



Uncharted waters: Mapping the potential legal concerns and current legislative measures governing social media influencer marketing in South Africa.

Gabrielle Michaela Naidoo

218013245

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SCHOOL OF LAW

Supervisor: Ms. Devarasi Bellengere

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DECLARATION

I, Gabrielle Michaela Naidoo, declare that:

this dissertation, unless specifically indicated otherwise, is my own work and that all references have been properly made. This dissertation has not been submitted to any other university in full or partial requirement of the academic requirements of any other degree or qualification.

Signed:

A black rectangular box redacting the signature, with a small vertical line extending downwards from the bottom center.

Date: 07 July 2024

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First, I give thanks to Jesus Christ. Father, thank you for the strength, courage, and boldness that you have given to me to complete this study. Thank you for every opportunity that you have afforded me and every blessing that you have placed on my path. I give you all the glory, honor, and praise.

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- Matthew 19:26 -

DEDICATION

I dedicate this dissertation to my grandparents. I will never be able to describe the appreciation I have for you. In every season of my life, I will always remember your words of Godly wisdom.

Thank you.

LIST OF ABBREVIATIONS

ACOP	: Advertising Code of Practice
ARB	: Advertising Regulatory Board
ARPAN	: Advanced Research Projects Agency Network
B2B	: Business-to-Business
B2C	: Business-to-Consumer
C2B	: Consumer-to-Business
C2C	: Consumer-to-Consumer
CPA	: Consumer Protection Act 68 of 2008
D2C	: Direct-to-Consumer
eCRM	: Consumer Relationship Management System
ECTA	: Electronic Communications and Transactions Act 25 of 2002
FTC	: Federal Trade Commission
ROI	: Return on Investment
NBC	: National Broadcasting Authority
SA	: South Africa
SMC	: Social Media Code
SMM	: Social Media Marketing
ToS	: Terms of Service Agreement
USD	: United States of America Dollar
WOMA	: Word-of-Mouth Association

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CHAPTER 1

INTRODUCTION

1.1. Introduction and background

In recent years, social media has become a central aspect of life through its features of interactivity, connectedness, and user-generated content.¹ Originally, it was designed as a means of communication, information sharing, and socialisation between members of a virtual community.² Since then, it has morphed into a platform where businesses can be developed, vocational work can be conducted, and online cross-border transactions may be concluded.³

The history of social media predates the 1970's, when the first social media platform created was the Advanced Research Projects Agency Network (ARPAN).⁴ This platform was established as a method of allowing scientists and science scholars to share data among themselves.⁵ As time evolved, software developers modified ARPAN's code, which inspired the creation of modern-day social media platforms such as Facebook, Instagram, Tik Tok, and YouTube.

The intention behind modern-day social media was to allow its users to connect with each other and create accessible information without the barrier of distance and time. Present studies found that members of the public engage (on average) with their social media accounts for more one hundred and forty-two minutes daily across seven-point six social media accounts.⁶ Therefore it is not surprising that the social media industry became a platform that host more than 3.999 billion users daily.⁷

Consequently, influential persons known as social media influencers (influencers) began to incorporate daily advice, opinions and advertising models into social media. This gave rise to social media influencer marketing (influencer marketing). Influencers are individuals who

¹ Author Unknown 'Reliance on Social Media in Today's Society' available at <https://www.insegment.com/blog/reliance-on-social-media-in-todays-society> accessed on 11 June 2022.

² Merriam Webster 'The definition of social media' available at [https://www.merriam-webster.com/dictionary/social media](https://www.merriam-webster.com/dictionary/social%20media) accessed on 11 June 2022.

³ Ibid.

⁴ Russ C 'Tweet Takers & Instagram Fakers: Social Media & Copyright Infringement' (2020) 22 *Tulane Journal of Technology and Intellectual Property* 205.

⁵ Ibid

⁶ Ibid

⁷ Ibid

possess the ability to inspire and direct the thought processes of those who listen to them.⁸ They post content consistently online, within a specific niche, and have accumulated a substantial audience as a result of such.⁹ On the other hand, influencer marketing occurs when a business uses the “influential,” “inspiring,” or “popularity” skills of an individual in the pursuit of achieving a commercial goal.¹⁰ For example, in 2020, brands such as Zara and Rare Beauty used influencers and celebrities to advertise their respective clothing and makeup lines. These were two among multiple brands that had used influencer marketing as a business strategy. This strategy had proven to be successful as influencer marketing contributed towards the 560 billion USD generated in sales and Return on Investments (ROIs).¹¹ This clearly indicates that there is not only exponential growth within the influencer marketing industry but that ROI’s may be generated at low operational costs.¹² However, as the industry continued to develop, various legal challenges arose.

These challenges include (but are not limited to) the non-disclosure of endorsement agreements, false, misleading, and deceptive advertising practices, and cyber fraud. Endorsement agreements are contracts concluded between influencers and businesses whereby one party agrees to promote a product in exchange for compensation.¹³ The failure to disclose such a contractual relationship would be considered misleading in the eyes of the law as it may affect the manner in which a consumer decides on their purchases.

To this end, the Consumer Protection Act 68 of 2008 (the CPA) will be considered in light of prohibited marketing practices and the honest and fair dealings of a business.¹⁴ Further, South Africa does not have a legal framework dedicated to the sole regulation of the influencer marketing industry. For this reason, the CPA, the Electronic Communications and Transaction Act 25 of 2002 (ECTA), and the Cybercrimes Act 19 of 2020 will be considered and discussed later on in this study. Moreover, the Advertising Regulatory Board’s (ARBs) Social Media Code (SMC) is not recognised as a primary source of law but rather acts as a Code of

⁸ Clause 2(5) of the Advertising Regulatory Board’s Social Media Code (Appendix K) 2019

⁹ Ibid.

¹⁰ Ibid.

¹¹ Werner Geyser ‘The State of Influencer Marketing Benchmark Report 2022 available at <https://influencermarketinghub.com/influencer-marketing-benchmark-report-2022/>, accessed on 5 February 2023.

¹² GRIN ‘The ROI of Influencer Marketing: A methodology for Implementing Influencer Marketing Strategy’ available at <https://grin.co/blog/the-roi-of-influencer-marketing-infographic>, accessed on 11 June 2022.

¹³ Clause 6 of the Advertising Regulatory Board’s Social Media Code (Appendix K), 2019.

¹⁴ Mupangavanhu Y ‘The Regulation of False Advertising in South Africa: An analysis of the Consumer Protection Act 68 of 2008 and self-regulation’ (2021) *SA Merc* 260.

Conduct designed to address the ethical and regulatory compliance of influencers. In light of the above, this study aims to establish an understanding of the influencer marketing industry and discuss the legal implications that may arise.

1.2. Statement of Purpose

Social media has allowed societies around the world to connect with each other without the barrier of time and distance.¹⁵ This interconnectedness between various societies has increased the attractiveness of social media as a marketing tool and has thereby caused influencer marketing to be viewed as a viable business strategy that shows a greater ROI.¹⁶ When an influencer is able to connect (reach and interact) with and inspire the thoughts of his audience, he is deemed to be an influential person.¹⁷ It is this ability to inspire and direct the thought processes of others that is considered to be a vital component within the marketing industry and business landscape.

Given the recent prolific nature of the influencer vocation, this study endeavours to identify and discuss the concerns and legislative measures governing the influencer marketing industry within South Africa. In determining whether there is a sufficient legal framework in place, analysis and reference of the CPA, ECTA, and the Cybercrimes Act will ensue. Moreover, relevant aspects of the ARB's SMC will be discussed. Lastly, this framework will use civil and criminal-related legal issues in order to determine whether South Africa should consider creating legislation dedicated solely towards regulating the influencer marketing industry.

1.3. Rationale of Study

As mentioned earlier, social media was originally designed as a means of establishing and maintaining a virtual communication channel between members of the general public. As technology evolved, more persons became dependent on the information gained through social media.¹⁸ To this end, the information obtained was seen as a recommendation being

¹⁵ Russ C op cit note 4 at 2015.

¹⁶ Ibid.

¹⁷ Guan C 'Editorial: A note on influencer marketing in social media' (2021) 15 *International Journal Internet Marketing and Advertising* 125.

¹⁸ Russ C op cit note 4 at 204.

made by a close friend or peer.¹⁹ Once businesses realised that this association may be profitable, social media became a new marketing tool.

As a result, this study aims to identify pertinent legal issues within the influencer marketing industry. At present, the marketing industry is littered with issues such as data breaches, data manipulation, trademark infringements, and unfair competition practices. Baring this in mind, the researcher accepts that there are constant social media trend changes and understands that the creation of formal legislation may be difficult to apply to such trends. Never the less, it is the researcher's opinion that the non-regulation of influencers may cause more legal and ethical issues in the future. As a result, this study not only proposes the creation of a formal regulation of the influencer marketing industry but also that all businesses engaging with influencers should do so through the use of a standardised influencer contract.

1.4. Research questions

The advent of technology and use of social media in recent years has made consumers more vulnerable to influencers. To this end, this study will consider the following questions:

- 1) What are influencers?
- 2) What is the history and development of influencer marketing?
- 3) What is the extent of social media's involvement within the influencer marketing industry?
- 4) How would Tik Tok's community guidelines ensure that influencers are promoting products in an ethical and legal manner?
- 5) Why does the ARB emphasise the importance of the need to incorporate an advertorial declaration within a Social Media Marketing (SMM) post?
- 6) How and to what extent does the ECTA regulate e-commerce practices?
- 7) Why does ECTA no longer have authority over the regulation of crimes related to influencer marketing?
- 8) How and to what extent do Sections 29 and 41 of the CPA protect vulnerable consumers?

1.5. Literature review

The development and evolution of the internet, technology and social media has not only connected the world but has also made all types of information (credible and non-credible)

¹⁹ Russ C op cit note 4 at 205.

easily accessible.²⁰ In turn this has eased the manner in which businesses markets their products to consumers and the manner in which consumers engage with such marketing. Despite this ease, businesses prefer to use influencers as third-party representatives to market their products to their target audiences. Brown and Hayes describe that it is the honesty, authenticity and relatability of the influencer's opinion which appeals to the consumer.²¹ As a result, such influencers were deemed as reliable. This perceived trustworthiness allowed influencers to influence and shape the thoughts of those who listened to them, and not to soon after, individuals who listened and valued the opinions of influencers began to "follow" them on social media.²²

Businesses associated the opinions of influencers with the recommendations of a close friend or peer.²³ In turn, influencers are considered to be friends and peers to the individuals who follows them. This means that if the influencer were to enjoy using a particular product and would recommend such, the odds of their followers purchasing such product would also increase.²⁴ This seems to be the school of thought that many scholars agree with, however, many legal scholars agree that the conduct of influencers when recommending such products warrants further discussion.

(b) Criminal and civil implications of influencer marketing

There are various social media platforms and self-regulatory bodies who have provided influencer marketing guidelines aimed at controlling the conduct of influencers. Despite these efforts, the industry is littered with multiple criminal and civil implications. Among these are, *inter alia*, the manipulation of data, the non-disclosure of endorsement agreements, false, misleading, and deceptive advertising practices and so forth.²⁵

Snail agrees that the manipulation of data and the use of manipulated data for personal gain is deceitful, unlawful, and may amount to cyber fraud.²⁶ Cyber fraud is described as the common law crime of fraud that is committed through the use of a digital tool (such as a

²⁰ Guan C 'Editorial: A note on influencer marketing in social media' (2021) 15 *International Journal Internet Marketing and Advertising* 125.

²¹ Brown D, Hayes N *Influencer Marketing* (2008) Elsevier ed.

²² Guan C op cit 18 at 125.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Snail S, Musoni M 'An overview of cybercrime law in South Africa' (2023) 4 *International Cybersecurity Law Review* 301.

computer).²⁷ Clouson found that influencers are prone to manipulating performance metrics data (likes, comments, and subscribers) for the purpose of creating the perception of a wider audience reach, thereby increasing their appealability to a business.²⁸ Further, influencer marketing statistics indicate that more than seventy per cent of influencers on Instagram use fake accounts in order to appear influential.²⁹ The act of purchasing and using such accounts is not only deceptive but also amounts to fraudulent misrepresentation (when one acts on the manipulated data). The moment a business relies on and uses the manipulated data, it can be said that such business would have become a victim of a type of cyber fraud because the influencer would have been hired by the business under false pretenses.³⁰

Baring this in mind, Gouncta C reminds the academic community that not all influencers have manipulated their performance metric data.³¹ She advocates for the influencer community claiming that the creativity, honesty, and ingenuity of an influencer's posts have transformed social media into platforms that could be used within the marketing, vocational, and business landscapes.³² In light of this transformation, the influencer vocation within the marketing industry became more prominent among the general members of the public, which increased the issue of the non-disclosure of endorsement agreements.³³ In order to combat this issue, multiple advertising self-regulatory bodies began creating and implementing influencer marketing codes of conduct and guidelines.

In addition to these guidelines, Gouncta suggested that businesses enter into standardised contracts with influencers.³⁴ She proposes that the contracts should be aimed specifically at influencer marketing and should incorporate the self-regulatory guidelines into the contracts. She reiterated that these guidelines act as an influencer's code of conduct and that influencers should remain abreast of changes made to such. Her argument was premised on the fact that if influencers are aware of these standards, then regulatory compliance should inevitably ensue. The researcher of this study agrees with Gouncta to the extent that this information may assist in the mitigation of false, misleading, and deceptive advertising practices as well

²⁷ Ibid.

²⁸ Clouson – Paquet M 'Can We Trust Social Media Data? Social Network Manipulation by an IoT Botnet?' 2017 8th International Conference Paper of Social Media & Society 5.

²⁹ Ibid.

³⁰ Snail S op cite note 26 at 31.

³¹ Goanta & Ranchordás *The regulation of social media influencers* 1 ed (2021) 13.

³² Ibid.

³³ Ibid.

³⁴ Ibid.

as with the issues of the non-disclosure of endorsement agreements. However, the researcher wishes to point out that this method of mitigation will only be effective should the influencer actually choose to comply with these guidelines.

To this end, Veltri C accurately points out that numerous independent advertising bodies (such as the United States of America's Federal Trade Commission (FTC)) have attempted to implement and emphasise the importance of influencers complying with these codes of conduct and policies but with no success.³⁵ Perhaps social media platforms can assist by actively reminding influencers with large audiences about the importance of complying with these codes of conduct.

Dajani proposes that regulatory control can be brought about within the influencer marketing industry (without legislative intervention) through the issuance of influencer licenses.³⁶ She explains this submission as only influencers with influencer marketing licenses may participate within the influencer marketing industry.³⁷ The researcher of this study somewhat disagrees. These 'licenses' do exist in the form of influencer verification.³⁸ The verifications are issued to influencers with large audiences by the social media platforms themselves.

c) Conclusion

These implications are of great concern. The question that remains is, "What actions should South Africa consider in order to combat these issues?". Presently, the South African influencer marketing industry is slowly growing.³⁹ South Africa does not have a proper legal framework dedicated to the regulation of the influencer marketing industry.⁴⁰

This study will propose that an educational initiative take place bi-annually in order to ensure that influencers and businesses are kept abreast with the ethical and legal standards to be complied with. Further, the researcher proposes that comprehensive influencer marketing legislation be drafted. The provisions contained therein should not be rigid nor too relaxed but rather should strike a balance between the two. The researcher has noted Christopher T's

³⁵ Bentz T, Veltri C 'The Indirect Regulation of Influencer Advertising' (2020) 75 *FDLI* 185.

³⁶ James T 'The Real Sponsors of Social Media: How Internet Influencers Are Escaping FTC Disclosure Laws' (2017) 11 *Ohio State Business Law Journal* 61.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Kerchhoff D False Advertising And Consumer Protection In South Africa (Unpublished LL.M thesis, University of the Western Cape, 2021) 63.

⁴⁰ Ibid.

view that the creation of an influencer statutory law would not guarantee that compliance with such will ensue.⁴¹

1.6. Research methodology

This study will use the desktop research methodology in order to address the research questions. A combination of primary and secondary sources of law will be used, discussed, and analysed. First, primary sources of law will be used to focus this study's discussion on the manner in which an influencer's conduct is regulated (if at all) within the South African legal framework. Primary sources of law will include various pieces of legislation and case law, and such will be referred to, analysed, and discussed accordingly.

The secondary sources of law will be used to introduce, extend, supplement, and discuss the present legal dialogue surrounding the influencer marketing industry. Such sources will include textbook extractions, journal articles, various advertising self-regulatory codes as well as internet-based websites.

1.7. Research limitations

Africa is known for its lack of infrastructure, technology, and internet-based resources.⁴² It is for this reason that only five per cent of the influencer vocation is occupied by Africa-based influencers.⁴³ In addition to this fact, there is a lack of academic literature dedicated towards the regulation of influencers from an African unique perspective. To this end, the researcher is limited. South Africa has no legal framework that governs the conduct of influencers within the influencer marketing industry, and in order to bridge these shortcomings, this study will discuss relevant aspects of the CPA, the ECTA, the Cybercrimes Act and the ARB's SMC.

1.8. Chapter outline

This study is structured as follows:

Chapter 1: Introduction

⁴¹ Terry C, Silberberg EJ & Schmitz S 'Throw the Book at Them: Why the FTC Needs to Get Tough with Influencers' (2021) 29(2) *Journal of Law and Policy* 406.

⁴² Werner Geyser The state of influencer marketing 2022: Benchmark Report available at <https://influencermarketinghub.com/influencer-marketing-benchmark-report-2022/>, accessed on 5 February 2023.

⁴³ Ibid.

This chapter is designed to provide an overview of the study. It intends to offer a brief background of the study, the rationale of such, and lists the research questions that will be answered in the chapters to follow. Moreover, a literature review discussing the dialogue regarding the intersection between influencers and the law is presented.

Chapter 2: Setting the Scene: The Influencer Industry

This chapter will dive into the background of the study. The chapter shall make reference to and describe the development of influencers and their connection between businesses and consumers. Additionally, the constituents of influencer marketing as well as the difference between the concepts of e-commerce and s-commerce will be discussed.

Chapter 3: Legal Concerns

The chapter intends on listing and briefly discussing pertinent legal concerns littering the influencer marketing industry. It will highlight the areas of data manipulation in terms of cyber fraud. Further, the compensatory element of an influencer's work as well as an influencer's ability to affect the purchase decisions of a consumer will be discussed. Lastly, a discussion regarding Tik Tok's advertising and community guidelines will be discussed.

Chapter 4: The South African Framework

The aim of this chapter is to identify and discuss the shortfalls of the present South African legal framework governing influencers within the influencer marketing industry. As a result, various pieces of legislation, including the CPA, the ECTA, and the Cybercrimes Act, will be discussed. Moreover, an analysis of the South African ARB's SMC and its application in recent cases will be included.

Chapter 5: Conclusion

This chapter will summarise the integral aspects of this study and provide recommendations on the manner in which the law will be able to bridge the shortfalls identified.

CHAPTER 2

SETTING THE SCENE: THE INFLUENCER INDUSTRY

2.1. Introduction

The influencer marketing industry is filled with concepts that are not defined in legal and marketing literature.⁴⁴ Despite the lack of authoritative definitions, there are various domestic and international guidelines, organisations, as well as academic submissions that proffer well-accepted explanations. For the purposes of this study, this chapter attempts to explain the concepts of influencer marketing and e-commerce. Further, this chapter will discuss the history and development of the influencer marketing industry and examine the various e-commerce models that may apply. It is important to note that a discussion of the law cannot occur without an understanding of these concepts, and it is for this reason that this chapter may reference legal principles but will not discuss such.

2.2.1. Influencers

Influencers are ordinary individuals who have grown a substantial audience (known as followers) through the dissemination of unique content, alternative perspectives, and specialised knowledge regarding specific topics.⁴⁵ These individuals operate within distinct niches (beauty, fitness, and culinary cuisine) across a multitude of social media platforms such as Instagram, Tik Tok, and YouTube.⁴⁶ They are perceived as authority figures who are able to shape the thoughts, actions, and purchasing choices of their followers;⁴⁷ however, influencers are not necessarily subject matter experts within their specific niches. Regardless of this fact, general members of the public seemed to be swayed by their opinions.

There is a common misconception that influencers are the same as celebrities. Celebrities are individuals or groups of people that (more often than not) fall within the entertainment and

⁴⁴ Vidani I & Das SG 'A Review on Evolution of Social Media Influencer Marketing: Reflection on Consumer Behaviour and Consumer's Decision-Making Process (2021) 12(9) *Turkish Online Journal of Qualitative Inquiry* 318.

⁴⁵ Booth N & Matic JA 'Mapping and leveraging influencers in social media to shape corporate brand perceptions' (2011) 16 *Corporate Communications International Journal* 184-192.

⁴⁶ Goanta C and Rachchordas S *The regulation of social media influencers: an introduction* ed (2020) 1

⁴⁷ The Advertising Standards Authority online advice 'Recognising ads: Social Media and Influencer Marketing' available at <https://www.asa.org.uk/advice-online/recognising-ads-social-media.html#:~:text=A%20social%20mediahttps%20user%20doesn,of%20their%20social%20media%20influence,> accessed on 23 September 2022.

sporting industries.⁴⁸ A celebrity's popularity is inherited from fame, talent, or a professional vocation, and such popularity is used as a mechanism of drawing attention towards a specific topic or product.⁴⁹ On the other hand, influencers are ordinary individuals who have become opinion leaders that have amassed a large audience.⁵⁰ Their content has the ability to inspire a two-way conversation between members of the general public on topics that may not necessarily be associated with product or service promotion.⁵¹

For this reason, the ARB describes influencers as:

'Individuals or groups of people who brands pay to engage with social media in a certain way, on a certain topic or in the promotion of a brand or publisher. Often an influencer has or is **perceived to have the ability to influence the behaviour or opinions of others, but this is not prescriptive to fulfil the role of a paid influencer.**'⁵² [own emphasis]

This explanation clearly affirms and signifies the weight that influencers may have on a consumer and members of the general public. In other words, influencers are individuals who are skilled at leveraging the power of influence and credibility in a manner that is perceived as inspiring and personalised in the eyes of the consumer. It is clear that an emphasis is placed on the roles that perception and credibility play within the business and marketing landscapes. Therefore, it is respectfully submitted that although influencers may have a significant reach within the marketing industry, their distinction is not limited to the celebrities but also includes niche experts and ordinary individuals. This means that the goal of engaging with influencers in promotional campaigns is for the business to be able to sway the thoughts of a consumer by offering a unique and personalised selling point that is not necessarily linked with fame.

2.2.2. Influencer tiers

⁴⁸ Ruiz-Gomez. A 'Digital Fame and Fortune in the age of Social Media: A Classification of Social media influencers' (2019) 19(19) *aDResearch ESIC* 11.

⁴⁹ Ibid.

⁵⁰ Booth N & Matic J A op cit 45 at 184-192.

⁵¹ Ruiz-Gomez op cit note 48 at 21.

⁵² Clause 2 of the Advertising Regulatory Board's Social Media Code (Appendix K), 2019.

Influencers are categorised into four tiers.⁵³ Each tier describes the influencer's audience size and the level of diversity among the said audience.⁵⁴

(a) *Tier 1: Mega Influencers*

The size of a mega influencer's audience comprises more than 1 million followers.⁵⁵ These influencers can charge a business hundreds of thousands in remuneration for a single marketing post.⁵⁶ Members of the general public are cautious towards products promoted by these types of influencers because their promotional motives, are seen as ingenuine.⁵⁷

(b) *Tier 2: Macro influencers*

The size of a macro influencer's audience ranges between 5 hundred thousand and 1 million followers.⁵⁸ These influencer audiences are the most diversified among the tiers, and these influencers are known for creating genuine and diversified content.⁵⁹

(c) *Tier 3: Micro influencers*

The majority of the influencer marketing industry comprises of micro influencers. The size of a micro influencer's audience ranges between 10 000 – 50 000 followers.⁶⁰ These influencers show the most influential power within the influencer marketing industry.⁶¹ The members of the general public view content created by micro influencers as organic, honest, and authentic.⁶² This indicates that if a business were to hire a micro influencer, it is more likely that a greater ROI will be seen.

(d) *Tier 4: Nano influencers*

The size of a nano influencer's audience is less than 10 000 followers.⁶³ Members of the general public associate unpolished and honest content as the creations of nano influencers.⁶⁴

⁵³ Cooper K 'Influencers: Not so Fluent in Disclosure Compliance' (2021) 41(1) *Loyola of Los Angeles Entertainment Law Review* 85.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid at 85-86.

⁵⁸ Ibid.

⁵⁹ Ewers & Childers CC '#Sponsored #Ad: Agency Perspective on Influencer Marketing Campaign' (2017) 40(3) *Journal of Current Issues and Research in Advertising* 258–274.

⁶⁰ Ibid.

⁶¹ Terry C, Silberberg EJ & Schmitz S op cit note 41 at 416.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Cooper K op cit note 53 at 85.

A business that employs the services of a nano influencer is likely to receive personalised and non-generic content.⁶⁵ Perhaps small and medium enterprises (SMEs) may generously profit from the use of a nano influencers. The influencer will gain follower traction, and the business will receive advertisements that are positively viewed among members of the general public. Therefore, the influencer's desire to produce organic content is the driving force behind the public's positive perception of this tier.

2.2.3. Engagement metrics

Engagement and reach are the performance metrics used by businesses as a measurement of an influencer's influential capacity.⁶⁶ Engagement refers to the rate at which an influencer interacts with their followers, and reach denotes the potential number of followers that an influencer may have access to.⁶⁷ Performance metric data comprises the size of the influencer's audience and the number of likes, comments, and clicks that an influencer generates for content posted on social media.⁶⁸ This data is significant as it depicts which influencers are perceived as influential, relatable, and capable of procuring the sale of a product.⁶⁹

It is a common misconception that a larger audience will result in higher performance metrics.⁷⁰ In other words, a larger audience does not necessarily mean that a positive engagement rate would be seen between the influencer and his audience. Celebrities and mega influencers are able to reach larger audiences; however mega influencers rarely engage with their audiences.⁷¹ For example, in 2021, Eskort hosted an influencer event called '*The Real Hot Dogs of Mzansi Awards*'.⁷² The event comprised of 400 nano and micro influencers who demonstrated positive performance metrics. In 2020, the engagement rate of South African mega influencers with more than 1 million followers sat at 1.7 per cent as compared

⁶⁵ Ibid.

⁶⁶ The rate of engagement and reach will collectively fall under the ambit of an influencer's performance metric and will be referred to as such. Cooper K op cit note 53 at 86.

⁶⁷ Priscilla Dube The effect of Sponsorship disclosure on consumer perception of source credibility and the likelihood to recommend organic hair products (unpublished P.HD thesis, University of Cape Town, 2021) 40.

⁶⁸ Cooper K op cit note 53 at 86.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Marcelle Pienaar 'Eskort campaign results show local nano-influencers worth' Bizcommunity 27 May 2022. An eversion is available at <https://www.bizcommunity.com/Article/196/669/228241.html>, accessed on 25 September 2022

⁷² Ibid.

to the 7.1 per cent shown by nano influencers with less than 10 000 followers post Eskort's influencer event.⁷³ Further, research concluded by *Influencer Marketing Hub* and *Humanz* revealed a high engagement rate among lower-tiered influencers.⁷⁴ Therefore, a larger audience will not necessarily result in a business receiving a greater ROI.

2.3. Influencer marketing

Influencer marketing is not a new practice but one that has a long-standing history within the marketing industry. The practice began in the early 1960s, when prominent members of society would “promote” specific types of products by linking such products with their prestige and credibility.⁷⁵ These products included, *inter alia*, exclusive pieces of artwork, cookery, and clothing.⁷⁶ These products were associated with influential individuals in hopes that such association would increase the product's sophistication and desirability; however, the number of individuals with whom influential figures were able to engage was limited.⁷⁷ For this reason, minimal growth was seen within the influencer marketing industry up and until the 20th century.

The 20th century brought about a new dimension of influencer marketing. The blend of mass media (television, radio, and print media) with the popularity and fame of the Hollywood film industry caused a surge within the marketing industry.⁷⁸ The combination of the visual, auditory, and popularity elements that were attached to celebrities and mass media allowed for the creation of compelling advertisements.⁷⁹ Celebrities were able to capture the attention of the general public by instilling a sense of desirability and aspiration.⁸⁰ Consequently, advertisements were perceived as organic and non-intrusive, similarly to that seen with Nike's collaboration with Mike Jordan.

⁷³ Ibid.

⁷⁴ Humanz ‘Influencer Marketing Stats & Benchmark Report South Africa’ (2022) H1 5.

⁷⁵ Cooper K op cit note 53 at 82.

⁷⁶ C R Clark & I J Horstmann ‘A model of advertising format competition: On the use of celebrities in ads’ (2013) 46 *Canadian Journal of Economics* 1607.

⁷⁷ Ibid.

⁷⁸ Erdogan BZ ‘Celebrity endorsement: A literature review’(1999) 15(5) *Journal of Marketing Management* 291-2.

⁷⁹ Ibid.

⁸⁰ Ibid.

In 1985, Nike designed a pair of sneakers that “represented” the colours of the Chicago Bulls basketball team.⁸¹ As per the terms of Nike’s contract, Jordan was required to wear a pair of these sneakers during the televised broadcasts of each game that he played for the Chicago Bulls.⁸² As Jordan’s popularity increased, so did the sales of Nike’s sneakers. As a result, Nike sold 450 000 USD worth of sneakers within the first year of this collaboration. These types of advertisements were integral in bridging the gap between the celebrity and the consumer by creating a sense of desirability, which consequently resulted in the concepts of popularity and fame being associated with the attributes of an influence.

The advent of social media transformed society’s perception as well as the landscape of influencer marketing. The emergence of social media platforms such as Tik Tok, YouTube, and Instagram has afforded members of the general public an opportunity to share content online and cultivate large interactional audiences.⁸³ It is respectfully submitted that influencer marketing experienced a form of “democratisation” for the first time in its history. Influencer marketing would no longer solely be associated with the popularity and fame of an individual but would include the distinctive voices of ordinary individuals who share different perspectives on a variety of topics. This would mean that popular third-party representatives would no longer be contracted due to popularity but for the skill of inspiring and directing the thoughts of an audience. As a result, social media became a preferred and alternative medium used in marketing strategies.⁸⁴

Despite the long-standing history of influencer marketing, the practice itself has yet to be definitively defined in marketing and legal literature. The Word-of-Mouth Association (WOMA) describes influencer marketing as an act of a third-party representative sharing product information in a manner that will achieve a broader business goal.⁸⁵ This means that influencer marketing is the process of a third-party representative engaging with an audience in a manner that induces a member of the said audience into purchasing a product.⁸⁶ On the other hand, the ARB defines SMM as:

⁸¹ Petropoulaki M ‘Influencer marketing: Nike’s Iconic Collabouration’ <https://www.visionfactory.org/post/influencer-marketing-nike-s-iconic-collabouration> , accessed on 24 September 2023.

⁸² Ibid.

⁸³ Hart C, 'Social Media Law: Significant Developments' (2016) 72(1) *Business Lawyer* 235.

⁸⁴ Ibid.

⁸⁵ Gouncta C *Regulation of social media influencers* op cite note 46 at 5.

⁸⁶ Ibid.

‘taking of advantage of social networking to help a company or brand increase brand exposure, broaden customer reach or drive specific user actions. **This can be done in two ways: Organically, through the creation of content and nurturing on communities, or through paid Social Media Advertising on the social media platforms**’⁸⁷ [own emphasis].

Accordingly, democratised influencers may be categorised as ordinary individuals who grew the size of their audience through the content that they had created.⁸⁸ Social Media Advertising is categorised as content created by a business or an influencer specifically intended for marketing purposes.⁸⁹ The former does not receive remuneration; however, the latter is paid for the advertisement.⁹⁰ Interestingly, the ARB does not explicitly mention the term influencer marketing but rather chooses to use the term SMM. It is not incorrect to use these terms interchangeably, although the researcher is of the view that SMM is a more accurate term. The concept of influencer marketing is rooted in prestige and popularity being associated with product promotion.⁹¹ “Social media” influencer marketing primarily incorporates ordinary influential persons within a business’s marketing strategy.⁹² This means that the term SMM casts a wide net in order to ensure that all types of influencers (irrespective of audience size and popularity) are included and protected.

As mentioned in Chapter 1, social media was originally designed to act as a virtual communication channel between members of society; however, it has recently expanded its functionality to incorporate the properties of a marketing facilitator. Given its proliferation within the last few years, it should not be surprising that it is estimated to grow into a 2.9 trillion USD industry by 2026.⁹³ Despite these promising statistics, a study conducted by Global Web Index confirmed that the present research completed within the influencer marketing industry may not be a true reflection of the industry’s potential growth.⁹⁴

⁸⁷ Clause 2.2 of the Advertising Regulatory Board Social Media Code (Appendix K), 2019 [own emphasis].

⁸⁸ Ruiz-Gomez op cit note 48 at 21.

⁸⁹ Clause 2.3 of the Advertising Regulatory Board’s Social Media Code (Appendix K), 2019.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Werner Geyser ‘The State of Influencer Marketing Benchmark Report 2022 available at <https://influencermarketinghub.com/influencer-marketing-benchmark-report-2022/>, accessed on 5 February 2023.

⁹⁴ Global Web Index (GWI), 2020: Connecting the dots available at <https://blog.globalwebindex.com/trends/connecting-the-dots-2021-trends/>, accessed 27 July 2022.

It was found that influencer marketing data is limited from an African perspective, with as little as five per cent of the African continent participating in influencer marketing.⁹⁵ This is due to Africa's lack of internet resources, infrastructure, and technology.⁹⁶ It places Africa at an advantage. Africa's influencers would be able to detect and deter various legal issues. For example, a major concern among first world countries was the non-disclosure of endorsement agreements.⁹⁷ However, South Africa was quick to combat this issue by incorporating influencer marketing disclosure requirements in the ARB's SMC.⁹⁸ On the other hand, the lack of technology and infrastructure places African businesses at a disadvantage. These businesses will receive a fraction in ROIs as compared to their first world counterparts.

2.4. The influencer-business relationship

The relationship between influencers and businesses has grown into an important feature of modern marketing as it blends the elements of business communication, consumer engagement, and online visibility. As mentioned earlier, this type of marketing (known as influencer marketing) involves influencers promoting products or services on social media platforms and using their reach to influence potential consumers' opinions and purchase decisions. Businesses capitalise on the influencer's established follower bases to achieve greater brand awareness and ROIs, while influencers benefit from financial compensation and product sponsorships.⁹⁹ To this end, this relationship has become a significant part of digital marketing and has reshaped the dynamics of e-commerce and communication in the digital space.

In essence, the relationship between influencers and businesses is predicated on trust and credibility.¹⁰⁰ Influencers (ranging from celebrities to niche experts and everyday individuals) act as third-party representatives between businesses and consumers, presenting products and

⁹⁵ Werner Geyser The state of influencer marketing 2022: Benchmark Report available at <https://influencermarketinghub.com/influencer-marketing-benchmark-report-2022/>, accessed on 5 February 2023.

⁹⁶ Global Web Index (GWI), 2020: Connecting the dots available at <https://blog.globalwebindex.com/trends/connecting-the-dots-2021-trends/>, accessed 27 July 2022.

⁹⁷ Marcus Lee 'Top 6 legal issues for influencer agreements' available at <https://www.mondaq.com/unitedstates/social-media/1090178/top-6-legal-issues-for-influencer-agreements>, accessed on 12 March 2022

⁹⁸ Clause 1 of the Advertising Regulatory Boards Social Media Code (Appendix K), 2019.

⁹⁹ Gouncta C *Regulation of social media influencers* op cite note 46 at 5

¹⁰⁰ The Advertising Standards Authority online advice 'Recognising ads: Social Media and Influencer Marketing' available at <https://www.asa.org.uk/advice-online/recognising-ads-social-media.html#:~:text=A%20social%20mediahttps%20user%20doesn,of%20their%20social%20media%20influence>, accessed on 23 September 2022.

services in a manner that resonates with their followers.¹⁰¹ These followers often view these presentations as personal recommendations rather than traditional or impersonal advertising models. As a result, businesses have strategically partnered with influencers who aligned with their business values and target audiences to increase the business's outreach, engagement, and ROI.

It is noted that this operational dynamic and the success of the influencer-business relationship depend on the manner in which various demographics respond to their promotional content. As will be discussed in Chapter 3, studies have shown that consumers (specifically the Generation Z and Millennial demographics) respond more positively to personalised recommendations from trusted individuals rather than traditional celebrity figures.¹⁰² Due to the fact that influencers share in various aspects of their lives, these demographics “feel” more connected towards the followed influencer.¹⁰³ This would increase the consumer's receptiveness toward product recommendations.¹⁰⁴ Respectfully, social media algorithms increasingly favour user-generated content, meaning that influencer marketing has become an original medium for businesses to insert themselves into the daily lives of their potential consumers, bypassing the limitations of paid advertisement models, which (more often than not) is blocked by ad-blockers.

Baring the above in mind, this relationship can give rise to multiple legal issues. First, influencers are most likely reaching audiences across a multitude of jurisdictions, and such jurisdictions may have stringent influencer marketing-based guidelines or regulations. Most jurisdictions (including South Africa) place emphasis on rules pertaining to the transparency of endorsement agreements. For example, the ARB in South Africa has introduced guidelines that mandate the clear labelling of promotional content with tags such as #ad or #sponsorship to inform consumers when endorsements are financially motivated.¹⁰⁵ Continual non-compliance with such may be indicative of deceptive advertising practices, which are in breach of various provisions within the CPA and can lead to penalties for both influencers and businesses.

¹⁰¹ Ibid.

¹⁰² YPulse “Stats that show influencers are as influential as ever” (2020) 3 *YPulse Daily*. The article is available at 3 *Stats That Show Influencers Are as Influential as Ever - YPulse*, accessed on 27 September 2022.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Clause 2 of the Advertising Regulatory Board's Social Media Code (Appendix K), 2019.

Further, businesses should engage with influencers through standardised influencer contracts. These contracts may be essential in establishing terms and conditions of the influencer's partnership with the business, including specific content requirements, non-disclosure clauses, exclusivity clauses, and jurisdictional clauses.¹⁰⁶ These types of contracts can protect both parties whilst ensuring that the influencer's content aligns with the business's goals and the self-regulatory guidelines. It is important to note that these contracts may and should include intellectual property and data disclosure clauses. Businesses may require rights to user-generated content across all of the influencers social media platforms. For this reason, such clauses will be important to ensure that the business is given permission to repurpose the influencer's content or limit the content usage. This is especially important where influencers have been "inspired" by another influencer's promotional content idea. The use of similar imaginary, sound effects, and so on may open a door to multiple copyright issues.

Hence the importance of the influencer-business relationship will be evident in the influencer's influence on consumer behaviour as well as the present market dynamics. Traditional advertising models have begun to lose traction in the recent digital age, thus making businesses increasingly dependent on influencer marketing to access consumers that prefer personal recommendations with social proof.¹⁰⁷ Therefore, influencers have become an indispensable element for businesses who intend on maintaining their competitive edge within their market space.

2.5. The influencer-consumer relationship

The relationship between influencers and consumers has evolved into a powerful symbiotic dynamic that shapes consumer behaviour, business perception, and social trends. This relationship functions through social media platforms such as Tik Tok, Instagram, and YouTube.¹⁰⁸ As mentioned earlier, influencers create content that establishes the perception of trust and relatability. This bypasses the traditional advertising model's consequence of only hosting a one-way conversation.¹⁰⁹ Influencer marketing, on the other hand, creates advertisements where a two-way conversation may be held at any time through the influencer and potential consumer commenting on a social media post.¹¹⁰ This relationship plays on the

¹⁰⁶ Goanta & Ranchordás *The regulation of social media influencers* 1 ed (2021) 13.

¹⁰⁷ Nielson 'Global Trust in Advertising' available at <https://www.nielson.com/insights/2015/global-trust-in-advertising-2015/>, accessed on 15 June 2023.

¹⁰⁸ Goanta & Ranchordás *The regulation of social media influencers* 1 ed (2021) 13.

¹⁰⁹ Ruiz-Gomez op cit note 48 at 21.

¹¹⁰ Ibid.

notion that consumers are seen as individuals and not a corporate entity's goal, thus increasing the willingness of the consumer to heed the influencer's recommendation.

The reason that this relationship has been fruitful is due to the fact that it appeals to the consumer's desire for advice and endorsement from relatable and reliable individuals rather than distant corporations.¹¹¹ To this end, the influencer (in the eyes of the consumer) satisfies the dual role of being a trusted source of information and a role model.¹¹² On the other hand, (and in the eyes of the business), influencers act as third-party representatives who are able to bridge the communication gap between a business and consumer, thereby giving consumers the ability to have insight into products in a manner that feels personalised, allowing them to make better informed purchase decisions.¹¹³

Despite the appealability of this relationship, influencers have to tread the lines of puffery and endorsement carefully in order to avoid the legal issues of transparency, non-disclosure, and accountability. As mentioned earlier, influencers have to clearly indicate when a post is sponsored or when they receive compensation (irrespective of whether such was received monetary or in-kind) for the promotion of a product. There are multiple self-regulatory bodies who have implemented influencer marketing guidelines; however, influencers still fail to comply with such, either due to the lack of awareness of legal obligations within the influencer marketing space or in an attempt to retain authenticity of their recommendations.¹¹⁴ Moreover, the cross-jurisdictional nature of influencer marketing adds to the complexity of influencer marketing regulatory compliance. Hence, influencer marketing guidelines not only shape what influencers can share but also how they interact with their followers on a data-driven level.

2.6. Ecommerce v Scommerce

Technology and the internet have transitioned traditional brick-and-mortar businesses into online stores. These online stores fall under the ambit of the e-commerce industry. eCommerce may be described as technology used as a tool for performing commercial acts of

¹¹¹ YPulse "Stats that show influencers are as influential as ever" (2020) 3 *YPulse Daily*. The article is available at 3 *Stats That Show Influencers Are as Influential as Ever - YPulse*, accessed on 27 September 2022.

¹¹² Fredricks T 'Not Content with Content Influencers: How the FTC Should Promote Advertisement Disclosure' (2019) 19(1) *Virginia Sports and Entertainment Law Journal* 31.

¹¹³ Ibid.

¹¹⁴ Taylor CR 'The urgent need for more research on influencer marketing' 2020 *International Journal of Advertising* 889-890.

sale, purchase, transfer, or the exchange of a product, service, or information by electronically processing and transmitting text, video, sound, and photography.¹¹⁵

Members of society and businesses were able to create content online, affect direct marketing services, and conclude electronic contracts and payments.¹¹⁶ In other words, e-commerce has become a commercial facilitator for business transactions while serving as an alternative delivery medium for advertisements. Examples of e-commerce stores are the Zara and Mr Price websites, which contain virtual stores where consumers are able to select and purchase products completely online.¹¹⁷ Essentially, the concept of e-commerce is so broadly defined that it can simply mean one's ability to advertise, purchase, sell, create, and transact online.

This wide encompassing description gave rise to five distinct e-commerce models, which include the Business-to-Business (B2B), Consumer-to-Business (C2B), Business-to-Consumer (B2C), Consumer-to-Consumer (C2C) and Business-to-Government (B2G) models.¹¹⁸ The B2C model allows businesses to transact with the consumers; however, with the development of technology and the internet, a new sub-division was created within the B2C model.¹¹⁹ This new sub-division is known as the Direct-to-Consumer (D2C) model.¹²⁰

The D2C model operates under the notion that businesses may sell products directly to the end-user (consumer) either virtually or physically without utilising the remaining players of the supply chain.¹²¹ In order to avoid these remaining players, e-commerce stores use a virtual Customer Relationship Management (eCRM) software program.¹²² eCRM is a program that assists businesses with the creation and maintenance of an e-commerce store through the collection and analysis of data.¹²³ Ecommerce and the use of the eCRM may increase the administrative workload of a business; however, its attractiveness is located in the algorithmic data, consumer data, and consumer management data that a business is able to

¹¹⁵ Van der Merwe, Roos & Eiselen et al *Information and Communications Technology Law* 3 ed (2021) 161.

¹¹⁶ Corbitt et al 'Trust and e-commerce: A study of consumer perceptions' (2003) 2 (1) *Electronic Commerce Research and Application* 203.

¹¹⁷ Ibid.

¹¹⁸ The D2C model will be of primary focus in this study, however other commerce models will be referenced where applicable. Van der Merwe et al *Information and Communications Technology Law* op cit note 99 at 161.

¹¹⁹ Influencer Marketing Hub 'Social Commerce' available at <https://influencermarketinghub.com/glossary/social-commerce/>, accessed on 26 Januray 2023.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Rouse M 'Electronic customer relationship management' available at <https://www.techopedia.com>, accessed on 25 March 2024.

¹²³ Ibid.

obtain.¹²⁴ Additionally, the eCRM program is able to analyse data obtained from a business's social media page.¹²⁵ Clearly, technology and the internet has transformed social media.

Interestingly, social media platforms (such as Tik Tok, Instagram, and YouTube) have integrated the D2C model into their algorithms and codes. At present, the majority of sales generated by this integration is seen from the sales of various types of subscriptions.¹²⁶ The subscription is sold directly through a social media platform. This type of sale is categorised under s-commerce.

Scommerce may be described as the sale and purchase of a product directly to a consumer through a social media platform.¹²⁷ Essentially, the social media platform acts as a business's store front.¹²⁸ For instance, Tik Tok has introduced Tik Tok Shop, where businesses are able to use an in-app function to create store fronts.¹²⁹ Users are able to visit these store fronts through shoppable posts and directly purchase products on the business's social media page.¹³⁰ As mentioned in chapter 1, members of the general public spend a great amount of time on social media. Therefore, it is believed that s-commerce will generate 30 billion USD in sales by 2027, accounting for 20 per cent of the total sales generated under e-commerce.¹³¹

These statistics seem to indicate that the D2C model may hold promising results for businesses in the future; however, the flexibility of this model might be the reason that the concepts of s-commerce and e-commerce are (mistakenly) viewed as one and the same. As mentioned earlier, e-commerce comprises internet-based stores where transacting occurs through a website. In order to complete the sale and purchase of a product, a consumer would have to complete several "pages" of personal and payment information.¹³² On the other hand, scommerce is the process of selling and purchasing products through a social media post,

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Influencer Marketing Hub 'Social Commerce' available at <https://influencermarketinghub.com/glossary/social-commerce/>, accessed on 26 Januray 2023.

¹²⁷ Ibid.

¹²⁸ Ibid

¹²⁹ TiK Tok Tik Tok Shop available at <https://business.tiktokshop.com/us/seller>, accessed on 28 September 2023.

¹³⁰ Ibid.

¹³¹ Influencer Marketing Hub 'Social Commerce' available at <https://influencermarketinghub.com/glossary/social-commerce/>, accessed on 26 Januray 2023.

¹³² Van der Merwe et al *Information and Communications Technology Law* op cit note 99 at 220-1

whereby the transaction is completed in one step without the need to complete several pages of information.¹³³

When one considers these comparisons, it is clear that s-commerce is a sub-division of e-commerce. In turn, social media influencer marketing operates under the e-commerce industry. Moreover, s-commerce and the D2C model operate in a similar manner. Both contain distinctive features but act as subsets that feed into, respectively, the e-commerce and B2C models. Bearing the above in mind, it is respectfully submitted that s-commerce should remain a sub-division of e-commerce due to its technological and internet-based nature. On the other hand, the D2C model should be accepted as a model on its own despite the fact that it coincides with the B2C model. Given its highly flexible nature and its disuse of the remaining players within the supply chain, the D2C model should be able to stand on its own as a broad division encompassing e-commerce practices.

2.7. Conclusion

Despite the lack of definitions provided by legal and marketing literature, academics and various organisations have successfully explained the important concepts of influencers, influencer marketing, and e-commerce. The influencer industry is comprised of celebrities and ordinary members of society who exhibit influential capabilities. These persons are used by businesses as third-party representatives, who are then required to share and promote product information (on social media) in a manner that will induce the sale of the product. Therefore, influencer marketing practice is a subset of e-commerce.

¹³³ Ibid.

CHAPTER 3

LEGAL CONCERNS

3.1. Introduction

Influencers hold an immense sway over the thoughts of their audience¹³⁴ which may lead to significant legal implications. There is a spectrum of criminal and civil legal issues that have been identified within the influencer marketing industry. These include, *inter alia*, an influencer manipulating performance metric data, misleading, deceptive, and false advertising representations, and the non-disclosure of compensation earned by the influencer. These violations tend to contravene consumer law, a service provider's (social media platform's) Terms of Service Agreement (ToS), as well as the ARB's SMC. In light of the above, this chapter will identify and discuss the legal areas of concern relating to the conduct of influencers. Afterwards, this chapter will highlight the relevant clauses within Tik Tok's ToS and Community Guidelines in order to determine whether a consumer may find a recourse against Tik Tok for an influencer's misleading conduct.

3.2. Manipulation of influencer data metrics

Influencer marketing has become a booming industry, and with the rise of influencers as agents of marketing, data integrity and transparency have become critical for maintaining consumer trust. Despite the attractiveness that the influencer marketing industry holds, there are multiple complex legal concerns that may need to be addressed, among which are various forms of data manipulation and cyber fraud. For this reason, Section 8 of the Cybercrimes Act is essential in safeguarding the industry from deceptive advertising practices and the unlawful interference of data.¹³⁵

One of the primary issues that Section 8 addresses within influencer marketing is the manipulation of engagement metrics (such as likes, comments, and followers) for the intention of presenting a misleading picture of the influencer's reach.¹³⁶ Bots are one of the most common methods used by influencers to manipulate their engagement metrics.¹³⁷ A bot is an artificial social media account designed to increase the size of the influencer's follower

¹³⁴ Booth N & Matic J A op cit 45 at 184-192.

¹³⁵ Section 8 of the Cybercrimes Act 19 of 2020.

¹³⁶ Section 8 of the Cybercrimes Act 19 of 2020 prohibits the alteration of data.

¹³⁷ Clouson – Paquet M 'Can We Trust Social Media Data? Social Network Manipulation by an IoT Botnet?' 2017 8th International Conference Paper of Social Media & Society 5.

base.¹³⁸ By using bots, influencers are able to bridge the difficulty of organically growing a follower base. Bots appear to be similar in appearance to fake or dummy social media accounts; however, they do not operate in the same manner. A dummy social media account is an inactive social media account that is created using false information.¹³⁹ On the other hand, bots are created with false information but are programmed to provide automated interactions with an influencer's posts.¹⁴⁰ In other words, bot accounts are able to like, comment, and "engage" with an influencer's post mimicking the behaviour and passing off in appearance as a human.¹⁴¹ A bot may even open the door to unauthorised access to different types of systems.¹⁴² This type of manipulation misrepresents influencer's the actual influential impact, thereby deceiving the business and consumer alike.

In this regard, Section 8 of the Cybercrimes Act provides for the criminalisation of the unauthorised alteration, deletion, copying, or moving of data.¹⁴³ Businesses rely on engagement metric data when determining which influencers align with their values and corporate goals; hence, such data has the ability to affect a business's operational costs objective, their potential ROI, as well as their reputation.¹⁴⁴ Reliance on such data assists businesses in determining monetary investment, and such manipulation of data can cause a business to allocate resources to influencers who fail to provide genuine visibility and engagement. This misrepresentation is fraudulent and amounts to cyber fraud.

In the case of the Federal Trade Commission v Devumi LCC, CV-81419-RKA, File no: 182 3066, Devumi LCC was charged with participating and contributing towards deceptive advertising practices. Devumi was a company that specialised in generating fake digital activity through the creation of bot accounts.¹⁴⁵ According to the FTC's report, Devumi had created and sold in excess of 50 000 fake Twitter followers, 4000 YouTube subscribers, and 32 000 YouTube reviews.¹⁴⁶ These "products" were highly accessible to influencers due to their low price and high-end demand, and by the end of 2019, it was reported that the

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Dunn D 'Famously Fake: Using the Law to Reverse the Demise of Social Media Credibility' (2022) 75(1) *Federal Communications Law Journal* 66.

¹⁴¹ Clouson – Paquet M op cite note 138 at 5.

¹⁴² Ibid.

¹⁴³ Section 8 of the Cybercrimes Act 19 of 2020.

¹⁴⁴ Goanta C op cit note 6 at 9.

¹⁴⁵ *Federal Trade Commission v Devumi LCC*, cv-81419-RKA, File no: 182 3066.

¹⁴⁶ Supra.

generation and sale of bot accounts sat at an alarming 1.3 billion USD.¹⁴⁷ Moreover, it was found that more than fifty per cent of influencers across all tiers had used bot accounts,¹⁴⁸ thereby reinforcing the concern surrounding the manipulation of data. Unfortunately, Devumi and other companies alike are represented by influencers as growth service opportunists; however, over and above the actual inclusion of bots as a form of manipulation, other companies use applications that often operate by accessing the influencer's social media account without the social media platform's authorisation and adjust the data to inflate engagement metrics.

Moreover, the issue of cyber fraud has been observed in cases where certain influencers or social media agencies have unlawfully accessed and altered backend data analytics to falsify performance reports. All of these forms of data manipulation are unlawful and intend to create misrepresentation in the eyes of the reader. Furthermore, these acts are considered violations under Section 8 of the Cybercrimes Act, which addresses the unauthorised accessing of data as well as interference with data, thereby addressing direct acts of data manipulation as well as preparatory acts.

3.3. Non-disclosure of compensation

The beginning of an influencer's career starts off as a slow and non-renumerated venture that turns on its heels once the influencer's follower base size and performance metrics rise.¹⁴⁹ This increase in recognition may grant an amalgam of business partnerships and collaborative opportunities,¹⁵⁰ though in recent years, these collaborations have led to the exponential rise in the influencer vocational practice, social media start-up companies, and agencies.¹⁵¹

An increase in recognition may lead to an influencer requesting a form of compensation. These may include the exchange of money for the promotion of a product through a single or a series of posts, receiving a free holiday, free or discounted products, or a donation made in the influencer's name.¹⁵² Mega influencers, such as Kylie Jenner, are paid in excess of 1

¹⁴⁷ Supra.

¹⁴⁸ Dunn D 'Famously Fake: Using the Law to Reverse the Demise of Social Media Credibility' (2022) 75(1) *Federal Communications Law Journal* 66.

¹⁴⁹ Bladow L 'Worth the Click: Why Greater FTC Enforcement is Needed to Curtail Deceptive Practices in Influencer Marketing' (2018) 59(3) *William & Mary Law Review* 1125.

¹⁵⁰ Ibid.

¹⁵¹ Gouncta C *Regulation of social media influencers* op cite note 46 at 6-15.

¹⁵² Groen M 'Swipe up to Subscribe: The Law and Social Media Influencers' (2020) 21 *Texas Review of Entertainment & Sports Law* 129. See also Catalina Goanta *Regulation of social media influencers* op cite note 46 at 127.

million USD per post as compared to nano influencers, who may only receive a free product.¹⁵³ This means that compensation is not limited to monetary value but is any form of reward that shows the existence of a mutually beneficial and reciprocal agreement.¹⁵⁴ Simply put, it is an offer of a reward in exchange for the acceptance of product promotion.

This offer and acceptance have caused local and international self-regulatory bodies to create advertising codes of practice in order to explain the constituents of a promotional post. Specifically, Clauses 3.2 and 3.3 of the ARB's SMC require the explicit need for the compensatory element of a business's partnership with an influencer to be disclosed.¹⁵⁵

These clauses require that all promotional content disseminated on social media by virtue of a promotional agreement must clearly disclose (i) the fact that the influencer is being paid to post such content, (ii) the material relationship between the influencer and business, and (iii) that the influencer used influencer marketing identifiers within the post.¹⁵⁶ This is due to the fact that compensation suggests the existence of a material commercial relationship and thus supports the assertion that if there is an inadequate amount of information about a product known, then a consumer is unable to fairly evaluate and consider whether the product should be purchased.¹⁵⁷ Conversely, businesses purport that the requirement for advertorial disclosure may result in a decrease in sales and product attractiveness.¹⁵⁸

In April 2023, South African influencer Tanya Vader endorsed Fenty Beauty's new foundation line. She posted a video of herself using and reacting to the product on Tik Tok and Instagram. Her posts clearly indicate that she complied with Clauses 3.2 and 3.3 of the ARB's SMC.¹⁵⁹ Her endorsement tags were clearly visible, and the commercial relationship with Fenty Beauty was disclosed through the use of Tik Tok's and Instagram's influencer marketing identifiers (paid partnership tools). Hence, there was compliance with the ARB

¹⁵³ Werner Geyser '20 of Instagram's Highest Paid Stars in 2023' available at <https://influencermarketinghub.com/instagram-highest-paid/>, accessed on 22 March 2023

¹⁵⁴ Antoniou A 'Advertising regulation and transparency in influencers' endorsements on social media' (2021) 26(4) *Communications Law* 197.

¹⁵⁵ Clause 3.2 and 3.3 of the Advertising Regulatory Board's Social Media Code (Appendix K), 2019.

¹⁵⁶ Clause 3.2 of the Advertising Regulatory Board's Social Media Code (Appendix K), 2019.

¹⁵⁷ Megan Bannigan & Beth Shane 'Towards Truth in Influencing: Risks and Rewards of Disclosing Influencer Marketing in the Fashion Industry' (2019) 64(3) *New York Law School Law Review* 261

¹⁵⁸ Bladow L op cit note 136 at 1133.

¹⁵⁹ Clause 4.1 of the Advertising Regulatory Board's Social Media Code (Appendix K), 2019 states: To ensure full transparency publishers and influencers are required to disclose if they were provided (permanently or on loan) with goods or services in return for media coverage (whether this is expressly stated or not). This helps reinforce publisher or influencer integrity while clearly allowing the consumer to make an informed opinion of the applicable content, product or service.

SMC's disclosure requirement, which resulted in an honest and transparent post. Moreover, these posts received a positive reaction from her follower base and virtual community, which implies a positive performance metric was acquired.¹⁶⁰

This demonstrates the merit behind the argument in that compensatory disclosure does not hinder the sale of a product. It describes that inadequate disclosure supports the notion that advertising assertions are not premised on good faith but on achieving a sale target. Arguably, both the self-regulatory bodies and businesses dispositions are premised on perspective. Businesses argue hinderance of sale while the self-regulatory bodies argue for the maintenance of influencer-business integrity while upholding consumer protection rights.¹⁶¹ Perhaps it is better said that it is not the non-disclosure of an advertorial agreement and its compensatory element that may hinder a sale, but the prospective agenda to hide the nature of an advertisement that may violate consumer rights as well as fair competition practices.

3.4. Consumer purchase decisions

It is clear from the previous chapters that the perceived expert knowledge, trust, and reliability of an influencer feed into their ability to direct the thought and motivation behind a consumer's purchase decision. When this perception is combined with the important role of information gathering and communication that social media has created, it should not be surprising that sixty per cent of consumers purchase a product in store after an influencer's promotional campaign.¹⁶² However, the effectiveness of an influencer-based purchase decision cannot be easily quantified when variables such as age, gender, desirability of product and niche knowledge are considered.¹⁶³

In 2018, a study conducted by YPulse found that influencers exercise strong influence over Generation Z and Millennials persons¹⁶⁴, however, a study by the Association of National Advertisers argues that as much as seventy-five per cent of the general consumer community participates in influencer marketing, with as little as thirty-six per cent claiming that

¹⁶⁰ Tanya Vader, official Tik Tok account available at <https://www.tiktok.com/@tanyavader/video/7226261982524050693?q=tanya%20vader%20fenty%20beauty%20foundation&t=1686121086549>, accessed on 26 April 2023.

¹⁶¹ Clause 4.1 of the Advertising Regulatory Board's Social Media Code (Appendix K) 2019.

¹⁶² Nielson 'Global Trust in Advertising' available at <https://www.nielson.com/insights/2015/global-trust-in-advertising-2015/>, accessed on 15 June 2023.

¹⁶³ Taylor CR 'The urgent need for more research on influencer marketing' 2020 *International Journal of Advertising* 889-890.

¹⁶⁴ YPulse "Stats that show influencers are as influential as ever" (2020) 3 *YPulse Daily*. The article is available at 3 *Stats That Show Influencers Are as Influential as Ever - YPulse*, accessed on 27 September 2022.

influencer recommendations are effective in assisting with the conclusion of a sound purchase decision.¹⁶⁵ On the other hand, a survey by Nielsen indicates that more than forty per cent of consumers rely on influencer recommendations within specific niches and that forty per cent of consumers have purchased these products because they recommended by an influencer.¹⁶⁶

Given the contrasting implications associated with the effects of influencers on consumer purchase decisions, it is not surprising that the American Marketing Association discovered a decline in consumer-influencer trust, with at least fifty-two per cent of women claiming that they trust influencers much less.¹⁶⁷ In as much as one would like to claim that advertising disclosures would have no negative impact on the consumer, it is reasonable to deduce that advertising disclosures have the ability to influence brand attitudes, a business's ROI, the trust of the general public, and the subversion of a consumer's basic purchase rights.

Although some of the above studies seem to hold evidence that corroborates that influencers' promotional content may yield positive responses,¹⁶⁸ one must be cognisant of the fact that consumers come from all walks of life. There can be palpable consequences for consumers, especially for those who lack sound knowledge of the influencer marketing industry and may fall prey to the unwitting purchase of products that have been falsely guised as genuine when actually endorsed or advertised. The average consumer is aware of the fact that televised commercials are most likely paid advertisements, although advertorial social media may not be as readily obvious.¹⁶⁹ It is respectfully submitted that the inability to differentiate between a promotional and a non-promotional social media post is detrimental to the consumer decision making process because advertisements have the ability to stretch the truth. Therefore, the primary focus of consumer law is consumer protection, fair marketing practices, and fair competition. Should an influencer hide their material relationship with a brand or mislead a consumer regarding the attributes of a product, it will affect the decision-

¹⁶⁵ American Marketing Advertisers "Advertisers love Influencer Marketing: An ANA study available at <https://www.ana.net/content/show/id/48437>, accessed on 18 July 2022.

¹⁶⁶ Nielson 'Global Trust in Advertising' available at <https://www.nielson.com/insights/2015/global-trust-in-advertising-2015/>, accessed on 15 June 2023.

¹⁶⁷ American Marketing Advertisers "Advertisers love Influencer Marketing: An ANA study available at <https://www.ana.net/content/show/id/48437>, accessed on 18 July 2022

¹⁶⁸ Fredricks T 'Not Content with Content Influencers: How the FTC Should Promote Advertisement Disclosure' (2019) 19(1) *Virginia Sports and Entertainment Law Journal* 31.

¹⁶⁹ Groen M op cite note 137 at 119.

making process of a consumer. This will ultimately undermine the rights of a consumer to make an informed purchase decision.

3.5. Tik Tok

As mentioned in Chapter 1, the primary function of social media is to act as a virtual channel of communication and information sharing between members of the general public. Over time, social media platforms such as Tik Tok, Instagram, and YouTube expanded their communicative functions and were incorporated within the business and marketing landscapes.¹⁷⁰ Tik Tok, in particular has, become the most downloaded social media platform since its launch and is prevalent within the influencer marketing industry¹⁷¹.

Tik Tok is a social media platform that allows its users to create and share short, timed videos featuring memes, sounds, and other visual effects.¹⁷² Each user has a specialised “For You” page that recommends content based on the user’s previous interactions with the platform.¹⁷³ Prior to use, all users are required to accept and adhere to Tik Tok’s ToS and Community Guidelines.¹⁷⁴ Tik Tok’s ToS is a legally binding contract entered into between Tik Tok and its users.¹⁷⁵ It delineates a user’s privileges and obligations, acceptable user conduct, and Tik Tok’s legal limitations.¹⁷⁶ In terms of influencer marketing, Clause 7 of the ToS requires all influencers and businesses who are disseminating marketing content on Tik Tok to refrain from misleading consumers.¹⁷⁷ The ToS provides that all influencers must comply with their countries laws and regulations regarding advertising and that Tik Tok bears no liability should the influencer fail to do so.¹⁷⁸ The ToS further states that if an influencer is unsure of the manner in which advertisements are to be disclosed, reference must be made to the FTC’s Guides Concerning the Use of Endorsements and Testimonials in Advertising 16 C.F.R 2009.

¹⁷⁰ Maryville University ‘The Evolution of Social Media: ‘How did it begin and where did it go?’ available at <https://online.maryville.edu/blog/evolution-social-media> accessed 11 June 2021.

¹⁷¹ Al-Zoubi MM ‘The growth of influencer marketing: A comparison of Tik Tok and Instagram’ 2022 *Proceedings of the European Union’s Contention in the Reshaping Global Economy* 355.

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Tik Tok Terms of Service Agreement 2023 available at <https://www.tiktok.com/legal/page/row/terms-of-service/en>. Tik Tok Community Guidelines 2023 available at <https://www.tiktok.com/community-guidelines/en>, accessed at 23 October 2023.

¹⁷⁵ Clause 1 of Tik Tok’s Terms of Service Agreement 2023.

¹⁷⁶ Clause 4, 5 and 7 of Tik Tok’s Terms of Service Agreement 2023.

¹⁷⁷ Clause 7 of Tik Tok’s Terms of Service Agreement 2023.

¹⁷⁸ Clause 7 of Tik Tok’s Terms of Service Agreement 2023 read together with Tik Tok’s Advertising Policy available at <https://ads.tiktok.com/help/article/advertising-on-tiktok-first-things-to-note?lang=en>, accessed at 23 October 2023.

In addition to the ToS, Tik Tok advises influencers to read and understand its Community Guidelines and Advertising Policies. The Community Guidelines and Advertising Policies are not legally binding but rather serve as a code of conduct for its users.¹⁷⁹ It equally prohibits influencers from engaging in deceptive advertising practices and emphasises the necessity of disclosing material relationships between a business and influencer.¹⁸⁰ Given the fact that Tik Tok has a large global user base, it is difficult to create a ToS, Community Guideline and Advertising Policy that expressly highlights the legal ramifications within which influencers must operate. For this reason, legal discussion surrounding Tik Tok's ToS and Community Guidelines in terms of influencer marketing is limited.

Despite this limitation, Tik Tok attempts to ensure that, as a social media platform, it is ethically and legally compliant. To this end, Tik Tok has created influencer marketing identifiers.¹⁸¹ Businesses and influencers who choose to disseminate marketing content on Tik Tok must ensure regulatory compliance prior to the advertorial's publication.¹⁸² This requires the advertiser (influencer or business) to provide a description of the product and whether or not the influencer is receiving remuneration for the advertisement.¹⁸³ The use of this information is two-fold. First, it is to ensure that harmful content and products (such as medication) are not advertised.¹⁸⁴ Secondly, it ensures that the information disclosed to Tik Tok correlates with the contents of the advertisement disseminated on its platform.¹⁸⁵ This acts as a deterrence mechanism against misleading and deceptive advertising practices. Further, the form requires the influencer to confirm whether he or she will use the provided influencer marketing identifiers upon the posting of the advertisement.¹⁸⁶

¹⁷⁹ Tik Tok Community Guidelines, 2023 available at <https://www.tiktok.com/community-guidelines/en>, accessed on 24 October 2023.

¹⁸⁰ Clause 1 of Tik Tok's Advertising Policies available at <https://ads.tiktok.com/help/article/tiktok-advertising-policies-ad-creatives-landing-page?redirected=2>, accessed on 23 April 2023.

¹⁸¹ Skalbania S 'Advising 101 for the Growing Field of Social Media Influencers' (2022) 97(2) *Washington Law Review* 693-4. See also West C 'Benchmark report 2024: A Marketer's Guide on Instagram Branded Content 2024' (2024) *Influencer Marketing Hub* available at <https://influencermarketinghub.com/instagram-branded-content/>, accessed on 18 February 2024.

¹⁸² Clause 2 of Tik Tok's Advertising Policies available at <https://ads.tiktok.com/help/article/tiktok-advertising-policies-ad-creatives-landing-page?redirected=2>, accessed on 23 October 2023.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Skalbania S op cit note 167 at 693-4.

Additionally, Tik Tok uses artificial intelligence and a monitoring committee to monitor the movement of misleading advertisements.¹⁸⁷ Artificial intelligence is used to identify “suspicious” patterns or keywords associated with deceptive promotional practices¹⁸⁸ and users are required to report these “suspicious” marketing communications to the monitoring committee.¹⁸⁹ In this instance, the word “suspicious” is associated with misleading and deceptive advertising conduct. Once the content has been reported, an evaluation team will weigh in on the contents of the posts in a review process and will either remove or block all activity on the influencer’s Tik Tok account.¹⁹⁰

Tik Tok’s ToS and Community Guidelines may be of a general nature; however, it has taken extensive measures to ensure that the platform leaves little to no room for advertising violations. Therefore, Tik Tok uses the artificial intelligence programs as well as a review and monitoring committee as proactive measures for limiting its legal liability. For this reason, if a consumer has become a victim of an influencer’s misleading advertisement, the consumer’s recourse would be against the influencer or business and not Tik Tok.

3.6. Conclusion

Despite the advantages that influencer marketing has brought about to the business landscape, it has created several legal implications. If an influencer fails to properly disclose the advertisement and compensatory element of the advertisement, it constitutes a representation that is intended to be misleading and thus infringes on the rights of a consumer to make an informed purchase decision. On the other hand, the manipulation and usage of manipulated performance metric data amounts to misrepresentation with an intention to deceive (fraudulent misrepresentation). This act is unlawful and criminal as it amounts to cyber fraud. In this instance, the manipulation of the performance metric data inhibits a business from making sound business decisions and prevents the business from competing fairly with other business ventures of a similar nature. In the first instance, the consumer will take recourse against the influencer, and in the second instance, a business will take recourse against the influencer; however, Tik Tok’s legal duty is to ensure that it provides influencers with the necessary means to properly declare advertorial content. Tik Tok has been proactive in

¹⁸⁷ Clause 2.11 of Tik Tok’s Advertising Policies available at <https://ads.tiktok.com/help/article/tiktok-advertising-policies-ad-creatives-landing-page?redirected=2>, accessed on 23 April 2023.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

ensuring such, which indicates that the likelihood of Tik Tok being involved in an influencer marketing suit is slim.

CHAPTER 4

THE SOUTH AFRICAN PERSPECTIVE

4.1. Introduction

As discussed in Chapter 3, influencers have an immense sway over the perceptions of their audiences, which has led to an array of legal issues. To address these issues, it is imperative that a discussion regarding an influencer marketing regulatory framework ensue. South Africa does not have a legal framework dedicated solely to the regulation of influencers but rather relies on various pieces of legislation and Codes of Advertising Practice to offer legal guidance. For this reason, this chapter seeks to understand the importance of the ARB's SMC's influencer marketing requirements. Additionally, this chapter will make provision for the discussion of the criminal implications of cyber fraud within the influencer marketing industry. In doing so, Section 8 of the Cybercrimes Act will be discussed and referenced accordingly. Lastly, this chapter aims to highlight the manner in which the provisions of CPA may apply to businesses and influencers.

4.2. SMC

The ARB is South Africa's independent advertising regulator, whose mandate is to serve and protect the public's interest by ensuring that all marketing communication disseminated within the Republic of South Africa is legal and ethical.¹⁹¹ In order to achieve this goal, the ARB reviews and adjudicates complaints submitted from the public, stakeholders, and competitors relating to problematic advertisements.¹⁹² These problematic advertisements are measured against the ARB's Advertising Code of Practice (ACOP). If an advertisement were to contravene an ACOP clause, then the ARB will require the creator of the advertisement to amend or withdraw such.¹⁹³

The ACOP's preamble states that all advertisements are to be created in a manner that is legal, honest, and transparent in order to maintain fair business practices.¹⁹⁴ Since 2018, the ARB has applied the ACOP to all types of media advertisements;¹⁹⁵ however, the prolific

¹⁹¹ Visagie J "The Jurisdiction of the Advertising Regulatory Board over Non-Members: The Supreme Court of Appeal confirms its *Herbex – order in the Bliss – matter*" (2023) 26 *PER* 2.

¹⁹² Clause 4.3 of the Advertising Regulatory Board's Advertising Code of Practice 2018.

¹⁹³ *Ibid.*

¹⁹⁴ Preamble of the Advertising Regulatory Board's Advertising Code of Practice 2018.

¹⁹⁵ Visagie J *op cit* note 175 at 2.

nature of technology and influencer marketing required further self-regulatory development. Consequently, the ARB drafted a SMC that outlines the conduct within which all players in the influencer marketing industry are to abide by.¹⁹⁶ The SMC is a self-regulatory document attached to the ACOP.¹⁹⁷ This means that it acts as an influencer's social media marketing guideline and does not form part of South Africa's regulatory framework. It would seem that the SMC was designed to solely act as an interpretative and supplementary guideline for pieces of legislation that may assist in the regulation of influencer marketing.¹⁹⁸

The purpose of the SMC is to ensure that influencer marketing does not infringe on the rights of a consumer.¹⁹⁹ It comprises of seven sections, all of which relate to influencer marketing in general. To this end, sections 3-4 outline SMM disclosure requirements; section 5 reiterates the importance of not misleading consumers; and section 6 deals with specific aspects of influencer marketing (relating to the creation of a paid social media post and the manner in which it should be disseminated).²⁰⁰

As mentioned in Chapter 1, due to a lack of technology and infrastructure, South African influencers (at this point in time) play a minimal role within the influencer marketing industry. Despite this fact, South Africa is placed at an advantage as it is easier to detect, control, and deter instances where the ACOP and SMC may be contravened.

In the ruling of *Pierre Cassuto v Ithuba Holdings RF (Pty) Ltd* (2022) Advertising Regulatory Board File Number 2203, Cassuto filed a complaint against Ithuba Holdings (Pty) Ltd (Ithuba) for the failure to display an advertisement declaration in a Twitter video. Ithuba, who is the operator of the South African National Lottery, had hired three influencers as part of a promotional campaign.²⁰¹ These influencers were required to create short videos describing the process within which Ithuba collected monies from consumers for purposes of the lottery.²⁰² The general's public's **initial** perception of these videos was that they were educational and informative and not commercial in nature.²⁰³

¹⁹⁶ Clause 1.2 of the Advertising Regulatory Board's Social Media Code (Appendix K), 2019.

¹⁹⁷ Advertising Regulatory Board's Social Media Code (Appendix K), 2019.

¹⁹⁸ Clause 1.1 of the Advertising Regulatory Board's Social Media Code (Appendix K), 2019.

¹⁹⁹ Clause 1.1 of the Advertising Regulatory Board's Social Media Code (Appendix K), 2019.

²⁰⁰ Sections (3), (4), (5) and (6) of the Advertising Regulatory Board's Social Media Code (Appendix K), 2019.

²⁰¹ *Pierre Cassuto v Ithuba Holdings RF (Pty) Ltd* (2022) file number 2203 1.

²⁰² *Pierre Cassuto v Ithuba Holdings RF (Pty) Ltd* (2022) file number 2203 2.

²⁰³ *Pierre Cassuto v Ithuba Holdings RF (Pty) Ltd* (2022) file number 2203 4 [own emphasis].

After receiving a complaint, the ARB adjudicated on the matter, which led to a discussion regarding the SMC's disclosure requirements. First, influencer marketing content must be differentiated between that which is organic and that which is paid.²⁰⁴ A paid social media post forms part and parcel of a commercial agreement, whereas an organic social media post may not necessarily be so.²⁰⁵ An influencer who creates a social media post that contains content that may praise a product may be considered organic if such praise originates from the unbiased opinion of the influencer.²⁰⁶ In other words, it must not move past the act of puffery.²⁰⁷

Secondly, clause 3.3 of the SMC requires that all material connections between a business and an influencer must be declared.²⁰⁸ A material connection is a commercial relationship that links a business to an influencer and affects the credibility of the advertisement.²⁰⁹ In other words, given the commercial nature of an advertisement, if a consumer or a potential consumer cannot readily recognise that a material connection exists between a business and an influencer (implicitly or explicitly), then the advertisement is considered to be misleading and deceptive.

Therefore, all advertisements are to be easily identifiable as such.²¹⁰ Influencers are advised to caption paid social media posts with #ad, #advert, or # advertisement instead of "in association with" or "thanks to".²¹¹ The caption "thanks to" may create ambiguity within the mind of the consumer, whereas #ad is a universal term that has been accepted as a word used by its ordinary meaning.²¹² The ARB further explained that in determining whether an advertisement declaration is sufficient, influencers and businesses should consider (i) the

²⁰⁴ The definition of SMM. See Clause 2.2 of the Advertising Regulatory Board's Social Media Code (Appendix K), 2019.

²⁰⁵ Clause 2.2 of the Advertising Regulatory Board's Social Media Code (Appendix K), 2019.

²⁰⁶ Clause 2.4 of the Advertising Regulatory Board's Social Media Code (Appendix K), 2019.

²⁰⁷ An overstatement or an exaggeration of a product or service for the purpose of marketing is defined as puffery. It occurs when an advertiser highly praises or exemplifies the characteristics, value, and strength of the advertised product. In other words, it is the sales talk behind an advertised item through an elevated subjective opinion which contains no specific facts. Simply put, a puff should be so exaggerated that no reasonable person would attach factual weight to the representation made. See De Wet F, Maris M & Human D "Should Puffery Advertising in South Africa be Banned? An interdisciplinary analysis" (2010) 42(2) *Acta Academica* 121.

²⁰⁸ Clause 3.3 of the Advertising Regulatory Board's Social Media Code (Appendix K), 2019.

²⁰⁹ Clause 3.1 of the Advertising Regulatory Board's Social Media Code (Appendix K), 2019.

²¹⁰ Clause 2 of the Advertising Regulatory Board's Social Media Code (Appendix K), 2019.

²¹¹ *Pierre Cassuto v Ithuba Holdings RF (Pty) Ltd* (2022) file number 2203 4. See also Clause 3.3 of the Advertising Regulatory Board's Social Media Code (Appendix K), 2019.

²¹² Section 22 of the Consumer Protection Act 68 of 2008.

need for the declaration, (ii) whether the declaration provides the consumer with essential information, and (iii) whether the declaration is visible when taking into account font size, colour, and placement.²¹³ Captions should be placed at the beginning of the post's description box in order to avoid the caption being buried among a plethora of other tags. Additionally, influencers must use a social media platform's marketing identifier.²¹⁴ This would indicate that the placement of the declaration is equally as important as the manner within which a material connection is disclosed.

In relation to the *Ithuba* case, the ARB noted that Mr Bezuidenhout was the only influencer hired by Ithuba, who complied with the above disclosure and declaration requirements.²¹⁵ Mr Bezuidenhout had uploaded the promotional Twitter video with the hashtag #advert as well as #ad. Further, he verbally mentions within the video that he uploaded the post as part of a commercial agreement between himself and Ithuba. In doing so, he disclosed his material connection with Ithuba and readily identified his video as part of a promotional campaign. The other influencers did not do so.²¹⁶

This ruling shows the importance of complying with the SMC. It demonstrates that if a consumer believes that he or she has been misled due to a misleading advertisement disseminated by an influencer and such advertisement failed to comply with the SMC, then the consumer's first course of action would be to file a complaint with the ARB. As previously mentioned, the ARB will either request the influencer to amend or withdraw the promotional social media post. If the consumer intends to pursue further action, he or she may do so at a consumer tribunal or a civil court of law.²¹⁷

Therefore, it is clear that these requirements are premised on the understanding that if a consumer is aware of a commercial relationship then the consumer is capable of interacting with the advertisement and deliberating on the information it contains in order to make an informed decision regarding the purchase of that product. Clearly, it is the paid nature of an advertisement that may influence the purchase behaviour of a consumer, and its non-disclosure can detract from a consumer's decision making process.

4.3. ECTA

²¹³ Antoniou A op cit note 139 at 200-1. See also Cooper K op cit note 53 at 94.

²¹⁴ Skalbania S op cit note 166 at 679.

²¹⁵ *Pierre Cassuto v Ithuba Holdings RF (Pty) Ltd* (2022) file number 2203 1.

²¹⁶ Supra.

²¹⁷ *Advertising Regulatory Board NPC v Bliss Brands (Pty) Ltd* 2022 JDR (SCA).

The ECTA is the main piece of legislation regulating the e-commerce industry within South Africa. It aspires to regulate and facilitate electronic communications and transactions in order to bring about comprehension, acceptance, and expansion of electronic transactions.²¹⁸ Further, ECTA is an enabling piece of legislation. This means that it cannot be read in isolation but will consider the provisions of other statutory laws (such as the CPA).²¹⁹ It deals with various legal aspects, such as the legal validity of a data message.²²⁰

There are certain terms contained within ECTA whose definitions may be applied within the influencer marketing industry, one of which is the term transaction. ECTA defines a transaction as a transaction that is either of a commercial or non-commercial nature.²²¹ It does not explain the term electronic transacting; however, as explained in Chapter 1, an electronic transaction may be understood as a transaction that is concluded by virtue of electronic means (such as a computer).²²² This means that the process of buying, selling, and paying would have been concluded through the use of the internet, and thus by electronic means.

Further, a data message may be described as data that has been generated, sent or, received, which includes a voice element.²²³ It is safe to say that given the nature of social media, the creation and dissemination of social media content would occur online. It is respectfully submitted that by comparing the definition of a data message to the creation and nature of a social media post, one may be able to detect similarities. An influencer creates (“generates”) content online (communicated by “electronic means”). Thereafter, the said influencer can choose to disseminate (“send out”) his post on social media. If one were to assume that during the creation and dissemination of these social media posts, the influencer decided to add a voice element to the post, this would mean that the attributes of a social media post coincide with the definition of a data message.

Since it has been established that a social media post may be considered to be a data message (which is subject to the provisions of the ECTA), the question that must be asked is whether the contents (communicated information) of the social media advertisement fall under the ambit of the ECTA? Accordingly, Section 43 of the ECTA, outlines the information that a

²¹⁸ Section 3 of the Electronic Communications and Transactions Act 25 of 2002.

²¹⁹ Ibid.

²²⁰ Section 2(1)(a)-(r) of the Electronic Communications and Transactions Act 25 of 2002

²²¹ Section 1 of the Electronic Communications and Transactions Act 25 of 2002.

²²² Van der Merwe et al *Information and Communications Technology Law* op cit note 99 at 161-4.

²²³ Section 1 of the Electronic Communications and Transactions Act 25 of 2002.

supplier (being the business or influencer) must provide to the potential consumer.²²⁴ This information is mirrored in sections 23 and 24 of the CPA.²²⁵

Section 43 requires a supplier to disclose information regarding the material aspects of the advertised product, such as the characteristics and use of the product, the price of the product, its price in comparison to its competitors, and so on.²²⁶ Section 43 generally applies to traditional forms of media advertisements (such as televised media).²²⁷ By the same measure, a brief description regarding the material aspects of the product should be contained within the social media post. In order to prevent a social media post misrepresenting the material characteristics of the product, section 43 of ECTA should be read together with sections 22, 23, and 24 of the CPA.

Section 22 of the CPA provides that all transactions²²⁸ should contain plain language in oral and/or visual representations. This plain language must be considered in relation to the educational and literacy levels of its intended audience and the possibility of such persons understanding the language of the advertisement.²²⁹ Since words can possess multiple meanings and can induce various interpretations in different contexts,²³⁰ the plain language requirement acts as a safeguard against the ambiguity of language in an advertisement. In ascertaining whether a transaction's representation contains plain language, the following factors would need to be considered:

- (i) *'the context, comprehensiveness and consistency of the notice, document, or visual representation;*
- (ii) *the organisation, form and style of the notice, document, or visual representation;*

²²⁴ Section 43 of the Electronic Communications and Transactions Act 25 of 2002.

²²⁵ Section 23 and 24 of the Consumer Protection Act 68 of 2008 outlines the information which a supplier must disclose to a consumer in relation to the product advertised.

²²⁶ Section 43 of the Electronic Communications and Transactions Act 25 of 2002.

²²⁷ Ibid. The ECTA applies to all electronic communications (including televised media) within the Republic of South Africa.

²²⁸ Advertisements may be classified as a means which may lead to a transaction, therefore 22 of the CPA should be considered in determining whether the product information is disclosed, disclosed not only the material aspects of the product but did so in a manner that is unambiguous as per Section 23 of the Consumer Protection Act 68 of 2008.

²²⁹ Section 22(2) of the Consumer Protection Act 68 of 2008.

²³⁰ Stoop PN, Churr C "Unpacking the Right to Plain and Understandable language in the Consumer Protection Act 68 of 2008" (2013) 16(5) P.E.R 530.

- (iii) *the vocabulary, usage and sentence structure of the notice, document, or visual representation; and*
- (iv) *aids used to assist the consumer in reading and understanding the notice, document, or visual representation.*²³¹

A user viewing a social media post should examine the body language, facial expression, and tone of the influencer.²³² In addition, users should then consider the words of the influencer and attach weight to the words expressed. As mentioned in Chapter 3, influencers tend to disclose their relations with businesses by burying the advertorial disclosure caption among a plethora of other tags.²³³ Accordingly, it can be claimed that this type of behaviour is equivalent to a reduction of font size, the non-disclosure of the material characteristics of a product, and an unstructured advertisement in terms of Section 22(2)(b). This lack of transparency opens a door that disallows a consumer to consider whether the purchase of the product would be in their best interest.

Section 22 affirms that electronic communications can validly form agreements. This provision aligns with the principle of functional equivalence, which recognises electronic contracts as legally enforceable as traditional paper agreements. Thus, Section 22 removes any legal ambiguity about electronic agreements by confirming that they meet formal contract requirements. This also encourages businesses to adopt electronic transactions, reducing the need for physical documentation and facilitating seamless, legally recognised online commerce.

Moreover, the section states that an electronic agreement cannot be invalidated solely because it's in electronic form. This enhances legal certainty and supports the growth of digital commerce by assuring parties that electronic contracts, whether concluded by email, online forms, or other digital means, are binding if the essential elements of a contract (consent, intention, and capacity) are present.

By setting these parameters, Section 23 creates a standardised approach to timing issues, helping to avoid disputes over when a message was received or sent. This is especially

²³¹ Section 22(2)(a)-(d) of the Consumer Protection Act 68 of 2008.

²³² K Cooper op cit note 53 at 93.

²³³ Victoria OB “#Ad-vice for influencers and brands: how to comply with CAP's new influencer's guide” (2019) 30(1) *Entertainment Law Review* 12.

relevant in disputes where timing affects the enforcement of rights, such as deadlines for acceptance or cancellation of contractual offers.

Section 24 deals with the expression of intent through electronic communications, confirming that an electronic message that demonstrates intent has the same legal standing as a physical statement of intent.²³⁴ This allows parties to express acceptance, offers, or other contractual intentions electronically, provided that such communication clearly expresses the party's intent. This provision is pivotal for contractual certainty in electronic transactions. By recognizing that a digital signature, click of a button, or even specific wording can indicate intent, Section 24 enables individuals and businesses to transact efficiently online while retaining the legal safeguards traditionally associated with written agreements.

In terms of section 43 of ECTA, the disclosure of the material characteristics of a product is information that is crucial to the decision process of a consumer.²³⁵ If a consumer is inhibited from reaching an informed choice, such inhibiting conduct can amount to a misleading representation in relation to the properties of the product. It requires suppliers in electronic transactions to disclose key information, including contact details, pricing, terms of the transaction, and cancellation procedures. This transparency mandate ensures that consumers are well-informed before completing a purchase online, providing them with essential details to make informed decisions. The section's intent is to protect consumer rights in digital transactions by making it more difficult for suppliers to engage in deceptive practices. By mandating transparency, Section 43 aligns with global e-commerce standards, fostering trust in digital marketplaces and encouraging more widespread participation in online commerce.

Section 29 regulates cryptography service providers, requiring them to register with a governmental authority if they offer cryptography services to the public.²³⁶ This regulation is intended to ensure that entities involved in providing encryption tools for securing electronic transactions are accountable and meet prescribed standards for privacy and security.²³⁷ As mentioned in Chapter 2, this is essential for protecting sensitive data in digital communications, especially in e-commerce, banking, and government interactions. The registration requirement would enhance consumer trust and enables oversight to maintain a secure digital environment. It also establishes accountability, ensuring that cryptographic

²³⁴ Section 24 of the Electronic Communications and Transactions Act 25 of 2002.

²³⁵ Section 43 of the Electronic Communications and Transactions Act 25 of 2002.

²³⁶ Section 29 of the Electronic Communications and Transaction Act 25 of 2002.

²³⁷ Ibid.

tools used in South Africa's digital market comply with standards that protect user data against unauthorised access or tampering.²³⁸

Lastly, in terms of section 41 governs unsolicited electronic communications, commonly referred to as "spam."²³⁹ The section allows recipients of unsolicited communications the right to opt-out from receiving such messages and mandates that senders must cease communications if the recipient expresses this preference.²⁴⁰ It is clear that by providing individuals with control over their communication, section 41 creates space for a more respectful marketing practice.

Furthermore, in Chapter 2 it was mentioned that when an individual chooses to transact online, a transaction falls under the ambit of e-commerce. If a consumer chooses to purchase a product after viewing an influencer's marketing post, such action may be considered an electronic transaction.²⁴¹ Hence, the product information disclosed should be transparent in all material aspects and should be disclosed in a manner that is unambiguous.

4.4 Influencer contracts

An agreement concluded between a business and an influencer would ensure that ethical and legal compliance is maintained.²⁴² Further, it inadvertently adds a layer of protection over consumers. In drafting the agreement, the following clauses should be considered:

4.4.1. Jurisdiction clause:

Jurisdiction is defined as the power or competency of a court to adjudicate over a matter in dispute.²⁴³ In terms of influencer marketing, one of two methods may be used in order to determine which court will bear jurisdiction. First, a court that is located in the area in which a Defendant or Respondent reside will have jurisdiction.²⁴⁴ If a business operates or an influencer is *domiciled* within a specific area (and such party is the Defendant or Respondent

²³⁸ Section 29(3) of the Electronic Communications and Transaction Act 25 of 2002.

²³⁹ Section 41 of the Electronic Communications and Transaction Act 25 of 2002.

²⁴⁰ Van der Merwe et al *Information and Communications Technology Law* op cit note 99 at 161-4.

²⁴¹ Van der Merwe et al *Information and Communications Technology Law* op cit note 99 at 161-3

²⁴² Ibid.

²⁴³ Snail S 'An overview of South African e-consumer law in the context of Electronic Communications and Transactions (part 2)' ()15(1) *The quarterly law review for people in business* 5.

²⁴⁴ Jones T Courts' Jurisdiction' *De Rebus Nov* 2006 at 26

within the dispute), the court that has jurisdiction over such area may adjudicate on the matter.²⁴⁵

This rule aligns with international public law, which states that a country has jurisdiction to adjudicate over matters that involve its citizens and juristic entities that fall within its borders.²⁴⁶ It is noted that not all parties to an influencer contract may be *domiciled* or operate within the borders of SA. In this instance, a contract should contain a clause that bridges this issue. First, the influencer and business can agree to a country that will bear jurisdiction should a dispute arise. This country should either be a place where the influencer is *domiciled* or where the business operates.²⁴⁷

Secondly, an influencer and business may choose not to elect a country of jurisdiction. While such is permitted, it is not ideal. If a dispute were to arise between the parties to which legal recourse is needed, the influencer and business will face a “conflict of laws” situation. Presently, there is no judgement where an eContract faced the issue of jurisdiction, although this does not mean that the issue will never arise in the future. If such an instance were to occur, the *lex contractus* principle should apply.²⁴⁸ Accordingly, the last place where the most recent contractual act was performed would have jurisdiction.²⁴⁹ Even so, the application of this principle may become another issue to arise between the parties.

Therefore, it is respectfully submitted that the following wording should be considered when drafting a jurisdiction clause in a standardised influencer contract:

“The parties agree that the country of XXX will have jurisdiction to adjudicate over disputes which arise from this agreement, failing which, jurisdiction shall be granted to the place of where the most recent contractual duty was performed.”.

The inclusion of the above clause or one of a similar nature may be used to avoid a jurisdictional issue.

4.4.2. Ownership of content clause:

²⁴⁵ Jones T Courts’ Jurisdiction’ De Rebus Nov 2006 at 26

²⁴⁶ Snail S op cit note 210 at 6.

²⁴⁷ Ibid.

²⁴⁸ *Kergeulen Sealing and Whaling Co Ltd v Commissioner for Inland Revenue* 1939 AD 487.

²⁴⁹ Snail S ‘op cit note 210 at 5. See also *Russian Telephone Company v Sony. Ericsson* (2012) Mobile Communications Rus (Resolution of the Supreme Commercial Court Presidium 19 June 2012 No 1831/12).

Influencers are given the creative freedom to create and edit the content that is posted on social media.²⁵⁰ Instances where a business creates a social media influencer marketing post are rare.²⁵¹ This is because a post created by a business may be perceived as ingenuine. In other words, ownership over influencer marketing content between the business and influencer belongs to the influencer, subject to the business retaining full editorial rights over the post.²⁵² To this end, a business may use the influencer's content solely for purposes of the contract. Therefore, the contract should contain a clause that gives effect to such.

4.4.3 Regulatory compliance clause

The agreement should specify that influencers bear the responsibility of familiarising themselves with the ARB's SMC. This clause should detail the extent to which the advertorial disclosure requirement should be satisfied, including what photos, videos, and captions should be included, that the caption '#ad' should be placed at the beginning of the post to use the social media's influencer marketing identifiers, and how often these disclosures should be repeated within the post's content if such content is in the form of a video.²⁵³

4.4.4. Breach of contract clause

A breach of contract clause will apply in instances where a party fails to carry out an obligation that arose from the standardised influencer marketing contract.²⁵⁴ As a result, the aggrieved party is entitled to initiate litigation proceedings against the breaching party for the recovery of damages that may have been incurred or request that the court order the breaching party to perform in terms of the agreement.²⁵⁵ It is respectfully submitted that a clause of this nature may be drafted as:

"Where a party is found in breach of this contract, the aggrieved party may initiate litigation proceedings against the party in breach".

4.5. The CPA

The CPA is the most comprehensive piece of legislation dedicated towards consumer protection and consumer protection rights within the Republic of South Africa. It was

²⁵⁰ Ruiz-Gomez op cit note 48 at 15.

²⁵¹ Ibid.

²⁵² Groen M op cit note 137 at 129 -130. See also Clause 6.3 of the Advertising Regulatory Board's Social Media Code (Appendix K), 2019.

²⁵³ Ibid.

²⁵⁴ Christie *The Law of Contract in South Africa* 7 ed (2016).

²⁵⁵ Christie *The Law of Contract in South Africa* 7 ed (2016).

designed to address the historical economic inequalities of the past by creating a system that protects the present socially and economically vulnerable members of society.²⁵⁶ The CPA aims to afford equal economic rights to all consumers (with a particular interest centered around vulnerable consumers), to deter or limit unethical business practices, provide redress for such practices and to ensure a transparent, accessible, and fair competitive business environment.²⁵⁷

A large percentage of the South African population has a low education performance rate, a high illiteracy rate, and falls within the unemployment sector.²⁵⁸ These individuals are considered to be vulnerable consumers and as such, are prone to becoming victims of an influencer's deceptive and misleading advertising conduct.²⁵⁹ As mentioned earlier in this chapter, influencers are required to ensure that marketable content is readily identifiable as such by using the caption #ad.²⁶⁰ If an influencer does not comply with this requirement, vulnerable members of society may find difficulty in distinguishing between the honest opinions of an influencer and those that had been said as a result of a promotional campaign.

To this end, the provisions of sections 29 and 41 of the CPA may be applied within the influencer marketing industry in order to protect vulnerable members of society. Accordingly, section 29 of the CPA is responsible for creating the general standards by which all businesses (and by extension, influencers) are to market products.²⁶¹ Section 29 prohibits a business or influencer from disseminating deceitful, fraudulent, or misleading marketing content during the ordinary course of business²⁶². It further prohibits the conduct of a business or an influencer that is likely to create a false, misleading, or deceptive impression regarding a product in the eyes of the consumer.²⁶³ In establishing whether an advertorial falls within this category, one should consider (a) the nature, properties and advantages achieved through the use of the product, (b) the agreed manner within which the product is to be

²⁵⁶ Preamble read together with section 3 of the Consumer Protection Act 68 of 2008.

²⁵⁷ Section 3 of the Consumer Protection Act 68 of 2008.

²⁵⁸ Khuluvhe M Adult Illiteracy in South Africa Fact Sheet available at <https://www.statista.com/topics/9296/employment-in-southafrica>, accessed on 15 January 2024.

²⁵⁹ Section 3 of the Consumer Protection Act 68 of 2008.

²⁶⁰ *Pierre Cassuto v Ithuba Holdings RF (Pty) Ltd* (2022) file number 2203 4.

²⁶¹ Section 29 of the Consumer Protection Act 68 of 2008.

²⁶² Mupangavanhu Y & Kerchhoff D 'Online Deceptive Advertising and Consumer Protection in South Africa-The Law and its shortcomings' (2023) *De Jure* 97-8.

²⁶³ *Ibid.*

supplied, (c) the price of the product including the competitor prices, (d) a sponsorship event and (e) any other material aspect deemed relevant.²⁶⁴

Each of these categories speaks to the material aspects of a marketing strategy.²⁶⁵ This means that for an advertisement to contain a material issue, it must be so serious that it may affect the ability of the consumer to make an informed purchase decision.²⁶⁶ In other words, but for the manner in which the product was represented, the consumer would not have purchased the product. If so, this would mean that a business or an influencer did not disseminate fair and honest marketing content. Therefore, section 29 casts a wide net over all forms of marketing, including influencer marketing, and sets the standard within which all requisite players are to abide so that fair marketing practices, competition compliance, and consumer protection are maintained.

On the other hand, section 41 sets out a non-exhaustive list of instances where the conduct of a business or an influencer may result in false, misleading, or deceptive representations.²⁶⁷ Such conduct is wide and open to interpretation.²⁶⁸ To this end, section 41 of the CPA is applicable. Section 41 contains a non-exhaustive list of instances where the conduct of suppliers can result in false, misleading, or deceptive representations.²⁶⁹ The type of conduct that falls within this list is wide and has an open interpretation.²⁷⁰ Section 41(1) focuses on the material deceit of a product. It determines whether the representation made is misleading or deceptive in relation to the qualities, durability, or characteristics of the product.²⁷¹ In reaching this conclusion, one should note that there is no distinct manner in which these representations can be made. This means that the representation can be explicit or implicit. It may include a broad interpretation of a fact, which may lead to the misrepresentation being seen as an opinion instead of a statement of fact.²⁷²

²⁶⁴ Section 29(b) of the Consumer Protection Act 68 of 2008.

²⁶⁵ Naudé & Eiselen Commentary on the Consumer Protection Act (2015) 41-6.

²⁶⁶ Ibid.

²⁶⁷ Section 41 of the Consumer Protection Act 68 of 2008.

²⁶⁸ Naudé & Eiselen Commentary on the Consumer Protection Act (2015) 29- 33.

²⁶⁹ Section 41(3) of the Consumer Protection Act 68 of 2008.

²⁷⁰ Naudé & Eiselen Commentary on the Consumer Protection Act (2015) 29- 33.

²⁷¹ Mupangavanhu Y & Kerchhoff D op cite note 229 at 270.

²⁷² *Feinstein v Niggli* 1981 (2) SA 684 (A) 695 D-G. In other words, it may amount to puffery.

A business is not entitled to disclose all information relating to a product or disclose such information in a manner that can be misinterpreted by a consumer.²⁷³ The latter conduct is actionable if a consumer relied on this information and it resulted in detriment.²⁷⁴ In this regard, one would also have to consider the intention behind the representation, meaning that the business had to have been aware that the representation made was misleading, false, or deceptive.²⁷⁵ Should this be the case, then onus lies on the consumer to prove that the business or influencer was aware that the representation was misleading and deceptive.²⁷⁶

Section 41(2) provides that a third-party representative acting on behalf of a business should not falsely represent themselves.²⁷⁷ An influencer is a third-party representative. This means that an influencer should not hide a material relationship with a business if he or she were hired to promote a product.²⁷⁸ Accordingly, the same acts in which a business was prohibited shall equally apply to influencers.²⁷⁹ Failure to do so may result in a consumer seeking redress against the business and influencer in a consumer tribunal court.

Given the difficulty in establishing the line between fact and opinion, it may be difficult for a consumer to show that the influencer knew that his or her representation was misleading. As Naudé correctly mentions, there are instances where the representation can be interpreted so broadly that it may be seen as opinion and not fact.²⁸⁰ Influencers may be given creative freedom without a business prescreening, the representation which can create issues when a consumer has to distinguish whether the contents of a post is fact or opinion.²⁸¹ Despite this shortfall, the open-endedness of these provisions has allowed the CPA to adapt to the changing circumstances in society, which in this case is social media influencer marketing.

4.6. Section 8 of the Cybercrimes Act

The Cybercrimes Act is a piece of legislation that has made significant strides regarding the regulation of crime within cyberspace. Signed into law in June 2021, the Cybercrimes Act

²⁷³ Mupangavanhu Y & Kerchhoff D op cite note 229 at 270. See also sections 43 of the Electronic and Communications Act 25 of 2002 read together with sections 23 and 24 of the Consumer Protection Act 68 of 2008.

²⁷⁴ Ibid.

²⁷⁵ Mupangavanhu Y & Kerchhoff D op cite note 229 at 29-10.

²⁷⁶ Ibid.

²⁷⁷ Section 41(2) of the Consumer Protection Act 68 of 2008.

²⁷⁸ Bannigan M & Shane B 'Towards Truth in Influencing: Risks and Rewards of Disclosing Influencer Marketing in the Fashion Industry' (2019) 64(3) *New York Law School Law Review* 261.

²⁷⁹ Section 41(2)(b) of the Consumer Protection Act 68 of 2008.

²⁸⁰ Naudé & Eiselen Commentary on the Consumer Protection Act (2015) 41-43.

²⁸¹ Ruiz-Gomez op cit 48 note at 15.

was established to address cyber-based offences within the Republic of South Africa and to protect individuals as well as juristic entities from such offences.²⁸² It is important to note that the Cybercrimes Act does not specifically define the meaning of a cybercrime. The ever-evolving nature of cyberspace creates difficulty for the legislature to provide an authoritative definition; however, there are academics who have attempted to outline the meaning of a cybercrime.²⁸³

Snail and Cassim describe a cybercrime as a criminal offence that has been committed through the means of the internet or technology.²⁸⁴ By this measure, the cyberspace is used as a tool in the commission of the crime or is the object of the crime itself.²⁸⁵ This means that the theft of a computer (in terms of hardware), the theft of software on a computer, or the use of the computer to manipulate data is a cybercrime.²⁸⁶ Accordingly, cybercrimes are classified as those that have originated from the cyberspace itself (such as data breaches) and those of which are common law crimes extended into the cyberspace (such as fraud and extortion).²⁸⁷ For this reason, the cyberspace is either used as the facilitator of the crime or is the target of the crime itself. For the purposes of this study, Section 8 of the Cybercrimes Act will be analysed and discussed.

Section 8(1) of the Cybercrimes Act prohibits the unauthorised access, interception, and interference with data and computer systems.²⁸⁸ This includes the altering, deleting, copying, or moving of data. It further criminalises the acquisition, possession, and dissemination of data with the intent to interfere with a computer system or network.²⁸⁹ In other words, the acts of altering, deleting, or fabricating digital information constitute data manipulation. Therefore, Section 8 does not merely prohibit the physical act of accessing data without proper authorisation but criminalises the possession, acquisition, or manipulation of data that could culminate in cyber fraud. Presently, data manipulation is often subtle and sophisticated

²⁸² Mabeka NQ 'The Application of Section 8 of Cybercrimes Act 19 of 2020 in Civil Procedure in South Africa is a Hailing Snow: A Comparative Studies between South Africa and United Kingdom' (2022) 5(2) *International Journal of Law and Public Administration* 13.

²⁸³ Cassim F 'Addressing the growing spectre of cybercrime in Africa: evaluating measures adopted by South Africa and other regional role players' (2011) *CISA* 124.

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*

²⁸⁶ Snail S, Musoni M 'An overview of cybercrime law in South Africa' (2023) 4 *International Cybersecurity Law Review* 301

²⁸⁷ *Ibid.*

²⁸⁸ Section 8(1) of the Cybercrimes Act 19 of 2020.

²⁸⁹ *Ibid.*

and uses advanced algorithms and artificial intelligence to evade the detection of such.²⁹⁰ For example, an individual could manipulate financial data in certain increments in order to avoid triggering alerts within a system, thereby committing fraud in a manner that appears genuine to standard monitoring systems. If the manipulation of such data were to occur through the use of a computer, then the common law crime of fraud becomes cyber fraud.

Cyber fraud is an offence involving the unlawful access to, or manipulation of, data with the intention to deceive its victim to their detriment.²⁹¹ On the other hand, common law defines fraud as an unlawful and intentional misrepresentation that can lead to actual or potential prejudice.²⁹² The difference between these definitions is that cyber fraud is executed through cyberspace and common law fraud is not necessarily executed in the same manner. Hence, the elements of cyber fraud in the context of Section 8 of the Cybercrimes Act are (a) the intention to defraud, (b) the making of a misrepresentation, (c) the use of a digital tool, and (d) unlawfulness.

In the case of *S v Van den Berg* 1991 (1) SACR 104 (T), Van den Berg was accused of unlawfully crediting a bank account with eight hundred rand. The court confirmed that such conduct can constitute the making of a fraudulent misrepresentation so long as there is an intention to deceive the other party to their detriment.²⁹³ Due to the fact that the transaction could not be properly justified, the court stated that the act committed by Van Den Berg amounted to fraud.²⁹⁴ It was explained that the electronic crediting of an account is no different than manually recording a false entry in a business's book of accounts.²⁹⁵ It could have been seen as a mistake; however, if an intention to deceive can be shown, then such an entry would amount to fraud.

The case of Van den Berg emphasises the importance that the act committed by the accused should not only be unlawful, but the intention must show that the commission of the act was to lead the other to their detriment. When considering this judgement against the legal

²⁹⁰ Mabeka NQ 'The Application of Section 8 of Cybercrimes Act 19 of 2020 in Civil Procedure in South Africa is a Hailing Snow: A Comparative Studies between South Africa and United Kingdom' (2022) 5(2) *International Journal of Law and Public Administration* 13.

²⁹¹ Cassim F 'Addressing the growing spectre of cybercrime in Africa: evaluating measures adopted by South Africa and other regional role players' (2011) *CISA* 124.

²⁹² Van der Merwe et al *Information and Communications Technology Law* op cit note 99 at 83.

²⁹³ *S v Van den Berg* 1991 (1) SACR 104 (T).

²⁹⁴ Supra.

²⁹⁵ Supra.

challenges mentioned in Chapter 3, it is evident that there is an overlap within the influencer marketing industry and fraud.

Businesses invest a significant number of resources in influencer partnerships and collaborations. The type of influencers that a business may choose to work with is generally based on the influencer's perceived reach, engagement, and credibility.²⁹⁶ This means that if an influencer were to manipulate their data in order to deceive businesses into paying higher rates of compensation or entering into contractual agreements based on false pretenses, it constitutes fraud.²⁹⁷ As mentioned in Chapter 3, the most common forms of data manipulation that have been identified within the influencer marketing industry are bots. In addition to bots, there are instances where influencers or marketing agencies have unlawfully accessed and altered backend data analytics to falsify performance reports. These types of acts constitute a cybercrime as devices, such as computers, distort cyber-collected information. As a result, Section 8 of the Cybercrimes Act is applicable as it aims to deter the malicious actions of those attempting to exploit data insights for competitive advantage.

As data becomes an increasingly valuable asset, its unauthorised manipulation can have far-reaching implications across a multitude of industries. Section 8 represents a crucial tool in the fight against cyber fraud by creating a standard that criminalises the unlawful acquisition and use of data. Therefore, the implications of Section 8 of the Cybercrimes Act within the influencer marketing industry relate to fraudulent conduct that distorts public trust and economic transactions.

Respectfully, the manipulation of an influencer's engagement data is no different than Person X falsifying the credentials within his curriculum vitae. Assuming that Person X is using the false credentials to procure an employment position, the submission of the false and manipulated information demonstrates an intention to deceive and is unlawful. Therefore, Person X's conduct amounts to fraudulent misrepresentation, and he would be found guilty on the charge of fraud. If he were to handwrite his false credentials, he is guilty of the common law crime of fraud, whereas if he were to use a software program to create and use the false information, he would be guilty of cyber fraud.

Hence, cyber fraud within the influencer marketing industry tends to implicate the influencer and the business. It is the business that employs and invests a substantial amount of resource

²⁹⁶ Goanta C op cit note 6 at 9

²⁹⁷ 1991 (1) SACR 104 (T).

into an influencer. If an influencer was employed based on manipulated metrics, then it is the business that is at risk of a significant financial loss. Further, Section 19 of the cybercrimes act read together with Section 276 of the Criminal Procedure Act 106 of 1977 provides that a court may impose an appropriate sentence (at its discretion) taking into account the charge and nature of the crime.²⁹⁸ Section 19 (4) allows a court to impose sentences for offences committed in terms of Sections 8, 9(1), (2), (10) or 11(2) of the Cybercrimes Act.²⁹⁹ This means that the business is entitled to recourse within the criminal court if he wishes to choose this route.

4.7. Conclusion

Despite the fact that South Africa does not have a piece of legislation dedicated towards the regulation of influencers and influencer marketing, the CPA, ECTA, Cybercrimes Act, and SMC provide a comprehensive layer of protection over the influencer, business, and consumer alike. At the heart of all the legal issues discussed is the act of misleading and deceiving a consumer to his or her own detriment. At this point in time, it is imperative that influencers and businesses familiarise themselves with the contents of the SMC in order to maintain a standard of legal and ethical compliance. The use of an influencer contract will assist in the deterrence of false, misleading, and deceptive advertising practices seen within the influencer marketing industry.

²⁹⁸ Section 19 of the Cybercrimes Act 19 of 2020. See also Section 276 of the Criminal Procedure Act 106 of 1977.

²⁹⁹ Section 19(4) of the Cybercrimes Act 19 of 2020.

CHAPTER 5

CONCLUSION

5.1. Conclusion

The ARB prides itself on creating an SMC that maintains an international standard.³⁰⁰ This standard places South Africa on equal footing with the advertising standards of countries such as the United States of America and the United Kingdom of Great Britain, Scotland, Wales, and Northern Ireland.³⁰¹ Consequently, this standard is advantageous to South Africa. It offers the ability to identify and anticipate legal and ethical issues in advance. This is because there are only five per cent of African influencers within the influencer marketing industry.³⁰² This means that South African influencers are able to avoid influencer marketing related issues by observing the manner in which first world countries had dealt with similar challenges.

As mentioned throughout this study, influencers have the ability to inspire and direct the thought processes of others.³⁰³ If influencers were to abuse this ability, a business's integrity and financial standing may be compromised. Influencers may abuse their influential qualities through the manipulation of performance metrics, recommending products under false pretenses and misleading consumers into purchasing products.³⁰⁴ These acts undermine the values of honesty and transparency that underpin the CPA as well as ARB's SMC.

Given the amount of content disseminated daily on social media, it is difficult to monitor all content for these abuses. This difficulty is furthered when a social media user's recommendation page constantly changes.³⁰⁵ It is unrealistic to consider monitoring all content disseminated on a popular social media platform, such as Tik Tok. Additionally, differentiating between influencers and popular persons on social media can be difficult, especially if the user is a first-time influencer or if the influencer is not verified.

³⁰⁰ Visagie J op cit note 175 at 2.

³⁰¹ Ibid.

³⁰² Werner Geyser The state of influencer marketing 2022: Benchmark Report available at <https://influencermarketinghub.com/influencer-marketing-benchmark-report-2022/>, accessed on 5 February 2023.

³⁰³ Gouncta C *Regulation of social media influencers* op cite note 46 at 1.

³⁰⁴ Dunn D op cit note 119 at 63.

³⁰⁵ Al-Zoubi MM op cit note 156 at 355.

It has been widely accepted that ignorance is not a defence in our law.³⁰⁶ However, since the ARB's SMC is administrative and supplementary by nature, it means that no serious consequence will follow its contravention.³⁰⁷ Ignorance regarding the content of the SMC may be claimed among influencers. Subsequently, these influencers may be required to amend or remove the content of the promotional post.³⁰⁸ Realistically, there are no definitive consequences within the influencer marketing industry that arise specifically from influencer marketing-based legislation. Rather, pieces of various statutory laws have been enabled and extended to incorporate the practices of the influencer marketing industry.

Another issue within this industry is the "eternal" nature of cyberspace. When content is posted onto a social media platform, an audience is able to interact with the post by liking, commenting, or sharing the post. If the ARB requires an influencer to remove the post, the post will be removed from the influencer's social media account. This is usually to prevent a greater number of individuals from interacting with the post; however, if an influencer's follower had shared the post prior to its removal, then its contents still exist within cyberspace and can still be shared.

Therefore, the question that remains is whether there needs to be more stringent laws in place to govern the influencer marketing industry. The truth of the matter is that there is a possibility that the self-regulation of the influencer marketing industry may not adequately regulate influencers in the future. The ARB does play a vital role in protecting consumers, but the influencer marketing industry constantly fluctuates. While it is agreed that the current manner in which influencers are controlled seems to be lax, creating stringent laws may harm the industry as a whole. If rigid laws were to be created, then the creativity and growth of influencers and social media would be hindered. If the law remains this lax, there will never be proper control. South Africa is in the driver's seat. Hence, South Africa should create a comprehensive piece of legislation dedicated towards the regulation of influencer marketing. This piece of legislation would need to strike a balance between flexibility and rigidity. In doing so, it will be easier to navigate legal and ethical issues relating to influencer marketing.

5.2.1. Recommendation 1: Education workshop

³⁰⁶ Van der Merwe et al *Information and Communications Technology Law* op cit note 99 at 169.

³⁰⁷ Skalbani S op cit note 12 at 677.

³⁰⁸ Ibid.

As mentioned in Chapter 4, the ARB is South Africa's independent advertising regulator.³⁰⁹ As the ARB has continued to perform the duties as those of its predecessor, it has expanded its functions to incorporate providing ethical marketing guidance to influencers.³¹⁰ Part of its expansion includes the creation of educational initiatives. The ARB evaluates data regarding popular advertising trends as well as its associated issues. Following the assessment of this data, an annual report released highlights the pertinent aspects of the assessment.³¹¹ Baring the above in mind, it is recommended that the ARB expand its educational initiatives.

First, the ARB should engage in a conversation regarding influencer marketing on specific social media platforms. Every social media platform hosts a dominant age-related generation. Presently, the appealability of the influencer vocation is prevalent among the younger Generation Z members of society in comparison to their Millennial and Boomer peers.³¹² Younger influencers are active on social media platforms such as Tik Tok, Instagram, and YouTube.³¹³ On the other hand, ARB is primarily active on Twitter and Facebook.³¹⁴ It is recommended that the ARB live stream influencer workshops on platforms that cater for the majority of the younger population. In doing so, influencers, youth, and the general public may become better informed and aware of the legal and ethical standards embedded within the SMC.

Secondly, it is common knowledge that influencers tend to gather in large groups at influencer marketing events.³¹⁵ The ARB can host an influencer event dedicated to informing influencers about the requisite ethical standards that must be maintained. Additionally, it will assist the ARB with monitoring and reviewing problematic advertisements. This type of event can encourage participation within the influencer marketing industry. As a result, influencers, competitors, and businesses can play an active role in identifying and mitigating new issues within the industry.

5.2.2. Recommendation 2: Establishing an Oversight Body for Digital Advertising

³⁰⁹ Visagie J op cit note 175 at 2.

³¹⁰ Ibid.

³¹¹ Ibid.

³¹² YPulse "Stats that show influencers are as influential as ever" (2020) 3 YPulse Daily. The article is available at 3 Stats That Show Influencers Are as Influential as Ever - YPulse, accessed on 27 September 2022.

³¹³ Ibid.

³¹⁴ Facebook Advertising Regulatory Board available at <https://m.facebook.com/p/advertising-regulatory-board-1000575967663158/>, accessed on 16 October 2022.

³¹⁵ Cooper K op cit note 53 at 76.

A second recommendation is to establish an oversight body dedicated to digital advertising and influencer marketing. Such a body would be responsible for monitoring influencer marketing practices, enforcing disclosure standards, and investigating consumer complaints related to misleading endorsements. This regulatory body could work closely with the ARB to establish a comprehensive code of conduct for influencers, brands, and agencies.

The oversight body could also maintain a certification program for influencers, brands, and marketers who complete training on ethical advertising practices, transparency, and regulatory compliance. A certification program would raise industry standards, promoting ethical and responsible influencer marketing in South Africa. Additionally, it would encourage brands to prioritise partnerships with influencers who demonstrate a commitment to integrity and transparency.

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Miss Gabrielle Michaela Naidoo (218013245)
School Of Law
Pietermaritzburg

Dear Miss Gabrielle Michaela Naidoo,

Original application number: 00017788

Project title: Unchartered waters: Mapping the potential legal concerns and current legislative measures governing social media influencer marketing in South Africa.

Exemption from Ethics Review

In response to your application received on 29 September 2022, your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW**.

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:

Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,



Mr Matthew Blain Kimble
obo Academic Leader Research
School Of Law

UKZN Research Ethics Office
Westville Campus, Govan Mbeki Building
Postal Address: Private Bag X54001, Durban 4000
Website: <http://research.ukzn.ac.za/Research-Ethics/>