generated Face Images” (2014) 11:2 ACM Transactions on Applied Perception 1 at 7, online: <<http://dx.doi.org/10.1145/2620030>>.
- ¹¹ See Deya Kuhline, “A comparative analysis of CGI Instagram influencer, @lilmiquela, and human Instagram influencer, @_emmachamberlain.” (Masters’ Thesis, Malmo University, 2019), Malmo University Electronic Publishing (online): <<hdl.handle.net/2043/30077>> “*Ibid* (e.g., a post by Lil Miquela captioned “I lost my necklace somewhere” which, of course, is impossible).
- ¹² See Caitlin Dewey, “I think I solved Instagram’s biggest mystery, but you’ll have to figure it out for yourself,” *The Washington Post* (22 September 2016), online: <<https://www.washingtonpost.com/news/the-intersect/wp/2016/09/22/i-think-i-solved-instagram-s-biggest-mystery-but-youll-have-to-figure-it-out-for-yourself/>>
- ¹³ See GQ Staff, “Instagram-famous Shudu is a supermodel with a secret”, *GQ India* (March 2018), online: <<https://www.gqindia.com/content/shudu-model-worlds-first-digital-supermodel-on-instagram>> [GQ]
- ¹⁴ See Ted Max and Chidera Anyanwu, “Kim Kardashian West Won the First CFDA Influencer Award: Will A CGI Supermodel Be Next?” (1 August 2018), online (blog): *Fashion & Apparel Law Blog* <<https://www.fashionapparelblog.com/2018/08/articles/advertising/cfda-influencer-award-digital-models/>>
- ¹⁵ American Marketing Association, *supra* note 9.
- ¹⁶ See Audrey Schomer, “INFLUENCER MARKETING 2019: Why brands can’t get enough of an \$8 billion ecosystem driven by Kardashians, moms, and tweens”, *Business Insider* (15 July 2019), online: <<https://www.businessinsider.com/the-2019-influencer-marketing-report-2019-7>>
- ¹⁷ See IZEA Worldwide, Inc., “2018 Canadian State of the Creator Economy” (November 2018), online (pdf): *IZEA* <<https://perma.cc/3QXZ-GKUM>> [*IZEA*]
- ¹⁸ Deceptive Marketing Digest 4, *supra* note 2.
- ¹⁹ See Laura E Bladow, “Worth the Click: Why Greater FTC Enforcement Is Needed to Curtail Deceptive Practices in Influencer Marketing” (2018) 59:3 Wm & Mary L Rev 1123 at 1124.
- ²⁰ Lou & Yuan, *supra* note 3 at 68 (credibility refers to the influencer’s trustworthiness, attractiveness, and perceived likeness).
- ²¹ *Ibid* at 67.
- ²² Bladow, *supra* note 19 at 1128.
- ²³ Statista, “Share of Canadians who block ads on selected devices as of February 2018” (June 27, 2018), online: *Statista* <<https://www.statista.com/statistics/878278/canada-ad-blocking-device/>>
- ²⁴ IZEA, *supra* note 17 (reporting over 75% of Canadian marketers say ad blocking affects their efforts).

- ²⁵ See Brian A. Facey & Dany H. Assaf, *Competition and Antitrust Law: Canada and the United States*, 5th ed (Toronto: LexisNexis Canada, 2019) at 10.1, available at: <<https://advance.lexis.com/api/permalink/665106ae-9ad4-42c2-b731-bf98d455e03b/?context=1505209>>
- ²⁶ See Canada, Competition Bureau Canada, “The Competition Bureau,” online: *Canada* <<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03336.html>>
- ²⁷ See Krystal N Lyons, “Disinfecting Market Pathogens: Astroturfing and Its Anticompetitive Impact” (2014) 20 J of L, Bus & Ethics 121 at 124.
- ²⁸ Facey & Assaf, *supra* note 25.
- ²⁹ See International Consumer Protection and Enforcement Network, “Online Reviews & Endorsements: ICPEN Guidelines for Digital Influencers” (2016) at 5, online: *International Consumer Protection and Enforcement Network* <<https://www.icpen.org>>. [ICPEN] (the Canadian Competition Bureau is an ICPEN member and assisted in the development of these guidelines).
- ³⁰ Lyons, *supra* note 27 at 124.
- ³¹ Deceptive Marketing Digest 4, *supra* note 2.
- ³² See Competition Bureau, *The Deceptive Marketing Practices Digest—Volume 1* (Information Bulletin) (10 June 2015) [*Deceptive Marketing Digest 1*].
- ³³ *Ibid* at 3.4.
- ³⁴ See Amy Mudge & Randal Shaheen, “Native Advertising, Influencers, and Endorsements: Where is the Line Between Integrated Content and Deceptively Formatted Advertising?” (2017) 21:5 J Internet L.
- ³⁵ Deceptive Marketing Digest 4, *supra* note 2.
- ³⁶ See Competition Bureau, *Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track under the Competition Act* (Information Bulletin) (September 22, 1999).
- ³⁷ Facey & Assaf, *supra* note 25 at 10.7.
- ³⁸ *Competition Act*, *supra* note 5.
- ³⁹ *Ibid* s 75.03(5).
- ⁴⁰ See *Canada (Commissioner of Competition) v Sears Canada*, [2005] CCTD No. 1 (Comp. Trib.) at paras 333-336; restated in *Canada (Commissioner of Competition) v Yellow Page Marketing B.V.*, [2012] OJ No 998 at para 34; see also *Apotex Inc. v. Hoffman La-Roche Ltd.*, <(2000) 195 D.L.R. (4th) 244> (Ont CA) at para. 16.
- ⁴¹ *Competition Act*, *supra* note 5 s 74.03(4).
- ⁴² See “FTC Social Media Actions”, (29 August 2019), online: *Truth in Advertising* <<https://www.truthinadvertising.org/ftc-social-media-actions/>> [*FTC Social Media Actions*]
- ⁴³ Facey & Assaf, *supra* note 25 at 10.44.
- ⁴⁴ Deceptive Marketing Digest 4, *supra* note 2.
- ⁴⁵ See Bartosz Wojdyski, Nathaniel J Evans & Mariae Grubbs Hoy, “Measuring Sponsorship Transparency in the Age of Native Advertising” (2017) 52:1 J Consumer Affairs 115 at 117 <<https://doi.org/10.1111/joca.12144>>
- ⁴⁶ ICPEN, *supra* note 29.
- ⁴⁷ Deceptive Marketing Digest 4, *supra* note 2.
- ⁴⁸ *Ibid*.
- ⁴⁹ *Ibid*.
- ⁵⁰ *Ibid*.

⁵¹ *Ibid.*

⁵² US, Federal Trade Commission, Press Release, “CSGO Lotto Owners Settle FTC’s First-Ever Complaint Against Individual Social Media Influencers” (2017). [*FTC CSGO Lotto*]

⁵³ See Kaya Yurief, “Instagram star isn’t what she seems. But brands are buying in” *CNNMoney* (2018), online: <<https://money.cnn.com/2018/06/25/technology/lil-miquela-social-media-influencer-cgi/index.html>> [“CNNMoney”]

⁵⁴ *Competition Act*, *supra* note 5 s 74.01.

⁵⁵ *Competition Act*, *supra* note 5 s 74.01.

⁵⁶ See Brian Solis, “The Influencer Marketing Manifesto: Why the Future of Influencer Marketing Starts with People and Relationships Not Popularity” (2016) at 16.

⁵⁷ Statista, “*Perspectives on factors that increase trust in influencer content in Canada as of February 2018*” (2018), online: Statista <<https://www.statista.com/statistics/856863/canada-factors-increasing-trust-in-influencer-content/>>

⁵⁸ IZEA, *supra* note 17.

⁵⁹ Deceptive Marketing Digest 4, *supra* note 2 (calling the ASC guidelines “one example of a growing body of valuable guidance”)

⁶⁰ IZEA, *supra* note 17.

⁶¹ See Appendix A for select screenshots of the Instagram account associated with Lil’ Miquela.

⁶² Canada, Canada Competition Bureau, “Influencer marketing: businesses and influencers must be transparent when advertising on social media” (Dec. 19, 2019), online: *Canada* <www.canada.ca/en/competition-bureau/news/2019/12/influencer-marketing-businesses-and-influencers-must-be-transparent-when-advertising-on-social-media.html>

⁶³ *Ibid.*

⁶⁴ *The Deceptive Marketing Practices Digest—Volume 1* (Information Bulletin) (June 10, 2015).

⁶⁵ FTC Social Media Actions, *supra* note 42.

⁶⁶ FTC CGSO Lotto, *supra* note 52.

⁶⁷ *Ibid.*

⁶⁸ US, “*In the Matter of Machinima, Inc, a corporation*” (complaint) (F.T.C. Docket No. C-4569, 2016).

⁶⁹ See US, Federal Trade Commission, Press Release, “***FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship***” (2017).

⁷⁰ Public Citizen, “Investigation Shows that FTC’s Reminder Letters Are Ineffective at Disclosing Paid Posts on Instagram” (June 26, 2017), online: *Public Citizen* <<https://www.citizen.org/media/press-releases/investigation-shows-ftc%E2%80%99s-reminder-letters-are-ineffectivedisclosing-paid-0>>

⁷¹ *Ibid.* See also Bladow, *supra* note 19 at 1156-1157.

⁷² FTC CGSO Lotto, *supra* note 52.

⁷³ See Evans et al., “Disclosing Instagram Influencer Advertising: The Effects of Disclosure Language on Advertising Recognition, Attitudes, and Behavioral Intent,” (2017) 17:2 *J Interactive Advertising* 138-149, DOI: <[10.1080/15252019.2017.1366885](https://doi.org/10.1080/15252019.2017.1366885)>

⁷⁴ See Ad Standards Canada, “Influencer Marketing Steering Committee” (2019), online: *Ad Standards Canada* <<http://adstandards.ca>>

⁷⁵ *Ibid* at 8.

⁷⁶ Evans et al., *supra* note 75. See also Boerman et al., “‘This Post is Sponsored’: Effects of

Sponsorship Disclosure on Persuasion Knowledge and Electronic Word of Mouth in the Context of Facebook,” (2017) *J Interactive Marketing* 38, 82-92.

⁷⁷ See Greg Sterling, “Survey: Most Consumers Unaware that Paid Influencer Posts are #Ads.” (2017) *Marketing Land*, online: <<https://marketingland.com/survey-consumers-unaware-paid-influencer-posts-ads-227021>>; See also Evans *supra* note 74 at 4.

⁷⁸ Evans et al., *supra* note 75 at 145.

⁷⁹ See Christina Sauerborn, “Making the FTC ☺: An Approach to Material Connections Disclosures in the Emoji Age” 28 *Fordham Intell. Prop. Media & Ent. L.J.* 571 at 571; See also Colin Campbell & Pamela E Grimm, “The Challenges Native Advertising Poses: Exploring Potential FTC Responses and Identifying Research Needs” (2019) 38:1 *J Public Policy & Marketing* at 17.

⁸⁰ Sauerborn, *supra* note 81 at 634.

⁸¹ Deceptive Marketing Digest 4, *supra* note 2. [emphasis added].

⁸² See Stacy K. Marcus, Michael Isselin, Noelle Klockner, “Preparing for the Next Phase of Influencer Marketing—The CGI Influencer” (July 2018), online: *Reed Smith LLP* <adlawbyrequest.com> (introduces a similar question in the US context).

⁸³ See Canada, Canada Competition Bureau, “False or misleading representations,” (2018) at 2.1, online: *Canada* <<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00513.html>> [*False or misleading representations*].

⁸⁴ See Canada, Canada Competition Bureau, “Additional information about the Competition Act” (2015), online: *Canada* <<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01315.html#Gen>>

⁸⁵ *Competition Act*, *supra* note 5 s 74.03(5).

⁸⁶ Deceptive Marketing Digest 4, *supra* note 19.

⁸⁷ False or misleading representations, *supra* note 86 at 2.1.1.

⁸⁸ *Ibid.*

⁸⁹ US, Federal Trade Commission 16 CFR, “Guides Concerning the Use of Endorsements and Testimonials in Advertising” at 255.1(c).

⁹⁰ Deceptive Marketing Digest 4, *supra* note 2.

⁹¹ See John Reynolds, “Bruce Lee resurrected for Johnnie Walker whisky ad”, (10 July 2013), online: *The Guardian* <<https://www.theguardian.com/media/2013/jul/10/bruce-lee-johnnie-walker-whisky-ad>>; (A 2013 marketing campaign featuring a CGI of the late Bruce Lee endorsing Johnnie Walker Blue Label Scotch.)

⁹² Kerry Barrett, “Mad Men and Dead Men: Justification for Regulation of Computer-Generated Images of Deceased Celebrity Endorsers”, (2017) 65 *Clev. St. LR* 561 at 580 [emphasis added].

⁹³ Recall that under Canadian law it is not necessary to establish that any consumer was actually deceived: *Competition Act*, *supra* note 5 s 74.03(4)(a).

⁹⁴ CNNMoney, *supra* note 53.

⁹⁵ See Scott Yoder, “The Instagram Influencer Who is More Human Than Human” (July 2018), online: *Marketing360* <<https://www.marketing360.com>>

⁹⁶ Deceptive Marketing Digest 4, *supra* note 2.

⁹⁷ See Annie Lee, “The Rise of CGI Influencers” (July 2018), online: *Venable LLP* <<https://www.allaboutadvertisinglaw.com>>

⁹⁸ *Competition Act*, *supra* note 5.

⁹⁹ Canada, Canada Competition Bureau “Untrue, misleading or unauthorized use of tests and testimonials” (Information bulletin) (2018) at 2.

¹⁰⁰ See GQ, *supra* note 13.

¹⁰¹ *Competition Act*, *supra* note 5 s 74.03(5).

¹⁰² See Canada, Canada Competition Bureau, “2019-20 Annual Plan: Safeguarding the Future of Competition” (2019).

¹⁰³ Canada, Canada Competition Bureau, “The Competition Bureau’s Strategic Vision for 2020-2024”, online: *Canada* <<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04513.html>>

¹⁰⁴ See Rosemary Stockdale, Ashir Ahmed, Scheepers, Helana, “Identifying Business Value from the Use of Social Media: An Sme Perspective” (2012) *Pacific Asia Conference on Information Systems 2012 Proceedings*, Paper 169, online: <<https://aisel.aisnet.org/pacis2012/169>>