

# In the Business of Influence: Contractual Practices and Social Media Content Monetisation

Catalina Goanta | Isabelle Wildhaber\*

*In 2018, 300 hours of content were uploaded on Youtube every minute. Most of it is generated by regular people who share content for a living, and those who amass enough followers are known as influencers. Traditionally, media laws have controlled aired content. Nowadays, broadcasting decentralisation and social media trends such as influencer marketing challenge the rationale and application of these rules. In practice, content is controlled by private parties, through contracts concluded in the monetisation supply chain, giving contract law a critical angle to tackle the peer economy of which influencers are part. Contractual transactions are ripe*

*with tensions: Influencers must constantly entertain followers, yet they depend on brands to monetise their popularity. As monetisation is inherently transactional, contracts are powerful windows into the mechanisms which exercise content control. This paper contributes to the debate on the regulation of social media influencers by examining the supply chain and proposing legal classifications for the type of contracts concluded therein according to Swiss law, as well as by discussing potential contractual vulnerabilities for the parties involved in these transactions.*

## Table of contents

- I. Introduction
- II. The Monetisation Supply Chain
- III. Assessing the Nature of Agreements Used in Social Media Content Monetisation
  - 1. Possible Qualifications of Influencer Agreements
  - 2. Consequences of Nature of Agreements
- IV. Potential Contractual Vulnerabilities
  - 1. Capacity to Act
  - 2. Breach of Contract
- V. Conclusion

## I. Introduction

In 2018, 300 hours of content were uploaded on Youtube every minute. Most of it is generated by regular people who share content for a living. Those who amass enough followers are known as influencers. Revered by vast fan-bases for authenticity and relatability, influencers monetise popularity through advertising. As peers not bound by professional standards, influencers rarely have editorial policies, generating huge amounts of content which may be unlawful in various ways. Illustrations include pro-

moting racist, anti-Semitic content,<sup>1</sup> supporting harmful products,<sup>2</sup> making health-related claims,<sup>3</sup> misleading consumers by not disclosing endorsements,<sup>4</sup> or negligently promoting consumer fraud.<sup>5</sup>

Traditionally, media laws have controlled aired content.<sup>6</sup> Nowadays, broadcasting decentralisation and social media trends such as influencer marketing challenge the rationale and application of these rules.<sup>7</sup> In practice, content is controlled by private parties, through contracts concluded in the monetisation supply chain, giving contract law a critical an-

<sup>1</sup> A. Campbell, PewDiePie's Excuse For Promoting Racist YouTube Content Includes More Racist Content, Huffington Post, 12.11.2018, <<https://www.huffpost.com>>.

<sup>2</sup> K. Faircloth, Inside the Big Instagram Business of Shilling Detox Teas, Jezebel, 28.4.2016, <<https://jezebel.com>>.

<sup>3</sup> Advertising Standards Authority UK Ruling on Nomad Choice Pty Ltd t/a Flat Tummy Tea, 23.9.2017, <<https://www.asa.org.uk>>.

<sup>4</sup> Italian Competition Authority, L'Antitrust chiude anche la seconda moral suasion su influencer e marchi, ma avvia istruttoria per possibili promozioni occulte, press release, 11.12.2018, <<http://www.agcm.it>>.

<sup>5</sup> Federal Trade Commission, CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers, press release, 7.9.2017, <[www.ftc.gov](http://www.ftc.gov)>.

<sup>6</sup> See the project of a future Swiss Law on Electronic Media (Bundesgesetz über elektronische Medien, BGeM), June 2018, <<https://www.uvek.admin.ch>>. In European law, the revised Audiovisual Media Services Directive (Directive 2010/13/EU) governs media law, see European Parliament, COM(2016)0287.

<sup>7</sup> Erläuternder Bericht zum Entwurf eines neuen Bundesgesetzes über elektronische Medien, Bern Juni 2018, <<https://www.admin.ch>>.

\* Dr. Catalina Goanta, LL.M, M.Sc., Assistant Professor in Private Law at Maastricht University; Prof. Dr. Isabelle Wildhaber, LL.M., Full Professor for Private and Business Law at University of St.Gallen. All websites were last checked on 31.5.2019.

gle to tackle the peer economy of which influencers are part. Contractual transactions are ripe with tensions: Influencers must constantly entertain followers, yet they depend on brands to monetise their popularity. Content reach is subject to algorithmic policies by platform, in turn stuck between generating advertising revenue and eliminating controversy. In the process, social media platforms participate in the commodification of reality, replacing editorial judgement with mathematical measures of popularity.<sup>8</sup> Platforms have a loose grasp over the expression of harmful content, and this is why markets and societies alike may end up being distressed. Controversial behaviour affects influencer and company reputation, as well as consumer rights and trust, because of the widespread popularity of influencers.

So far, legal scholarship on social media influence has mostly focused on political speech, fake news and democracy,<sup>9</sup> and deceptive practices like non-disclosures.<sup>10</sup> The latter body of papers is often doctrinal<sup>11</sup> and generally US-centric.<sup>12</sup> Disclosures are a subject of inquiry in other disciplines as well,

such as communication<sup>13</sup> and computer science,<sup>14</sup> and are complemented by a wealth of marketing literature on word-of-mouth<sup>15</sup> or influencer advertising.<sup>16</sup>

The influencer phenomenon is highly complex given its scale and business models. Existing research highlights some relevant aspects of this phenomenon, yet an overview of the parties involved in the monetisation influencer content, as well as their contractual practices is lacking.

As monetisation is inherently transactional, contracts are powerful windows to the mechanisms which exercise content control. This paper contributes to the debate on the regulation of social media influencers by examining the supply chain and proposing legal classifications for the type of contracts concluded therein, as well as potential contractual vulnerabilities of the parties.

In the first part, our paper describes the different stakeholders in the monetisation supply chain, characteristic to the industry as a whole (II.). The second part analyses the nature of the transactions undertaken by the identified parties: how influencer agreements can be classified according to Swiss law, and what the general obligations of the parties are, depending on possible classifications (III.). The third part examines contractual vulnerabilities arising out of transactions around monetised content, which are at odds with Swiss law (IV.). Lastly, a conclusion is presented (V.).

<sup>8</sup> See for instance the work of *T. Gillespie*, *Custodians of the Internet: Platforms, Content Moderation, and the Decisions that Shape Social Media*, New Haven: Yale University Press 2018.

<sup>9</sup> *A. Allemanno*, *How to Counter Fake News? A Taxonomy of Anti-fake News Approaches*, *European Journal of Risk Regulation* 2018, Vol. 9, Issue 1, pp. 1–5; *S. Vaidhyanathan*, *Antisocial Media: How Facebook Disconnects Us and Undermines Democracy*, Oxford: Oxford University Press 2018.

<sup>10</sup> *S.C. Boerman/G. van Noort/N. Helberger/C.J. Hoofnagle*, *Sponsored Blog Content: What do the Regulations Say? And what do Bloggers Say?*, *Journal of Intellectual Property, Information Technology and E-Commerce Law* 2018, Vol. 9, pp. 146–159.

<sup>11</sup> *C. Goanta*, *How Technology Disrupts Private Law: An Exploratory Study of California and Switzerland as Innovative Jurisdictions*, *TTLF Working Papers* 2018, Vol. 38, Stanford Law School; *F. Henning-Bodewig*, *Influencer-Marketing – der “Wilde Westen des Werbens”?*, *Wettbewerb in Recht und Praxis* 2017, Vol. 12, pp. 1415–1421.

<sup>12</sup> *L.E. Bladow*, *Worth the Click: Why Greater FTC Enforcement Is Needed to Curtail Deceptive Practices in Influencer Marketing*, *William & Mary Law Review* 2018, Vol. 59, Issue 3, p. 1123–1164; *M. Bernstein*, *How to Avoid the FTC Not Liking Your Next Campaign*, *Managing Intellectual Property* 2016, Vol. 262, pp. 49–53.

<sup>13</sup> *M. De Veirman/V. Cauberghe/L. Hudders*, *Marketing through Instagram influencers: the impact of number of followers and product divergence on brand attitude*, *International Journal of Advertising* 2017, Vol. 36, Issue 5, pp. 798–828.

<sup>14</sup> *A. Mathur/A. Narayanan/M. Chetty*, *Endorsements on Social Media: An Empirical Study of Affiliate Marketing Disclosures on YouTube and Pinterest*, in: *Proceedings of the ACM on Human-Computer Interaction* 2018, Vol. 2, p. 6.

<sup>15</sup> See for instance *V. Blazevic/W. Hammedi/I. Garnefeld/R.T. Rust*, *Beyond Traditional Word-of-Mouth: An Expanded Model of Customer Influence*, *Journal of Service Management* 2013, Vol. 24, Issue 3, pp. 294–313.

<sup>16</sup> *D. Brown/N. Hayes*, *Influencer Marketing: Who Really Influences Your Customers?*, Oxford: Routledge 2008; *M. Jahnke*, *Influencer Marketing für Unternehmen und Influencer: Strategien, Plattformen, Instrumente, rechtlicher Rahmen. Mit vielen Beispielen*, Wiesbaden: Springer Gabler 2018.

## II. The Monetisation Supply Chain

When Youtube was founded in 2005, it was a platform where users would upload home videos made with the early versions of affordable personal cameras.<sup>17</sup> At that time, while the idea of creating a platform where users could share such videos with the world – essentially broadcasting their own content via the world wide web – was ground-breaking, the founders of Youtube struggled with finding business models that would make this activity a financial success. After Youtube was purchased by Google in 2006, the answer to this struggle came in the form of the same business model adopted, later on, by other social media platforms, namely free services powered by advertising. Youtube became a vehicle for Google's AdSense programme, and thus users uploading videos on the platform could choose to display ads and commercials affiliated with their content (see Figure 1.2 below). This model is a mere replication of the more traditional advertising schemes used by TV channels. Yet the success of such schemes was previ-

ously based on their context, namely not giving users the possibility of skipping them while on the channel. TV viewers have been dreading commercial breaks to such an extent that new services were created on the basis of the need to avoid them.<sup>18</sup> Booming TV advertising markets were thus built on the control of aired content by TV channels. To date, displaying advertising space on social media platforms has become a lot more subtle.

With viewers able to skip commercials with the click of a button, it comes as no surprise the marketing industry has been in search of new models of advertising that would speak to new generations of users who spend more and more time on social media. This led to the rise of influencer marketing. The phenomenon entails regular users or peers on social media platforms becoming popular, and subsequently using their popularity to endorse goods and services in exchange for money or other benefits. Depending on their following, influencers may be labelled as mega influencers (millions of followers),<sup>19</sup> micro in-

<sup>17</sup> M. R. Dickey, The 22 Key Turning Points In The History Of YouTube, Business Insider, 15.2.2013, <<https://www.businessinsider.com>>.

<sup>18</sup> A.K. Hagerty, Embedded Advertising: Your Right in the TiVo Era, John Marshall Review of Intellectual Property Law 2009, Vol 9, Issue 1, p. 160.

<sup>19</sup> K. Ismail, Social Media Influencers: Mega, Macro, Micro or Nano, CMS Wire, 10.12.2018, <<https://www.cmswire.com>>.

fluencers (hundreds of thousands of followers),<sup>20</sup> or nano influencers (thousands/tens of thousands of followers).<sup>21</sup> The first regular Internet users who became mega influencers and have been creating content for the past decade often reached fame randomly, through a combination of passion (e.g. enjoying speaking to an audience online; learning new skills such as video-editing), consistency, and luck (e.g. videos going viral). In more recent times, given the financial and reputational success enjoyed by the pioneers of blogging, vlogging and photo sharing, influencer marketing has led to a thriving business ecosystem. Apart from influencers themselves and the platforms they are active on, influencer/talent agencies and PR/advertising agencies currently intermediate transactions between brands buying advertising services and influencers who sell it (see Figure 2 below).

According to market research, we can identify three main models regarding intermediation that

characterise the transactions taking place in the supply chain:<sup>22</sup>

- (i) *Bilateral use of intermediation*: both brands and influencers are represented by advertising or PR agencies, and respectively talent or influencer agencies.
- (ii) *Unilateral use of intermediation*: either the brand or the influencer use intermediation (see Figure 2 for the latter example).
- (iii) *No intermediation*: brands and influencers are in direct contract.

Parties often transact using the framework of so-called “influencer agreements”, and various assumptions can be made on the basis of how they are used in the three supply chain models identified above. In legal practice, any contract, be it sale, rental, employment, etc. represents the basis of the transaction between parties. When contractual formalities are used, potentially given the need for pre-contractual negotiations or evidence of concluding the contract, standard terms or guidelines are often used. The par-

<sup>20</sup> B. Wissman, Micro-Influencers: The Marketing Force Of The Future?, Forbes, 2.3.2018, <<https://www.forbes.com>>.

<sup>21</sup> R. Godwin, The rise of the nano-influencer: how brands are turning to common people, The Guardian, 14.11.2018, <<https://www.theguardian.com>>.

<sup>22</sup> Linquia, The State of Influencer Marketing 2018, <<http://www.linquia.com>>; K. Gallagher, The Influencer Marketing Report: Research, strategy & platforms for leveraging social media influencers, Business Insider, 24.9.2018, <<https://www.businessinsider.com/>>.

ty drafting standard terms is supposed to have developed sufficient know-how in order to protect itself and the transaction. In the influencer industry, the bigger the market role, the more likely it is a market actor who has sufficient resources to invest in legal formalism (e.g. using lawyers/in-house counsellors to draft contracts). As influencer marketing is currently embracing nano influencers more and more, we can assume the difference in bargaining power between a large brand (whether represented by a PR agency or not) and a small influencer only increases. For this reason, there has been a proliferation of influencer agencies managing the affairs of individual influencers, and sometimes also providing or negotiating influencer agreements.

A core object of influencer agreements is advertising. There are four popular business models used by influencers to transform photos or videos in advertising deliverables:

- (i) *Affiliate marketing*: The agreement between an influencer and a brand stipulates that the influencer has to communicate a discount code to their audience while promoting a product or service. The code is used to record the volume of transactions successfully routed by the influencer, who gets paid a given commission (e.g. 10%) relative to the value of each transaction concluded using the code.
- (ii) *Paid endorsements*: The brand agrees with the influencer on a set of deliverables (e.g. a specific number of photos advertising goods or products; or a specific time-frame for a video review, for which the influencer is paid a sum of money). This also extends to brand representation deals, where the influencer becomes a brand ambassador and has to illustrate their support in social media posts.
- (iii) *Barter*: The brand provides the influencer with goods and/or services (e.g. clothes, make-up, games, but also trips, hotel stays, dinners), in exchange for posts on social media where the influencer expresses their endorsement of these goods and/or services. Although this type of agreement may present the features of an exchange contract, the legal requirements to this end are not met, since an exchange cannot involve services, but only objects.
- (iv) *Direct selling*: Influencers establish themselves as a legal entity which they use to directly provide their audience with goods (e.g. branded

merchandise; own products made in collaboration with other companies) or services (e.g. access to platforms where users can exchange videogame weapon skins).

Monetising social media content through the use of influencer marketing depends on several market factors. These factors include the size of the influencer's following, the nature of the industry, or the willingness to branch out into as many business models as possible. In addition, the control of generated content is in the hands of the party with more bargaining power. As a coveted advertising partner, a mega influencer (e.g. 16 million followers on Instagram) will very likely have at least one company, with business and legal know-how, and can close very lucrative deals by charging up to \$14000 per Instagram post.<sup>23</sup> It is likely that in their contracting practices, mega influencers will have enough bargaining power vis-à-vis average business partners to negotiate or even impose contractual terms. Aspiring influencers who do not have that many deals to choose from, tend to accept any collaboration that may come their way. In doing so, influencers end up concluding agreements informally (e.g. via Direct Messages on social media or via e-mail), and without circulating, negotiating and signing a written influencer agreement. Such informal agreements are valid contracts nevertheless, and the legally binding exchange of promises made via social media reflects the main obligations of the parties.

### III. Assessing the Nature of Agreements Used in Social Media Content Monetisation

Analysing the phenomenon of social media influencers by examining the contractual supply chain is a task that has not been done in Swiss law so far. Legal literature on social media influencers has extensively covered questions arising from unfair competition law.<sup>24</sup> The market impact of contractual practices, as

<sup>23</sup> See for instance The Telegraph, The highest-paid Instagram influencers, including one star who gets £14000 per post, 19.7.2017, <<https://www.telegraph.co.uk>>.

<sup>24</sup> Art. 1 Swiss Law on Unfair Competition; see also R.H. Weber/S. Volz, Online Marketing and Competition Law, Zurich 2011, n. 205, 244.

well as potential enforcement mechanisms protecting public interests play a key role in the debate around the optimal regulation of the influencer marketing phenomenon. However, the very few cases that got the attention of competition and/or consumer authorities around the world,<sup>25</sup> have not shed sufficient light on contractual practices used in influencer marketing.

One way of understanding the content of influencer agreements is to look into the scarce body of litigation surrounding these contracts. For example, PR Consulting is an American PR company who sued one of their influencer collaborators, *Lukka Sabbat*,<sup>26</sup> before the Supreme Court of the State of New York, invoking breach of contract. PR Consulting was the agency representing social media company Snapchat (Snap, Inc.), to promote Snapchat's eyewear, Snap Spectacles. The complaint reveals various contractual clauses:<sup>27</sup>

- PR Consulting set the number and type of social media posts: *Sabbat* was to post a minimum of four unique posts, one Instagram Feed post; and three Instagram Story posts. Out of the latter, two were supposed to capture events during the New York Fashion Week (6–12 September 2018), and one Story post was to be in Milan or Paris, related to similar events;
- For specific posts indicated in the contract, PR Consulting wanted *Sabbat* to include a “swipe-up CTA (call to action)”, meaning a post that can redirect the viewers to a given website (in this case Snapchat);
- PR Consulting wanted *Sabbat* to be photographed in public wearing the Snap Spectacles;
- PR Consulting wanted *Sabbat* to provide it with analytics (reach, comments, likes and views for Instagram stories) within 24 hours of posting;

- PR Consulting asked *Sabbat* to submit his draft posts for review before posting online;
- The price of the contract was set at \$60 000, and \$45000 was paid upfront.

This is a rare example of court documents referring to the content of clauses included in an influencer agreement.

While it may be difficult to draw conclusions on actual business practices without empirical research on the topic, we can, however, explore the legal standards influencer agreements ought to fulfill. To do so, we must first categorise them from the perspective of Swiss contract law. Art. 19 of the Code of Obligations (CO) enshrines the principle of contractual freedom, as the parties are free to establish their obligations, but depending on the type of contract they enter into, their will is limited by mandatory rules governing both general and special contract rules.<sup>28</sup>

Contracts between influencers and brands, whether intermediated by PR and/or influencer agencies or not, may take different legal shapes. The legal qualification in each specific case is based on the contract content and the actual relations between the parties. Such an analysis makes it possible to assign the influencer activity to a contract category regulated by law or to an innominate contract. In its case law, the Federal Supreme Court takes into account various indications to complete the legal criteria in order to distinguish the different types of contracts or situations from one another.<sup>29</sup>

### 1. Possible Qualifications of Influencer Agreements

An influencer contract could be qualified as a *contract for work and services according to Art. 363 CO et seq.* This is a contract whereby the contractor undertakes to carry out work and the customer undertakes to pay him for that work. The work may be a physical or intellectual work result.<sup>30</sup> Today, it is largely undisputed that even immaterial works can be the subject of

<sup>25</sup> Illustrations of such public cases are the investigation launched by the Italian Competition authority against fashion brand Alberta Ferretti for the non-disclosure of paid advertising (supra note 4), as well as the case settled by the US Federal Trade Commission with the owners of CSGO Lotto for deceptively endorsing gambling activities (supra note 5).

<sup>26</sup> PR Consulting, Inc. v Luka Sabbat [2018], 655382/2018 (NY Sup), Supreme Court of the State of New York, US, <[https://f.datasrvr.com/fr/2/418/10884/655382\\_2018\\_PR\\_Consulting\\_Inc\\_v\\_Luka\\_Sabbat\\_complaint\\_2.pdf](https://f.datasrvr.com/fr/2/418/10884/655382_2018_PR_Consulting_Inc_v_Luka_Sabbat_complaint_2.pdf)>.

<sup>27</sup> Ibid.

<sup>28</sup> Art. 19(2) Code of Obligations: Clauses that deviate from those prescribed by law are admissible only where the law does not prescribe mandatory forms of wording or where deviation from the legally prescribed terms would contravene public policy, morality or personality rights.

<sup>29</sup> Federal Supreme Court 4A.200/2015, 3.9.2015, consid. 4.

<sup>30</sup> Federal Supreme Court 4C.69/2004, 22.6.2004, consid. 4.

work contracts. This refers to scientific, artistic, creative or generally intellectual works.<sup>31</sup> Whether the success of the work is ultimately embodied in an external form may not be decisive today, in view of the advanced optical, acoustic and electronic recording techniques in many work contracts, for the choice or determination of the applicable legal norms. The contract for work and services is characterised by the fact that the entrepreneur bears the risk of achieving the promised work success. Entrepreneurs owe not only work, but a work success, the promised result,<sup>32</sup> as they have to deliver the work and are liable for defects.

For affiliate marketing and paid endorsements, the main contractual obligations revolve around the payment of money by one party (whether in a lump sum, installments or commissions) in return for the provision of advertising space or time on social media by the other party. It could be argued that concluding an influencer agreement entails the performance of artistic work (such as taking an aesthetic photo or video) in exchange for remuneration.<sup>33</sup> Considering the creative part of the work (e.g. influencers are often called “content creators”), an influencer agreement can be labelled as a contract for works and services.

In practice, there are several forms of contract which do not correspond to the type of contract for work and services under Art. 363 et seq. CO, but are close to it. These may be *sui generis contracts* which are closer to the contract for work and services than to other types of legal contracts, *mixed contracts* which combine the main performance obligations of different types of legal contracts, or *contracts composed* of two independent legal contracts.

An influencer contract could also be qualified as an *agency contract according to Art. 394 CO et seq.* An agency contract is a contract whereby the agent undertakes to conduct certain business or provide certain services in accordance with the terms of the contract. The agent undertakes to provide factual services of any kind. In contrast to a contract for work and services, a simple agency contract is only for action in the interest of the client (without success in perfor-

mance). The contractor owes a work, the agent only an action. If a work result can be checked for its contractual conformity according to objective criteria, it can be promised as a work by the service provider and it is owed as a work success.<sup>34</sup> If an influencer promises to advertise a certain product, but it is not specified how and on what exact social media account, then the agreement might be an agency agreement.

Recent jurisprudence correctly assumes that freedom of legal qualification prevails<sup>35</sup> and that Art. 394 CO does not preclude the assumption of *innominate contracts* similar to contracts for work and services.<sup>36</sup> This provision, according to which “contracts for the provision of work or services not covered by any other specific type of contract are subject to the provisions governing agency”, excludes, in its (unhappily formulated) wording, but not in its sense and purpose, that there is room for innominate contracts in contracts for work performance. Art. 394(2) CO, the wording of which is broader than its purpose, does not restrict the freedom of contract and therefore does not oblige mixed contractual forms to be subject either entirely to the contract for work or entirely to another legal type. Innominate contracts are playing an increasingly important role in practice. In most cases, they contain elements of an agency contract, which, depending on the concrete contract constellation, have a different, but hardly ever completely negligible meaning.

Influencer agreements are usually not employment contracts. However, the Federal Supreme Court has pointed out that part of the labour law provisions, for example access to labour courts,<sup>37</sup> might be applicable to freelancers who do not fall in the category of employed or self-employed persons. Such a relationship could be classified as a *sui generis employment contract*.<sup>38</sup> According to this case law,<sup>39</sup> the protection

<sup>31</sup> BSK-G. Zindel/U. Pulver/B. Schott, vor Art. 363–379 N. 2 et seq., in: Basler Kommentar Obligationenrecht I, Art. 1–529 OR, 6<sup>th</sup> edition, Basel 2015.

<sup>32</sup> P. Tercier/P. Favre, Les contrats spéciaux, 4<sup>th</sup> edition, Genf/Zürich/Basel 2009, N. 4232 et seq.

<sup>33</sup> BJM 1975, p. 193 et seq.

<sup>34</sup> A. Rusch, Erfolgsbezug bei Werkvertrag und Auftrag, BJM 2013, p. 285 et seq.

<sup>35</sup> Federal Supreme Court 127 III 543; 114 II 56; 110 II 382; 109 II 463.

<sup>36</sup> Contrary view in older jurisprudence: Federal Supreme Court 109 II 36; 106 II 159; 104 II 110; Bericht des Bundesrats vom 11.1.2017, Bericht über die zentralen Rahmenbedingungen für die digitale Wirtschaft, 46892, <<https://www.seco.admin.ch>>, p. 62.

<sup>37</sup> Federal Supreme Court 4P.83/2003, 9.3.2004, consid. 3.2.

<sup>38</sup> Federal Supreme Court 4P.83/2003, 9.3.2004, consid. 3.2; Federal Supreme Court 4P.36/2005, 24.5.2005, consid. 2.3.

<sup>39</sup> Ibid.

resulting from economic dependency affects the legal framework of platform employment. Persons who carry out successive, selective assignments within the framework of a relationship that cannot be qualified as an employment contract can thus benefit from limited protection if the courts recognise an economic dependency. A decisive criterion for the existence of an economic dependency is given if a person works exclusively or predominantly for a single client.<sup>40</sup> Therefore, if an influencer (e.g. a food blogger) has a collaboration with one brand (e.g. a supermarket), works almost exclusively for this brand and is economically dependent on it, such relationship might be qualified as a *sui generis* employment contract.<sup>41</sup> In this case, the employment protection provisions apply. However, these vary depending on the duration and nature of the work assignment. This differentiation is relevant in the context of influencer agreements, since these usually consist of very short assignments. The question therefore arises as to which provisions are applied in which constellation, but also as to whether such exclusive deals reflect actual industry practices.

To date, to our knowledge, there are *no court decisions yet* on contractual relations involving influencers in Switzerland.<sup>42</sup> This lack of judgments contributes to the legal uncertainty surrounding the qualification of influencer agreements.

## 2. Consequences of Nature of Agreements

The nature of the contract dictates the obligations of the parties. Some contracts will be more suitable than others in protecting the interests of the weaker party. This is because regulatory restrictions of influencer agreements not only stem from public (profes-

sional and trade) law, but are also embedded in contract law. Mandatory norms determine the content of the contract. In particular, the legislator has issued mandatory law to protect employees, tenants and, more recently, consumers. Mandatory rules relevant for influencer contracts can be found in general contract law, in particular Arts. 19–21 CO. For instance, a contract between a brand and an influencer, where terms are impossible, unlawful or immoral, is deemed void according to Art. 20(1) CO, and clauses contravening to mandatory rules protecting public policy, morality or personality rights are inadmissible according to Art. 19(2) CO. Public interests are mostly protected by other fields of law, such as media law, that limits the advertising of certain products (e.g. the advertising of tobacco or alcohol), protects certain categories of legal subjects (e.g. minors), or sanctions the use of deceptive advertising.<sup>43</sup>

In the case of contracts for work and services, agency, or innominate contracts, there are barely any mandatory limitations to contractual freedom, in particular freedom in the description of the services to be provided. The provisions of these contracts are largely of a dispositive nature, so that deviating contractual agreements generally take precedence. The wording of contracts is really important. What parties do *not* stipulate in their contracts, will be regulated by default rules. If parties stipulate things in their contracts that contravene to mandatory law, the latter prevails. Whenever concluded more formally (e.g. in writing and signed), influencer agreements tend to be generic and short in length.<sup>44</sup> Given the succinct nature of such contracts, it is likely that parties will not successfully deviate from all default rules.

As an illustration, Art. 364(1) CO stipulates that in contracts for work and services, “the contractor generally has the same duty of care as the employee in an employment relationship”. This raises the question of how to interpret a duty of care in the context of an influencer agreement, whereby the latter very likely only includes an explicit reference to deliverables (e.g. the number of posts), but not on the quality

<sup>40</sup> K. Pärli, Neue Formen der Arbeitsintegration – Internet-Plattformen als Arbeitgeber, *Zeitschrift für Arbeitsrecht und Arbeitslosenversicherung* 2016, p. 243 et seq., p. 251.

<sup>41</sup> Bericht des Bundesrates vom 8.11.2017 in Erfüllung der Postulate 15.3854 Reynard vom 16.9.2015 und 17.3222 Derder vom 17.3.2017, Auswirkungen der Digitalisierung auf Beschäftigung und Arbeitsbedingungen – Chancen und Risiken, 50248, <<https://www.seco.admin.ch>>, p. 57 et seq.

<sup>42</sup> There are no court decisions on contractual relations involving any platforms in Switzerland, see B. Zein, Travail par les plateformes: quelles relations contractuelles?, *AJP* 2018, p. 711 et seq., p. 722; Bericht des Bundesrats vom 11.1.2017 (supra note 36), p. 82.

<sup>43</sup> K. Krell Zbinden, F(G)ood Advertising Practice in Switzerland, *European Food and Feed Law* 2010, Issue 6, p. 341 et seq.

<sup>44</sup> This observation is based on two standard influencer agreements from two international PR agencies specialising in influencer marketing, obtained by the authors, as well as additional market research.

of work that is expected from the influencer. This was already visible in the illustration relating to the case brought against *Luka Sabbat*, discussed earlier in this paper.<sup>45</sup> In this case, no reference is made to the quality of the photos to be submitted by *Sabbat*, or a general duty of care when handling the advertising for Snap Inc. If this case was governed by Swiss law, and the contract deemed to be one of work and services, *Sabbat* would be held to the same standard of work as an employee by default, as the parties did not derogate from it by means of agreement. This is particularly risky for the influencer who might be interested in being bound to a lower standard for his or her duty of care.

Influencers will not always be careful when fulfilling their contractual obligations. In May 2016, reality star *Scott Disick* (or his representatives) thought so little of the diet shake he was promoting that he accidentally posted the instructions for sharing his paid Instagram post in his caption. He posted: "Here you go, at 4 pm est, write the below. Caption: 'Keeping up with the summer workout routine with my morning @booteauk protein shake!'" This post looked inauthentic and did not put across the kind of personal support the brand wanted.<sup>46</sup>

#### IV. Potential Contractual Vulnerabilities

To better illustrate vulnerabilities arising out of influencer agreements, we will further elaborate on two legal issues that ought to be taken into account when drafting and concluding such agreements, one arising from mandatory limitations (1. Capacity to Act), and the other arising from the use of default rules (2. Breach of Contract).

##### 1. Capacity to Act

Teenagers and children are an essential part of influencer marketing, since on the one hand, as digital natives, they constitute a large audience of online content, and on the other hand, they are themselves becoming influencers.<sup>47</sup> For instance, in 2018, YouTube's highest earning content creator was a seven-year old

boy who made \$22 million from toy reviews.<sup>48</sup> This phenomenon of teenfluencers and childfluencers raises several interesting legal questions.

Although Swiss law provides for a liberal contractual environment guided by party autonomy as a core principle, as mentioned above, influencer agreements may sometimes collide with mandatory rules found in general contract law. One of the most considerable contractual protections, which also goes to the root of contractual formation, is the capacity to act (Art. 12 et seq. CC). The capacity to act is very relevant in influencer agreements. Only a person who has capacity to act has the capacity to create rights and obligations through their actions (Art. 12 CC). A person under the age of 18 does not have the capacity to act (Art. 17 CC). Swiss law then distinguishes between those capable of judgement and those incapable of judgement.

Ryan, the seven-year old influencer, lacks capacity of judgment due to his very young age. He therefore cannot create legal effect by his actions (Art. 18 CC). An influencer contract with a child like Ryan is not possible at all. In the case of child influencers, this provision might work against the very interests it seeks to protect. Casting children aside as incapable gives parents full control of contractual transactions that involve activities performed by their children, in the light of the attractive financial potential attached to monetisation. This has led to a phenomenon called "sharenting", namely parents who are keen to share content about their children online.<sup>49</sup> Monetising a child's image before they have any legal possibility of consenting to this (due to their incapacity of judgement) seems to be a salient form of exploitation made possible by social media. In reality, it will be Ryan's parents doing the commercial negotiation and the curation of the YouTube channel. Since the parents are "commercialising" their young son, the issue becomes one of personality rights (Art. 28 CC – right to own picture) and of family law.<sup>50</sup>

<sup>45</sup> See III., p. 384.

<sup>46</sup> T. Dreier, *Influencer Marketing: Doing it Wrong*, Streaming Media November/December 2018, p. 14.

<sup>47</sup> M. Bergen, *YouTube Kidfluencers Are Becoming Minefields for Google*, Fortune, 23.3.2019, <<http://fortune.com>>.

<sup>48</sup> C. Johnston, *YouTube top earners: The seven-year-old making \$22m*, BBC, 3.12.2018, <<https://www.bbc.com>>.

<sup>49</sup> B. Wong, *In the Future, will your kids be able to sue you for over-sharing?*, Huffington Post, 22.4.2019, <[www.huffpost.com](http://www.huffpost.com)>.

<sup>50</sup> S. Husi-Stämpfli/R. Jedelhauser, *Alles für ein "like": Sharenting vs. Kindeswohl*, Jusletter 29.4.2019; C. Bessant, *Parental rights to publish family photographs versus children's rights to a private life*, Entertainment Law Review 2017, Vol. 28, Issue 2, pp. 43–46.

The legal situation is different for teenage influencers. If they are capable of judgement, they can enter into obligations or give up rights with the consent of their legal representative (Art. 19(1) CC). Teenage influencers thus depend on their parents who will act as their legal representatives and have to consent in order for influencer agreements to be validly concluded. If the legal representative does not grant approval, either party may demand the restitution of any performance already made (Art. 19b(1) CC). If the teenage influencer has induced the other party to erroneously assume that he or she has the capacity to act, then he or she is liable for the loss or damage incurred (Art. 19b(2) CC). Without such consent, teenage influencers may only accept advantages that are free of charge (Art. 19(2) CC).

Teenage influencers do not only thrive on endorsement deals (e.g. putting an influencer's name or logo on a product), but they also receive a lot of free products to use in a monetised video. Companies often send influencers so-called PR packages,<sup>51</sup> which are nothing more than free goods or services.<sup>52</sup> At first sight, brands undergo such expenses to befriend influencers and establish a good relationship with them. However, upon further consideration, it turns out brands do have a clear expectation that when they send out free products, influencers should promote them on social media. According to Art. 6a CO, the sending of unsolicited goods does not constitute an offer. The recipient is not obliged to return or keep such goods. Similarly, the recipient is not obliged to render any expected performance, i.e. promote the goods on Instagram. Minors who are capable of judgement may receive gifts, provided their legal representatives do not forbid them to accept the gifts or send them back (Art. 241 CO). Teenage influencers may accept all advantages that are free of charge (Art. 19(2) CC). This means that a teenage beauty blogger can accept make-up, but a teenage travel blogger may not necessarily validly accept a travel package to the Maldives.

Another legal question arising from children and teenage influencers being minors relates to public law employee protection. The Swiss Labour Act (Arbeitsgesetz, ArG) protects juvenile workers in Art. 29 et seq. and in its Ordinance 5.<sup>53</sup> Before the age of 15, juveniles generally may not work. There are exceptions for young people under the age of 15 in cultural, artistic, sporting and advertising performances, according to Art. 30(2)b. However, these special protection regulations are only applicable in employment contracts. Neither contracts for work and services nor agency contracts know similar regulations of public law juvenile protection. In an era of platform gigs, where work is outsourced and thus excluded from the classical employment paradigm embedded in Art. 319 et seq. CO, this is very relevant. In the gig economy it may be necessary to discuss special protection regulations for juveniles. One should think about the introduction of an analogous application of specific public law employee protection regulations to platform workers. But so far, Art. 29 et seq. Labour Act are usually not relevant in the case of influencers of minor age. There is no formal age requirement for a contract for works and services or for an agency contract.

## 2. Breach of Contract

As illustrated in the examples regarding *Luka Sabbat* and *Scott Disick*, breach of contract is very likely a regular problem for influencer agreements, due to factors such as inconsistency or unprofessionalism in the work delivered by influencers. Often, influencer agreements will be informal and even though parties will know that they have set some binding rules between themselves, they will not think of these rules as a contract. In addition to that, if influencer agreements are mostly informal or too succinct, this will result in parties not being able to successfully deviate from the default rules imposed by the Code of Obligations. Even though parties might not be aware of it, there will often be a binding contract, and it will be very unclear how to qualify the contract and what should happen in case of breach of contract. In this Section, we briefly discuss two main questions that

<sup>51</sup> Octoly, Gifting 101: How to send products to influencers, Medium, 30.8.2018, <<https://insights.octoly.com>>.

<sup>52</sup> For instance, Disney Parks covers travel and accommodation for influencers at various Disneyland locations, in return for social media exposure, see *H. Todd*, The Magic of Social Media Influencers for Disney Parks, Platform Magazine, 2.11.2017, <<http://platformmagazine.org>>.

<sup>53</sup> Bundesgesetz über die Arbeit in Industrie, Gewerbe und Handel (Arbeitsgesetz, ArG) vom 13.3.1964 (SR 822.11); Verordnung 5 zum Arbeitsgesetz (Jugendarbeitsschutzverordnung, ArGV 5) vom 28.9.2007 (SR 822.115).

stand out with respect to non-performance: (i) Can an influencer be forced to perform?, and (ii) How can parties cover potential loss of profit?

With respect to the first question, in principle, Art. 107 CO stipulates that a creditor may demand for specific performance if the debtor fails to perform. However, according to Art. 119 CO, an obligation ceases to exist when performance is rendered impossible by circumstances which cannot be attributed to the debtor. In principle, impossibility exists if the debtor can no longer perform the contract at all (objective impossibility) or may no longer be asked to perform it (subjective impossibility).<sup>54</sup> It is necessary that the debtor is not responsible for the impossibility of performance or that it is not attributable to his area of risk.

Impossibility in influencer agreements is rather difficult to pin down. If an influencer was contracted to make videos in a specific location (e.g. their studio, a specific event), any changes impacting the availability of the location to such an extent that performance is out of the question, may be considered, under certain conditions, to have the elements of a case of impossibility. The main problem with this argument is that impossibility imposes a very high threshold, and the flexibility of influencer content (e.g. taking videos and photos anywhere, improvising), as well as the lax content control exercised contractually, strengthen the view it will always be possible to perform the content of the obligation.

Considering influencer agreements as work and labor contracts adds the question of personal impossibility: What if the influencer is in a personal situation that makes performance relatively impossible? Personal performance is required if the work to be produced is so characterised by the individual physical and mental abilities employed that another person would not be able to produce the desired work (Art. 364(2) CO). Influencer agreements entail performance from a specific person, namely the influencer. In some cases, influencers have entire production teams making and posting content for them. When influencers have to but cannot practically contribute to this content, personal impossibility (e.g. health issues) may be used by them as a bar to a claim

for specific performance, but any price that was already paid is owed back to the creditor on the grounds of unjustified enrichment (Art. 62 CO). Still, according to special rules, the influencer is entitled to ask for the payment of any work that has already been done (Art. 378 CO). Applied to the influencer industry, personal impossibility raises a lot of questions that may very well redefine its boundaries. The influencer community has long been showing signs of mental health issues arising from the pressure of entertainment and advertising.<sup>55</sup> If mental health is considered to fall within the ambit of Art. 119 CO, this may lead to additional questions regarding capacity on the one hand, and attributability on the other (e.g. is the intensity of the stress an influencer may be exposed to under the influencer's control?).

Regarding the second question, reputation loss is one of the most important risks influencer agreements ought to envisage. An influencer's reckless or controversial behavior (e.g. hate speech) may damage the reputation of a brand using the influencer's services, and vice-versa, scandals surrounding brands (e.g. forced labor) may also have repercussions on the reputation of any influencers affiliated with the brand. A further prerequisite for the assertion of a claim for damages under Art. 97 CO is a damage caused by the breach of contract. Damage is an involuntary reduction in assets, which can consist of a reduction in assets, an increase in liabilities or a loss of profit. When examining whether and to what extent the loss of profit is to be compensated, causality considerations must be taken into account. Loss of profit must be replaced if the profit can be expected with probability according to the special circumstances and after the normal course of events.<sup>56</sup> The loss of a chance (*"perte d'une chance"*) is highly controversial and is rejected by the Federal Supreme Court.<sup>57</sup>

As loss of reputation does not always have a direct pecuniary expression (e.g. cancelled contracts), it therefore does not always constitute a loss of profit

<sup>54</sup> BSK-W. Wiegand, Art. 119 n. 5, in: Basler Kommentar Obligationenrecht I, Art. 1–529 OR, 6<sup>th</sup> edition, Basel 2015; Federal Supreme Court 4A.189/2012, 2.10.2012, consid. 5.2.

<sup>55</sup> J. Gritters, How Instagram takes a toll on influencers' brains, The Guardian, 8.1.2019, <<https://www.theguardian.com>>. Focus, Fitness-Influencerin Sophia Thiel zieht die Reissleine, 3.6.2019, <<https://www.focus.de>>.

<sup>56</sup> Federal Supreme Court 4A.401/2011, 18.1.2012, consid. 3.5; H. Rey/I. Wildhaber, Ausservertragliches Haftpflichtrecht, 5<sup>th</sup> edition, Zürich 2018, n. 406.

<sup>57</sup> Federal Supreme Court 133 III 462; Ch. Müller, Schadenersatz für verlorene Chancen, AJP 2002, p. 389 et seq.

allowing damages according to Art. 97 CO. In the case of breached influencer agreements, it may be very problematic to determine the existence or calculate the scope of loss of profit, especially from the perspective of causation and foreseeability. Another course of action possible, however, might be suing for satisfaction. Any person whose personality rights are unlawfully infringed is entitled to a sum of money of satisfaction, provided this is justified by the seriousness of the infringement and no other amends have been made (Art. 28 CC – personality rights, corroborated with Art. 49 CO – satisfaction).

Current social media metrics available on the impact of influencer marketing (e.g. reach, engagement, likes, views, etc.) reflect brand reputation, especially for brands established around influencer personas. These metrics often determine the price of influencer services, which is directly proportional to the ambit of an influencer's reputation.<sup>58</sup> Yet social media metrics tend to be fluid,<sup>59</sup> and sometimes even manipulating.<sup>60</sup> Moreover, influencer/content popularity and brand development entail a certain randomness which may make it very difficult to, for instance, project precise influencer earnings. Similarly, since brands have a limited amount of tools to measure consumer conversion (e.g. how many consumers buy products advertised by consumers), it will be difficult to prove whether a morally questionable act by an influencer endorsing the brand would actually result in a contractual loss of profit.

## V. Conclusion

In this article we tried to clarify the nature of influencer agreements and the contractual vulnerabilities parties to such agreements ought to consider when concluding them. To this end, we briefly mapped the

supply chain and business models used therein, and classified influencer agreements as contracts for work and services, agency contracts, or innominate contracts. Furthermore, we explored issues arising out of contractual mandatory as well as default rules. The high variance of all the factors involved in influencer marketing leads to considerable legal uncertainty. As influencer agreements are rarely formally written and signed, the main obligations of the parties are oftentimes not described. Moreover, absent formal classifications made by statute or case law, there is a lot of legal uncertainty regarding what the main obligations ought to be. An illustration of this issue is an influencer's duty of care, which raises issues regarding the standard used to evaluate influencer work. These standards have a dual effect: they clarify the obligations of the parties, and place responsibility on the shoulders of the influencer, who ought to aim to conclude transactions as professionally as possible. Parties should focus on understanding the mandatory limitations to their agreements. In cases where parties may end up in a legal conflict, this sanction may damage the interests of the party that has already performed, and may not be able to obtain the counter-performance under the influencer agreement. Moreover, parties should also consider that not derogating from default rules may lead to the application of legal standards that fill gaps in the intention of the parties, but which may not be in the interest of at least one of the parties to the agreement. To further understand the contractual behaviour of parties to influencer agreements and deepen the debate regarding the positive law applicable to these agreements, as well as the normative considerations of regulation on influencer marketing, further research – especially empirical research – is required.<sup>61</sup>

<sup>58</sup> The Economist, Celebrities' endorsement earnings on social media, 17.10.2016, <<https://www.economist.com>>.

<sup>59</sup> H. Kaur, YouTuber James Charles has lost nearly 3 million subscribers since his feud with Tati Westbrook, CNN, 14.5.2019, <<https://edition.cnn.com>>.

<sup>60</sup> N. Confessore/G.J.X. Dance/R. Harris/M. Hansen, The Follower Factory, NY Times, 27.1.2018, <<https://www.nytimes.com>>.

<sup>61</sup> We are currently deploying a questionnaire among the largest PR and influencer agencies in Switzerland, and the results will be made available in a separate publication.