Stanford – Vienna
Transatlantic Technology Law Forum

A joint initiative of
Stanford Law School and the University of Vienna School of Law

TTLF Working Papers

No. 40

A Face Worth a Thousand Dollars or Euros: How New Marketing Technologies Will Challenge Law on Both Sides of the Atlantic

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2018

TTLF Working Papers

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Suggested Citation

This TTLF Working Paper should be cited as:
Marie-Andrée Weiss, A Face Worth a Thousand Dollars or Euros: How New Marketing Technologies Will Challenge Law on Both Sides of the Atlantic, Stanford-Vienna TTLF Working Paper No. 40, http://ttlf.stanford.edu.

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Abstract

Images have become a popular way to communicate online. Smart phones allow us to easily take photographs and share them instantly on social media sites. A lot of these images represent the likeness of an individual, whether it is a “selfie” or a photograph taken by a third party, often for the express purpose to be shared online.

These photographs have commercial value, as they can be used for advertising or even for selling purposes. The way this abundant User Generated Data is acquired and used triggers different legal responses.

Businesses may acquire these photographs without prior authorization, and thus run afoul of right of publicity laws. They may acquire them as a token for sweepstakes entry, which are governed by state laws. They may hire influencers, whose social media accounts are followed by thousands, to post images and messages to promote goods or services. This new way to advertise has led consumer protection agencies on both sides of the Atlantic to mandate that these posts be labeled as advertising.

These new practices also raise the issue of data retention and protection of privacy, including whether there is a right to be forgotten.

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I. Introduction

Among the numerous pictures uploaded each day on social media, many are self-photographs, or "selfies," a neologism named word of the year in 2013 by the *Oxford Dictionaries*, which defined it as "*a photograph that one has taken of oneself, typically one taken with a smartphone or webcam and uploaded to a social media website.*"[1] Social media users post these selfies mainly on two sites, *Instagram*, which is owned by *Facebook*, or *Snapchat*, and share them, with the appropriate hashtags, to their networks. Some of these users have thousands, even tens of thousands of followers, and post mainly about the clothes or makeup they wear, the restaurants and bars they patronize, their travels and their home decors. Followers often post comments, hoo-ing, haa-ing and emojing back, asking where a particular item was bought.

[1] SELFIE was named Oxford Dictionaries Word of the Year 2013, BLOG OXFORD DICTIONNARIES, Nov. 19, 2013, http://blog.oxforddictionaries.com/press-releases/oxford-dictionaries-word-of-the-year-2013.

Companies are understanding that their best marketers may no longer be on Madison Avenue, but, instead, consumers loving the brand and willing to share their interests with their social media network. An online survey made in 2013 by Nielsen found that recommendations from friends and family are the most influential of recommendations, as this source of recommendation was the most trustworthy for eighty-four percent of people living in fifty-eight countries.[2] Some of these influencers can also be social media contacts: according to the same Nielsen online survey, sixty-eight percent of the respondents trust consumer opinions posted online.[3] A survey conducted in February 2014 by the McCarthy Group found that 84% of the Millennials surveyed did not like advertising, that they trusted their closest friends the most, and sales people the least, [4] and that they trusted their closest friends the most.[5] A 2015 study found that almost 70% of consumers rely on online review before buying a product or service.[6]

A study published by Twitter in May 2016 stated that "[*n*]*early 40% of Twitter users say they've made a purchase as a direct result of a Tweet from an influencer.*"[7] A 2016 marketing

[2] *Under the Influence: Consumer Trust In Advertising*, NIELSEN (Sept. 17, 2013), http://www.nielsen.com/us/en/insights/news/2013/under-the-influence-consumer-trust-in-advertising.html.
[3] According to the survey, this percentage of trust ranked third in 2013, up seven percentage points from 2007.
[4] *Engaging Millennials*, THE MCCARTHY GROUP, http://themccarthygroup.com/what-we-do/millennials_survey/
[5] *New Study Finds Majority of Millennials Distrust All Forms of Advertising, But Close Friends, Digital Channels, Even Online News Sources Rank As Most Trustworthy*, PRWEB, (June 4, 2014), http://www.prweb.com/releases/2014/05/prweb11870392.htm.
[6]Ashlee Kieler, *Nearly 70% Of Consumers Rely On Online Reviews Before Making A Purchase*, CONSUMERIST, (June 3, 2015, 12:18 PM EST), https://consumerist.com/2015/06/03/nearly-70-of-consumers-rely-on-online-reviews-before-making-a-purchase/.
[7] Katherine Karp, *New research: The value of influencers on Twitter*, TWITTER BLOG, May 10, 2016, 17:16 UTC, https://blog.twitter.com/2016/new-research-the-value-of-influencers-on-twitter. See also Marty Swant, *Twitter Says Users Now Trust Influencers Nearly as Much as Their Friends*, ADWEEK, (May 10, 2016°, http://www.adweek.com/digital/twitter-says-users-now-trust-influencers-nearly-much-their-friends-171367.

survey found that social media was the most trusted source for information about beauty products for the female consumers surveyed.[8]

Products and services may now be purchased directly on social media feeds. This new way to shop online, using the resource of both e-commerce and social media, has been called social commerce, and the likeness of influencers and even of the general public is at the center of this new sales and marketing model. The Forrester Research Social Media Forecast, 2014 To 2019 for Western Europe, predicted that social media advertising spending in Europe would be 4.3 billion Euros by 2019, up from 2.6 billion Euros.[9] Therefore, it is not surprising that brands and retailers are trying to find innovative ways to communicate with their customers on social media and even to sell their products directly on social media sites. Social commerce is a promising new market: a September 2014 *Harris Poll* survey found that only 5% of Americans have made a purchase on a social media site, but that 20% would consider to do so.[10] However, social commerce is still not embraced as a way to shop online, even by Millennials. [11]

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[8] *2016- Unmasking the Beauty Consumer*, WOMEN'S MARKETING.COM, p.6, http://www.womensmarketing.com/beauty-research-insights-marketing-consumer-2016-2017 (on file with author). The report surveyed 1,000 women ages 18-54 across the U.S. asking them about how to discover and buy their skin and hair care products.

[9] Jitender Miglani, *Forrester Research Social Media Forecast, 2014 To 2019 (Western Europe),* FORRESTER, July 2, 2014, https://www.forrester.com/Forrester+Research+Social+Media+Forecast+2014+To+2019+Western+Europe/fulltext/-/E-RES117467

[10] http://www.prnewswire.com/news-releases/new-digitaslbi-study-reveals-5-of-americans-have-made-a-purchase-on-a-social-media-site-yet-20-say-they-would-consider-doing-so-273948741.html

[11] Kimberlee Morrison, *Millenials Arent't Shopping on Social Media,* ADWEEK, (Sept. 26, 2016, 3:00PM) http://www.adweek.com/socialtimes/millennials-arent-shopping-on-social-media-infographic/645330. Marketing firm *GumGum* surveyed Millennials and found that, while 42% of them accessed Instagram more than five times a day and 38 % accessed Snapchat more than five times a day, 99% of them said they had never bought anything on Snapchat, as said 91% of Instagram users.

One of the ways to market a product or service on social media, or even to sell it, directly or indirectly, on a social media site, is to collaborate with the social media stars, the 'influencers'. Some of the social media influencers are famous on their own right, such as star soccer player Cristiano Ronaldo[12], but others have become famous in their social media eco-system. Their posts include images, comments and hashtags, and are sometimes used to promote a product or a service featured in the post.

While some of the posts have been published independently and spontaneously, social media "influencers" are now being courted by marketers, which pay them to write laudatory posts about a particular product or service. This type of marketing is named "influencer marketing," and it is more efficient than traditional online marketing tools, such as banners.[13] A journalist described influencer marketing as "*an advertising ecosystem that's revolutionizing marketing, however confusing its dynamics seem to older generations accustomed to famous spokespeople on TV, usually not in a hot tub."*[14] Indeed, some social media stars are posting live from a hot tub.[15] What would Don Draper think about this?

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[12] Cristiano Ronaldo has 260 million followers combined on his various social media accounts) Facebook, Twitter and Instagram) He gained 65 million followers in 2016 , and has 120 million fans on Facebook, the most fan any other person in the world. It has been estimated that his active social media presence has generated $500 million euro in value for his corporate sponsor Nike. See Kurt Badenhammer, *Cristiano Ronaldo Generated $500 Million in Value for Nike in 2016*, FORBES, (Feb. 17, 2017), https://www.forbes.com/sites/kurtbadenhausen/2017/02/16/cristiano-ronaldo-generated-500-million-in-value-for-nike-in-2016/#4aca97a0c3e9.

[13] A 2016 study found that influencer marketing is 11 times more effective than banner ads, see Uptin Saiidi, *The power of Instagram: Brands eye more social media influencers*, CNBC, (May 21 2016 4:00 PM), http://www.cnbc.com/2016/05/20/the-power-of-instagram-brands-eye-more-social-media-influencers.html.

[14] Max Chafkin, *Why Snapchat's Influencer Economy Runs on Hot Tubs, Selfies, and Whey Protein*, BLOOMBERG BUSINESSWEEK,(May 25, 2016), https://www.bloomberg.com/features/2016-arsenictv-snapchat-influencer-economy.

[15] Max Chafkin tells the story in his article of Arsenic, a Snapchat account, which shows scantily dressed models and social media star on its SnapChat Stories feed. The women are given the password to the Arsenic account and use their own cell phone to post live videos of themselves. They are not being paid, but are not paid, and

Influencers marketing has become a lucrative business for companies.[16] It may be lucrative too for the most successful of these influencers[17] who are able to monetize their social media popularity by entering into agreements with third parties to promote their products or services.[18] Some influencers are even collaborating with fashion or cosmetic companies to create a line of products under their name, which is then in turn advertised on their social media channels.[19] Not all of these influencers are human, and other species, mostly cats or dogs, have gathered thousands of social media followers thanks to their savvy 'humans'.[20] In that case, the images of these social media stars are not selfies, although the question of whether an animal is indeed able to take a selfie has recently been presented to the Ninth Circuit…[21]

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participate in order to be able to promote their personal Snapchat handle, which may, in turn, increase their influencer power and lead to more lucrative marketing deals.

[16]It is estimated that it had a $2 billion market share in 2016, *Influencer Marketing Opens 2017 with Continued Growth*, INFLUENCER MARKETING INDEX (Feb. 14, 2017), http://influencermarketingindex.com/influencer-marketing-opens-2017-continued-growth/. According to a 2017 survey, 36 per cent of companies using social marketing are spending less than 5000 dollars per campaign, which makes the ROI of such campaigns quite hgh, see David Kirkpatrick , *Study: Influencer marketing budgets are bigger this year for 63% of marketers,* (March 22, 2017) , https://www.marketingdive.com/news/study-influencer-marketing-budgets-are-bigger-this-year-for-63-of-markete/438662/. According to another study, influencer marketing content has a ROI 11 times higher than traditional forms of digital marketing, TapInfluence 2016 study with Nielsen Catalina Solutions, *The ultimate list of Influencer Marketing Statistics*.

[17] Women's Wear Daily reported that blogger Rumi Neely, who write the Fashiontoast blog, "*was charging as much as $3,000 for dedicated posts in 2014*." Ally Betker, *From It Girl to Business Woman*, WWD, June 2, 2016, http://wwd.com/eye/people/it-girl-business-kendall-jenner-gigi-hadid-karlie-kloss-10437101/

[18] According to a talent agency quoted in this BBC article, social media influencers with 3 to 7 million followers could ask $75,000 on average for a promotional post on their Instagram account. *Celebrity YouTube promotion fee '*$187,000 on average', BBC (Aug. 31, 2016), http://www.bbc.com/news/technology-37234385.

[19] A make-up company developed a highlighter with social media personality Jaclyn Hill, with sold for an estimated $20 million in the second half of 2015 and was the biggest single-day seller in online retailer sephora.com's history: Rachel Brown, *Social Media in the Beauty Landscape*, WWD.COM, Feb. 16, 2016, http://wwd.com/beauty-industry-news/beauty-features/beauty-industry-social-media-10347599/.

[20] Andy Newman, *This Instagram Dog Wants to Sell You a Lint Roller*, THE NEW YORK TIMES, (July 13, 2017), https://www.nytimes.com/2017/07/13/nyregion/instagram-dogs.html. There is such demand for dog influencers that there is even an agency specializing in representing them, see http://www.thedogagency.com/facts. The owner if the agency, Loni Edwards, is quoted in the New York Times' article affirming that "[*p*]*et influencers outperform humans*," meaning , as explained by Andy Newman, that "*their posts go viral more often, and they get more comments and more likes*."

[21] Naruto v. Slater, No. No. 16-15469, Court of Appeals, 9th Circuit, 2018.

One of the reasons influencer marketing is efficient is that consumers are emotionally engaged when viewing the posts. Often, they have been following the influencer for a while on social media, and feel they know him or her, after having viewed so many pictures of his or her daily life and getting to know his or her favorite brands and things to do. Even if the influencer is an animal, followers have an emotional connection with it, maybe even stronger than with a human being.[22]

New technologies may allow marketers to use consumers' likeness to sell and market their products, but is this practice legal?

II. How to turn consumers' likeness into gold

A. Review of technology

Writer and artist Douglas Coupland described selfies as "*mirrors we can freeze*." He predicted that selfies will soon be in 3-D, [23] and informed selfies takers: "*You're turning yourself into a product*."[24] How can this be done?

a) Selfies

[22] A woman interviewed on camera by The New York Times (n. 2), tells the reporter that she is "*in love*" with Sprout, the griffon with more than 60 000 followers on Instagram (@brussels.sprout, https://www.instagram.com/brussels.sprout/).

[23] Douglas Coupland: *The 2½th Dimension Get ready for the selfie of the future – photography posing as sculpture*, THE FINANCIAL TIMES MAGAZINE, Oct. 3, 2014, 12:43PM. See also Lorena Muñoz-Alonso, *Douglas Coupland Predicts the 3D Selfie*, ARTNET NEWS, Oct. 10, 2014, https://news.artnet.com/people/douglas-coupland-predicts-the-3d-selfie-129442

[24] Douglas Coupland commented on Facebook's facial recognition program in his 2015 series DEEP FACE, where he painted geometric figures on black and white photographs of individuals, shown in 2016 at the White Chapel Gallery in London it the *Electronic Superhighway (2016-1966) exhibition.* See *Top 10: Electronic Superhighway*, WHITECHAPEL GALLERY BLOG, http://www.whitechapelgallery.org/about/blog/top-10-electronic-superhighway/.

There is no doubt that data has value. As stated in a report published in May 2012 by the World Economic Forum, "*personal data represents an emerging asset class, potentially every bit as valuable as other assets such as traded goods, gold or oil*." [25] The European Commission wrote in 2013 in its communication about "*Rebuilding Trust in EU-US Data Flows*" that "[*p*]e*rsonal data has become a highly valuable asset: the estimated value of EU citizens' data was €315bn in 2011 and has the potential to grow to nearly €1tn annually by 2020*."[26] An article published in The Economist in May 2017 claimed that "*The world's most valuable resource is no longer oil, but data*". [27]

While users of social media sites originally relied less on images than on text to communicate, the last years have seen increasing interest in social media sites featuring mainly images, such as *Instagram* or *Pinterest*, as the Web is becoming "*increasingly mobile and image-centric."*[28] According to a 2013 *Pew Research Center's Internet Project* survey, 92% of Americans

[25] WORLD ECONOMIC FORUM, RETHINKING PERSONAL DATA: STRENGTHENING TRUST (May 2012), p.7, available at http://www3.weforum.org/docs/WEF_IT_RethinkingPersonalData_Report_2012.pdf The European Data Protection Supervisor noted in an opinion published in September 2016 that "It is now commonplace for personal information to be compared to a currency used to gain access to online services... Data may be a directly-traded commodity, or it may have an ancillary function as an input for the creation of individual user profiles." European Data Protection Supervisor, Opinion 8/2016 EDPS on coherent enforcement of fundamental rights in the age of big data (2016), p. 6. https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Events/16-09-23_BigData_opinion_EN.pdf.

[26] European Commission, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL , Rebuilding Trust in EU-US Data Flows, p.3, http://ec.europa.eu/justice/data-protection/files/com_2013_846_en.pdf , (quoting Boston Consulting Group, *The Value of our Digital Identity*, November 2012.)

[27] *The world's most valuable resource is no longer oil, but data*, THE ECONOMIST (May 6, 2017), https://www.economist.com/news/leaders/21721656-data-economy-demands-new-approach-antitrust-rules-worlds-most-valuable-resource.

[28] Rachel Metz, *Facebook Gets More Visual to Keep Its Users Engaged*, MIT TECHNOLOGY REVIEW, March 7, 2013, http://www.technologyreview.com/news/512341/facebook-gets-more-visual-to-keep-its-users-engaged/

own a cell phone, and 58% own a smart phone.[29] A 2015 report from the same found that 67% of adults living in the U.S. use smart phones, and that 28% of them use *Instagram*, up from 13% in 2012.[30] Most smart phones now include a camera, and thus taking pictures with a phone is quite banal. Another *Pew Research Internet Project* report, published in September 2012, noted that the rise of smart phones with built-in cameras contributed to the increasing popularity of these new social media sites.[31] The report also noted that "*46% of adult internet users post original photos or videos online that they themselves have created*" and that "*41% of adult internet users take photos or videos that they have found online and repost them on sites designed for sharing images with many people."*

Facebook understood early on how photos posted by users may be used by the site for lucrative purposes. It announced in July 2010 its new Tag Suggestion program, noting that "[*n*]*inety-nine percent of people using Facebook have uploaded at least one photo. More than 100 million photos are uploaded every day. That's insane*."[32]It stated two months later that "[*p*]*hotos often bring us the best news of the day*."[33] Fresh content is important for Facebook, as it relies on a constant flow of information posted by its users to both sustain users' interest and collect this data to possibly turn it into a profit. Facebook improved the quality of the

[29] Maeve Duggan, *Photo and Video Sharing Grow Online*, PEW RESEARCH INTERNET PROJECT, Oct. 28, 2013, http://www.pewinternet.org/2013/10/28/photo-and-video-sharing-grow-online/
[30] Maeve Duggan, *Mobile Messaging and Social Media – 2015* PEW RESEARCH INTERNET PROJECT, Aug. 2015, http://www.pewinternet.org/2015/08/19/mobile-messaging-and-social-media-2015/
[31] Lee Rainie, Joanna Brenner, Kristina Purcell, *Photos and Videos as Social Currency Online*, p.2, PEW RESEARCH INTERNET PROJECT, Sept. 13, 2012, http://www.pewinternet.org/files/old-media//Files/Reports/2012/PIP_OnlineLifeinPictures_PDF.pdf
[32] Sam Odio, *Making Facebook Photos* Better, FACEBOOK , July 1, 2010, https://www.facebook.com/notes/facebook/making-facebook-photos-better/403838582130
[33] Sam Odio, *More Beautiful Photos,* FACEBOOK, Feb. 10, 2011, 3:21PM, https://www.facebook.com/notes/facebook/more-beautiful-photos/432670242130

photographs posted on the site by improving the resolution of the images posted on the site, as it increased in February 2010 "*the size of the photos stored from 720 pixels to 2048 pixels on the largest edge, for an 8 times increase overall*."[34]

Professor Alessandro Acquisti, from Carnegie Mellon University, noted in his presentation at the December 2011 FTC workshop on facial recognition that, in 2000, only celebrities had their pictures posted online, but that in 2010, 2.5 billion photos were uploaded on Facebook alone.[35] 58 millions of photos are uploaded each day on Instagram.[36] *Instagram*, was bought by *Facebook* in 2012 for 1 billion dollar, and the financial has paid off, as *Instagram* is increasingly the social media site of choice for young people. According to a report published by GlobalWebIndex in 2014, 34% of Millennials have an *Instagram* account, while only 19% of GenXers and 7% of Baby Boomers do have one.[37] Instagram reached the 400 million users and 40 billion photos shared in September 2015,[38] and reported in 2016 that it has 500 million monthly users.[39] It reported in April 2017 that it had more than 700 million users, and that "*the last 100 million of* [*users*] *joined faster than ever*."[40] Its rival Snap, an app allowing its users to share ephemeral photos and videos to their friends, with the option to add text and images to them, was reported to have more than

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[34] Ibid.
[35] *Face Facts: A Forum on Facial Recognition Technology*, FEDERAL TRADE COMMISSION, transcripts of remarks of Professor Alessandro Acquisti, p. 19, (Dec. 8, 2011), https://www.ftc.gov/sites/default/files/documents/videos/face-facts-session-3/4/120811_ftc_sess3.pdf.
[36] Instagram Company Statistics, STATISTIC BRAIN, http://www.statisticbrain.com/instagram-company-statistics/
[37] Shea Bennett, *How Many Millennials, Gen Xers And Baby Boomers Use Facebook, Twitter And Instagram? [STUDY]*, ADWEEK, June 3, 2014, 3:00PM, http://www.adweek.com/socialtimes/millennials-gen-x-baby-boomers-social-media/499110
[38] Davey Alba, *Instagram Now Tops 400 Million Users And 40 Billion Photos*, WIRED, (Sept. 22, 2015, 5:02pm), http://www.wired.com/2015/09/instagram-now-tops-400-million-users-40-billion-photos/
[39] Christopher Heine, *Instagram Now Has More Than 500 Million Monthly Users as Explosive Growth Continues,* ADWEEK, (June 21, 2016, 10:15 AM EDT), http://www.adweek.com/news/technology/instagram-now-has-more-500-million-monthly-users-explosive-growth-continues-172133.
[40] *700 Million*, INSTRAGRAM BLOG, (April 26, 2017), http://blog.instagram.com/post/160011713372/170426-700million.

100 million users, [41] then 166 million in the first 2017 quarter.[42] These figures are still far away from the two billions users boasted by Facebook[43], but who knows?

Why posting selfies? Why not indeed? Kenneth J. Gergen described in 1991 the postmodern "pastiche personality" as "*a social chameleon, constantly borrowing bits and pieces of identity from whatever sources are available and constructing them as useful or desirable in a given situation.*"[44] He added: *"Life becomes a candy store for one's developing appetites*"[45] and noted that clothing is very important for such personality, as "*there is no self outside of that which can be constructed within a social context. Clothing thus becomes a central means of creating the self*." [46] More than twenty-five years later, Mr. Gergen could very well be describing some *Instagram* users posting selfies, showing off their latest fashionable acquisitions.

Selfies are a better version of ourselves, thanks to digital filters which can be applied to the photographs to make them more appealing on social media.[47] Art critic A.D. Coleman noted that "[*a*]*s a result, photography's service as a vehicle for fantasy now stands alongside its function as a recording system and may supersede it."*[48] Selfies even serve for some as personal appearance

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[41] *Madison Malone Kircher, Instagram Has More Daily Users Than Snapchat*, NEW YORK MAGAZINE, (June 21, 2016, 9:00AM), http://nymag.com/selectall/2016/06/hey-snapchat-instagram-is-kicking-your-butt-in-daily-users.html. Snapchat passed Twitter in daily usage in daily active users in the Spring of 2016: Sarah Frier, *Snapchat Passes Twitter in Daily Usage*, BLOOMBERG, (June 2, 2016, 7:30 AM EDT).

[42] Josh Constine, *Snapchat hits a disappointing 166M daily users, growing only slightly faster,* TECHCRUNCH, May 10, 2017, https://techcrunch.com/2017/05/10/snapchat-user-count/.

[43] Christopher Ingraham, *If Facebook were a religion, it would be the second largest in the world*, WONKBLOG, THE WASHINGTON POST (June 30, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/06/30/if-facebook-were-a-religion-it-would-be-the-second-largest-in-the-world/?utm_term=.5af46ec816c4.

[44] Kenneth J. Gergen, THE SATURATED SELF, p. 150 BasicBooks, 1991

[45] Ibid.

[46] Gergen, p. 154.

[47] Saeideh Bakhshi, David A.Shamma, Lyndon Kennedy, EricGilbert : *Why We Filter Our Photos and How It Impacts Engagement,* p. 7, http://comp.social.gatech.edu/papers/icwsm15.why.bakhshi.pdf . The researchers found that certain filters, such as filters *"with warm temperature significantly increase number of comments and their effect on number of views*", p.8.

[48] A.D. Coleman, *Auras: The is an App for That,* MIT TECHNOLOGY REVIEW, Vol.118, No. 1, Jan./Feb.2015, p. 78.

benchmarks, as some *Instagram* users are now asking plastic surgeon to make them appear more like their own selfies, as enhanced by an *Instagram* filter! [49] Indeed, *Instagram*'s filters may give the most mundane images a veneer of glamour. As noted by Kate Losse in *The New Yorker*, "[*a*] *face in an Instagram photograph, filtered to eliminate any glare or unflattering light, appears star-like, as if captured by a deft paparazzo*."[50]

Posting one's image on social media may even become an obsession. Columnist Jeanne Phillips, of *Dear Abby* fame, told a recently-married man whose "*beautiful… tall and elegant*" wife's addiction to selfies-taking, 100 a day or so, triggered him to write to ask Abby what he could do about this obsession, that he "[*had] married a beautiful piece of arm candy*" *whose vanity and insecurity* "[*was*] *the "accessory" that* [*went*] *with* [*his*] *trophy*."[51] Is obsessive selfies-taking indeed an indication of an insecure personality? According to a study conducted by Ohio State University Professor Jesse Fox and graduate student Margaret Rooney, men posting selfies are more likely to be narcissistic. They also, according to this study, "*score higher on this other anti-social personality trait, psychopathy, and are more prone to self-objectification*,"[52] meaning that they value themselves mainly for their personal appearance. Taking selfies may encourage narcissism, as, according to Professor Fox, "[*w*]*ith the growing use of social networks, everyone is more concerned with their appearance. That means self-objectification may become a bigger problem for men, as well as for women*." Another academic study, conducted in 2013 by the

[49] Nicole Lyn Pesce, *Instagram fuels a new wave of plastic surgery*, NEW YORK DAILY NEWS, Feb. 4, 2015, 2:00AM, http://www.nydailynews.com/life-style/instagram-fuels-new-wave-plastic-surgery-article-1.2102389.
[50] Kate Losse, The Return of the Selfie, THE NEW YORKER, May 31, 2013, http://www.newyorker.com/tech/elements/the-return-of-the-selfie
[51] Ref http://www.uexpress.com/dearabby/archives .
[52] Jeff Grabmeier, *Hey, Guys: Posting a Lot of Selfies Doesn't Send a Good Message*, THE OHIO STATE UNIVERSITY NEWSROOM, Jan. 6, 2015, http://news.osu.edu/news/2015/01/06/hey-guys-posting-a-lot-of-selfies-doesn%E2%80%99t-send-a-good-message/

Department of Information Systems of the TU *Darmstadt University* by Dr. Peter Buxmann, and by the *Institute of Information Systems of the Humboldt-Universität zu Berlin* by Dr. Hanna Krasnova, social media sites "*offer users easy and transparent means to compare and "benchmark" themselves against their peers, inducing them to engage in social comparison*."[53]

Selfies are not, however, merely a frivolous activity. Taking selfies at the polls has been considered by some courts as an exercise of free speech protected by the First Amendment. The First Circuit explained that banning selfies at the voting booth, as proposed by, would "*affec*[*t*] *voters who are engaged in core political speech, an area highly protected by the First Amendment….A ban on ballot selfies would suppress a large swath of political speech, which occupies the core of the protection afforded by the First Amendment*." [54] Selfies can also be used, when coupled with face-recognition technology, as a way to authenticate a financial transaction, instead of a password, the so-called "selfies payments."[55]

Even artists are paying attention. Richard Prince's *New Portraits* 2014 exhibition at the *Gagosian Gallery* in New York City featured printout on canvas of *Instagram* pictures, some featuring celebrities, model Kate Moss for instance, while others featured less famous users, such as bloggers.[56] The appropriation artist chose a particular picture, commented on it using his own *Instagram* account, and then printed the photograph on canvas. The show was harshly criticized

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[53] Hanna Krasnova, Helena Wenninger, Thomas Widjaja and Peter Buxmann, *Envy on Facebook: A Hidden Threat to Users' Life Satisfaction*, http://warhol.wiwi.hu-berlin.de/~hkrasnova/Ongoing_Research_files/WI%202013%20Final%20Submission%20Krasnova.pdf

[54] Rideout v. Gardner, 838 F. 3d 65 , 75, (2016), quoting McIntyre, 514 U.S. at 346.

[55] MasterCard Identity Check: Facial Recognition Biometrics, MASTERCARD, http://newsroom.mastercard.com/videos/mastercard-identity-check-facial-recognition-biometrics/,

[56] Richard Prince, New Portraits, September 19 - October 24, 2014, GAGOSIAN GALLERY, http://www.gagosian.com/exhibitions/richard-prince--september-19-2014.

by some, and one critic, Tiernan Morgan, even wrote that the "*confluence of blue chip success, big brand money, and juvenile contempt for copyright imbues New Portraits with a dour, repugnant air*."[57] Fellow artist Laurie Simmons was one of the *Instagram* users whose picture has been used by Prince in the exhibition. Prince featured in his exhibition one images from the "How We See" Laurie Simmons exhibition, where the photographs represent a woman looking like a cross with a Japanese doll and a Margaret Keane 'Big Eyes' painting. Laurie Simmons has an *Instagram* account and posted some of the "How We See" photographs. As reported in *ArtNews*, Simmons was "*not happy*" about this use of her art by Prince.[58]

b) Face recognition technologies

Professor Alessandro Acquisti explained in his remarks at the December 2011 FTC Face Fact Workshop that technologies now enable anyone to identify a face amongst the billions of faces uploaded on social media. He further noted that Facebook makes it mandatory for its users to use their real name.[59] Therefore, a picture of an individual, even posted anonymously, can be linked to a particular individual if he has posted images of himself somewhere else on the Web under his real name, or if a third party has posted images of himself and identifies him in the pictures. Professor Acquisti and a group of U.S. researchers also proved that it is possible to link

[57] Tiernan Morgan, *Richard Prince, Inc*., HYPERALLERGIC, (Oct. 9, 2014), http://hyperallergic.com/152762/richard-prince-inc/

[58] Andrew Russet, *Eyes Wide Shut,* ARTNEWS, March 2015, p. 76. This show led to several copyright infringement suits, see Marie-Andrée Weiss, *Is Richard Prince the King of Fair Use?* TTLF Newsletter on Transatlantic Antitrust and IPR Developments (July 30, 2015), https://ttlfnews.wordpress.com/2015/07/30/is-richard-prince-the-king-of-fair-use/, and Marie-Andrée Weiss, *Richard Prince May Offer the SDNY Another Chance to Define Transformative Use of a Work*, THE 1709 BLOG (Nov. 23, 2016), http://the1709blog.blogspot.fr/2016/11/richard-prince-may-offer-sdny-another.html.

[59] *Face Facts: A Forum on Facial Recognition Technology*, FEDERAL TRADE COMMISSION, transcripts of remarks of Professor Alessandro Acquisti, p. 19, (Dec. 8, 2011), https://www.ftc.gov/sites/default/files/documents/videos/face-facts-session-3/4/120811_ftc_sess3.pdf

face recognition data with publicly available web 2.0 data and thus "re-identify" a particular individual. [60] Indeed, a Russian photographer has already proven that already-available inexpensive facial recognition technology can be used to identify a complete stranger by coupling a picture taken in public and searching for the same face on social media sites. [61] Yegor Tsvetkov photographed metro riders in St Petersburg, Russia, then uploaded them on the facial recognition app *FindFace*,[62] from Moscow-based company *N-Tech.lab*, to identify them. The app searches photographs posted on *VKontakte*, Russia's biggest social network, to find a match Mr. Tsvetkov published the results of this project online and titled it "*Your Face is Big Data*."

Facebook's artificial intelligence (AI) Research team presented a paper titled "*DeepFace: Closing the Gap to Human-Level Performance in Face Verification*" at the Conference on Computer Vision and Pattern Recognition in June 2014, about a facial recognition system, Deep Face, which the researchers claim "*is now at the brink of human level accuracy*." [63] *DeepFace*'s accuracy was 97.35% on a dataset, which comprised four million facial images belonging to more than 4,000 different persons. Such accuracy approaches human-level performance. According to the report, *DeepFace* is able to recognize faces even they are seen frontally on a photograph.

Professor Acquisti had predicted that "[*n*]o *doubt, 5 to 10 years from now, face recognizers will incorporate… additional metadata. Where will this data come from? Can you*

[60] Alessandro Acquisti, Ralph Gross, Fred Stutzman, *Faces of Facebook, Privacy in the Age of Augmented Reality,* Heinz College, Carnegie Mellon University, https://www.blackhat.com/docs/webcast/acquisti-face-BH-Webinar-2012-out.pdf

[61]Elena Cresci, *Russian photographer identifies strangers with facial recognition app*, THE GUARDIAN, (April 14, 2016 10:27EDT), https://www.theguardian.com/world/2016/apr/14/russian-photographer-yegor-tsvetkov-identifies-strangers-facial-recognition-app.

[62] http://findface.ru/

[63] Yaniv Taigman, Ming Yang, Marc'Aurelio Ranzato, Lior Wolf, *DeepFace: Closing the Gap to Human-Level Performance in Face Verification*, FACEBOOK, https://www.facebook.com/publications/546316888800776/

guess? Online social networks, mostly." [64] Therefore, Facebook real name's policy, further coupled with its proprietary face recognition program, *Tag Suggestion*, may be a marketer's dream, but a privacy nightmare. People or companies using this technology, which is inexpensive, [65]may have different purposes, from idle curiosity, stalking, "doxing,"[66] or background checking. But this technology can also be used by a retailer interested in knowing more about the likes and dislikes of a consumer, even if the consumer wants to keep this information a secret. A quick glance at the social media posts of a prospective client may be enough to inform the sale person about her most pressing retail needs without the prospect not being aware that the sales person knows her name and all the information that she has publicly shared on social media. Such technique can also be used by retailers to identify quickly and cheaply everybody entering their stores: here comes John Anderton indeed.

c) Holograms

Holograms of influencers' likeness could be used in the future for marketing purposes. Holograms are 3-D images which can be projected into a room where it can be viewed from different angles. Some may even be moving. They are starting to be used for advertising purposes

[64] *Ibid*.
[65] Professor Acquisti informed the audience at the FTC workshop that his team used a cloud-computing cluster which cost $2 an hour, and that they were able to compare a pair of images in 0.0000108 seconds. He also predicted that in 2021, one would be able to compare one random image taken from workshop audience to everyone in the U.S., in five minutes and at $2 an hour, possibly for $60 an hour in 10 seconds.
[66] Kevin Rothrock, AD VOICES GLOBAL VOX, *Facial Recognition Service Becomes a Weapon Against Russian Porn Actresses* (April 22 April 2016, 13:16 GMT) https://advox.globalvoices.org/2016/04/22/facial-recognition-service-becomes-a-weapon-against-russian-porn-actresses/.

in some airports[67] and may soon appear in retail stores as well. [68] While these pioneer holograms are using the likeness of a model, which, one assumes, has licensed his or her likeness for this particular commercial use, one can imagine that retailers may use soon the likeness of people visiting their store or maybe of their social media "friends". Imagine if the hologram of your best friend or of your favorite social media influencer would greet you at the entrance of a store at the local mall. Wouldn't you be likely to enter and have look at their socks or their computers? [69]

d) Virtual reality and augmented-reality

However, holograms may be soon *passé* as virtual reality (VR) is rapidly developing, and can even be used "on the go". Palmer Luckey developed a virtual-reality headset, the Oculus Rift and its *Oculus* start-up was sold to Facebook in March 2014 for $2 billion. Palmer Luckey predicted at the time of the sale that "[*w*]*e're going to the point where virtual reality is indistinguishable from reality itself."*[70] Another start-up, *Magic Leap,* developed a system where users would not have the feeling they are into a virtual world, but, instead, that a virtual world is visiting their own, real, world.[71] This technology allows its users to interact with other people, who are physically in another place, but seem to be in the same place than the *Magic Leap* user.[72]

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[67] Nate Schweber, *At La Guardia, a Smiling Helper Materializes, Digitally*, N.Y. TIMES, August 8, 2012, http://www.nytimes.com/2012/08/09/nyregion/la-guardias-digital-avatar-gives-passengers-airport-information.html?_r=0

[68] Jacob Kastrenakes. *Will you smile back when human holograms greet you at the airport?*, THE VERGE, (June 16, 2013, 4:18 pm), http://www.theverge.com/2013/6/16/4435982/airport-human-hologram-virtual-assistants

[69] Of course, one can also argue that that display would instead make us feel creepily uncomfortable.

[70] Innovators Under 35, MIT TECHNOLOGY REVIEW, Vol. 117 No. 5, Sept./Oct 2014, p. 62.

[71] Rachel Metz, *Magic Leap,* MIT TECHNOLOGY REVIEW, VOL. 118 No. 2, March/April 2015, p. 28-33.

[72] Brian Crecente, *Magic Leap: Founder of Secretive Start-Up Unveils Mixed-Reality Goggles, ROLLING STONE*, (Dec. 20, 2017), https://www.rollingstone.com/glixel/features/lightwear-introducing-magic-leaps-mixed-reality-goggles-w514479.

Consumers can buy their own Oculus Rift since March 2016.[73] Chinese retailer Ali Bab developed its own virtual reality technology which would allow virtual shoppers to visit stores from all around the worlds from their home.[74]

Such new technologies are already being used by retailers to attract new customers in their stores by offering them an on-site virtual-reality experience to lure them away from online shopping. North Face offered a virtual reality hiking experience in its Manhattan store and Lowe has created a 'Holoroom' which allows customers to view a virtual reality version of their home improvement project.[75] While Holoroom does not directly use the likeness of consumers, the retail consultant for this project believed that "[*i*]*n this selfie generation that we're contending with, it becomes a little bit of a form of social currency to have this experience, take a picture of yourself having that experience.*"[76] The virtual reality experience, at least as long as it is viewed by consumers as an interesting novelty, is likely to produce selfies featuring the product, which will be shared on social media.

e) In the future? Tracking consumers using wearable devices

Google introduced its Glass product in 2012, a head-worn computer which could be used to take pictures or make movies. Glass never became a commercialized product, and Google announced in 2015 that it was abandoning the project. One writer, Rachel Metz, explained then

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[73] Brian X. Chen, *Oculus Rift Will Cost $599*, BITS, (Jan, 6, 2016, 12:55 PM), http://bits.blogs.nytimes.com/2016/01/06/facebooks-oculus-says-it-will-charge-599-for-the-rift/.
[74] Frank Tong, *Alibaba develops technology to allow virtual visits to stores*, INTERNET RETAILER, (March 19, 2016, 12:00 PM), https://www.internetretailer.com/2016/03/18/alibaba-develops-technology-allow-virtual-visits-stores .
[75] Sarah Halzack, *Ever wanted to base jump? North Face wants you to try it — in its stores*, THE WASHINGTON POST, (May 10, 2015), http://www.washingtonpost.com/business/economy/virtual-reality-the-latest-weapon-in-the-battle-for-your-shopping-dollars/2015/05/10/07639f8c-e976-11e4-9767-6276fc9b0ada_story.html.
[76] Ibid.

that one of the reasons of its demise was its perceived lack of utility, as "*no one could understand why you'd want to have that thing on your face, in the way of normal social interaction.*"[77] Ms. Metz also noted that Google released Glass in beta, "*hop*[*ing*] *that software developers would come up with killer applications*."[78] One of the apps developed for Glass, Name Tag, allowed Google Glass wearer to check the online profile of a person after having taken a picture of him using the Goggle Glass camera.[79]

But wearables such as *Glass* may have a future after all, and may even be used for marketing purposes, using consumers' likeness. Snap announced on September 24, 2016 that it was launching its '*Spectacles'* product, a pair of glasses with an integrated video camera connecting directly into Snap, allowing its wearer to film its surroundings and post the video instantly on social media. Snap explained that "[*c*]*ircular video plays full screen on any device, in any orientation, and captures the human perspective with a 115 degree field of view*."[80] Snap is also developing a model of glasses which would include virtual reality. [81] Google relaunched its Glass product in 2017, but marketed it only to business which workers needs to have theirs hand free when working,[82] not for marketing purpose.

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[77] Rachel Metz, *Google Glass is Dead; Long Live Smart Glasses*, MIT TECHNOLOGY REVIEW, Vol. 118 No1, Jan./Feb. 2015, p. 80.
[78] Rachel Metz, ibid.
[79] Luke Dormehl, *Facial recognition: is the technology taking away your identity?* THE GUARDIAN (May 4, 2014, 8:00 BST), https://www.theguardian.com/technology/2014/may/04/facial-recognition-technology-identity-tesco-ethical-issues.
[80] *Introducing Spectacles!* , SNAP NEWS, (Sept. 24, 2014), https://snap.com/news/.
[81] Jon Russell, *Snap is developing a second version of Spectacles which may include augmented reality*, TECHCRUNCH (June 12, 2017), https://techcrunch.com/2017/06/12/snap-is-developing-a-second-version-of-spectacles-which-may-include-augmented-reality/.
[82] https://x.company/glass/.

B. How to use consumer's likeness for marketing purposes

What can marketers do with all this data? Much.

a) Using the power of influencers

Some users have become famous by sharing videos on YouTube, or by posting images on Instagram. However, companies doing the same are not always as successful.[83] Therefore, companies need to 'piggy-back' on social media influencers to successfully market their goods or services on social media. Some of social media accounts have followers in the ten thousands, hundred thousands, even millions. [84]

Personal likeness is a data which is particularly sought after by marketers and its commercial value has been increasing with the emergence of social commerce. Images are a powerful tool to communicate and to sell, as "*photos inspire more emotions in people… than text.*"[85] An Instagram post does have a commercial value, but this value is difficult to estimate. A site dedicated to influencer marketing allows interested social media users to enter their

[83] Douglas Holt, Branding in the Age of Social Media, HARVARD BUSINESS REVIEW, March 2016, p. 43. The author, a former professor at Harvard Business School and the University of Oxford, notes that only three corporations have made it to YouTube Top 500, and that "[*i*]*n YouTube or Instagram rankings of channels by number of subscribers, corporate brands barely appear."*

[84] Some of these followers, however, may be fake ones, as one may buy followers if feeling the need, see Natalie Koltun, *Insta-fakers: When fraud hits influencer marketing*, MOBILE MARKETER, (August 14, 2017), https://www.mobilemarketer.com/news/insta-fakers-when-fraud-hits-influencer-marketing/448797/ .

[85] Douglas MacMillan and Elizabeth Dwoskin, Smile! Marketing Firms Are Mining Your Selfies, WALL STREET JOURNAL, Oct.9, 2014, 9:35PM, http://online.wsj.com/articles/smile-marketing-firms-are-mining-your-selfies-1412882222

Instagram handle to calculate the commercial value of one of their posts,[86] and another one offers to calculate the value of one tweet posted from a particular Twitter account.[87] However, these sites can only offer an estimate.

A *Variety* survey of U.S. teens made in 2015 found that YouTube stars and other online stars have more influence on teenagers than Hollywood and pop stars, such as Bruno Mars and Taylor Swift.[88] It is thus not surprising that these new online stars have drawn the attention of well-established companies seeking to reach marketing prospects. As explained by *New York Times* journalist Katherine Rosman, "[*t*]*hese brands are looking to co-opt the Insta-fluence of people posting photographs of their lives and experiences in a way that is interesting to strangers*." [89] However, brands choose sometimes to associate themselves with 'micro-influencers' who may have only a mere 1000 followers or more, if they believe that the influencer and its audience are likely to be interested in the brand, if the influencer efficiently engages with his audience and regularly posts new entries on his social media page.[90]

Such social media stars are called 'influencers'. The Interactive Advertising Bureau (IAB) defines influencers as "[*u*]*sers with the ability to reach other users or affect other users 'thinking*

[86] *Instagram Sponsored Post Money Calculator*, INFLUENCER MARKETING HUB, https://influencermarketinghub.com/instagram-money-calculator/,See also *Here's exactly how much your Instagram posts are worth,* MONEYISH https://moneyish.com/upgrade/heres-exactly-how-much-your-instagram-posts-are-worth/.

[87] *Calculate how much your tweets are worth*, WEBFLUENTIAL, https://influencermarketinghub.com/instagram-money-calculator .

[88]Susanne Ault, *Digital Star Popularity Grows Versus Mainstream Celebrities*, VARIETY, (July 23, 2015, 09:35AM PT), http://variety.com/2015/digital/news/youtubers-teen-survey-ksi-pewdiepie-1201544882/.

[89] Katherine Rosman, *Your Instagram Picture, Worth a Thousand Ads* (Oct. 15, 2014), http://www.nytimes.com/2014/10/16/fashion/your-instagram-picture-worth-a-thousand-ads.html?_r=0

[90] Chris Ake, *How To Choose The Right Micro-Influencer For Your Brand*, FORBES, (Aug 2, 2017, 09:00 AM), https://www.forbes.com/sites/forbesagencycouncil/2017/08/02/how-to-choose-the-right-micro-influencer-for-your-brand/#3a91ab837885.

in a social media online community… A person, group or entity with the ability to reach and affect another person or group of people's thinking and behavior due to attributes such as experience, expertise, reputation and social footprints." [91] France's professional advertising regulatory authority (*autorité de regulation professionnelle de la publicité*) (ARPP) added in June 2017 to its recommendation on digital advertising a point devoted to influencers collaborating with a brand, and defined an influencer as "*an individual expressing a point of view or giving advice in a specific area and in a style of its own which is identified as such by his audience*."[92]

Some influencers are getting free products and services in exchange of one or several posts about them on their *Instagram* feed, with appropriate hashtags. Others are even paid. This new marketing practice, however, raises consumer protections issues, as the FTC considers it is an endorsement, as we'll see later on.

They are many ways influencers may influence the marketing decision of their followers. They may, for instance, share online what they bought on their shopping expeditions, their "shopping hauls."[93] A study made by Google in 2014 noted that the popularity of these videos "*spike during key shopping events and hit their peak during Black Friday weekend. Videos with "haul" in the title have been watched more than 1.1B times on YouTube, and views are up 1.7x this year*

[91] http://www.iab.com/wp-content/uploads/2015/12/MRC-Social-Media-Measurement-Definitions-FINAL.pdf

[92] « *un individu exprimant un point de vue ou donnant des conseils, dans un domaine spécifique et selon un style ou un traitement qui lui sont propres et que son audience identifie*. »

[93] Bethany Mota's YouTube channel counts more than 7 million subscribers, https://www.youtube.com/user/Macbarbie07. Ms. Mota is a teenager, still living with her parents in California. She regularly posts videos about fashion, cosmetics, and share her shopping "hauls" online.

compared to last year."[94] For Google, these videos are "*the YouTube equivalent of telling your best friend about your latest shopping purchases.*" But telling one's best friend offline about one's shopping purchases is of no interest to retailers, unless the friend later posts this recommendation on his social media account, whereas online shopping recommendations can be shared and monetized.

Another way to influence the buying decisions of social media contacts is to share photos while shopping. Some companies started offering e-commerce sites technologies allowing their customers to "try on" clothes sold on the site by offering them "virtual fitting rooms." The consumer first created a profile by uploading a photograph of him or her standing, wearing tight-fitting clothes, which could then be used to "try on" the photography of the clothes sold online. A particular item was superimposed to the full-standing picture of the consumer, who could then share this image to his or her social media contacts by using a "share" button.[95]

Danish start-up *Fitbay* developed an app which matches users with similar shape and body sizes so that users can share pictures of them, wearing the clothes, so that prospective shoppers can assure that clothes they want to order online will fit.[96] Christian Wylonis, *Fitbay*'s founder and CEO, was quoted as saying: "*It's the missing social network*; w*e aim to become the Facebook of clothing*." [97] Each of the users had a "Discover" page, which not only features pictures of

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[94] *2014 Holiday Shopper Research: Shopping Never Sleeps*, GOOGLE ADWORDS, Oct. 9, 2014, http://adwords.blogspot.com/2014/10/2014-holiday-shopper-research-shopping.html

[95] *Cloud-Based Augmented Reality Virtual Fitting Room For Apparel Brands and Retailers*, FITTING REALITY, http://fittingreality.com/downloads/AR_Fitting%20room_eng-1.pdf, p.5.

[96] Natasha Lomas, *Fitbay Doubles Down On Fashion Selfies,* TECHCRUNCH (June 17, 2015), https://techcrunch.com/2015/06/17/fitbay-doubles-down-on-fashion-selfies/.

[97] *A stitch in time? 'Facebook of clothing' could be the right fit,* THE IRISH TIMES (Sept. 5, 2014, 12:00 PM), http://www.irishtimes.com/business/sectors/retail-and-services/a-stitch-in-time-facebook-of-clothing-could-be-the-right-fit-1.1919035

merchandise from online stores, but also photographs of other *Fitbay* users site wearing clothes they've bought, which *Fitbay*'s algorithms predicted a particular user will like. Another start-up, *Stylinity,* proposed to install big photo booths outside retail stores' fitting rooms. A customer tried out a new outfit, stepped into the *Stylinity box,* and was able to take four high-quality pictures so they could have a record of the clothes they are trying on. The pictures were then sent by email to the customer. If he signed up for a *Stylinity* account, all of these images were made available to him. These images can also be shared on social media via the *Stylinity* site, and the social media contacts were provided with a link to directly buy online the clothes featured by their "friend." If enough of their friends ended up buying clothes after seeing the images, the users are rewarded with gift cards. [98] *Fitting Reality* had even developed an app for *Google Glass.* The promotional video showed a young man, wearing *Google Glass*, shopping for his girlfriend. He scanned the bar codes for the two dresses he had selected, and was able to see them on the virtual fitting profile of his girlfriend, and could send these pictures to her. They were seen discussing by phone which dress to buy (spoiler alert, he ended up buying both.)[99]

Even though Google announced on January 19, 2015 that it retired *Google Glass* from the market, similar technologies are now available. Such 'smart' fitting rooms may become a privacy quagmire, as they collect personal data which are of interest to retailers and marketers. How

[98] Marc E. Babej, *How Stylinity Is Turning Fashion Retail Into A Social Experience*, FORBES, (Feb. 25, 2014, 5:53 PM), http://www.forbes.com/sites/marcbabej/2014/02/25/how-stylinity-is-turning-fashion-retail-into-a-social-experience/. This article does not tell, however, exactly how many social media connections must buy the clothes after having seen them on their "friend."

[99] FITTING REALITY: http://fittingreality.com/google-glass/

does the consumer consent to that collection before using the fitting room? There is also a risk of surreptitious data collection.[100]

Influencers may, more simply, take a selfie showing off their latest fashionable acquisitions and, by the savvy use of tags and comments, advertise the brand on their social media accounts, particularly on Instagram.

b) How to use all of this UGC

As creating content for marketing campaign can be time-consuming and expensive for companies, many companies tap into User-Generated Content (UGC) to create advertising campaigns.

The Interactive Advertising Bureau (IAB) defines UGC as "[*c*]*ontent that is entered, copied to, posted (or otherwise created) by users of a* [*s*]*ocial* [*m*]*edia* [*p*]*latform for sharing with others on that* [*p*]*latform."*[101] UGC can be a tweet, a blog post, a comment or a critic about a product or service, a video, and, of course, a photograph. Marketers refer to the use for marketing purposes of images taken by consumers as "consumer engagement." Such consumer engagement can stem from an invitation to comment on a product or a service online, using a particular hashtag, to an invitation to provide pictures or text to be used to create a marketing campaign. Collecting UGC is inexpensive and easy, and even small companies can easily collect them. Not all, but many

[100] This concern is voiced by Nuala O'Connor, President and CEO of the Center of Democracy and Technology, when interviewed by the Associated Press in this video: https://cdt.org/press/ap-fitting-rooms-go-high-tech-to-spur-sales/.
[101] *Social Media Definitions*, IAB (Dec.2015), https://www.iab.com/wp-content/uploads/2015/12/MRC-Social-Media-Measurement-Definitions-FINAL.pdf.

of this UGC are images taken by consumers of their likeness or the likeness of their family and friends.

Using UGC for marketing purposes is an attractive method for advertisers, as it is not costly, and the marketing campaigns thus created have a high return on investment. A 2017 survey made in the U.S. found that a quarter of women shoppers considered UGC to be the most influential tool, while 73% of the persons surveyed found that UGC increased their purchasing confidence. [102]

The amount of information and images uploaded every day on social media is staggering. According to an IBM study, 90 percent of the data in the world in 2016 had been created in the last two years.[103] Scouring the web to find UGC which may be used for marketing purposes is a daunting task, even with the help of hashtags and metadata. This is why most companies are not harvesting organically produced data, that is, data created spontaneously. Instead they are incentivizing users to create content especially for them. To do so, they either initiate the collection of data by organizing a contest or a sweepstake, or they use the services of a third party, such as a platform helping companies to use UGC to create a marketing campaign.[104] Such

[102] The survey was developed by TurnTo and executed by Ipsos, on a sample of 1000 U.S. shoppers, see *New Study Shows User-Generated Content Tops Marketing Tactics by Influencing 90 Percent of Shoppers' Purchasing Decisions*, PRNEWSWIRE, (June 19, 2017, 07:48 ET), http://www.prnewswire.com/news-releases/new-study-shows-user-generated-content-tops-marketing-tactics-by-influencing-90-percent-of-shoppers-purchasing-decisions-300475348.html.

[103] 10 Keys Marketing Trends for 2017 and ideas for Exceeding Customer Expectations, IBM marketing Cloud, https://public.dhe.ibm.com/common/ssi/ecm/wr/en/wrl12345usen/watson-customer-engagement-watson-marketing-wr-other-papers-and-reports-wrl12345usen-20170719.pdf.

[104] See for example, Ricola which made "*user-generated content an integral part of their marketing plan*", Natasha D. Smith, *Ricola Taps Into Genuine Customer Stories to Boost Sales*, DIRECT MARKETING, (March 8, 2016), http://www.dmnews.com/content-marketing/ricola-taps-into-genuine-customer-stories-to-boost-sales/article/481541/. The article quotes Matthew Scott, SVP of business development and strategy for the platform Crowdtap: "*By empowering a community of people to function as de facto employees, Ricola proves the power of consumer-centric marketing*."

platform, *Crowdtap*, calls this marketing method "*peer-to-peer brand storytelling*" and urge companies to "[*s*]*park authentic, branded conversations across all of the major social media platforms."*[105] Such platforms also provide a new way for social media influencers to 'monetize' their account by taking advantage of their "influencer" status, a person likely to influence a person into buying a particular product or service.

Consumers willing to create UGC for a brand are "*brand advocates*." "*Brand advocacy*," according to the definition provided by the Interactive Advertising Bureau (IAB), is the "[*a*]*ctivity whereby a user creates favorable UGC about a brand or product, and then passes on positive messages about the brand to other users such as in a recommendation*."[106] Many social media users post images of themselves wearing their latest fashion acquisitions, and some e-commerce sites allows clients to post these pictures below the garment offered for sale.[107] A platform allows companies to aggregate such posts and to feature them on their own sites, calling the process "on-site UGC". [108] These selfies are thus used for marketing purpose, often without compensating the users for the commercial use of their likeness. Consumers are aware that their selfies may be featured on the brand's site, as only pictures using the appropriate hashtag may be used.[109] Is using the official hashtag consent to have one's UGC and likeness be used commercially? We'll come back to this question later on.

105

106 *Social Media Definitions*, IAB (Dec.2015), https://www.iab.com/wp-content/uploads/2015/12/MRC-Social-Media-Measurement-Definitions-FINAL.pdf

107 J.Crew for instance.

108 https://www.curalate.com/product/fanreel/.

109 *INTRODUCING: Fanreel for MotivesCosmetics.com and SHOP.COM*, FANREEL (Feb. 24, 2017), https://blog.unfranchise.com/blog/introducing-fanreel-motives-cosmetics-shop-com.

a. Consumers' likeness used in social media marketing campaigns

As selfies are not a rare commodity, a site asking visitors to share them is likely to receive enough entries to organize a successful and cost-effective social marketing campaign. Such campaigns can be organized in different ways.

The preferred method for most companies to harvest relevant pictures is to ask members of the public to share their selfies on social media while using a particular hashtag. The images are then used for various marketing purposes. It is an easy way to start a marketing campaign and it is thus often used, for better or worse.[110] As an example of the latter, a British online dating service used fake profiles, which included photographs, to entice users to sign up for a paid membership account.[111] After a new user signed up for a free account, he or she started receiving messages expressing romantic interest which were sent by these fake profiles. The new user had to sign up for paid membership in order respond to these messages. The Federal Trade Commission (FTC) filed suit against the online dating service, claiming that such practices were a violation of Section 5(a) of the FTC Act as they were an unfair or deceptive act affecting commerce.[112] In the complaint, the FTC described such fake profiles as "*Virtual Cupids*" and

[110] A Tumblr blog which used to collect un-inspirational examples of such contests had for motto: "Your Selfie Idea is Not Original. It's Shit", http://yourselfieideaisnotoriginal.tumblr.com/.
[111] Online Dating Service Agrees to Stop Deceptive Use of Fake Profiles, FEDERAL TRADE COMMISSION, Oct.29, 2014, http://www.ftc.gov/news-events/press-releases/2014/10/online-dating-service-agrees-stop-deceptive-use-fake-profiles
[112] Federal Trade Commission v. JDI Dating, Ltd. and William Mark Thomas, No. 1:14-cv-08400 (ND Illinois filed Oct.27, 2014), http://www.ftc.gov/system/files/documents/cases/141028jdidatingcmpt.pdf

explained that they "*frequently contain*[*ed*] *photographs and personal information mimicking real people*" but did not disclose that these profiles were fake ones.

Some marketing projects can be rather elaborate. For instance, retailer Forever 21 invited in 2015 I*nstagram*'s users to tag their photographs with #Forever21ThreadScreen for a chance to participate in the making of an promotional event for the store, as the tagged images were projected on a 2,000 pounds screen made out of rotating spools of threads. The machine was originally built to be shown in one of the retailer's stores, but, as it turned out to be too heavy, at 2, 000 pounds, to be installed there, the agency who had created it kept it in its office in Brooklyn,[113] and it could be seen live on a web site created for the occasion.[114]Not all the images tagged #Forever21ThreadScreen were selfies, but many of them were.

British fashion retailer *French Connection* only wanted selfies for its April 2014 promotional campaign, which used customers' selfies to create a digital storefront display. Individuals interested to participate could first register, then chose an outfit at a *French Connection* store and be given a "makeover." They took a selfie which was posted in the store's windows. Passersby's were able to vote for their favorite pictures by placing their hand in front sensors placed in the window, further mixing real life and digital life, an particular experience named "*phy-gital*."[115] *French Connection* also published the selfies online, and even used them to create an "F" design.[116]

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[113] Hilary Hilnes, *Forever 21's 1-ton screen turns Instagrams into real-life mosaics*, DIGIDAY, July 22, 2015, http://digiday.com/brands/forever21s-1-ton-screen-turns-instagrams-real-life-mosaics/.
[114] F21THREADSCREEN.COM, http://f21threadscreen.com/
[115] French Connection Launches In-Store #Selfie Campaign, FASHION&MASH, April 22, 2014, http://fashionandmash.com/2014/04/22/french-connection-launches-in-store-selfie-campaign/
[116] http://selfie.frenchconnection.com/post

Fashion companies are not the only one ones using this marketing strategy: a pretzel store asked users to post pictures on social media using the hashtag #saycheddar to promote a new product, a cheddar-filled pretzel nuggets,[117] and Dunkin Donuts regularly organize such contests.[118] Tour operators also organize selfies contests,[119] even universities.[120] A chocolate maker encouraged consumers to take a selfie, use the hashtag #wonderfullycomplicated when posting it on social media, for a chance of having the selfie be used in an advertising campaign.[121]

Selfies are also used as a token to enter a sweepstake. Participants post a selfie on *Twitter* or *Instagram* using a particular hashtag for a chance to win a price.[122] A company even asked consumers to share their own baby pictures to enter a particular contest.[123] Often, the company organizing the sweepstake is asking participants to feature their product in the selfie, a practice which may run afoul of sweepstake laws, as we'll see later on.[124]

It is sometimes necessary to post a selfie because the contestant will be judged on his appearance. For example, fashion company *Marc Jacobs International* (MJI) launched a

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[117] Auntie Anne's, *#SAYCHEDDAR CONTEST*, Facebook (Oct. 5, 2015), https://www.facebook.com/auntieannespretzels/photos/a.135180527409.109589.9736862409/10153614542602410/?type=3&theater.

[118] See for instance *Snap Us Your First Day of Summer Selfies for the Chance to Win $10,000*, DUNKIN DONUTS, (June 20, 2017), https://news.dunkindonuts.com/blog/Firstdayofsummer.

[119] https://www.facebook.com/BulldogTours/photos/a.10152515925277049.1073741838.68692072048/10152525327802049/?type=3.

[120] http://www.univ-orleans.fr/deg/iae/orl%C3%A9ans-selfie-contest.

[121] Karlen Lukovitz, *Scharffen Berger Digital Billboards Feature Selfies*, MEDIA POST, Sept. 4, 2014, 9:49AM, http://www.mediapost.com/publications/article/233530/scharffen-berger-digital-billboards-feature-selfie.html

[122] See for example the #Dress4MLS contest organized by Major League Soccer (MLS) to celebrate the beginning of the MLS 2016 season. Fans were asked to share on social media their pictures wearing MLS products, *Wear your MLS gear this Friday and share using #Dress4MLS*, MLS SOCCER (Feb. 29, 2016, 11:10AM EST), http://www.mlssoccer.com/post/2016/02/29/wear-your-mls-gear-friday-and-share-using-dress4mls.

[123] Alex Samuely, *Cinnabon sprinkles mobile coupons, film partnership into latest social sweepstakes*, MOBILE COMMERCE DAILY, (Sept. 26, 2016), http://www.mobilecommercedaily.com/cinnabon-sprinkles-mobile-coupons-film-partnership-into-latest-social-sweepstakes

[124] See below.

promotion in the fall of 2014 to find models for its spring 2015 *Marc by Marc Jacobs* advertising campaign. It had already done so six months earlier when searching for models for its fall 2014 advertising campaign. Candidates could post a photograph of themselves on *Twitter* or *Instagram*. By tagging their entry #castmemarc, they accepted to enter the competition. Under the terms of the contest, participants agreed that, "[*b*]*y using the hashtag [#castmemarc] in connection with your Instagram or Twitter account post, you are acknowledging and agreeing that MJI has the right to stream your post through the Instagram or Twitter API (as applicable) or otherwise use your posts in connection with this casting call…Your Instagram account must be set for public viewing in order for your submission to be eligible."*[125] It is unclear if the winners of this social media casting call were being financially compensated, or if being the star of a photo shoot was the reward itself. [126]

The likeness of social media users may also be used to advertise a brand. Snap allows its users to superimpose their images, including their selfies, to emojis or scribbles. The company introduced in October 2015 its 'Sponsored Lens' program, which allows companies to design special lenses promoting their brand or product, [127] featuring their logo and trademarks to be superimposed by users on their Snap posts.[128] Many of these posts are selfies, and thus the image of the user can be superimposed with a corporate logo. Mc Donald's was the first company to

[125] Terms and Conditions on file with the author.
[126] Lizzie Crocker, *How Marc Jacobs Punk'd the Modeling World*, THE DAILY BEAST, July 8, 2014, http://www.thedailybeast.com/articles/2014/07/08/marc-jacobs-punk-d-the-modeling-world.html
[127] Lauren Johnson, *Snapchat's First Sponsored Lens Stars 'Peanuts' and a Stream of Candy Corn* , ADWEEK, (Oct. 30, 2015, 2:01PM PM), http://www.adweek.com/news/technology/snapchats-first-sponsored-lens-stars-peanuts-and-stream-candy-corn-167852 . Some of these images are posted on Twitter by the user thus branded, see for example https://twitter.com/misscrazybanana/status/851564570279804928.
[128] *Snapchat turns geofilter digital stickers into revenue source*, LOS ANGELES TIMES, (June 15, 2015, 9:40 PM), http://www.latimes.com/business/la-fi-0613-snapchat-geofilters-20150616-story.html#page=1.

use this marketing program and users could superimpose their posts with images of hamburgers or French fries. Many other companies have followed since, including high-end companies such as Tiffany[129] or Lilly Pulitzer.[130] The likeness of the user is superimposed with an image of a product or a logo, and sometimes seems to interact with the product. As noted by journalist Julia Boorstin, this allows Snap "*users to merge themselves with a brand, play around with a logo and then send a video of themselves, swathed in a brand image, to their friends [thus] turn[ing] consumers into brand evangelists… in the most personal and powerful of ways*."[131]

b. Product placement on social media

Social media posts may be used to promote a product by placing it into the post. For instance, Soccer player Cristiano Ronaldo is sponsored by Nike, and the brand name was referenced, or its logo was visible, in 347 of the 2016 social media post of Ronaldo, generating 477 million interaction (likes, comments…) [132]

c. Consumers' likeness used for market analysis

Some marketing professionals are only interested in selfies because they want to know the brand of the goods worn or held by the subject of the photograph. To do so, they may hire companies such as *Ditto Labs*, which web site asks this question: "*1.8 Billion photos are shared in*

[129] Tiffany incorporates Snapchat lens, geofilter into #LoveNotLike effort, LUXURY DAILY, (July 29, 2016), https://www.luxurydaily.com/tiffany-incorporates-snapchat-lens-geofilter-into-lovenotlike-effort/.
[130] Lara Piras, Lilly Pulitzer Has Created Custom-Printed Filters for Snapchat, PSFK, (June 26, 2016), http://www.psfk.com/2015/06/lilly-pulitzer-geofilters-snapchat-laforce-stevens.html
[131] Julia Boorstin, How *Snapchat utilizes lenses to turn users into brand evangelists*, CNBC, (Aug. 26, 2016, 2:10 PM ET), http://www.cnbc.com/2016/08/26/how-snapchat-utilizes-lenses-to-turn-users-into-brand-evangelists.html
[132] See Kurt Badenhammer, *Cristiano Ronaldo Generated $500 Million in Value for Nike in 2016*, FORBES, (Feb. 17, 2017), https://www.forbes.com/sites/kurtbadenhausen/2017/02/16/cristiano-ronaldo-generated-500-million-in-value-for-nike-in-2016/#4aca97a0c3e9.

social media every day. Have you seen what they say about your brand?" The *Ditto* "Photo Firehose" livestream is available online, and shows the last pictures shared publicly on social media sites which have been scanned for logos and brands.[133] The database is searchable by themes: for example, if one searches for "coffee," the logo of a certain company headquartered in Seattle in seen quite frequently. However, this brand has competitors and a box on the left-side of the screen shows the percentage of appearance on social media pictures of various coffee brands, even indicating if their popularity is up (green) or down (red). The companies featured in these pictures may thus get a glimpse into how their products or services are used by their customers and also possibly get a better understanding of their customers' lifestyle and tastes, including which other brands they also wear or use. As noted by David Rose, *Ditto's* chief executive, this helps identify "*affinities for partnerships and cross-merchandising*."[134] Google is creating its own image classification program, *GoogLeNet*, which is able to recognize the objects in a picture and label them.[135]

David Rose specified that Ditto only analyzes photos publicly shared on Twitter, Tumblr and Instagram, "*to avoid privacy concerns*." [136] Is this enough? Are they other legal issues to consider; such as right of publicity or copyright? We'll come back to these questions later.

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[133] James Dean, *Smile, the advertisers are watching your social networks*, THE TIMES (October 14 2014, 1:01am), https://www.thetimes.co.uk/article/smile-the-advertisers-are-watching-your-social-networks-hr7wzvq3vrt.
[134] Jane L. Levere, *Kraft Macaroni and Cheese Enlists Start-Up to Help With Social Media*, THE NEW YORK TIMES, April 20, 2014, http://www.nytimes.com/2014/04/21/business/media/kraft-macaroni-and-cheese-enlists-start-up-to-help-with-social-media.html
[135] Christian Szegedy, *Building a deeper understanding of images*, GOOGLE RESEARCH BLOG, Sept.5, 2014, http://googleresearch.blogspot.com/2014/09/building-deeper-understanding-of-images.html
[136] Jane L. Levere, *Kraft Macaroni and Cheese Enlists Start-Up to Help With Social Media*, THE NEW YORK TIMES, April 20, 2014, http://www.nytimes.com/2014/04/21/business/media/kraft-macaroni-and-cheese-enlists-start-up-to-help-with-social-media.html

d. Using consumer's likeness to analyze their emotions

"Emotional analysis" is the science of analyzing human emotion. Researchers are finding ways to incorporate that knowledge into machines, including computers, mobile devices and their applications, in order to "*open…up a new dimension of human-machine interfaces*."[137]

Indeed, human faces clearly reflect emotions, and marketing companies are taking notice, as "emotion detection" allows marketers to know, in real time, if a particular product or service is successful, or likely to be successful. For instance, the *Ditto* software, created by the Ditto Labs, can detect the geolocation of the pictures and gives each faces in the photograph a facial mood score (FMS).

BBC Worldwide used an emotion-detection technology developed by *CrowdEmotion*, a *BBC Worldwide Labs* startup, to analyze the spontaneous facial expressions of viewers of a pilot program to decide whether the new program is worthy to be developed as it would likely be successful.[138] *CrowdEmotion* described its technology as "[*t*]*he world's first cloud based facial coding technology so you can measure emotions anytime, anywhere simply using your own camera."* [139] The product combined algorithms and neuroscience research so that facial expressions may be analyzed in real time. This is how it works: a camera, installed on a computer or a television set, analyzes the emotion of the person in front of it. The various human face' expressions thus captured are compared with the Facial Action Coding System (FACS), which was

[137] Yuval More, *Emotions Analytics to Transform Human-Machine Interaction,* WIRED, Sept. 2013, http://www.wired.com/2013/09/emotions-analytics-to-transform-human-machine-interaction/
[138] Shona Gosh, *BBC Worldwide uses facial recognition to find the next Breaking Bad*, MARKETING MAGAZINE, Nov. 5, 2014, http://www.marketingmagazine.co.uk/article/1320543/bbc-worldwide-uses-facial-recognition-find-next-breaking-bad
[139] CROWDEMOTION, http://www.crowdemotion.co.uk/

first developed by Paul Ekman and Wallace V. Friesen, with Joseph C. Hagar later contributing to the project as well. [140] The *CrowdEmotion*'s software analyses the images in real time and measures the degrees of seven human emotions: neutral, happy, surprised, angry, disgusted, afraid, and sad. *CrowdEmotion*'s website not only lists television and film as industries which may benefit from this new technology, but also, marketing, human resources, sales, education, health, public safety, games, and social media.

A similar program, *TVision*, uses facial recognition technology to measure when the eyes of television viewers are actually fixed on the screen and provide this second-by-second data to advertisers, agencies, and television networks which then use this information to verify if a particular television ad is effective. [141] Television viewers opt in to the program and are compensated, so consent is not an issue. They also agree to provide TVision their age, gender, ethnicity, education level, household income and even political affiliation. *TVision* installs under their television a small box holding a sensor, which then tracks how many people are in the room, when they are looking at the screen, when they are not looking at the screen, and even if they smile or frown. This technology has been used during the 50th *Super Bowl* broadcast in February 2016. [142]

Using a moving image instead of a static photography is of great interest for marketers, as our face reflects our emotions, likes and dislikes, in a much more complex way than a mere digital thumb up or thumb down. A Swiss startup company, *nViso*, posits to have created an

[140] PAUL EKMAN GROUP, http://www.paulekman.com/paul-ekman/.
[141] http://tvisioninsights.com/team/
[142] http://www.betaboston.com/news/2016/02/05/on-super-bowl-sunday-facial-recognition-software-will-show-which-ads-were-worth-the-money/

algorithm which, by capturing "*hundreds of measurement points, tracking 43 facial muscles in real-time*", is able to analyze the emotion of consumers by analyzing their "micro emotions."[143] The *nViso* company also used the work of Dr. Paul Ekman on micro-expressions to create their product. According to Dr. Ekman's website, "[*m*]*icro expressions are very brief facial expressions, lasting only a fraction of a second. They occur when a person either deliberately or unconsciously conceals a feeling. Seven emotions have universal signals: anger, fear, sadness, disgust, contempt, surprise and happiness."* [144] These micro-expressions are universal. Dr. Ekman's interest in this study is however more about improving our capacity at empathy than analyzing consumer's emotions. *nViso*'s emotional analytics technology may thus allow marketers to analyze the emotional reactions of focus groups participants to their products or services,[145] but the technology can also be of use, according to the company's website, to online and off-line retailers, to benefit their customer service department or to measure their media success. For example, a comedy club in Barcelona is already using facial recognition technology to monitor how much its patrons are enjoying the shows. Tablets attached at the back of each seats are monitoring facial expressions, and each laugh is billed 0.30 Euros, with a cap of 24 Euros.[146]

Facebook owns a patent for "*Techniques for emotion detection and content delivery*. "[147] The technique uses smartphone or laptop cameras to detect user's emotions so that the site can deliver them content adapted to this particular emotion: after the emotion has been identified,

[143] http://www.nviso.ch/technology.html.
[144] http://www.paulekman.com/micro-expressions/.
[145] Frederic Filloux, *Smartphones and facial recognition: focus groups 2.0,* THE GUARDIAN, June 17, 2013, 06;11 EDT, http://www.theguardian.com/technology/blog/2013/jun/17/smartphone-facial-recognition-monday-note
[146] Jane Wakefield, *Comedy club charges per laugh with facial recognition*, BBC, October 9, 2014, 10:41 ET, http://www.bbc.com/news/technology-29551380
[147] U.S. Patent No. 9,681,166 (filed Feb. 25, 2014).

an application programming interface (API) identifies content to display to user based on his or her identified emotion type. Indeed, being able to know the emotional state of their customers is of great interest to marketers. Devices allowing them to gather this data are already invented or commercialized. An Australian shopping mall has been using facial recognition to state the mood of its shoppers, in a range very unhappy to very happy.[148]The U.S. Patent and Trademark Office (UPSTO) issued in 2015 a patent to Microsoft for a "*wearable emotion detection and feedback system*."[149] It is described as a "*see-through, head mounted display and sensing devices cooperating with the display detect audible and visual behaviors of a subject in a field of view of the device... During interactions, the device, recognizes emotional states in subjects by comparing detected sensor input against a database of human/primate gestures/expressions, posture, and speech. Feedback is provided to the wearer after interpretation of the sensor input*." So the device allows its wearer to recognize the emotional states by comparing it to a database of prior-recognized emotional states. Where would this data come from? One of the articles cited by Microsoft as reference in its application is an article about an augmented reality shopping assistant, which would be worn be consumers while shopping.[150] Such device would "*provide personalized advertising and in-store shopping assistance based on dynamic*

[148] Luke Anscombe, *Westfield is using facial detection software to watch how you shop,* NEWS.COM.EU (Oct.19, 2017,1:16PM), http://www.news.com.au/finance/business/retail/westfield-is-using-facial-detection-software-to-watch-how-you-shop/news-story/7d0653eb21fe1b07be51d508bfe46262.
[149] U.S. Patent No. 9,019,174 (filed Oct. 31, 2012).
[150] Zhu, et al., *Personalized In-store E-Commerce with the PromoPad: An Augmented Reality Shopping Assistant*, PROCEEDINGS OF ELECTRONIC JOURNAL OF E-COMMERCE TOOLS AND APPLICATIONS, vol. 1 Issue 3 (2004).
applicant .

contextualization."[151] Any consumer using this device, or similar ones, would be well advised to read carefully the privacy policy of the retailer providing such device.

Indeed, while the *TVision*' users agreed to participate to the program, it is not clear whether Facebook and Microsoft would inform people that their facial expressions will be analyzed for possible marketing purposes. After the FTC had hosted, on December 8, 2011, a public workshop on facial recognition technology, it asked on its website consumers to comment on the issues discussed at the workshop, among them "[*w]hat are best practices for providing consumers with notice and choice regarding the use of these technologies?*"[152]

e. Consumer's likeness used in digital signage

The technology used in the movie *Minority Report*[153] to provide personalized advertising to John Anderton is already available, although it is not (yet) scanning the eyes of passing-by consumers to provide them personalized advertising. One of the presenters at the December 2011 FTC workshop on facial recognition technology, [154]Brian Huseman, presented the *AIM Suite* product developed by IBM. AIM stands for Audience Impression Metrics and is a facial detection software used in digital signs. It uses AVA (Anonymous Viewer Analytics) to determine the general age and gender of the viewer. However, it does not record any images nor does it store

[151] WEI ZHU, CHARLES B. OWEN, HAIRONG LI, DESIGN OF THE PROMOPAD: AN AUTOMATED AUGMENTED-REALITY SHOPPING ASSISTANT, in COMPUTATIONAL ADVANEMENTS IN END USER TECHNOLOGIES: EMERGING MODELS AND FRAMEWORKS, 202 (Steve Clarke ed., 2009).
[152] Amanda Koulousias, *Face Facts: We want to hear from you*, FEDERAL TRADE COMMISSION BUSINESS BLOG, Dec. 29, 2011, 3:40PM, http://www.ftc.gov/news-events/blogs/business-blog/2011/12/face-facts-we-want-hear-you.
[153] Steven Spielberg, 2002.
[154] Face Facts: A Forum on Facial Recognition Technology, December 8, 2011: https://www.ftc.gov/news-events/events-calendar/2011/12/face-facts-forum-facial-recognition-technology

images[155] and it does not detect ethnicity.[156] It can be used as a digital advertisement, but it can also be used inside a store, such as a grocery store, offering menu suggestions.[157]

U.K. retailer Tesco made the news in 2013 when announcing that it will start using facial recognition technology to tailor ads seen by consumers filling up their cars at Tesco gas stations.[158] The system was presented as being only able to assess the sex and the approximate age of the consumer in front of them so that they could offer them ads tailored to their particular age and sex group. However, such system does not provide consumers the possibility to opt in, nor to opt-out, unless one considers that wearing a hat or a hood with sunglasses qualifies as opting out. This option may not even be available to French citizens, as, under a law enacted in 2010, it is a misdemeanor, punished by a fine, to conceal one's face in the public space.[159] While its article 2 provides for exceptions, if covering one's face "*is required or permitted by law or regulations, if justified by health or professional reasons, or if it is in part of sporting activities, celebrations or artistic or traditional events*," there is no "protection of privacy" exception to the law.

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[155] Transcript of the second session, p. 2-3: https://www.ftc.gov/sites/default/files/documents/videos/face-facts-session-2/4/120811_ftc_sess2.pdf

[156] Transcript of the second session, p. 5.

[157] This implies that the grocer is relying on studies informing him about the likely taste of men and women in their respective age categories. While advertising personalization is often presented as a way to better serve the customer, one can see that it also involves to be placed in cases, and thus prevented from seeing ads not deemed relevant to us. During the demo, Mr. Huseman showed that, as he had been recognized as a male, he was shown a BMW ad.

[158] *Tesco petrol stations use face-scan tech to target ads*, BBC (Nov.4,2013), http://www.bbc.com/news/technology-24803378 and Thomas Hobbs, *Tesco to tailor adverts in petrol stations by using face-scanning screens,* THE GROCER, Nov. 3, 2013, http://www.thegrocer.co.uk/channels/supermarkets/tesco/tesco-turns-to-face-scanning-ad-screens/351181.article?utm_source=rss_feed&utm_medium=rss&utm_campaign=rss&redirCanon=1

[159] Lpi n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law n° 2010-1192 of October 11, 2010, prohibiting facial concealment in public space], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 18344.

Technology may already be used to tailor advertising after having recognized the consumer and analyzed outside data. For instance, Microsoft has been awarded a patent for a "*web-based targeted advertising in a brick-and-mortar retail establishment using online customer information*" system.[160] The system recognizes the customer and greets him by his name, and provides custom-tailored ads. To do so, it uses information, captured on location by its sensors, on what the consumer is wearing, or which products he has already chosen to buy, to assess which are his interests. But the system can also use external data, such as online searches, online purchases, pages visited on websites, and details about the purchases, such as mode and time of delivery. Such system is more invasive to consumers' privacy than the one used by Tesco.

Yahoo! was issued a patent in 2016 for a method which measures user engagement with smart billboards. [161] The patented method uses "*a variety of information* "to determine the interest of the general audience close enough to be able to see the billboard, and to select the advertisements which may be of interest for the whole group of potential viewers. This technique, as described in the patent application, relies "*on "grouplization," i.e., selection of advertising content based on an aggregate representation of the target audience that is derived, at least in part, from real-time information*." As noted in the patent, the nature of the real-time information collected in order to select the advertising "*may include traffic sensor data, image/video data, or audio data"*, adding that "*mobile device data or image/video data can be*

[160] U.S. Patent No. 20080004951 (filed Jan. 3, 2008).
[161] http://appft.uspto.gov/netacgi/nph-Parser?Sect1=PTO2&Sect2=HITOFF&p=1&u=%2Fnetahtml%2FPTO%2Fsearch-adv.html&r=1&f=G&l=50&d=PG01&S1=20160292713&OS=20160292713&RS=20160292713

used to identify specific individuals in the target audience". Does that mean that the device could access the wealth of data contained in our smart phones, including selfies and other pictures, to select an ad? Could such apparatus even communicate with, say, our computer at home? The description explains that:

> "*with the increasing instrumentation of ordinary objects such as smart appliance, vehicles, etc. (i.e., the "Internet of Things"), the sources of data and information that may be used to enable the techniques described herein are virtually limitless. That is, any sensors or sensor systems that generate data or collect information in real-time that represent some aspect of the context in which the electronic public advertising display is situated (including the target audience) may be used*."

Must that statement be interpreted as allowing a sensor on the billboard to access all the information collected by the network of devices as they are connected to the IoT? If this is the case, it would be chilling.

C. How to use consumer's likeness to sell products

E-commerce is not showing signs of slowing down: the Census Bureau of the Department of Commerce estimated in February 2015 that U.S. retail e-commerce sales for the fourth quarter of 2014, adjusted for seasonal variation, but not for price changes, was $79.6 billion, an increase of 2.3 percent increase from the third quarter of 2014.[162] However, consumers may not be so interested to use their favorite social media site as an e-commerce site: a November 2015 poll of

[162] Press Release, Census Bureau of the Department of Commerce, Quarterly Retail e-Commerce Sales 4th Quarter 2014, (Feb. 17, 2015), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf.

social media users worldwide ages 16 to 64 found that only 9% of Facebook users and 12% of Twitter users were interested in a buy button. Interest of *Instagram* users as only slightly higher, at 14%. [163] Twitter started offering a 'buy button" on mobile phone in 2014[164], but stopped offering it in 2017.[165] Interestingly, images are not the main feature of Twitter, which became famous when daring users to express themselves in 140 characters or less, not using photographs. [166]

a) Setting a social commerce site

a. Selling on *Instagram*

While most retailers, particularly in the fashion and cosmetics industry, understand the marketing power of an *Instagram* account, such social media presence may or may not yield to sales. The *Instagram* account of a retailer may simply be used by its visitors as a way to keep up with current trends or to enjoy a bit of digital window shopping, while the retailer may not profit financially from that traffic.

But *Instagram* images may now be "shoppable," thanks to third-party platforms which make it possible to turn a social media account into an e-commerce site, allowing companies or individuals to sell their products directly on *Instagram*. To do so, they may connect their

[163] *Do Social Network Users Want Buy Buttons?*, EMARKETER, (Dec. 9, 2015), https://www.emarketer.com/Article/Do-Social-Network-Users-Want-Buy-Buttons/1013321.
[164] Anthony Ha, *Twitter Announces Its First Commerce Product — A "Buy" Button On Mobile*, TECHCRUNCH, (Sept. 8, 2014), https://techcrunch.com/2014/09/08/twitter-commerce-buy-now/.
[165] Jason Del Rev, *Twitter's 'Buy' button is officially dead*, RECODE, (Jan. 18, 2017, 1:02pm EST), https://www.recode.net/2017/1/18/14311230/twitter-buy-button-dead-killed-shuts-down.
[166] Twitter expanded the characters allowed for a tweet to 280 in November 2017, Sarah Perez, *Twitter officially expands its character count to 280 starting today*, TECHCRUNCH, (Nov. 7, 2017), https://techcrunch.com/2017/11/07/twitter-officially-expands-its-character-count-to-280-starting-today/.

Instagram account with their *Spreesy* account, before uploading pictures of the products they wish to sell, along with information about price and available quantity. *Instagram* users interesting in buying the product must provide their email address in their comments. *Spreesy* then email them a secure checkout link and they can complete their purchase using *Paypal*. This social commerce procedure is however not seamless, as three different sites are involved in the process.

Similar technology is also offered by the start-up *Curalate*, which has developed the shopping platform *Like2Buy* to allow *Instagram* followers to make a purchase directly from the site. By embedding a link in a photograph, the image becomes "shoppable" as, by clicking on it, the user reaches directly the retailer's page selling the product featured on the photograph.[167] It counts retailer *Nordstrom* amongst its clients[168] and also *Michael Kors*, which introduced in November 2014 its #InstaKors program.[169] Michael Kors has more than eleven million followers on *Instagram*, and they can choose to sign up for the #InstaKors service by proving their names, email addresses and *Instagram* handle. After having registered, they can double click on any Michael Kors posting bearing #InstaKors to receive by email a link to the *Michael Kors* e-commerce site where they can buy the item featured in the posting."[170] *Michael Kors* program uses its own images, but head designer Michael Kors was quoted in *Harper's Bazaar* as noting

[167] http://www.curalate.com/solutions/like2buy/ .
[168] *Nordstrom Debuts Shoppable Instagram Feed*, RETAIL INFO SYSTEMS NEWS, Aug. 29, 2014, http://risnews.edgl.com/retail-news/Nordstrom-Debuts-Shoppable-Instagram-Feed94831
[169] Lauren Fisher: *Michael Kors Debuts Shoppable Instagram*, HARPERS BAZAAR, (Nov. 17, 2014), http://www.harpersbazaar.com/fashion/fashion-designers/michael-kors-shoppable-instagram-instakors. This service is only available in the U.S.
[170] CURALATE, http://www.curalate.com/solutions/like2buy/

that *we really do live in a selfie world*." Could consumers' selfies be used by fashion companies and retailers to generate sales?

Celebrities photographs found online can also be "shoppable". The *Spotted Friend* application would allow users to shop directly from an *Instagram* image and from other images found on the web for products worn by celebrities. Its site describes the product as "*a specialized visual image-recognition search engine platform for classifying and identifying objects from taking pictures on your smart phone as well as in photographs from social media feeds*."[171] The program would "recognize", say, the handbag carried by a famous *Instagram* social media user while on holiday in Italy. By clicking on the digital image, a *Spotted Friend* user would be directly taken to a shopping site where he or she could buy the coveted bag, or similar ones.

The developer of *Spotted Friend* filed a suit against actress Lindsay Lohan and her brother in October 2014 in the New York Supreme Court, claiming that defendants stole trade secrets when they developed a similar shopping application, *Vigme*, even though they both had signed a trade secret agreement when they became members of the company. The complaint further describes the *Spotted Friend* application as allowing "[*u*]*sers … to "follow" celebrities and friends whose style they admire and to view their online shopping history through their "virtual closets*"." [172] According to the complaint, "*Spotted Friend revolutionizes users' shopping experience in two ways: (1) through a social commerce platform that allow* users *to access celebrities' and friends' "virtual closets" to purchase the same products through image-*

[171] SPOTTED FRIEND, http://www.spottedfriend.com/home.php
[172] Spotted Friend LLC and Fima Potik v. Vigme Inc. and al. (NY Sup. Ct, filed Oct. 30, 2014), Paragraph 18, available at https://www.scribd.com/doc/245143949/Spotted-Complaint

recognition technology that allow users to identify clothing and accessories in social media feeds and to match these items to corresponding ones in Spotted Friend's comprehensive database."[173]

Another platform, *LiketoKnow.It*, allows users to shop from their *Instagram*'s feeds. They must first register on *LiketoKnow.It,* and provide their email address. They must then sign up to their *Instagram* account and authorize *LiketoKnow.It* to access it. After having done that, they can chose to "like" photos on their *Instagram*'s feed bearing a *#LiketoKnow.It* hashtag. They then receive an email message with a clickable image of products, which links to e-commerce sites selling the featured items[174]

As fashion bloggers typically also have an *Instagram* account, they are able to financially profit from the popularity of their account using platforms such as *LiketoKnow.It*.[175] One of the most famous social media influencers is Chiara Ferragni, known as *The Blonde Salad* to her thousands of Instagram followers. She is now selling her own fashion collection on her own website, which is advertised in her Instagram bio. She is so successful that she has even been the subject of a Harvard Business School case.[176] Ms. Ferragni started her online presence with her fashion and lifestyle blog, *The Blonde Salad*, where she posted daily images of herself wearing fashionable outfits and accessories while sharing personal events, even her pregnancy. The blog quickly became successful, which lead to several business opportunities. She decided in 2013 to use Instagram to promote her brand, and quickly gained 2 million followers in 2013 and 3 million

[173] Spotted Friend Complaint, paragraph 17.
[174] This short video explains the process: http://liketoknow.it/#hiw_video
[175] Chavie Lieber, *Everyone From Vogue to Style Bloggers is Cashing In on Your Mindless Instagram Scrolling: Here's How*, RACKED, (June 17, 2014, 2:51 PM), http://www.racked.com/2014/6/17/7591969/instagram-social-media-online-shopping-liketoknowit
[176] Anat Keinan, Kristina Maslauskaite, Sandrine Crener and Vincent Dessain, *The Blonde Salad*, HARVARD BUSINESS SCHOOL, (Jan. 9, 2015), (on file with author).

in 2014. [177] She now has 11.7 million followers on Instagram[178] and has collaborated with several fashion companies to create products.[179], and has even her own Barbie doll.[180]

b. Retailers creating their own social networks

Online retailer *Net-A-Porter* launched its own social media network, *The Net Set*, in May 2015. It was presented by the e-tailer founder, Natalie Massenet, as the "*world's first luxury 'shoppable' mobile social network where fashionable digital women all over the world can connect and enjoy a unique and seamless shopping experience across all devices*."[181] It uses an image-recognition software to analyze images of clothes featured in photographs uploaded on *The Net Set* , and then find clothes sold on the *Net-A-Porter* site which are similar than the ones worn by people in the photograph.[182]

Proprietary social media platform are data riches for retailers, as they can learn more from their consumers' interests, including the interests of their social media contacts, than from the data consumers create on shopping on a site. Clicking on say, a women's corporate blue shirt with ruffles, size 8, retailing at $345, may be an indication of the consumer's size, social economics, maybe even level of education, but does not give any clues as to what music the consumer listens to or her political opinions. However, if the consumer buys the same shirt from

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[177] The Blond Salad, Harvard Business School case, p.9.
[178] https://www.instagram.com/chiaraferragni/?hl=en
[179] Stephanie Chan, *Style Notes: An IKEA Fragrance Is Coming; Tod's Collaborates With The Blonde Salad's Chiara Ferragn*i, PRET A REPORTER, 9June 12, 2017, 2:56 PM PDT), http://www.hollywoodreporter.com/news/style-notes-an-ikea-fragrance-is-coming-tods-collaborates-blonde-salads-chiara-ferragni-1012780.
[180] https://www.instagram.com/p/BJqNljaAif3/
[181] Gurjit Degun, *Net-A-Porter to launch fashion social network*, MEDIA WEEK, (May 6, 2015), http://www.mediaweek.co.uk/article/1345869/net-a-porter-launch-fashion-social-network
[182] Marc Bain, *Fashion retailer Net-a-Porter's new social network wants to combine your photo-sharing and shopping in one app*, QZ (May 6, 2016), http://qz.com/399174/fashion-retailer-net-a-porters-new-social-network-wants-to-combine-your-photo-sharing-and-shopping-in-one-app.

a retailer social media site, the retailer has a much deeper knowledge of the consumer's tastes, opinion, network, and so on, and can have a more precise image of each of its social media customers.[183]

III. How these practices are regulated

A. How to legally obtain an image

The Merriam-Webster Online Dictionary defines "crowdsourcing" as "*the practice of obtaining needed services, ideas, or content by soliciting contributions from a large group of people and especially from the online community rather than from traditional employees or suppliers*" [184] The term was coined by Jeff Howe in an article published in June 2006 by *Wired* where it noted the surge of companies taking advantage of the web to tap into their consumers' talent: "*The labor isn't always free, but it costs a lot less than paying traditional employees. It's not outsourcing; it's crowdsourcing*."[185]

So, if a company solicits selfies to use them in an advertising campaign, it is crowdsourcing. How may these images be obtained legally?

a) **The issue of consent**

[183]Dan Berthiaume, *Tech Bytes: Three Reasons Retailers Should Launch Their Own Social Platforms*, CHAIN STORE AGE, (March 28, 2016), http://www.chainstoreage.com/article/tech-bytes-three-reasons-retailers-should-launch-their-own-social-platforms. The author notes that a "*proprietary social network is a veritable treasure trove of customer data*."

[184] Crowdsourcing, MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/crowdsourcing.

[185] Jeff Howe, *The Rise of Crowdsourcing,* WIRED, (June 1, 2006, 12:00PM), http://www.wired.com/2006/06/crowds/.

The company must first ensure that the consumer has agreed to this commercial use of his image. This could be done through their terms of use. But are they enough to prove that users have consented to the use of their likeness?

As noted by Daniel Solove and Woodrow Hartzog, "[*a]lthough privacy policies look like contracts, there are barely a handful of cases attempting to enforce privacy policies as contracts. In contrast, terms of use are clearly the province of contract law*."[186] One of these cases is the Eastern District of New York (E.D.N.Y.) *In re JetBlue Airways Corp. Privacy Litig*.class action case.[187] Following a written request from the Transportation Security Agency (TSA), JetBlue had agreed in September 2002 to provide its database of Passenger's Names Records (PNRs) to a data mining company, so that it could be used in a test program designed to predict which individuals could pose a threat to military installations. JetBlue Chief Executive Officer acknowledged in September 2003 that the transfer had violated JetBlue's privacy policy.

This revelation led some of JetBlue passengers to file a class action suit against the airline and the datamining company, claiming, *inter alia*, that such sharing of their personal data was trespass to property and unjust enrichment. They also brought a claim for breach of contract against JetBlue alone. Plaintiffs had argued that JetBlue's published privacy policy was "*a self-imposed contractual obligation by and between the airline and the consumers with whom it transacted business*"[188] and that "*these self-imposed public assurances... created an obligation under the contract-of-carriage and a duty on the part of JetBlue and the persons with whom it did*

[186] Daniel Solove and Woodrow Hartzog, *The FTC and the New Common Law of Privacy,* 14 COLUM. L. REV. 583, 589, (2014).
[187] *In re JetBlue Airways Corp. Privacy Litig.,379 F. Supp. 2d 299.*
[188] *In re JetBlue Airways,* 316.

business not to act in derogation of JetBlue's privacy policy'." JetBlue had therefore caused them injury by breaching this promise.[189] The airliner argued that its privacy policy was only a "*stand-alone privacy statement" — which "could only be accessed and viewed by clicking on a separate stand-alone link" on the bottom of JetBlue's website — is not a term in the contract of carriage*."[190]

The E.D.N.Y. considered the four elements required by New York law to be proven in a breach of contract action: (1) the existence of a contract, (2) performance of the contract by one party, (3) breach by the other party, and (4) damages.[191] The complaint failed as plaintiffs were not able to prove contract damages. Plaintiff's attorney had been asked during oral argument which injuries or damages his clients had suffered. He stated that the "*contract damage could be the loss of privacy"* but acknowledged that loss of privacy "may" be a contract damage. He added that "*perhaps it could be alleged or argued that plaintiffs were deprived of the "economic value" of their information*," but conceded that "*the only damage that can be read into the present complaint is a loss of privacy*."[192]

Arguing that plaintiffs were deprived of the economic value of their information is tempting, but a difficult road. Asserting damages in any privacy cases is a difficult exercise, as stated in 1854 by the Exchequer Court in *Hadley v. Baxendale*: "*damages in contract actions are limited to those that may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it*." [193] A

[189] *In re JetBlue Airways,* 325.
[190] *In re JetBlue Airways,* 325.
[191] *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 525 (2d Cir.1994).
[192] *In re JetBlue Airways,* 326
[193] Hadley v. Baxendale, 9 Ex. 341, 156 Eng.Rep. 145 (1854).

similarly basic principle of contract law is that the contract damages must put a plaintiff in the same economic position he or she would have occupied had the contract been fully performed. But what is the value of a selfie?

While the E.D.N.Y. agreed with plaintiffs that the privacy policy was a contract, the court nevertheless granted the airliner its motion to dismiss the breach of contract claim as Plaintiff had failed to prove damages. For the E.D.N.Y., JetBlue's passengers "*had no reason to expect that they would be compensated for the "value" of their personal information…* [*and*] *there* [*was*] *absolutely no support for the proposition that the personal information of an individual JetBlue passenger had any value for which that passenger could have expected to be compensated*. *It strains credulity to believe that, had JetBlue not provided the PNR data en masse to Torch, Torch would have gone to each individual JetBlue passenger and compensated him or her for access to his or her personal information. There is likewise no support for the proposition that an individual passenger's personal information has or had any compensable value in the economy at large*."[194] The court could very well be talking about a case where crowdsourced selfies were used without authorization by a company.

What about the social media networks terms of service? Do they allow the social media sites to gather and to use the likeness of their users? *Instagram*'s current Terms of Use specifies that the site "*does not claim ownership of any Content* [*posted*] *on or through the Service. Instead*, [*the user*] *… grant*[*s*] *to Instagram a non-exclusive, fully paid and royalty-free, transferable, sub-licensable, worldwide license to use the Content* [*posted*] *on or through the Service*."[195]

[194] *In re JetBlue Airways,* 327.
[195] Instagram Terms of Use, Right, §1: http://instagram.com/about/legal/terms/ .

The use of Facebook profile photographs for advertising purposes was at the origin of the *Frayley v. Facebook* litigation. In that case, Facebook users sued the social media site over its 'Sponsored Stories' program, launched on January, 25, 2011. Each of these stories appeared on a user's page featuring the name, profile and picture of another Facebook user, asserting that he or she "liked" a particular company, which logo was also featured in the 'Sponsored Stories." Several Facebook users, including a minor child, filed a putative class action suit in the U.S. District Court of Northern California, claiming that Facebook's Sponsored Stories violated California's right of publicity Statute, Civil Code § 3344, because Facebook had unlawfully misappropriated their names, photographs, likenesses, and identities to be used without their permission in paid advertisements. Facebook had argued that Plaintiffs consented to the commercial use of their likeness when they registered for and used Facebook website under its Terms of Use.

Facebook's Statement of Rights and Responsibilities addressed its commercial use of member profiles, informing users that they could change their privacy settings to "*limit how your name and* [*Facebook*] *profile picture may be associated with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us*."[196] However, Facebook users could not opt out of Sponsored Stories. Also, even though Facebook's Statement of Rights and Responsibilities informed users that they had given Facebook "*permission to use [their] name and [Facebook] profile picture in connection with [commercial, sponsored, or related] content, subject to the limits you place*," the plaintiffs in Frayley had signed up before 25 January 25, 2011, and argued that, therefore, they did not know about the Sponsored Stories program at the time, and

[196] Frayley v. Facebook, Inc., 830 F.supp.2d 785, 792 (N.D. Cal. 2011).

that Facebook had not asked them to review or re-affirm Facebook's Terms of Use after it introduced this program. [197]

Judge Lucy Koh addressed the issue of consent to a social media site terms and conditions in *Frayley*.[198] She noted that "[*t*]*he gravamen of Plaintiffs' consent argument is that even if the Statement of Rights and Responsibilities can be broadly construed to encompass Sponsored Stories, such "consent" was fraudulently obtained and thus not knowing and willful*."[199]

Cohen v. Facebook[200] is another case about Facebook Friends Finder feature. Facebook argued that its Statement of Rights and Responsibilities "*unambiguously* [*gave*] *Facebook the right to use any photos, including Plaintiffs' profile photos, in any manner on Facebook, subject to Users' privacy and application settings*." District Judge Richard Seeborg found that "[*n*]*othing in the provisions of the Terms documents to which Facebook has pointed constitutes a clear consent by members to have their name or profile picture shared in a manner that discloses what services on Facebook they have utilized, or to endorse those services.* "[201] He noted further that "*Plaintiffs may indeed have consented to the disclosure of their names and profile pictures to their Facebook friends and even to Facebook users at large, but Facebook has not established that they consented to the particular uses in dispute here*."[202]

[197] Frayley at 792.
[198] Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 805 (2011).
[199] Frayley at 805, 806.
[200] Cohen v. Facebook, Inc., 798 F. Supp. 2d 1090, 1095 (2011), referred to as Cohen I.
[201] Cohen I, at 1095.
[202] Cohen I, at 1096.

The original Instagram Terms of Use (ToU), published when the photo-sharing site first launched in 2010, did not claim any ownership rights in the content posted by users on the photo-sharing site:

> "*Instagram does NOT claim ANY ownership rights in the text, files, images, photos, video, sounds, musical works, works of authorship, applications, or any other materials (collectively, "Content") that you post on or through the Instagram Services*."

Instead, users granted the site a "*non-exclusive, fully paid and royalty-free, worldwide, limited license to use, modify, delete from, add to, publicly perform, publicly display, reproduce and translate*" the content they uploaded on Instagram. Following its acquisition by Facebook in April 2012, for a reported one billion dollar, Instagram announced on December 18, 2012 it would change its ToU. The new ToU were scheduled to go into effect on January 19, 2013 and provided that "*Instagram does not claim ownership of any Content that you post on or through the Service*." As for the license given to Instagram, it became "*a non-exclusive, fully paid and royalty-free, transferable, sub-licensable, worldwide license to use the Content that you post on or through the Service*" which was, however, "*subject to the Service's Privacy Policy*."

Users were given notice of the ToU changes, and given the opportunity to stop using the service on or after January 19, 2013, if not agreeing with the new terms. The announcement of these ToU changes lead to users' uproar, as they interpreted the changes to give Instagram the right to sell their photographs to advertisers.

Following the social media users upheaval, Instagram published a post on its blog on December 18, 2012, assuring its users that it had no intent to sell users photos. It added that it

had no plan to allow user's photos to be part of an advertisement.[203] It noted, however, that the company "*envision*[*s*] *a future where both users and brands alike may promote their photos & accounts to increase engagement and to build a more meaningful following. Let's say a business wanted to promote their account to gain more followers… some of the data you produce– like… your profile photo – might show up if you are following this business*." This is the same business model which led to the Fraley v. Facebook litigation. On December 20, 2012, Instagram posted a somewhat different version of the new ToU, which went into effect on January 19, 2013.

Despite these changes, an Instagram user, Lucy Funes, filed a putative class action complaint in the Northern District of California, just a few days after the changes to the ToU were announced. This complaint was filed to challenge "*the proposed shift in property right… resulting from Instagram's unilateral changes to their* [*ToU*]." Plaintiff claimed that, by changing the ToU, Instagram had breached its covenant of good faith and fair dealing. It also claimed a violation of California's right of publicity law, California Civil Code § 3344, as the new ToU allowed now Instagram to use, without consent, plaintiff and the putative class' "*names, photographs, or likeness to directly advertise or sell a product or service*."

Instagram moved to dismiss, and the parties stipulated to file an amended complaint which substituted a new plaintiff, Lucy Rodriguez, to the original plaintiff. The new complaint was similar to the first one and also claimed an infringement to California Civil Code § 3344, but was dismissed for lack of federal jurisdiction without prejudice to refile in state court. Lucy Rodriguez then filed a new class action complaint against Instagram in the San Francisco Superior Court.

[203] *Thank you, and we're listening,* INSTAGRAM BLOG (DEC. 18, 2012), http://blog.instagram.com/post/38252135408/thank-you-and-were-listening.

Unlike the complaint filed in federal court, this one noted that Instagram was owned by Facebook, which was not a party to this case, and explained further how Facebook derives income from its "Sponsored Stories" program, where Facebook's users 'name or likeness are used in paid advertisements appearing to be an endorsement. The complaint added that Facebook had announced its plan to monetize Instagram and that Plaintiff "*believe*[*d*] *based on the business model of … Facebook, that* [*Instagram*] *ha*[*d*] *imminent and concrete plans to commercially exploit* [*p*]*laintiff and* [*c*]*lass* [*m*]e*mbers*'[*p*]*roperty for purposes of advertising or soliciting purchases of products… or services*." The complaint further claimed that Instagram "*by attempting to add provisions that were not reasonably anticipated by the* [*original ToU*], *and not in accordance with the subject matter and/or scope of the* [*original ToU*] *had violated its implied covenant of good faith and fair dealing.*"

These arguments did not convince the court, which ruled in favor of Instagram on February 28, 2014. [204] The court reasoned that Plaintiff had "*a full and perfectly reasonable opportunity to read*" the new ToU, and then decide whether she wanted to opt out before the new ToU goes into effect. Plaintiff had continued to use Instagram after the new ToU came into effect and "[*t*]*hus Plaintiff must have consented to the* [*new TOU*]." Plaintiff unsuccessfully argued that, by filing the federal complaint, she had not agreed to the new ToU. The court also noted that plaintiff had not alleged harm arising out of the contract breach, and "[*d*]*amages are an essential element for a breach of contract claim*." The court also noted that the alleged harm

[204] Rodriguez v. Instagram, CGC-13-532875 (San Francisco Sup. Ct. Feb 28, 2014).

would rise from the "*imminent plans to sublicense Plaintiff's pictures or other content she posted*", but, as she had agreed to the new ToU, there was no harm.

In *Frayley*, Judge Koh had also found that "*whether Facebook's Statement of Rights and Responsibilities, Privacy Policy, or Help Center pages unambiguously give Defendant the right to use Plaintiffs' names, images, and likenesses in the form of Sponsored Story advertisements for Facebook's commercial gain remains a disputed question of fact and [was] not proper grounds for dismissal at this time*."[205] Could such statement be made by a court in Europe?

French law does not consider that just any personal data can be sold. Its civil Supreme Court, the *Cour de Cassation*, held in June 2013 that the sale of a customer file which had not been declared to the *Commission nationale de l'informatique et des libertés* (CNIL), as required by article 22 of the French data protection law,[206] was thus not in commerce, and therefore could not been sold.[207] Article 1128 of the French civil Code, one of the rare original articles of the 1804 original civil Code still in force, until indeed stated that "*[o]nly goods which are in the market can be the subject of agreements*." If the client had been declared to the CNIL, then it would have been considered as a good in commerce. Therefore, it can be inferred from this case that the sale of personal data is legal in France, as long as it has been collected legally, and thus can enter commerce.

[205] Frayley, at 806.
[206] Loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés [Law n° 78-17 of January 6, 1978, on Data Processing, Date Files and Individual Liberties], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF France], Jan. 7, 19878, p. 227.
[207] It has been replaced in 2016 by article 1162 of the French civil Code, which prohibits contracts derogating to public order by its stipulations or by its purpose, whether it has been known by the parties or not.

Is personal data a virtual currency? A report published in 2012 by the European Network and Information Security Agency matter-of-factly stated that personal data is "*extensively used as currency in exchange for services" on the Internet*. [208] As such, it would not be a 'real' currency, that is, one issued by a sovereign state with legal tender in that state, but a 'virtual' currency. In a guidance document issued on March 18, 2013, the Financial Crimes Enforcement Network of the U.S. Department of Treasury defined virtual currency as a "*medium of exchange that operates like a currency in some environments, but does not have all the attributes of real currency*." [209] That definition could encompass personal data, including personal images, as a currency allowing access to free web sites and services.

There is indeed a certain enervating quality at being constantly monitored, which may hamper one's pleasure at surfing the web. Is such loss of privacy an economic loss one? We saw that the E.D.N.Y., while considering that airline JetBlue privacy policy was indeed a contract, nevertheless granted Defendant's motion to dismiss, as class action plaintiffs had failed to prove that they had suffered damages caused by Jet Blue breach of its breach of privacy. [210] The EDNY explained that the only damages suffered by plaintiffs were a breach of privacy. While this may be tortious damage, it cannot be contractual damage, as "*recovery in contract, unlike recovery in tort, allows only for economic losses flowing directly from the breach*."[211] Plaintiffs could not claim either loss of the economic value of their information as contract damage, even though it

[208] ENISA, PRIVACY CONSIDERATIONS OF ONLINE BEHAVIORAL TRACKING, 2012, p. 3, *available at* https://www.enisa.europa.eu/activities/identity-and-trust/library/deliverables/privacy-considerations-of-online-behavioural-tracking

[209] DEPARTMENT OF THE TREASURY FINANCIAL CRIMES ENFORCEMENT NETWORK,GUIDANCE FIN-2013-G001, *available at* http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2013-G001.pdf

[210] *In re JetBlue Airways Corp. Privacy Litig.,325.*

[211] *In re JetBlue Airways Corp,* 326-327, citing *Young v. U.S. Dep't of Justice*, 882 F.2d 633, 641 (2d Cir.1989).

would be an economic loss, as the breach of the privacy policy, as "*the purpose of contract damages is to put a plaintiff in the same economic position he or she would have occupied had the contract been fully performed*."[212]The EDNY further reasoned that plaintiffs "*had no reason to expect that they would be compensated for the "value" of their personal information. In addition, there is absolutely no support for the proposition that the personal information of an individual JetBlue passenger had any value for which that passenger could have expected to be compensated. It strains credulity to believe that, had JetBlue not provided the PNR data en masse to Torch [the data mining company], Torch would have gone to each individual JetBlue passenger and compensated him or her for access to his or her personal information. There is likewise no support for the proposition that an individual passenger's personal information has or had any compensable value in the economy at large*."[213]

Some companies had tried to put an economic value on the whole of one's personal data, that is, one's online reputation. The Wuffie Bank, a non-profit organization which aimed at creating a currency based on one's reputation, did not survive. Another start-up, Enliken, did not survived either. It encouraged consumers to sell their own data. Subscribers voluntarily downloaded a plug-in which tracked their online activity. Enliken aggregates this data, anonymized it, and sold it to advertisers. Users could even choose to donate the proceeds of the sale of their data to a particular charity.

The argument in favor of such programs is that if consumers have better control over their data, they are more likely to share relevant information, which, in turn, benefits companies.

[212] *In re JetBlue Airways Corp, 327,* citing *Katz v. Dime Savings Bank, FSB*, 992 F.Supp. 250, 255 (W.D.N.Y.1997)
[213] *In re JetBlue Airways Corp,* 327.

Users often lie when sharing information in an attempt to preserve their privacy, and thus the currency of the Internet may be counterfeited. If companies collecting data are confident that the data collected is accurate, the value of data increases, which benefits both companies and users, who may then receive better services in exchange for their data.

Is it possible to put some sort of numerical value over an online presence? The number of social media "friends" or "followers" is an indication of the value of a particular account. A pop-up clothing shop in New York offered its customers in November 2014 the possibility of getting discount for their purchases using their social media followers. For a limited time, customers could connect their social media accounts to a system which aggregated their all social media contact from various social media sites, including Facebook, Instagram, Twitter, Tumblr, Vine, Pinterest, YouTube, and LinkedIn, in order to receive $1 discount for every 500 followers.[214]

If such data has value, should users pay a tax on their personal data? Is this an even exchange? If it is, companies and users are bartering. How many of us have reported barter on our last tax return, even though the Internal Revenue Service requires it to be reported on Form 1040? A report on taxation of the digital economy, commissioned by the French government and published in January 2013 recommended taxing companies on the personal data they collect from data subjects living in France. [215] If the French government finds appropriate to tax personal data, it probably means that users are shortchanged in the trade between data and free services.

[214] Felicity Sargent, C.R.E.A.M. (Clout Rules Everything Around Me): A SoHo Pop-Up Shop Lets Customers Pay with Their Social-Media Followers, VOGUE, Nov. 10, 2014, 5:55PM.
[215] MISSION D'EXPERTISE SUR LA FISCALITÉ DE L'ÉCONOMIE NUMÉRIQUE, by Pierre Collin and Nicolas Colin, January 18, 2013 [hereinafter « the FRENCH REPORT »], *available* (*in French*) at http://www.economie.gouv.fr/files/rapport-fiscalite-du-numerique_2013.pdf

If a State justifies taxing companies for the personal data of its residents, would it also tax its residents if they sell or trade their personal data?

The *French Report* took the position that providing free workers to companies was a base for taxing, noting that at web users are not only contributing by their work to lower the price of the product, just as we are required to build shelves bought at a certain Swedish retailer, but also by producing value which benefits all users. The digital economy is becoming a "contributory economy" (*économie contributive)*, as bottom up contributions by users make them production and distribution auxiliaries.[216] Indeed, some companies are no longer outsourcing, but instead 'unsourcing,' or 'crowdsourcing,' by using the expertise of their own customers to provide services to all customers. For example, the British mobile network company giffgaff is "run by you," the user, and states that "our members get rewarded for running parts of our business."[217] In the U.S., Walmart announced in 2013 plans to have customers deliver packages to online shoppers.[218] Why not having Internet users running the social media advertising campaigns of their favorite brands?

The French Report compared the creation of a tax on personal data to an environmental tax.[219] The bases for an environmental tax, according a definition posted on a European Union (EU)'s web page, is "a physical unit… of something that has a proven, specific negative impact on the environment." [220] Similarly, the bases for a tax on data could be the negative impact it has

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[216] FRENCH REPORT, p. 52.
[217] GIFFGAFF, http://giffgaff.com/index/us.
[218] *Walmart crowdsourcing scheme may use customers as delivery drivers* THE GUARDIAN (Mar. 28, 2013, 13:31 EDT), http://www.guardian.co.uk/business/2013/mar/28/wal-mart-retail
[219] FRENCH REPORT p. 5
220 EUROSTAT, Environmental taxes, http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Environmental_taxes.

on the privacy of data subjects, such as the constant monitoring endured by users surfing the web. Consent is an important issue in Europe. In *Reklos and Davourlis v. Greece*, the European Court of Human Rights noted that "*the right to control* [*the use of one's image] involves the possibility for an individual to refuse publication of his or her image, it also covers the individual's right to object to the recording, conservation and reproduction of the image by another person. As a person's "*presupposes… *obtaining the consent of the person concerned at the time the picture is taken and not simply if and when it is published. Otherwise an essential attribute of personality would be retained in the hands of a third party and the person concerned would have no control over any subsequent use of the image*"[221]

The British personal care and cosmetics retailer *Superdrug* launched an advertising campaign in October 2014, urging consumers to share "*their hair and beauty selfies*" on Twitter or *Instagram* using the hashtag #TreatYourSelfie, or to upload it directly on their site to have a chance for their selfies to be publishing online in a special photo gallery.[222] According to the terms and conditions of the contest, which had to be accepted before uploading, pictures could not feature an individual under the age of 16. By submitting their photograph, users agreed to *Superdrug*'s privacy policy, which states that the retailer uses personal data subject to the individual prior consent "*where required under applicable Data Protection Laws*."[223] According to the privacy policy, *Superdrug* also collected personal data from other sources "*which could include commercially available sources, such as public databases and data aggregators to the extent permitted by applicable Data Protection Laws*." Such personal data collected from other

[221] *Reklos* at 40.
[222] #tratyourselfie, SUPERDRUG, http://www.superdrug.com/treatyourselfie#
[223] Privacy Policy, SUPERDRUG, http://www.superdrug.com/acc/privacypolicy#

sources include "*shopping habits; preferences and information about your lifestyle such as your hobbies and interests; and publicly available information such as user-generated content, blogs and postings*." Therefore, by uploading the selfie, the individual agrees that his or her likeness will be matched with marketing information, a name, an email, and possibly a social media account. The individual can decline to have his or her name to be published online, but the company collects nevertheless that personal information. By agreeing to the privacy policy, the user also agrees that the company may share his or her personal information with other companies. The terms and conditions and the contest stated that *SuperDrug* would delete the photographs not selected for the gallery, and that it would ultimately delete all photographs at the end of the contest. This is an good policy, as, without that clause, a company would be able to gather and retain a database of users 'likeness and even possibly share it with other companies. Therefore, a database of individuals' likeness, associated with their names, social media account, tastes and dislikes, could be created and shared, at a great threat to privacy.

Indeed, some *Instagrams* users sharing pictures of products they have purchased and even using appropriate hashtags are nevertheless not interested in having their images used for marketing purposes. A mother living in New York State found out in 2015 that the shoe company Crocs had featured the image of her 4-year-old daughter wearing pinks Crocs sandals on its online gallery of UGC photographs only after having been contacted by a reporter.[224] The show company later asked the mother for permission to use the picture of her daughter. *The New York Time* article describes the rather casual permission process, as the company reached out to

[224] Sydney Ember and Rachel Abrams, *On Instagram and Other Social Media, Redefining 'User* Engagement', THE NEW YORK TIMES (Sept. 20, 2015), http://www.nytimes.com/2015/09/21/business/media/retailers-use-of-their-fans-photos-draws-scrutiny.html.

consumers by posting a comment on their Instagram account and asking for permission to use the photograph.[225] The comment sent by Crocs asking for permission to reuse the photo contained a link to "*Shared Content Rights Terms & Conditions*" ("Crocs'terms and conditions.")[226] The consumerwas invited to express her assent by replying using the hashtag "#CrocsOk"[227] As explained in Crocs 'terms and conditions, replying to the comment by using this hashtag "s*ignif*[*ies*] [*the consumer's*] *acceptance and understanding of these terms and … grant*[*s*] *Crocs the rights described* [*in the terms and conditions*.] Does the consumer express consent by replying?

The answer to this question is important, as many rights were given to the company by consenting. Crocs stated it did not claim any copyright in the UGC, but the consumer instead granted the company and its " *subsidiaries, affiliates, successors and assigns, a nonexclusive, fully paid, worldwide, perpetual, irrevocable, royalty-free, transferable license (with the right to sublicense through unlimited levels of sublicensees) to use, copy, modify, distribute, publicly display and perform, publish, transmit, remove, retain repurpose, and commercialize the* [*UGC*] *in any and all media or form of communication whether now existing or hereafter developed, without obtaining additional consent, without restriction or notification, and without compensating you in any way, and to authorize others to do the same*." So the license was so broad and comprehensive that it encompassed the exclusive rights of the copyright owner

[225] The comment reads as follow: "*We love your pic! In fact, we love to share photos like yours in our marketing, including social media, e-mail, in our stores, on our websites, and in print. Please reply with #CrocsOK to signify your understanding and acceptance of our terms. http://ow.ly/KuSro*."
[226] *Shared Content Rights Terms & Conditions*, CROCS, http://www.crocs.com/terms-and-conditions/content-rights-terms.html
[227] See for example: https://www.instagram.com/p/BBNosIZj8L6/?taken-by=deannadsu

provided to her by copyright laws, that is, the reproduction right, the right to make derivative works, the right to distribute the work to the public.

As images may have been uploaded by consumers from countries recognizing that authors retain their moral rights over their work, Crocs' terms and conditions included an irrevocable waiver of "*any "moral rights" or other rights with respect to attribution of authorship or integrity of materials regarding the Content that you may have under any applicable law under any legal theory*."[228]

Crocs's terms and conditions also addressed "*the right to include the name provided along with the* [*UGC*.] However, Crocs "*shall have no obligation to include such name with our use of* [*the UGC*] [*and is*] *not responsible for the use or disclosure of any personal information that* [*the consumer] voluntarily disclose*[*s*] *in connection with the* [*UGC*] *that* [*he*] *submit*[*s*] *or license*[*s*] *to* [*Crocs*.] Finally, the consumer waived "*any and all claims relating to copyright infringement and/or any invasion or misappropriation of the right of privacy or publicity and warrant that we do not need permission from any other party, including those of parents or other subjects in the Content*." The terms and conditions thus included a copyright infringement waiver, a right of publicity waiver, and were giving Crocs parental permission to use minors' image and personal data, including minors 'under 13-year of age.

Indeed, some social media influencers are minors, including minors under the age of 13. Toddler Mia is a social media star, thanks to dedicated postings made by her mother on Instagram

[228] Some countries, such a France, do not allow authors to waive their moral rights, as they are perpetual and inalienable.

since she and her twin sister were born.[229]The account has three million followers and the mother was reportedly able to quit her job to dedicate herself full-time to her lucrative influencer account. Any use of these photographs by a third party would have to be authorized by the twins' parents. In the U.S, the federal Children's Online Privacy Protection Act of 1998 (COPPA) [230] is the federal law regulating the online collection, use, and disclosure of personal information of children under the age of 13. The sites collecting, using, or disclosing such personal information must obtain "*verifiable parental consent*." COPPA directed the Federal Trade Commission's (FTC) to implement regulations concerning children's online privacy. The Commission's original COPPA Rule became effective on April 21, 2000, and the FTC issued an amended Rule on December 19, 2012, which became effective on July 1, 2013.[231]

COPPA, 15 U.S.C. § 6501 (8), defines "*personal information*" as "*individually identifiable information about an individual collected online*", such as a first and last name, an address, or an email address, or information concerning the child or the parents of that child that the website collects online from the child and combines with an identifier described in 15 U.S.C. § 6501 (8).[232]

While this definition does not explicitly include a photograph, the FTC's revised Children's Online Privacy Protection Act Rule, which took effect on July 1, 2013, expanded COPPA's

[229] Remy Smidt, *This Mom's Full-Time Job Is Posting To Instagram And This Is What It's Like*, BUZZFEED, (Jan. 25, 2018, at 8:45 a.m) https://www.buzzfeed.com/remysmidt/mila-emma-katie-stauffer?utm_term=.lpLDDeG4o#.vwzoo8Gjz.
[230] Child's Online Privacy Protection Act of 1998, Pub. L. No. 106-170, 15 U.S.C. §§ 6501-6506
[231] COPPA Rule, 15 U.S.C. §§ 6501-6506; 16 C.F.R. § 312.
[232] This includes a first and last name; *"a home or other physical address including street name and name of a city or town; an e-mail address; a telephone number; a Social Security number; any other identifier that the FTC determines permits the physical or online contacting of a specific individual; or information concerning the child or the parents of that child that the website collects online from the child and combines with an identifier described in this paragraph."*

definition of personal information and considers photographs to be personal information. The original COPPA Rule, which had become effective on April 21 2000[233], was revised by the FTC in 2013 because it believed "*that changes to the online environment over the past five years… warrant[ed] reexamining the Rule*." As the FTC "*determined that the inherently personal nature of photographs, and the fact that they may contain information such as embedded geolocation data, or can be paired with facial recognition technology, makes them identifiers that permit the physical or online contacting of a specific individual*,"[234] it considered thus that a photograph no longer had to be combined with an identifier to be considered "personal information" under COPPA.

b) Right of publicity

Companies using social media for advertising and marketing purposes must be careful and obtain prior written consent to use the likeness of the person portrayed in a selfie as failing to do so may lead to right to publicity claims.

For instance, Japanese retailer Uniqlo organized a marketing campaign for the 2014 holiday season, named the "Selfless Selfie Project", where customers of some of its flagship stores[235] were invited to have a portrait taken by a machine, which could then print their photography using a 3-D printer.[236] Members of the public were also invited to post on social

[233] Children's Online Privacy Protection Act Rule, 16 CFR part 312 (2000)
[234]16 CFR Part 312 Children's Online Privacy Protection Rule; Final Rule (2013), https://www.federalregister.gov/documents/2013/01/17/2012-31341/childrens-online-privacy-protection-rule.
[235] New York, Paris, San Francisco, London, Berlin…
[236] For an image of the machine, see https://twitter.com/UNIQLO_UK/status/524518355722452992.

media selfies promoting selflessness, showing them doing good deeds,[237]using the dedicated hashtag #3DSelfies. 150 of these selfies, taken in the stores or shared on social media, were chosen to be printed in 3-D. The 8-inch statuettes thus produced were showcased in the Uniqlo stores participating to the event.[238]

This type of contest raises several issues, which need to be addressed in its rules.[239] As the statuette reproduces the likeness of the contestant, the rules must indicate that, by entering the contest, the participant authorizes the organizer to use its likeness for commercial purposes. As right of publicity laws differs from state to state, the terms of this right of publicity license should be as broad as possible and clearly define the terms of the rights which is being licensed, the temporal and geographical scope of the license, the amount of the royalties, whether the license may be renewed, and how the license may be terminated, with or without cause.

The right of publicity is "*the right of every person to control the commercial use of his or her identity."*[240] This control can be a right to entirely forbid commercial use of one's identity or persona, but it can also be a right to financially profit from the commercial exploitation of one's identity. How is it protected by law, in the U.S. and in the E.U.?

a. How right of publicity is protected in the U.S.

[237]This probably qualifies as 'humblebragging', see http://www.urbandictionary.com/define.php?term=humblebrag

[238]Alicia Fiorletta *UNIQLO "Selfless Selfie Project" Inspires Holiday Giving*, RETAIL TOUCH POINT, (Sept. 26, 2014 10:40), http://www.retailtouchpoints.com/features/news-briefs/uniqlo-selfless-selfie-project-inspires-holiday-giving

[239] I have not found the rules of this scheme online, but assumes that Uniqlo addressed all the legal issues therein.

[240] Thomas J. McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 Colum.-VLA J.L. & Arts 129, 130 (1994-1995).

The term "right of publicity" was first used by the Judge Jerome Frank from the Second Circuit court of appeals in the *Haelan Laboratories, Inc., v. Topps Chewing Gum, Inc*. case,[241] where the court held that "*in addition to and independent of that right of privacy ..., a man has a right in the publicity value of his photograph*...."[242] This is good news for influencers, as the law recognizes they retain a right in the value of their photograph, even though they give up their right to privacy by showcasing their lives on social media, for all to see.

The right of publicity is not a right of privacy, even though it originally stemmed from that right. Instead, it is a property right, similar to an intellectual property right over's one's identity. The Third Circuit explained in Hart v. Elec. Arts, Inc. that "[*t*]*he right to exploit the value of* [*a person's*] *notoriety or fame belongs to the individual with whom it is associated, for an individual's name, likeness, and endorsement carry value and an unauthorized use harms the person both by diluting the value of the name and depriving that individual of compensation*."[243]

Some states protects right of publicity only at common law,[244]others do not recognize it at common law, but have a right of publicity statute. There is no federal right of publicity law, but most U.S. states, with the exception of Alaska, Kansas, Maine, Maryland, Mississippi, Montana, North Carolina, North Dakota, Vermont[245] Wyoming and Idaho,[246] recognize a statutory a

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[241] *Haelan Laboratories, Inc., v. Topps Chewing Gum, Inc*., 202 F.2d 866 (2d Cir. 1953).
[242] Haelan at 868.
[243] Hart v. Elec. Arts, Inc., 717 F.3d 141, 151, (3d Cir. 2013), citing McFarland v. Miller, 14 F.3d 912, 919, 923 (3d Cir.1994).
[244] New Jersey for example, Presley's Estate v. Russen, 513 F. Supp. 1339, 1354 (D.N.J. 1981), citing Edison v. Edison Polyform Mfg. Co., 73 N.J.Eq. 136 (1907), where the court enjoined a company from using the name and likeness of Thomas Edison to promote its products.
[245] Vermont recognizes a right of publicity at common law to famous people, Staruski v. Continental Telephone Co. of Vermont, 581 A.2d 266 (Vt. 1990).
[246] The source of this list is Professor Rothman's blog dedicated to right of publicity, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, https://www.rightofpublicityroadmap.com/.

common law right to publicity, or both. Some states even recognize a post-mortem right of publicity, which is descendible.[247]

Dean Prosser identified four privacy torts in its seminal 1960 article,[248] which have been recognized by the Restatement (Second) of Torts: public disclosure of private facts, publicly placing another in a false light, unreasonable intrusion upon the seclusion of another, and appropriation of another's name and likeness.[249] Some or all of these torts have been adopted by the states.

The tort of intrusion upon seclusion and the tort of using the name or likeness of an individual for commercial purposes, also known as right of publicity tort, which protects the right any individual as over the privacy of his own image and his right in the commercial value of his image, are of particular interest for this study. Restatement (Second) of Torts § 652C provides that "*One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy*."[250]The Restatement (Second) of Torts defines intrusion upon seclusion as "*intentionally intrud[ing], physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns (…) if the intrusion would be highly offensive to a reasonable person*."[251] This tort is not recognized by every state. For instance, it is not recognized in New York, but it is recognized in California. But even if this tort is recognized

[247] California, Tennessee…
[248] William L. Prosser, Privacy, 48 CAL. L. REV. 383 (1960).
[249] Restatement (Second) of Torts §§ 652B, 652c, 652D, 652E (1977)
[250] RESTATEMENT (SECOND) OF TORTS (1977).
[251] Restatement (Second) of Torts §652B (1977)

by a state, its courts may not be convinced that this tort applies to unauthorized collection of personal data.

For instance, in *Dwyer v. American Express Company*, class action plaintiffs had claimed that American Express 'practice to aggregate information about cardholders 'spending habits and to sell it to third parties "*amounted to a tortious appropriation of their names and "personality profiles.""*[252] However, the Appellate court of Illinois found that Plaintiffs 'claim failed to prove the first element of the tort, an *«unauthorized intrusion or prying into the plaintiffs 'seclusion."*[253] The Appellate court reasoned that a cardholder "*voluntarily*" and "*necessarily*" gives information to American Express when using the card, "*that, if analyzed, will reveal a cardholder's spending habits and shopping preferences."*[254]

This is a 1995 case, at a time where algorithms were not yet routinely used to aggregate vast amount of "Big Data." Now, a court could no longer write "if analyzed", but should rather write "when analyzed." Since analyzing data is now prevalent, a collection of personal data may be held to be unreasonable by a court only if the party collecting and analyzing it assured individuals that their data will <u>not</u> be collected. Indeed, companies collecting data are now privacy savvy, and have a policy describing their practices to inform users, clients, or visitors to their sites about the how their personal data will be collected and whether they will be shared or sold to third parties, and individuals consent to these policies before using the service.

[252] *Dwyer v. American Express Company*, 652 N.E.2d 1351, 1355 (Ill.App. 1995)
[253] *Dwyer*, at 1354.
[254] *Dwyer*, at 1354

The state of New York, does not recognize a general right to privacy at common law,[255] but New York Civil Rights Law § 50 on "*Right of privacy*" [256] law, first enacted in 1903, provides that "[*a*] *person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor."* A person whose portrait or picture has been used commercially without her written consent can file a civil action for injunctive relief and damages.[257]

The New York Court of Appeals explained in 1984 that the New York right of publicity statute "*applies to any use of a person's picture or portrait for advertising or trade purposes whenever the defendant has not obtained the person's written consent to do so. It would therefore apply… in cases where the plaintiff generally seeks publicity, or uses his name, portrait, or picture, for commercial purposes but has not given written consent for a particular use… Thus where the written consent to use the plaintiff's name or picture for advertising or trade purposes has expired… or the defendant has otherwise exceeded the limitations of the consent …, the plaintiff may seek damages or other relief under the statute, even though he might properly sue for breach of contract*."[258]

New York courts consider that an image has been used for "*advertising purposes*" if it "*appears in a publication, which, taken in its entirety, was distributed for use in, or as part of, an*

[255] The New York Court of Appeals rejected adopting a common law right of privacy in 1093, *Roberson v. Rochester Folding Box Co*., 171 N.Y. 538 (1902).
[256] N.Y. Civ. Rights Law § 50 (McKinney 2009).
[257] N.Y. Civ. Rights Law § 51 (McKinney 2009).
[258] Stephano v. News Group Publications, Inc., 485 N.Y.S.2d 220, 224 (N.Y. 1984).

advertisement or solicitation for patronage of a particular product or service."[259] "Purpose of trade" "*involves use which would draw trade to the firm.*" [260] This definition encompasses "shoppable" images on Instagram and advertising, including social media promotions.

A New York State bill, Assembly Bill A08155, introduced on May 31, 2017, attempted to provide a First Amendment defense in the New York right of publicity law. It would not have been necessary to obtain the consent of the individual for using her likeness if "*used in connection with… news, public affairs or sports broadcast, including the promotion of and advertising for a public affairs or sports broadcast, an account of public interest or a political campaign;…a play, book, magazine, newspaper, musical composition, visual work, work of art, audiovisual work, radio or television program if it is fictional or nonfictional entertainment, or a dramatic, literary or musical work;… a work of political, public interest or newsworthy value including a comment, criticism, parody, satire or a transformative creation of a work of authorship; or an advertisement or commercial announcement for any* [*news, public affairs or sports broadcast, including the promotion of and advertising for a public affairs or sports broadcast, an account of public interest or a political campaign*].

The bill would, however, also have considerably expanded the scope of what is protected by New York Civil Rights Law §§ 50 and 51. While the law currently protects only the commercial use of someone's name or picture, the bill would have extended this protection to an individual's name, voice, signature and likeness. The "*likeness*" of an individual was defined as "*an image, digital replica, photograph, painting, sketching, model, diagram, or other recognizable*

[259] Beverly v. Choices Women's Medical Center, Inc., 78 N.Y. 2d 745, 751, 579 N.Y.S.2d, 637 (1991) .
[260] Kane v. Orange County Publications, 649 N.Y.S.2d 23, 232 A.D.2d 526.

representation of an individual's face or body, and includes a characteristic… [*which is*] "*a distinctive appearance, gesture or manner*." This protection of an individual's manner is overbroad. [261]Indeed, thus expanding the scope of New York right of publicity bill would make writing cease-and-desist letters an easy task for attorneys. The law would have a broad scope, and its terms are not easily comprehensible. Therefore, it would be difficult for the recipients of such letters, even educated ones, to assess whether the menace has some grounds or not and may choose to take down their posts to avoid further unpleasantness. This shows how the commodification of one's persona may have dire effect on free speech.

The First Amendment can be a defense in right of publicity suits, as Supreme Court held in Zacchini v. Scripps–Howard Broadcasting Co.[262] that the right of publicity does not bar reporting on newsworthy facts. Indeed, the right of publicity must sometimes give way to the First Amendment rights of the party which has used the likeness of another without authorization. In 2014, a federal district judge dismissed the right of publicity claim of a couple whose engagement photograph had been used without permission by an organization to promote anti-gay speech.[263] Senior Judge Wiley from the United States District Court for the District of Colorado quoted a Colorado Supreme Court case which stated that "*there is a First*

[261] Mannerisms cannot easily be protected by trademark either. Gene Simmons, of Kiss fame, unsuccessfully attempted to register a hand's sign which he claimed was his own. The application described the sigh as "*a hand gesture with the index and small fingers extended upward and the thumb extended perpendicular*." Thus performed, the sign suggests the devil's horns, or, at least, some horns. If Osborne had been able to trademark the sign, a social media user, whether he be a fan, or a detractor taking a picture of himself doing the sign and posting it on Instagram, could have been sued by Osborne for trademark infringement, or, at a minimum, been asked to take down the selfie. There is a First Amendment defense, but arguing it in response of a cease and desist letter require hiring an attorney or knowledge of free speech law.

[262] Zacchini v. Scripps–Howard Broadcasting Co. (1977) 433 U.S. 562, 574.

[263] Kristina Hill, Brian Edwards and Thomas Primitere v. Public Advocate of the United States, CV No. 12-cv-02550-WYD-KMT.

Amendment privilege that permits the use of a plaintiff's name or likeness when that use is made in the context of, and reasonably relates to, a publication concerning a matter that is newsworthy or of legitimate public concern." [264] The Colorado Supreme Court added that "[*i*]*n many situations, however, it is not altogether clear whether a particular use of person's name or likeness is made for the purpose of communicating news or for the purpose of marketing a product or service*. *After all, many advertisements incorporate factual information as part of their sales message. … To resolve this question, courts must determine whether the character of the publication is primarily noncommercial, in which case the privilege will apply, or primarily commercial, in which case the privilege will not apply*." [265] The Colorado Supreme Court went on explaining that the Colorado right of publicity prevents using a third party's likeness "*for a predominantly commercial purpose*" which is a use " *mainly for purposes of trade, without a redeeming public interest, news, or historical value*." [266]

California recognized the invasion of privacy by appropriation tort at common law, and also has a right of publicity statute, California Civil Code § 3344. The elements of a common law appropriation of name or likeness claim in California are "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." [267]

As explained by the California Second District Court of appeals, there are two different types of appropriation claim at common law and "[*t*]*he difference between the two is found not*

[264] Joe Dickerson & Assocs., L.L.C., 34 P.3d at 1003 (citations omitted).
[265] Ibid.
[266] Ibid, citing J. Thomas McCarthy, THE RIGHTS OF PUBLICITY AND PRIVACY, § 8:13 (2d ed.2000).
[267] Eastwood v. Superior Court, 149 Cal. App. 3d 409, 417 (1983), quoting Prosser, Law of Torts (4th ed. 1971).

in the activity of the defendant, but in the nature of the plaintiff's right and the nature of the resulting injury." [268] One type of appropriation is the right of publicity, which was described by the Supreme Court of California in *Lugosi v. Universal Pictures*[269], as *"the reaction of the public to name and likeness, which may be fortuitous or which may be managed or planned*, [*and which*] *endows the name and likeness of the person involved with commercially exploitable opportunities*." The other type of appropriation claim is *"the appropriation of the name and likeness that brings injury to the feelings, that concerns one's own peace of mind, and that is mental and subjective*." [270] The latter would be less of use to influencer's as the former, as influencers indeed are their name or likeness provides them with commercial opportunities.

The right of publicity of a California influencer, or a consumer having uploaded a selfie on social media, later used for commercial purpose without authorization, is also protected by statute. All of the four elements at common law must also be proven in a California statutory right of publicity claim, along with two more elements, (5) "a knowing use by the defendant," and (6) "a direct connection between the alleged use and the commercial purpose."[271] In a case of a selfie used without authorization for marketing purposes, such use would be certainly "knowing" but the direct connection between the use and the commercial purpose may be difficult to prove if the image was merely reposted on a corporate social media account. However, if the image is posted on a corporate site, the marketing purpose of such use is apparent.

[268] Dora v. Frontline Video, Inc., 15 Cal. App. 4th 536,541, quoting McCarthy, The Rights of Publicity and Privacy (1992) § 5.8(C), p. 5–67.
[269] Lugosi v. Universal Pictures, 25 Cal.3d 813, 824.
[270] Dora v. Frontline Video at 541, quoting Stilson v. Reader's Digest Assn., Inc. (1972) 28 Cal.App.3d 270, 273.
[271] Frayley v. Facebook, Inc., 830 F.supp.2d 785, 803 (N.D. Cal. 2011).

The Ninth circuit Court of appeals explained in Motschenbacher v. RJ Reynolds Tobacco Company [272]that while "[*i*]*t is true that the injury suffered from an appropriation of the attributes of one's identity may be "mental and subjective"—in the nature of humiliation, embarrassment, and outrage… where the identity appropriated has a commercial value, the injury may be largely, or even wholly, of an economic or material nature*. "[273] Therefore, an influencer whose likeness was used commercially without her permission would have to prove in California that she suffered an economic injury. As with most privacy cases, this could prove to be difficult to do. [274]

New York Assembly Bill A08155 recognized that identity is now a valuable commodity which can be traded, licensed, even transferable to heirs, as it stated that "*A living or deceased individual's name, voice, signature and likeness, individually and collectively known as his or her right of publicity, is personal property, freely transferable or descendible, in whole or in part, by contract or by means of any trust or testamentary instrument*…"

Indeed, the right of publicity has a double nature, at the same time a right protecting the persona, but also a property right, which can be used by the subject for his financial benefit, and can even be licensed.[275] As noted by John David Viera, while "*privacy… is passive, publicity is assertive*". He added that, when asserting his right of publicity, "*the individual says: "I own that"*

[272] Motschenbacher v. RJ Reynolds Tobacco Company, 498 F. 2d 821,824 (1974).
[273] Motschenbacher at 824, 825.
[274] In the U.S. Supreme Court decided that a plaintiff whose social security number had been disclosed by the Department of Labor could not recover damages for its great concerns and worries because of this disclosure, "and its potentially `devastating' consequence" had standing to sue the Department of Labor under the Privacy Act of of 1974. The Court however added "Standing to sue, but not to succeed … unless Doe also incurred an easily arranged out-of-pocket expense". Doe v. Chao, 540 US 614, 641 (2004).
[275] Restatement (Second) of Torts § 652C, comment (a) explains further that *"an exclusive license may be given to a third person, which will entitle the licensee to maintain an action to protect* [*this exclusive property right."*

[*which*] *also implies that the image being protected has economic value*."[276] As such, it is a property right, and may be licensed or sold. This is good news for influencers.

Professors Stacey L. Dogan and Mark A. Lemley noted in their 2005 article about right of publicity and trademarks that some "*courts and commentators have… contend*[*ed*] *that copyright law's incentive-based rationale supports the publicity right. Reasoning that the right of publicity gives individuals the incentive to develop valuable personas, courts conclude that depriving those individuals of the fruits of their labors will interfere with those economic incentives."* [277] While the article was written before the emergence of social media, it is nevertheless applicable to the emergence of influencers, who indeed have an incentive "*to develop valuable personas*." Their personas is their brand, as they become famous not by selling products, but by offering their opinion about products and by wearing them in the selfies posted on their social media accounts.

Right of publicity has some similarities with trademarks. Dean Prosser had explained in 1971 that "[*a*]lthough *the element of protection of the plaintiff's personal feelings is obviously not to be ignored in [a right of publicity] case, the effect of the appropriation decisions is to recognize or create an exclusive right in the individual plaintiff to a species of trade name, his own, and a kind of trade mark in his likeness*."[278] The Third Circuit Court of appeals stated in Hart v. Elec. Arts, Inc., [279] that an individual's "*name, likeness, and endorsement carry value and an unauthorized*

[276] Image Ethics, The moral rights of Subjects in Photographs, Film and Television, Edited by Larry Gross, John Stuart Katz, and Jay Ruby, Oxford University Press, 1988, p. 136-137.
[277] Stacey L. Dogan and Mark A. Lemley, What the Right of Publicity Can Learn From Trademark Law, 58 STAN. L. REV.1161,1163 (2006)
[278]William Prosser, LAW OF TORTS, (4th ed. 1971), at 807.
[279] Hart, at 151.

use harms the person both by diluting the value of the name and depriving that individual of compensation."[280]

The Lanham Act §43(a), 15 U.S.C.A. § 1125(a), provides two different civil cause of action for unauthorized commercial exploitation of an individual's identity by "[*a*]*ny person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact*."

§43(a) (A) provides a cause of action for false designation of origin, such as passing off or reverse passing off, if the unauthorized use of likeness "*is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person*."

§43(a) (B) provide a false advertising cause of action if the unauthorized use of likeness is made "in *commercial advertisings or promotion, [and] misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activitie*s." Plaintiff must prove damages in both cases, false designation of origin and false advertising.

In order to have standing to sue, plaintiffs must prove that they are engaged in interstate commerce, as §5 15 U.S.C.A. § 1127, states that the Lanham Act "*protect persons engaged in such*

[280] Citing McFarland v. Miller, 14 F.3d 912, 919, 923 (3d Cir.1994).

commerce against unfair competition." Court interprets this as meaning that "*the focus of the statute is on anti-competitive conduct in a commercial context*."[281]

Therefore, consumers cannot not sue under the Lanham Act for unauthorized commercial use of their likeness, as they are not engaged in commerce. However, influencers who have contracts with companies are indeed engaged in interstate commerce and thus have standing to sue under the Lanham Act.

b. The right of publicity in Europe

There are no European Union Directive or Regulation about commercial use of one's identity, and so the laws of each Member States are different, which may lead to legal difficulties. Indeed, several authors noted that "[*s*]*uch legal differences causes obstacles to intra-Community* [now intra-Union] *trade*," adding that "[i]*n the light of the fundamental rights guaranteed by the European Convention on Human Rights it seems arguable that at least some common ground should exist as to the protection against unauthorized commercial exploitation of personality*."[282]

Some European countries have a right in one's image, whether the likeness is used commercially or not. Her Majesty's Revenue & Customs (HMRC), which is the U.K. tax collection authority, does not consider, for the purposes of Capital Gain Tax (CGT), image rights to be a form of property, stating that "*unless the assignment is of a specific form of Intellectual Property Rights*

[281] Procter & Gamble Co. v. Amway Corp., 242 F. 3d 539, 561 (5th Circuit 2001).
[282] Huw Beverley-Smith, Ansgar Ohly & Agnès Lucas-Schloetter, Privacy, Property and Personality 4 (Cambridge University Press 2005).

(e.g. a registered trade mark or copyright), the asset concerned is likely to be goodwill."[283] The HMRC further explained that "[g]*oodwill is a personal property and its ownership can be transferred by assignment."* However, goodwill "*cannot be assigned "in gross" - separate from the business to which it relates."*[284]Lord Macnaghten defined in the 1901 *IRC v Muller & Co Margarine Limited* House of Lords case that goodwill "*is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start*."[285]

Under French law, certain rights called "personality rights" (*droits de la personnalité*) are considered to be outside the stream of commerce and thus cannot be sold. These rights are the right to one's private life [286]and to one's name, one's voice or one's image. This *droit à l'image* has been developed by the courts when interpreting article 9 of the French civil Code, which provides a right to respect for private life to everyone.[287] Under article 9, "*Everyone has the right to respect for his private life. Without prejudice to compensation for injury suffered, the court may prescribe any measures, such as sequestration, seizure and others, appropriate to prevent or put an end to an invasion of personal privacy; in case of emergency those measures may be provided for by interim order*."[288] The courts considered over the years that article 9 includes the right in

[283] Her Majesty's Revenue & Customs, *CG68420 - Intellectual Property Rights: assignment of "image rights"*, http://www.hmrc.gov.uk/manuals/cgmanual/cg68420.htm
[284] Ibid.
[285] *IRC v Muller & Co Margarine Limited* [10901] AC 217, 223.
[286] *Droit à la vie privée*.
[287] *Chacun a droit au respect de sa vie privée*, CODE CIVIL [C.CIV.], art.9 (Fr.).
[288] The translation is provided by *Légifrance* , a site powered by the French government as a public service to allow everyone access to the law. http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations.

the privacy of one's image. The *droit à l'image* is a rare example in France, a civil law country, of a legal doctrine which was built by the courts.

A project to renew entirely the civil Code was published in 1952. It would have replaced article 9 with an article 165 stating that "*unlawful infringement on **personality** gives the one who suffers from it the right to request that it be terminated, without prejudice to any liability which may arise for its author*"[289] (my emphasis). As such, the article would have protected all of the personality rights, not merely right in one's image. It is surprising that, since 1952, no further attempt have been successfully made to enlarge the scope of article 9. Another

However, the *droit à l'image* is not a right to publicity, and the concept of being able to commercially profit from one's image is viewed by some as just a little too American. An unsuccessful 2003 bill[290] aimed at adding an article 9-2 in the French civil Code which would have been worded as such: « *Everyone has a right to her personal image. The person's right on his image means that everyone has a right to the reproduction or use of his own image. The image of a person, however, can be reproduced or used as long as it does not result in any real and substantial harm to the person*." Its authors presented their motives[291] for enacting such a law as such: "*provisions of the current law give any holder of any rights to one's image the possibility to obtain financial compensation [for it use], even if the use at stake would cause no harm. The*

[289] « *Toute atteinte illicite à la personnalité donne à celui qui la subit le droit de demander qu'il y soit mis fin, sans préjudice de la responsabilité qui peut en résulter pour son auteur* ». Travaux de la Commission de Réforme du Code civil, Année 1950-1951, Recueil Sirey, 1952.

[290] *Proposition de loi visant à donner un cadre juridique au droit à l'image et à concilier ce dernier avec la liberté d'expression*, July 16, 2003, No.1029. The bill would have added an article 9-2 in the French civil Code: « *Everyone has a right to her personal image. The person's right on his image means that everyone has a right to the reproduction or use of his own image. The image of a person, however, can be reproduced or used as long as it does not result in any real and substantial harm to the person*."

[291] Available at http://www.assemblee-nationale.fr/12/propositions/pion1029.asp.

perverse effect of this laudable case law, which is protective of personality…rights, is to encourage our citizens to barter their image… or, worse, cause them procedural reflexes worthy of the worst overseas procedural reflexes." The original text is "*Outre Atlantique*" and thus specifically alludes to the United States, a country indeed viewed sometimes in France as highly litigious and where damages are being generously awarded.

Does the *droit à l'image* protect somewhat individuals against the commercial exploitation of their identity? Identity cannot be sold, traded, licensed or passed on to heirs. French courts are reluctant at recognizing that individuals may commercially exploit their likeness, even though they recognized early on that unauthorized use of likeness for commercial purpose was a tort, [292]and the *Cour de cassation* held in 2000 that the right to privacy and the right in one's image are two distinct torts, and thus are two different sources of damages recovery for a plaintiff.[293]

Therefore, if a third party would use the likeness of a social media user without specific authorization, plaintiff would have to prove that the use was a violation of his privacy. For instance, the Amiens Court of appeals recognized in 2014 that an employer does not have the right to use for a commercial contest. a video showing a worker performing his duties The employer could not prove that the employee had indeed consented to this commercial use, even though he had accepted to be filmed while working. For the Court of appeals, "[*t*]*he use of the image of the employee for advertising purposes is an infringement of the privacy of [the*

[292] T. comm. Seine, June 8, 1886, Paris Court of appeals, April 18, 1888, Reverchon v.Vaissier frères et Balmain, about the unauthorized use of actress Sarah Bernhardt to market make-up.
[293] Cour de cassation [Cass.] [Supreme court for judicial matters] 1e civ., Dec. 12,2000, Bull.civ. I No. 321 (Fr.)

employee] who has the right not to accept that his image as a worker comes out of the professional sphere."[294]

French courts rarely consider that plaintiffs in such cases suffered damages, because they could not profit from the commercial use of their likeness. Some courts, however, have awarded such damages. The Dijon Court of appeals ruled in 2013 that a vineyard worker, whose image had been used for commercial purpose, even though he had not consented to it, could be awarded damages, and estimated them to 25.000 euros. The court considered that the photograph had been used in printed marketing publications, but also on the vineyard's website, where it was freely downloadable. All these findings were "*a clear indication of the existence of* [*an injury*] *since the plaintiff receives no remuneration for this commercial use of his image*."[295]

However, even though French law considers that the right in one's image is a right in one's personality, it does not forbid parties to enter into agreements to commercially exploit the image of one of the parties, and the parties may freely determine the extent of their respective rights and obligations.[296] The likeness of a person can be freely licensed,[297] without the party licensing her likeness having to be considered an artist-interpret (*artiste-interprète*) contract, which is specifically regulated by the French Intellectual Property Code[298], or a model, an activity regulated by the labor law Code.[299] The Versailles Court of appeals explained that "*everyone an*

[294] Amiens Court of Appeals, September 4, 2013, N° 12/01271.
[295] Dijon Court of appeals, November 5, 2003, N° 12/01393.
[296] See for example, Tribunal de grande instance de Paris, Chamber 1, section 1, March 24, 1999.
[297] See for exemple Versailles Court of appeals, 12th Chamber, Section 2, September 22, 2005, N° 03/06185.
[298] Articles L. 212-1 and following of the French Intellectual Property Code, which defines the *artiste-interprète* as "*a person representing, singing, reciting, declaiming, playing or executing any other ways a literary or artistic work, variety number, a circus act or a puppet show."* We are far from the influencers who must aim at being authentic!
[299] Articles L. 763-1 and following, French labor Code;

exclusive right on his image and the use made of it allows him to oppose its dissemination without his express and special permission…. Since the right in one's image essentially has the characteristics of a patrimonial right, it can validly give rise to the establishment of contracts, subject to the general system of contracts, between the assignor, who has the right to legally control his image, and the assignee, who becomes the holder of the prerogatives attached to this right."[300]

French law recognizes a free speech defense to defendants in a *droit à l'image* suit. The Paris Court of appeals held in 2008 that "the *droit à l'image must yield to freedom of expression each time exercising the first would have as effect to arbitrarily prevent receiving and communicating ideas which are expressed especially in an artist's work, except in cases where the publication contrary to the dignity of the person or having for this person consequences of particular gravity."*[301]

French law curiously also recognizes a right on the images of one's goods, *le droit à l'image des biens*, which, as the *droit à l'image*, stems from the interpretation by the courts of an article of the civil Code, article 544, which provides that ownership of things "*is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations.*"

B. Using the images legally

[300] Versailles Court of appeals, 12th Chamber, Section 2, September 22, 2005, N° 03/06185.
[301] Paris Court of appeals, Nov.5, 2008, cited by Joelle Verbrugge, DROIT A L'IMAGE, Editions KnowWare, 2013, p.61.

a) Advertising law

Advertising for products or services on social media is, well, advertising and thus has to comply with advertising laws.

a. Social media endorsements

i. In the U.S

a. The Better Business Bureau

The Better Business Bureau (BBB) updated in February 2015 its *Code of Advertising* to reflect the new ways advertising may now be presented online to consumers, including on social media. [302] Its Section 30 is about *Testimonials and Endorsements* and considers that testimonials or endorsements, when used in advertising, are likely misleading or confusing if they are "*not genuine and does not actually represent the current opinion of the endorser*" or if "[*t*]*he actual wording of the testimonial or endorsement has been altered in such a way as to cha*nge *its overall meaning and impact*", or if they contain "*representations or statements which would be misleading if made directly by the advertiser.*"

Such testimonials or endorsements are deceptive if, while literally true, they create "*deceptive implications*." This is the case if the endorser is not a bona fide user of the endorsed product or service at the time of the endorsement, or if "*the advertiser represents that the endorser uses the product or service*." There are some specific rules for online endorsements, such as Rule 30.1.12 which states that endorsements published on blogs or other third-party

[302] *New BBB Advertising Standards Reflect 21st Century Advertising in Traditional and New Media*, BETTER BUSINESS BUREAU,9Feb. 12. 2015),

websites must "*clearly and conspicuously disclose the connection to the advertiser and comply with each of the provisions in* [*the BBB Code of Advertising*]," and Rule 30.1.13 prohibits compensating consumers for leaving feedback on third-party blogs or websites without making sure that consumers disclose on those blogs or websites that they have been compensated for writing these feedbacks.

The National Advertising Division of the Council of Better Business Bureaus, NAD, reviews social media posts deemed to be advertising. In January 2017, it found that posts made about a tea by Kourtney Kardashian, Khloe Kardashian and Kylie Jenner, on their respective Instagram accounts, had been made without disclosing that they had been paid to endorse the products.[303] NAD stated that disclosing such "material connections" between the brand and the endorser was necessary because consumers "*are likely to weigh an opinion differently if it is a paid endorsement for a product. As a result, such a payment is a connection that is material to consumers and should be disclosed*."

b. The Food and Drug Administration

Social media law indeed owes a lot to the Kardashian family. The Food and Drug Administration (FDA) sent a warning letter to a drug company [304] informing it that the social media post of Kim Kardashian about its morning sickness drug,[305] which she posted on

[303] Kardashian, Kourtney, et.al.,NAD Case No.6046 (January 2017).

[304] https://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/EnforcementActivitiesbyFDA/WarningLettersandNoticeofViolationLetterstoPharmaceuticalCcompanies/UCM457961.pdf

[305] The Instagram post has been deleted, but can be see at https://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/EnforcementActivitiesbyFDA/WarningLettersandNoticeofViolationLetterstoPharmaceuticalCompanies/UCM457965.pdf. The Twitter post relaying it is still available, https://twitter.com/KimKardashian/status/622937497333596160.

Instagram, Facebook and Twitter; was "false *or misleading in that it presents efficacy claims for DICLEGIS, but fails to communicate any risk information associated with its use and it omits material facts. Thus, the social media post misbrands DICLEGIS within the meaning of the* [*FDA*] *Act*."

The original post read as follow:

> "*OMG. Have you heard about this? As you guys know my #morningsickness has been pretty bad. I tried changing things about my lifestyle, like my diet, but nothing helped, so I talked to my doctor. He prescribed me #Diclegis, and I felt a lot better and most importantly, it's been studied and there was no increased risk to the baby. I'm so excited and happy with my results that I'm partnering with Duchesnay USA to raise awareness about treating morning sickness. If you have morning sickness, be safe and sure to ask your doctor about the pill with the pregnant woman on it and find out more www.diclegis.com; www.DiclegisImportantSafetyInfo.com*."

Indeed, pharmaceutical firms must provide the FDA with postmarketing submissions of interactive promotional media for their FDA-approved products, as, under the FD&C Act and FDA's implementing regulations, promotional labeling for drugs and advertisements for prescription drugs must disclose certain information about the product's risk.[306] This includes promotion on social media, whether the pharmaceutical firm is promoting its product on its own social media accounts, or if it is promoting it on third-party sites.

[306] FD&C Act sections 502(a)(n)(q)(r), 201(n); 21 CFR 1.21(a); 21 CFR 78 201.1.

The FDA published in January 2014 a draft "*Guidance for Industry Fulfilling Regulatory Requirements for Postmarketing Submissions of Interactive Promotional Media for Prescription Human and Animal Drugs and Biologics*"[307] It stated that "[*a*] *firm is responsible for promotion on a third-party site if the firm has any control or influence on the third-party site, even if that influence is limited in scope*." Such control or influence includes collaborating with the third-party site, or having editorial, preview, or review privilege. This would be the case if the company would direct a social media influencer to promote a particular product, such in the Kardashian case.

The FDA also published, in June 2014, its draft "*Guidance for Industry Internet/Social Media Platforms with Character Space Limitations— Presenting Risk and Benefit Information for Prescription Drugs and Medical Devices,"*[308] which applies to advertising of medical products "*on electronic/digital platforms that are associated with character space limitations*. The draft guidance states that "*the firm should …incorporate risk information within the same character-space-limited communication. The firm should also provide a mechanism to allow direct access to a more complete discussion of the risks associated with its product*. "

The draft explained that, when advertising for medical products on platforms with character space limitations, companies must make sure that benefit information about the product are "*accurate and non-misleading and reveal material facts within each individual character-space-limited communication (e.g., each individual message or tweet)."* This information must be accompanied by risk information, if "*enough capacity will remain in the character-space-limited communication to adequately convey required risk information"*, which

[307] https://www.fda.gov/downloads/drugs/guidancecomplianceregulatoryinformation/guidances/ucm381352.pdf
[308] https://www.fda.gov/downloads/drugs/guidancecomplianceregulatoryinformation/guidances/ucm401087.pdf.

includes providing a hyperlink to a page "*devoted exclusively to the communication of 328 risk information about the product*."

In the Kardashian case, even though the post contained a link to a corporate site listing health risks associated with taking this drug, this was not enough for the FDA, as the post "*entirely omit*[*ed*] *all risk information*" and this "[*did*] *not mitigate the misleading omission of risk information*." The FDA also found the post to be misleading as it "*because it fail*[*ed*] *to provide material information regarding DICLEGIS' full approved indication, including important limitations of use."* The FDA requested the drug company to immediately cease such misbranding or to stop selling the drug in interstate commerce.

c. The FTC

The FDA is not the only agency which may regulate such posts, as Section 12 of the FTC Act specifically prohibits the dissemination of "*any false advertisement…which is likely to induce, directly or indirectly the purchase of food, drugs, devices, services, or cosmetics*."[309]The Federal Trade Commission (FTC) has been very active these last years at regulating advertising and endorsements on social media.

Article 5 of the FTC Act empowers the FTC to prevent persons, partnerships and corporations from using unfair or deceptive acts or practices affecting commerce.[310] This includes advertising, and thus also advertising on social media.

[309] 15 U.S.C. § 52.
[310] Federal Trade Commission Act, 15 U.S.C. § 45(a) (2015).

Section 15 of the FTC Act defines a 'deceptive advertising' as "*an advertisement, other than labeling, which is misleading in a material respect*." The FTC explained in its Deception Policy Statement, published in October 1983, that an ad is deceptive if it contains a material misrepresentation, omission or practice likely to mislead a reasonable consumer, and defined a material misrepresentation or practice as one "*likely to affect a consumer's choice of or conduct regarding a product*."[311] The FTC concluded it would find "*an act or practice deceptive if there is a misrepresentation, omission, or other practice that misleads the consumer acting reasonably in the circumstances, to the consumer's detriment*."

The FTC published in 2009 its revised *Guides Concerning Use of Endorsements and Testimonials in Advertising* (FTC's Endorsement Guides),[312] which were first published on May 21, 1975. The FTC's Endorsement Guides defines an endorsement as "*any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.*"[313] Material connections between the endorser and the marketer of a product or service must be clearly and conspicuously disclosed, unless the connection is already clear from the context of the communication containing the endorsement.

[311] https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.
[312] *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 16 C.F.R. §§ 255.0-255.5.
[313] *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 16 C.F.R.255(b).

These endorsement rules apply on social media and thus endorsers must disclose a particular connection they may have with a sponsor on social media, including on Twitter which used to limit each "tweet" to 140 characters, and limits them now to 280 characters.

The FTC also published a FAQ page on endorsement, and answered the question: "*How can I make a disclosure when my message is limited to 140 characters?*" as such:

> "*The FTC isn't mandating the specific wording of disclosures. However, the same general principle – that people have the information they need to evaluate sponsored statements – applies across the board, regardless of the advertising medium. A hashtag like "#paid ad" uses only 8 characters. Shorter hashtags – like "#paid" and "#ad" – also might be effective*."[314]

Therefore, if an individual would post a photograph of himself on social media featuring a product or while using a service of a third-party sponsor, he must include at least one appropriate hashtag to inform his followers that this post is sponsored.

The FTC published a new report in March 2013 explaining "*How to Make Effective Disclosures in Digital Advertising*,"[315] which noted that "[*t*]*he FTC Act's prohibition on "unfair or deceptive acts or practices" encompasses online advertising, marketing, and sales*,"[316] then published on May 29, 2015 an updated version of the *FTC's Endorsement Guides: What People Are Asking, a list of frequently asked questions (FAQs)*, which was last updated in September

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[314] *The FTC's Revised Endorsement Guides: What People are Asking*, THE FEDERAL TRADE COMMISSION, June 2010, http://business.ftc.gov/documents/bus71-ftcs-revised-endorsement-guideswhat-people-are-asking

[315] *.com Disclosures, How to Make Effective Disclosures in Digital Advertising*, Federal Trade Commission (Mrch 2013), https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf.

[316] *.com Disclosures*, p. i.

2017.[317]This new document reflects the intricate ways an influencer may be used by companies to promote a product or a service. It addresses endorsing a product on a blog, on YouTube and on other social media platforms, and also addresses the issues of an influencer being made "ambassador" to a brand to discuss it in real life. In that case, free meals and free travel must be disclosed. The guides specify that the influencers do not have to disclose their compensation, nor do they have to write something positive about the product or the service for the post to be considered an endorsement by the FTC.[318]Even influencers living outside of the U.S. may have to disclose their ties with the company offering the product or service by mentioning it online, if it is "*reasonably foreseeable that* [*the post*] *will be seen by and affect U.S. consumers."*

These FAQs also specifically addresses famous influencers, that is, people who are famous on their own right, not only on social media. The FTC advices them to disclose their relationship with companies, even though the general public knows that they are a spokesperson for a particular product and know that the influencer regularly enters into advertising contracts. Indeed, it is not always easy to decide whether a particular celebrity social media post is sponsored or not. When Boston Red Sox slugger David Ortiz retired at the end of the 2016 season, he posted both on his *Facebook*[319] and *Twitter* account[320] a picture of himself on the steps leading to the clubhouse, embracing his son and holding a bottle of *Coca-Cola*. The capture of the image read: "*every walk-off ends at home*". The photo was framed in such a way that the big

[317] https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking
[318] "*You don't necessarily have to use words to convey a positive message. If your audience thinks that what you say or otherwise communicate about a product reflects your opinions or beliefs about the product, and you have a relationship with the company marketing the product, it's an endorsement subject to the FTC Act*."
[319] https://www.facebook.com/davidortiz/photos/a.425403239835.199800.60844829835/10154585989339836/?type=3&theater.
[320] https://twitter.com/davidortiz/status/786347251216084992.

Coca Cola sign on top of the left field wall of Fenway Park. While the Facebook post did not originally have the #ad hashtag, it was added after the '*Truth in Advertising'* organization wrote a blog post about these posts on its site.[321]

Failing to make clear to consumers that a particular social media post has been sponsored in a violation of article 5 of the FTC Act. In March 2015, retailer *Lord & Taylor* chose fifty fashion influencers, each having a sizable *Instagram* following, to launch a new ready-to-wear line. It gave them each the same dress and paid them each $1,000 to $4,000, according to their degree of social media influence, to publish on their *Instagram* account a selfie taken while wearing a the dress [322] *Lord & Taylor* pre-approved the postings, to make sure that each of them bore the marketing campaign hashtags and the @lordandtaylor *Instagram* handle. However, none of the postings included a disclosure that the dress had been given for free or that the influencers had been compensated for these particular posts.

The FTC issued a complaint in March 2016, alleging that the retailer had violated the FTC Act by failing to require, in the provisions of the contract, that the influencers had disclose in their postings that they had been compensated by the retailer. *Lord & Taylor* agreed to settle, and on May 2016, the FTC approved a final consent order with *Lord & Taylor*,[323] which required the retailer, when advertising by way of an endorsement, "*to disclose clearly and conspicuously,*

[321] Ad or Not? Big Papi's Final Walk-Off, THE TRUTH IN ADVERTISING, (Oct. 13, 2016), https://www.truthinadvertising.org/ad-not-big-papis-final-walk-off/.
[322] David Griner, Lord & Taylor Got 50 Instagrammers to Wear the Same Dress, Which Promptly Sold Out Flooding fashion feeds pays off, ADWEEK, (March 31, 2015, 5:44 PM EDT), http://www.adweek.com/news/advertising-branding/lord-taylor-got-50-instagrammers-wear-same-dress-which-promptly-sold-out-163791
[323] Federal Trade Commission, *Lord & Taylor, LLC; Analysis of Proposed Consent Order To Aid Public Comment*, https://www.ftc.gov/news-events/press-releases/2016/05/ftc-approves-final-lord-taylor-order-prohibiting-deceptive .

and in close proximity to the representation, a material connection, if one exists, between the endorser and Lord & Taylor."[324] Indeed, example 5 under § 255.1 of the FTC's Endorsement Guides explains that an advertiser is liable for providing "*guidance and training to its bloggers concerning the need to ensure that statements they make are truthful and substantiated. The advertiser should also monitor bloggers who are being paid to promote its products and take steps necessary to halt the continued publication of deceptive representations when they are discovered*."

The Endorsement Guides apply to marketers and endorsers and the FTC signaled in 2017 that it will start holding the influencers accountable for respecting them. It announced in April 2017 that it had, for the first time, directly contacted influencers to let them know that they had not complied with the Endorsement Guides when posting on *Instagram*.[325] This move followed a letter sent in September 2016 to the FTC by non-profit organizations *Public Citizen* and *Center for Digital Democracy* which urged the agency to "*engage in an affirmative effort to change the culture around paid endorsements on Instagram, and* [*to*] *act promptly and aggressively*."[326] In April 2017, the FTC sent ninety letters to influencers, among them celebrities and athletes such as Lindsay Lohan,[327] reminding them that they must clearly and conspicuously disclose their

[324] https://www.ftc.gov/system/files/documents/federal_register_notices/2016/03/160323lordtaylorfrn.pdf
[325] The FTC contacted more than 90 influencers. *FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship*, FTC, (April 19, 2017), https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose.
[326] *Letter to FTC re instagram endorsements*, PUBLIC CITIZEN, (Sep.7, 2016), https://www.citizen.org/sites/default/files/letter-to-ftc-instagram-endorsements.pdf.
[327] Their names were revealed following a FOIA request from non-profit organization Public Citizen, see *Public Citizen's FOIA Leads FTC to Name Celebrities Warned Over Paid Instagram Posts*, PUBLIC CITIZEN (Sept. 14, 2017), https://www.citizen.org/media/press-releases/public-citizen's-foia-leads-ftc-name-celebrities-warned-over-paid-instagram. For a list of the FTC recipients, see Alexandra Steigrad, *FTC Issued Warnings to 45 Celebrities Over Unclear Instagram Posts*, WWD (May 8, 2017), http://wwd.com/business-news/media/ftc-issued-warnings-to-45-celebrities-over-unclear-instagram-posts-10883342/.

material connection with the marketers.[328] The letter explained that, in order for a disclosure of a material connection to be clear and conspicuous on Instagram, it must appear above the "more" button which consumers reading their Instagram stream on a mobile device click to see more than the first few lines of a post.

These letters were however only warnings, and the FTC did not filed any complaints. Nonprofit organization Public Citizen then tracked the social media accounts of forty six of these influencers from May 1, 2017 to June 12, 2017 and found out that only one of them had fully and consistently complied with the FTC endorsements requirements.[329] It found that, while some of these influencers had disclosed their material connections, others had continued to post endorsements without disclosures. Public Citizen reported that it had found that 327 posts, that is 79 percent of the 412 advertisements posted by the 46 influencers it had monitored, did not comply with the FTC disclosure requirements. The non-profit organization then sent a letter to the FTC asking the agency to "*bring enforcement actions and to seek penalties for posting nondisclosed sponsored content, especially for influencers and brands that are repeat offenders*."[330]

[328] *Staff Reminds Influencers and Brands to Clearly Disclose Relationship,* FEDERAL TRADE COMMISSION, (April 19, 2017), https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose.
[329] *Investigation Shows That FTC's Reminder Letters Are Ineffective at Disclosing Paid Posts on Instagram*, PUBLIC CITIZEN, (June 26, 2017), https://www.citizen.org/media/press-releases/investigation-shows-ftc's-reminder-letters-are-ineffective-disclosing-paid-0.
[330] https://www.citizen.org/system/files/case_documents/ftc_instagram_letter_and_investigation.pdf.

Code, not law,[331] came to the rescue in June 2017 when Instagram announced a new feature designed to make it easier to disclose that a particular post is sponsored.[332] The social media site explained on its business blog that it now offered a "*Paid partnership with*" tag on posts and stories.[333]Users are provided with a technical feature to disclose that a particular post is sponsored, a disclosure which appears about each post.

The FTC seems to be however getting more aggressive at enforcing its Endorsement Guides. In September 2017, it announced that Trevor "TmarTn" Martin and Thomas "Syndicate" Cassell, two online gaming community YouTube and Instagram influencers, had settled with the FTC over allegations of deceitful endorsements of online gambling service CSGO Lotto, which is an online multi-players game where players can gamble using virtual collectible items as currency, which can then be traded for real money. It was the first time that the FTC had filed a complaint against the influencers themselves. It should be noted that the two influencers were in this case the owners of the company they were promoting as influencers, while failing to disclose it to their followers. They also allegedly paid other influencers to promote their company, but failed to direct them to disclose that the posts had been sponsored. [334]

The consent order directed the two respondents to disclose "*clearly and conspicuously, and in close proximity to that representation, any unexpected material connection between [an]*

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[331] See Lawrence Lessig, CODE AND OTHER LAWS OF CYBERSPACE, Basic Books (1999).
[332] Katie Notopoulos, *Instagram Made A Feature To Disclose Celebrity #Sponsored Posts*, BUZZFEED, (June 14, 2017, 10.00 AM), https://www.buzzfeed.com/katienotopoulos/instagram-made-a-feature-to-disclose-celebrity-sponsored?utm_term=.bta55lw23#.jq2PPyoMQ.
[333] *Why Transparency Matters: Enhancing Creator and Business Partnerships*, INSTAGRAM BUSINESS BLOG, (Update Aug. 29, 2017, 9:00 AM PT), https://business.instagram.com/blog/tagging-and-insights/.
[334] *SGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers,* FEDERAL TRADE COMMISSION, (Sept. 7, 2017), https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against.

endorser and [*the respondents*] …; *other individual or entity affiliated with the product or service; or … the product or service*. "[335]As several of the posts had been made in a video, the consent order was an opportunity for the FTC to address endorsement disclosure in videos:

> "*In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure ("triggering representation") is made through only one means*.
>
> …
>
> "*An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it*."

It also specified that "[*w*]*hen the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, "ordinary consumers" includes reasonable members of that group."* We saw earlier with Kim Kardashian post about a drug that it is not only fashion and cosmetic products which are being advertised by social media endorsements, and that the social media demographic encompasses childhood to old age.

d. WOMMA

335 https://www.ftc.gov/system/files/documents/cases/1623184_csgolotto_agreement_and_decision_and_order.pdf.

The Word of Mouth Marketing Association (WOMMA), which is the official trade association representing the interests of the word of mouth and social media industry, has published its "*Code of Ethics and Standards of Conduct*" (WOMMA code of ethics) which closely follows the FTC's "*Guides Concerning the Use of Endorsements and Testimonials in Advertising*."[336]Standard 2 of the WOMMA code of ethics directs WOMMA members to "*require their representatives to disclose meaningfully and prominently all forms of consideration or compensation they received from the member, marketer or sponsor of the product or service*."

Therefore, WOMMA members engaging in social media marketing, and having influencers endorse their products or services, either by paying them or by providing them free products or services, must make sure that the influencers provide a "*full, meaningful, and prominent disclosure*."[337] Standard 3 of the WOMMA code of ethics requires that members "*require their representatives involved in a word of mouth initiative to disclose the material aspects of their commercial relationship with a marketer, including the specific type of any remuneration or consideration received*." Under Standard 4, WOMMA members must comply with the FTC's Endorsement Guides, and under Standard 7, WOMMA members must not include children under the age of 13 in any of their word of mouth marketing programs or campaigns, and must comply with COPPA and other laws dealing with minors and marketing.

ii. In the U.K: the Advertising Standards Authority

[336] According to WOMMA, the FTC's guides are "[*t]he fulcrum of the* [*WOMMA*] *Code and Standards*," *The WOMMA Code of Ethics*, WOMMA, https://womma.org/ethics/.
[337] As stated in Standard 2 of the WOMMA code of ethics.

In Great Britain, the Advertising Standards Authority, (ASA), which is the United Kingdom's independent regulator for advertising across all media, including social media, is in charge of the administration of the UK Advertising Codes. These Codes are written and maintained by the Committees of Advertising Practice (CAP). ASA applies the "*Code of Non-broadcast Advertising and Direct & Promotional Marketing*" (CAP Code), which is written by its sister organization, the Committee of Advertising Practice (CAP). The CAP Code states the rules for non-broadcast advertisements, sales promotions and direct marketing communications.[338]

The salient CAP rules for social media marketing are CAP Rule 2.1 which states that "[*m*]*arketing communications must be obviously identifiable as such*" and CAP Rule 2.4 which states that "[*m*]*arketers and publishers must make clear that advertorials are marketing communications; for example, by heading them "advertisement feature".*

ASA published an adjudication on November 26, 2014, where it found that the Mondelez UK Ltd company, which manufactures the Oreo cookies, had breached CAP Code (Edition 12), rules 2.1 and 2.4 regarding recognition of marketing communications, when it had asked several video bloggers (vloggers) with popular YouTube channels to participate to an "Oreo Lick Race."[339]The vloggers chosen by Oreo posted a video where they indeed licked a new variety of cookies. While they mentioned in the videos that Oreo had provided them with free cookies, they had not disclosed that they had been paid to post the videos. A journalist from the BBC issued a complaint to ASA, claiming that these ads were not obviously identifiable as marketing communications.

[338] UK Code of Non-broadcast Advertising and Direct & Promotional Marketing, 12th Edition, (Sep. 1, 2010)m https://www.asa.org.uk/codes-and-rulings/advertising-codes/non-broadcast-code.html.
[339] ASA Adjudication on Mondelez UK Ltd, https://www.asa.org.uk/rulings/mondelez-uk-ltd-a14-275018.html.

ASA noted "*that the CAP Code required ads to be obviously identifiable as marketing communications.*" Even though the vloggers used some disclosure statements, such as "Thanks to Oreo for making this video possible", either in the video or in the text below the video, such words were "*insufficient to make clear the marketing nature of the videos because, although they might indicate to some viewers that Oreo had been involved in the process, they did not clearly indicate that there was a commercial relationship between the advertiser and the vloggers (i.e. that the advertiser had paid for and had editorial control over the videos)*."

In another case, soccer player Wayne Rooney posted on Twitter: "*The pitches change. The killer instinct doesn't. Own the turf, anywhere. @NikeFootball #myground pic.twitter.com/22jrPwdgC1*". [340] A consumer who had seen this message, as it had been retweeted by one account he followed, claimed it could not be identified as a marketing communication. Nike Football argued that the inclusion of the @NikeFootball Twitter handle was enough to show that the tweet was a Nike Football marketing communication, especially since the message was part of a series of five tweets posted by Wayne Rooney over four days, which all included the @NikeFootball Twitter handle to promote a new football collection. This argument did convince ASA, as "*the reference to Nike Football was prominent and clearly linked the tweet with the Nike brand*." Even though not all Twitter users knew that Wayne Rooney had a sponsorship deal with Nike, ASA "*considered that in the particular context of a tweet by Wayne Rooney the wording of the initial statement was such that in combination with "@NikeFootball" and "#myground", the overall effect was that the tweet was obviously identifiable as a Nike*

[340] ASA Adjudication on Nike Ltd, September 4, 2013, https://www.asa.org.uk/rulings/nike-uk-ltd-a13-229986.html.

marketing communication." Such a conclusion would not have been made by the FTC, and rightfully so, as the mere inclusion of a Twitter handle is not "clear and conspicuous" disclosure of an endorsement, and is instead likely to be interpreted by users as the savvy way to write about a particular company on Twitter, where names of people and companies are preceded by '@'.

ASA noted in a recent blog post that "*negative publicity that arises from our interventions can erode consumers' trust in the brand and followers' trust in the influencer; so, neither party wins from a failure to disclose advertising as such*."[341] This may a signal that warnings may be issued, but the influencers or the marketers will not have to pay fines.

iii. In France: the Autorité de Régulation Professionnelle de la Publicité

We saw that France's professional advertising regulatory authority, the *autorité de regulation professionnelle de la publicité*) (ARPP), defined in June 2017 an influencer as "*an individual expressing a point of view or giving advice in a specific area and in a style of its own which is identified as such by his audience*."[342] Such way to market goods or services is legal in France, but the relationship between the influencer and the company must be disclosed to the public. The ARPP considers that a collaboration between an influencer and an advertiser must be disclosed if several conditions are cumulatively met:

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[341] *Blog: Online Influencers - is it an #ad?*, ASA (Aug. 21, 2017), https://www.asa.org.uk/news/online-influencers-is-it-an-ad.html.

[342] « *un individu exprimant un point de vue ou donnant des conseils, dans un domaine spécifique et selon un style ou un traitement qui lui sont propres et que son audience identifie*. »

-the content is made through reciprocal commitments;

- the influencer is compensated for expressing himself, either by being paid or by receiving free goods and services;

- the advertiser or his representatives exercises a dominant editorial control, such by imposing a particular speech and approving its content before its publication; and

- if the influencer's communication aims at promoting the product or the service.

If all of these conditions are cumulatively fulfilled, the communication of the influencer must be identified as commercial communication, "*explicitly and instantaneously*." Such disclosure can be made by any means, orally, in the text accompanying the content, or by mentioning it during the course of the video. What matters is that the public is informed about the commercial relationship.

b) Sweepstakes and contest laws

We saw how some brands are using people's likeness when organizing a promotional contest or sweepstake. While the winner of a sweepstake is found by random drawing of all entries, the winner of a contest has been determined as the most skilled one.

a. Lotteries

Indeed, such promotions are legal, provided they are not lotteries, which are generally unlawful, unless organized by the State itself.[343] While each state has its own lottery laws, a

[343] For instance, article 1 §9 of the New York State Constitution prohibits lotteries and the sale of lottery tickets, "except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized

lottery is generally defined as a game or contest which comprises three elements: prize, chance and consideration.[344] New York law, for instance, defines a lottery as "*an unlawful gambling scheme in which (a) the players pay or agree to pay something of value for chances, represented and differentiated by numbers or by combinations of numbers or by some other media, one or more of which chances are to be designated the winning ones; and (b) the winning chances are to be determined by a drawing or by some other method based upon the element of chance; and (c) the holders of the winning chances are to receive something of value*."[345] California law defines a lottery as "*any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known*."[346] The Supreme Court of South Carolina defined it as "*scheme for the distribution of prizes or things of value by lot or chance among persons who have paid, or agreed to pay, a valuable consideration for the chance to obtain a prize*."[347]

Indeed, a lottery is generally defined as a game which participants are paying a fee to enter it for the chance to win an object of value. There are thus three elements characterizing a lottery: chance, prize and consideration. In order for a promotional contest or sweepstakes to be

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and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe."

[344] See for example this Supreme Court of South Carolina case, *Johnson v. Collins Entertainment Co.* 333 S.C. 96, 108-109 (1998).

[345] N.Y. PENAL LAW § 225.10 (McKinney 2016).

[346] CAL. PENAL CODE § 319.

[347] Johnson v. Collins Entertainment Co., 333 S.C. 96, 103 (1998), quoting its own Darlington Theatres, Inc., v. Coker, 2 S.E. 2d, 782, 786 (1939).

legal, it must thus avoid at least one of these elements. While one cannot eliminate the prize elements, as taking it away would certainly dampen the enthusiasm of participants, chance or consideration must be eliminated.

If the element taken is consideration the promotion is a sweepstake. If the element taken is chance, the promotion is a contest.

b. Sweepstakes

Just as the states have their own lottery laws, they do have their own sweepstakes laws. If a particular contest is organized online, it will be accessible all around the U.S.A. and must thus comply with the laws of the fifty states, unless it conspicuously void in one or several states, or if "void when prohibited" is added in the rules. As web-based sweepstakes are also accessible all around the world, organizers would be well-advised to limit the participations to the U.S.

Each U.S. states have their own sweepstakes law. The California Department of Consumer Affairs provided in 2013 a definition of a sweepstake, which could be applied in every states, as "*any procedure for distributing anything of value by lot or chance. A sweepstakes must not violate any provision of law, including the law that prohibits lotteries*." [348]

Consideration is defined differently from states to states. Under Florida law, consideration for a bet or contest of skill is "*money or other thing of value.*"[349] As the saying goes, 'Time is Money' and indeed, if a participant is required to extend a significant amount of time and effort in order to enter the contest, this may be a consideration. In that case, the organizer

[348] California Department of Consumer Affairs, *Rules For Operation of Contests and Sweepstakes: Legal Guide U-3*, (Jan. 2013), http://www.dca.ca.gov/publications/legal_guides/u-3.shtml.
[349] FLA. STAT. ANN. § 849.09 (2016).

must provide an alternate method of entry (AMOE) to avoid this entry to be a considered a consideration.

Must the organizer of a sweepstake provide an AMOE if the way to enter a sweepstake is to post a selfie, which will not be judged by a jury, but is simply a way to enter the sweepstake? It would depend on the selfie. If participants are asked to enter a sweepstake by taking a selfie featuring a product or service sold by the organizing entity, this may be a consideration, as the contestant would have to incur expenses in order to take this selfie. This would also be the case if the selfie has to be taken at a place which can only be accessed by paying a fee, at an amusement park for instance. The official rules for the 2017 'Oreo Dunk Sweepstakes' allowed participants to enter by providing a selfie or a video of themselves which either showed them dunking a Oreo cookie in milk, or showed them "*with an Oreo product package in store*."[350]

Even merely taking a selfie, if it is later used for promotional purposes by the organizers, may be consideration in Washington state, as the Supreme Court of Washington considers that "[*b*]*enefits in the form of increased sales, good will and public response to the advertising o*f [*the promotional game*] amount[*s*] *to a consideration valuable indeed to the promoters and [is] consideration*."[351] In that case, the person wishing to enter the chance game, bingo in this case, had to obtain a bingo booklet, distributed for free at organizer's stores, without requirement of a purchase. The bingo player also had to obtain bingo cards, also distributed for free at the stores, without any requirement of purchase However, only one bingo card was given per day, which

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350 https://web.archive.org/web/20170409193846/https://mondelez.promo.eprize.com/oreodunksweeps/public/fulfillment/rules.pdf.

351 *State ex rel. Schillberg v. Safeway Stores*, Inc., 450 P.2d 949, 955 (1969).

required multiple visits to the store, if one wished indeed to fill up a bingo card. As such, the player had "*to expend time, energy and perhaps money, too, by visiting [organizer] to procure a prize slip, the basic token employed in the game, for, even though the prize slips were issued on* mere *request without need to purchase any merchandise, the player must visit a store to procure one*." The Court further noted that the organizer had experienced "*material increase in business not attributable to any factor other than the effects of* [*the chance game*.]" [352] This is less likely to be the case in an online environment, as increased traffic to a web site due to a promotion is less likely to result in purchases. However, such increased traffic has beneficial effect on the organizer brand's goodwill, and thus may be regarded as consideration by the Washington courts. Also, the entity organized these selfies-based contest sometimes do use the selfies thereafter. As these selfies are works protected by intellectual property and right of publicity, they may be consideration.

So, in general, if a selfie does not require having to incur costs to take it, and is merely used as an entry token to the sweepstakes, either by uploading it on the organizer's site, or by sharing it on social media with the appropriate hashtag, it is not consideration, as one does not need to pay a fee to register on a social media site, and downloading the selfie is free. However, participants may incur data charges, and that alone may be consideration.

As sweepstakes are a form of advertising, they must not be deceptive. Section 12 (a) (2) of the FTC Act defines false advertising as an advertising which would induce "*or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce, of food, drugs,*

[352] *State ex rel. Schillberg v. Safeway Stores*, Inc., at 956.

devices, services, or cosmetics." Section 12(b) of the FTC Act specifies that disseminating or causing the dissemination of such false advertising is an unfair or deceptive act or practice within the meaning of Section 5 of the FTC Act. The FTC delineated in its *Policy Statement on Deception* that a deceptive practice or act involves "*a representation, omission or practice that is likely to mislead the consumer… acting reasonable under the circumstances…* [*T*]*he representation, omission, or practice must be a "material" one…* [*that is,* an] *act or practice… likely to affect the consumer's conduct or decision with regard to a product or service*." "[353]

c. Contests

If the element of chance is taken out, the promotion is a contest. The California Department of Consumer Affairs provided in 2013 this definition of a contest: it is a "*game, puzzle, scheme, or plan which offers prospective participants the opportunity to receive or compete for gifts or prizes on the basis of skill or skill and chance, and which is conditioned wholly or partly on the payment of some value*."[354] If a contest is legal if it requires at least some skills from the participant, we need to answer the question, what is "skill"?

Chance can be taken away by rewarding the most skilled of the participants. This would be the case, for instance, if a sweepstake rewards the "best" or the "most glamourous" of the selfies entered. The Federal Trade Commission defined a skill contest, albeit only "[*f*]*or purposes of this order… as any promotional contest or device in which the award of a prize or anything of*

[353] FTC Policy Statement on Deception, Oct.14, 1983,appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (1984). Available at https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.
[354] California Department of Consumer Affairs, *Rules For Operation of Contests and Sweepstakes: Legal Guide U-3*, (Jan. 2013), http://www.dca.ca.gov/publications/legal_guides/u-3.shtml.

value to the participants is determined on the basis of the winning answers or solutions submitted by participants through the exercise of a substantial degree of skill in determining the winning answers or solutions to the questions or problems which are the subject of the contest or device." [355] One of these skills could be photography: but does taking a selfie require a particular skill? The answer is… it depends. [356]

In order to determine whether a particular contest or sweepstake requires skills or chance to win, most courts and states laws[357] use the "dominant factor doctrine", or "predominance test" under which "*a scheme constitutes a lottery where chance dominates the distribution of prizes, even though such a distribution is affected to some degree by the exercise of skill or judgment*." [358] State courts have their own definition of chance. For example, the Nebraska Supreme Court defined it as "*an* [*a*]*bsence of explainable or controllable causation; accident; fortuity; hazard; result or issue of uncertain and unknown conditions or forces; risk; unexpected, unforeseen, or unintended consequence of an act. The opposite of intention, design, or contrivance*."[359] In order to reduce or eliminate altogether the element of chance, contestants must be judged on an objective criteria, which must be disclosed and explained in the contest rules. The judges must be qualified to assess the quality of the entries.

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[355] In the Matter of Glendinning Companies, Inc. Modifying Order (Jan. 13, 1987), 109 F.T.C. 8 (1987), https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-109/ftc_volume_decision_109_january_-_june_1987_pages_1-100.pdf

[356] Even a monkey can be the author of a selfie, as we learned in Naruto, et al. v. Slater, et al., 3:15-cv-04324 (N.D. Calif. 2016), on appeal to the Ninth Circuit. The case settled. 0:16-cv-15469.

[357] For a review of the states which are using or not the dominant factor test, see Chuck Humphrey, *State Gambling Law Summary,* http://www.gambling-law-us.com/State-Law-Summary.

[358] *Morrow v. State*, 511 P.2d 127, 129 (Alaska 1973).

[359] Contact, Inc. v. State, 324 N.W. 2d 804, 806 (Supreme Court Neb. 1982) (quoting BLACKS'LAW DICTIONARY 210 (5th ed. 1979).

The FTC requires companies organizing social media contests and sweepstakes, where participants enter by sending a tweet or making a pin[360], with a particular hashtag promoting their product, to direct them to use make the word "contest" or "sweepstakes" as part of the hashtag. The FTC notes, however, that "*the word "sweeps" probably isn't, because it is likely that many people would not understand what that means*."[361]

The FTC's Endorsement Guide also apply to contests on social media. On March 20, 2014, the FTC's Division of Advertising Practices sent a letter to the counsel of shoe designer and retailer Cole Haan, Inc., informing her that the 'Wandering Sole' Pinterest contest organized by her client violated Section 5 of the FTC Act.[362]Contestants had been instructed by Cole Haan to create a "Wandering Sole" Pinterest board, which had to include five shoe images of 'Cole Haan's Wandering Sole Pinterest Board' and five images of the contestants' "*favorite places to wander*." The contestants were also instructed to use #WanderingSole as a hashtag. The winner of the "*most creative entry*" could win a $ 1,000 shopping spree. The FTC took the position that such entries, that is, the "*pins featuring Cole Haan products,*" were endorsements of the Cole Haan products. Since "*Section 5 of the FTC Act requires the disclosure of a material connection between a marketer and an endorser when their relationship is not otherwise apparent from the context of the communication that contains the endorsement*," Cole Haan should have "*instruct*[*ed*]

[360] On Pinterest.com.
[361]The FTC's Endorsement Guides: What People Are Asking, THE FEDERAL TRADE COMMISSION, https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking#socialmediacontests.
[362] F.T.C. Closing Letter to Christie Grymes Thompson, Counsel for Cole Haan, Inc., March 20, 2014, no. 142-3041 https://www.ftc.gov/system/files/documents/closing_letters/cole-haan-inc./140320colehaanclosingletter.pdf.

contestants to label their pins and Pinterest boards to make it clear that they had pinned Cole Haan products as part of a contest." However, as the pins did not indicate that they were posted as an entry to a contest, consumers could not know that they had been posted as an endorsement.

The letter is interesting because the FTC did not make any difference there between a bona fide social media influencer, with many followers and possibly even some lucrative endorsements deals, from the average social media user deciding to participate to a contest. Both are influencers, and their entries are considered as endorsing a product. The FTC also explained in the letter that the organizer of such a contest must "*take reasonable steps to monitor social media influencers''compliance with the obligation to disclose material connections when endorsing its products.*" Therefore, the responsibilities of the organizer goes beyond posting the rule. It also has an obligation to monitor the entries for compliance with the FTC's Endorsement Guides. The letter describes the level of care expected from the organizer of such contest as "*tak*[*ing*] *reasonable steps to monitor social media influencers' compliance with the obligation to disclose material connections when endorsing its products.*"

While the FTC did not elaborate on what should be these "*reasonable steps*," it would be *at minima*, monitoring the contest's hashtag. But what should the organizer do when finding an entry which does not disclose that it had been published as an endorsement? At a minimum, the contest rules should disqualify entries failing to disclose endorsements. But this policy alone would favor the organizer while not protecting consumers, as the organizer would still reap the advertising benefit from the entry published online without an endorsement. Therefore, the contest rules should also state that the contestant will be contacted on social media to be

informed that his entry is void. This would likely lead the contestant to delete the entry, but it may not. If the contestant does not delete the entry, the organizer continues to reap advertising benefits from it, and a consumer may still believe that the entry was published without ulterior motive, and possibly even make a purchasing decision based on that entry. The organizer does not have the power to delete the entry. Do the "*reasonable steps*" which the organizer must take to reach its level of care then involve contacting the social media site and ask them to delete the entry? For the social media site to be able to do so, the entry would have to breach its own policies.

c) **Intellectual property laws**

Let's take the example of a company soliciting social media pictures from the public to create an ad.[363] The ad uses the likeness of the users to create a work which is protected by copyright. Therefore, the company must not only obtain consent from the users to use their likeness commercially, but must also assert that it owns the copyright in the advertising. How could it be done?

Indeed, social media posts featuring the likeness of users may also run afoul of copyright law. Remember Uniqlo "Selfless Selfie" promotion, where selfies taken by consumers were reproduced by a statuette? As Section 106 of the Copyright Act gives the copyright owner the exclusive right to reproduce the work, such reproduction needs to be authorized by the owner of the copyright, if the selfie is original enough to be protected by copyright. Indeed, the U.S. Copyright Act only protects "*original works of authorship fixed in any tangible medium of*

[363] See, for example, Lauren Indvik, *Fashion Designer Rebecca Minkoff to Use Fans' Instagram Photos in First Print Ad*, MASHABLE, (Sept. 28, 2011), http://mashable.com/2011/09/28/rebecca-minkoff-instagram-ad/#agPUj0_q_iqy

expression."[364]While all selfies are fixed in a tangible medium, not all of them are original enough to be protected by copyright, although the originality threshold is quite low. The U.S. Supreme Court explained in 1991 that "original" "*means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity*."[365] While merely pointing one's smart phone at one's face, in a close-up, may not be creative enough for the selfie to be protected by copyright, most people chose at least the setting (taking a selfie with a celebrity, showing a funny road sign…) and the pose of the photograph,[366] and that may be original enough.

However, selfies taken to be used as entries of a contest are likely to be taken with greater care than ordinary, especially if the quality of the selfies is taken into account for determining the winner of the contest. If a selfie is protected by copyright, the company organizing the contest must have the right to use it. It may choose to have the contestants giving them the copyright. This option is never chosen, and the rules of such contests instead state that contestants give the company a worldwide license. For instance, the Canadian branch of *Ikea* created its first crowdsourced advertising spot early 2016 ever after having asked consumers to share videos of their best moments spent at home, urging them to make "#EverySecond" counts, the hashtag consumers had to use to share their video on social media.[367] The Every Second's project Terms of Service specified that participants, while retaining all their intellectual property rights, granted *Ikea* "*a perpetual, irrevocable, worldwide, non-exclusive, royalty-free, sublicenseable and*

[364] 17 U.S. C. § 102(a).
[365] *Feist Publications, Inc. v. Rural Telephone Service Co*., 499 US 340, 345-346 (1991).
[366] Is choosing a specific filter the exercise of a minimal degree of creativity? The answer to this question may depend on the number of filters available to users.
[367] EVERY SECOND, http://everysecond.ca.

transferable license to use, reproduce, distribute, prepare derivative works of, display, and perform the User Submissions, including without limitation for promoting and redistributing part or all of the Site (and derivative works thereof) in any media formats and through any media channels."[368] This shows that, while the consumer is indeed the author of the work and its copyright owner, it is a third party, the company at the origin of the crowdsourced project, which is able to profit, at no cost, from the dissemination of the work. This is quite a change from the traditional view on the purpose of intellectual property rights, which assure that science and the useful arts are promoted "*by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writing and Discoveries*."[369] What is left to the authors are bragging rights. However, the public still profit from the author's skills by watch the original videos and the advertising spot created by Ikea, a derivative work under U.S. copyright laws.

Indeed, in the case of the Ikea video, or the Forever 21 spool,[370]the company collected works of authorships and then used to create a new work. Is such work a joint work, a collective work, or a work made for hire?

As noted by the Second Circuit in Childress v. Taylor, "[*c*]*are must be taken to ensure that true collaborators in the creative process are accorded the perquisites of co-authorship and to guard against the risk that a sole author is denied exclusive authorship status simply because*

[368] EVERY SECOND TERMS OF SERVICE, http://everysecond.ca/v3-terms-of-service.html
[369] U.S. CONST. art. I, § 8, cl. 8.
[370] In this case, the question of the originality of the work, a compilation of selfies, may be asked. The Supreme Court recognized in Feist that factual compilations may be original enough to be protected by copyright, explaining that "[t]he compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws."

another person rendered some form of assistance." [371]Companies asking consumers to provide selfies to be used for advertising must be wary to avoid a consumer being recognized as a co-author, because then the consumer could be considered as co-owner of the work, and thus as having the right to use or license the copyright independently, only with the duty to account to the co-owner for any profits.

§ 101 of the Copyright Act defines "joint work" as "*a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole*." Joint authors are co-owners of the copyright. Even though participants to an UGC project do provide a contribution, even a contribution which may be protected by copyright, they are not necessarily joint authors, as "*authorship is not the same thing as making a valuable and copyrightable contribution*." [372] "*There has to be some original expression contributed by anyone who claims to be a co-author"*[373]and thus a selfie protected by copyright may be enough. However, some courts consider that, in order to be a joint author of a work, one "*must contribute some non-trivial amount of creative, original, or intellectual expression to the work*."[374] A mere selfie may be considered too trivial.

Since, in order to be joint authors, the two authors must have had the intention to merge their contributions to create one work, companies gathering UGC to create a work should include in the contest rules that they are the sole owner of the work created using the UGC.

[371] Childress v. Taylor, 945 F. 2d 500, 504 (2nd Circuit 1991).
[372] Aalmuhammed v. Lee, 202 F. 3d 1227, 1232 (9th Circuit 2000).
[373] Gaiman v. McFarlane, 360 F. 3d 644, 658 (7th Circuit 2004).
[374] Brownstein v. Lindsay, 742 F. 3d 55 (3rd Circuit 2014), citing 1 Nimmer on Copyright § 6.07.

Could such work be considered a collective work? The Copyright Act defines a collective work as "*a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole*."[375] This could describe a work created by assembling photographs sent by users. Section 201 (c) of the Copyright Act specifies that "*each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series*." Therefore, companies using UGC must incorporate in the contest rules that, by entering the contest, users transfer their copyright to the company.

Finally, such work could not be a work-for-hire, unless the company specifically would like it to be and states so in the rules, as the Copyright Act defines such work as "*a work prepared by an employee within the scope of his or her employment or… a work specially ordered or commissioned for use… as a contribution to a collective work,…*[*or*] *as a compilation… if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire*." [376]

Copyright law may, however, protect authors of photographs used for marketing purpose, as even major companies are vulnerable to ill-advised decisions of their social media

[375] 17 U.S.C. § 101.
[376] 17 U. S.C. § 101.

team. Beer maker Anheuser-Bush settled in April 2017 with a woman who had sued the company for copyright infringement after the company had used a photograph of her on promotional coasters for the beer, showing her drinking one of their beers.[377] It was the plaintiff's friend who had taken a picture of her at her bar, donning a fake moustache and drinking a beer. Plaintiff published the photograph on Facebook, where Anheuser-Bush allegedly found it and used it without Plaintiff's authorization to create posters and promotional coasters for bar and restaurants. Plaintiff's friend assigned all her rights in the photograph to Plaintiff, which registered the copyright, allowing her to sue the beer company for copyright infringement.[378] This case shows that training one's social media manager on intellectual property and social media may save time and money.

C. Retaining images

a) Privacy

(to be completed)

b) Digital signage

The Digital Signage Federation (DSF) adopted in February 2011 privacy standards ("DSF Privacy Standards") which are "*voluntary privacy guidelines recommended by DSF for digital*

[377] Kraft v. Anheuser-Bush, No. 4:17-CV-22 (E.D. of North Carolina, filed Feb. 20, 2017).
[378] The beer company has been quoted as saying that they believed that Plaintiff had indeed given her authorization to use the picture, see Anandashankar Mazumdar ‚*Anheuser-Busch Mustache IP Tiff Shows Social Media Risks*, BNA (March 10, 2017), https://www.bna.com/anheuserbusch-mustache-ip-n57982085041/. The poster read "Drink Natty, Make Stories, #Nattystories" and the company may have been actively seeking consumers 'social media pictures for the campaign. The case settled.

signage companies, their partners and the venues that host these systems." [379] They are based on the Fair Information Practices (FIPs), which were first developed in 1973 by the United States Department of Health, Education and Welfare (HEW). The DSF Privacy Standards recommends digital signage companies to obtain consumers' opt-in consent "*before collecting directly identifiable or pseudonymous data."*[380] The DSF Privacy Standards define pseudonymous data as "*any data that could reasonably be associated with a particular consumer or a particular consumer's property, such as a smart phone or other device, or any other unique identifier"* and include IP addresses or Bluetooth numbers, social networking data, including friend lists, and user-generated data, which are defined as "*data generated knowingly by an individual, such as search terms, posts in discussion forums and data input into social networking profiles*."[381] The DSF Privacy Standards note that, "[*a]lthough pseudonymous data do not directly identify an individual, pseudonymous data can be traced to an individual's identity with relative ease*."

c) Facial recognition

The rapid development of face-recognition technologies now allows private companies, to easily create a unique and file describing the face of an individual, which may be permanently stored, and even sold to third parties.

While no federal law regulates the collection of biometric data for commercial purposes, the Illinois Biometric Identification Privacy Act (BIPA) was enacted in 2008. Legislative findings

[379] Digital Signage Privacy Standards, DIGITAL SIGNAGE FEDERATION, Feb. 2011, available at http://www.digitalsignagefederation.org/Resources/Documents/Articles%20and%20Whitepapers/DSF%20Digital%20Signage%20Privacy%20Standards%2002-2011%20%283%29.pdf
[380] Ibid. p. 2.
[381] Ibid. p. 2.

for the law noted that, since biometric information are unique to an individual, this information cannot be changed if its privacy has been compromised and thus "*the individual has no recourse, is at heightened risk for identity theft, and is likely to withdraw from biometric-facilitated transactions*." Its Section 5(d) further notes that "[*a*]*n overwhelming majority of members of the public are weary of the use of biometrics when such information is tied to finances and other personal information*."

BIPA forbids the collection, capture, purchase or purchase of biometric identifier or biometric information, unless the private entity prior inform the data subject or his legal representative, in writing, of such practice. Such written notice must include "*the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used*." The private entity must also receive a written release from the data subject or its representative. Even if the private entity secures such release, it still not legal under the BIPA to "*sell, lease, trade, or otherwise profit*" from such biometric information. Such information cannot be disclosed or disseminated to a third party without consent, unless such disclosure is necessary to complete a financial transaction requested or authorized by the data subject or his representative, or is required by federal, state, or municipal ordinance, a warrant or a subpoena. Further, biometric information must be stored, transmitted and protected from disclosure by "*using the reasonable standard of care within the private entity's industry*" and "*in a manner that is the same as or more protective than the manner in which the private entity stores, transmits, and protects other confidential and sensitive information*." Also, under Section 15(a) of BIPA, "*a private entity in possession of biometric identifiers or biometric information must develop a written policy, made available to the public*, *establishing a retention schedule and guidelines for*

*permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first***."**

BIPA provides an action to individuals against private entities which either negligently, intentionally or recklessly has violated the BIPA. On December 15, 2010, Facebook introduced its Tag Suggestion program, explaining that "[*w*]*hen* [*a Facebook user*] *upload*[*s*] *new photos, we use face recognition software—similar to that found in many photo editing tools—to match your new photos to other photos you're tagged in*." The program was rolled out as an opt-out program, and all Facebook users were automatically enrolled, but could opt out. Facebook explained face recognition as such**:**

> **"***We currently use facial recognition software that uses an algorithm to calculate a unique number ("template") based on someone's facial features, like the distance between the eyes, nose and ears. This template is based on your profile pictures and photos you've been tagged in on Facebook. We use these templates to help you tag photos by suggesting tags of your friends. If you remove a tag from a photo, that photo is not used to create the template for person whose tag was removed. We also couldn't use a template to recreate an image of you***."**

This new feature led to a class action suit filed by several Facebook users who were citizens of Illinois, claiming that Facebook's collection of biometric data without its users' consent violated the BIPA.[382] Plaintiffs argued in the complaint that Facebook "*extract biometric*

[382] In re Facebook Biometric Info. Privacy Litig., 2016 WL 2593853 (N.D. Cal. May 5, 2016). The class action was transferred to the Northern District of California, as Facebook claimed that the parties had agreed when signing up

identifiers from user-uploaded photographs in order to determine who the people in the photographs are" and then uses "*facial recognition software to extract biometric data from user uploaded photographs through the use of an algorithm that calculates a unique digital representation of the face (which it calls a "template") based on geometric relationship of their facial features, like the distance between their eyes, nose and ears*." Plaintiffs argued that this "template" is a form of a biometric identifier within the meaning of the BIPA, and that, because Facebook had not secured the prior consent of its users before extracting their biometrics identifiers from their photographs, and then stored them, it had violated the BIPA.

Facebook moved to dismissed and argued in its motion that BIPA does not apply to Tag Suggestions. Indeed, BIPA defines "biometric identifier" as being "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry," but does not specifically include photographs in the definition. A Senate amendment filed on May 26, 2016 by Illinois Senator Terry would have specifically taken "*physical or digital photographs*" out of BIPA's scope and would have defined "scan" as "*data resulting from an in-person process whereby a part of the body is traversed by a detector or an electronic beam*."[383] Since the amendment had been filed three weeks after Judge James Donato allowed the Facebook Biometric Information Privacy Litigation to proceed, and aimed at amending a bill unrelated to BIPA, it is likely that the amendment was filed in direct

for the service to be bound by California law, which does not have a law similar to BIPA. However, on May 5, 2016, District Judge James Donato allowed the case to move forward.

[383] http://www.ilga.gov/legislation/99/HB/09900HB6074sam001.htm.

answer to the ongoing litigation. However, the amendment was placed on hold a day after having been filed, following critics from several non-profit organizations.[384]

Snapchat is an app allowing its users to share text messages and images which disappear after a while.[385] **.** Several Snapchat users filed a putative class action suit against the company in May 2016, claiming that it had collected, stored and used the unique points and contours of the faces of the users of its "Lenses" feature.[386] The complaint alleged that Snapchat had "*created, collected and stored tens if not thousands of millions of "face templates… - highly detailed geometric maps of the face-* [*which Snapchat created*] *using sophisticated facial recognition technology."* This allowed users to place an animated image over their pictures. However, Snap did not call the technology behind "Lenses" a facial recognition technology, but rather, an 'object recognition' technology, adding that "*object recognition isn't the same as facial recognition. While Lenses can recognize faces in general, they can't recognize a specific face*." As the case settled on August 30, 2016, we will not have an opportunity to find if the court would have been convinced by this argument.

d) Right to be forgotten

[384] Megan Geuss, *Illinois senator's plan to weaken biometric privacy law put on hold* ARS TECHNICA, (May 27, 2016, 2:31 PM), https://arstechnica.com/tech-policy/2016/05/illinois-senators-plan-to-weaken-biometric-privacy-law-put-on-hold.

[385] Snapchat advertised at its beginning that they would disappear forever, which led to the FTC filing a complaint against the company for violation of the FTC Act, alleging that the texts and photographs could be accessed by third parties indefinitely. The case settled. *Snapchat Settles FTC Charges That Promises of Disappearing Messages Were False*, FTC, (may 8, 2014), https://www.ftc.gov/news-events/press-releases/2014/05/snapchat-settles-ftc-charges-promises-disappearing-messages-were

[386] Jose Luis Martinez et al v. Snapchat, Inc, 2:16-cv-05182, C.D. Calif.

On January 25, 2012, the European Commission introduced a Proposal for a General Data Protection Regulation.[387] Its explanatory memorandum explained that "[*r*]*apid technological developments have brought new challenges for the protection of personal data. … Technology allows both private companies and public authorities to make use of personal data on an unprecedented scale in order to pursue their activities.*" Recital 6 states that "[*t*]*hese developments require building a strong and more coherent data protection framework in the Union…given the importance to create the trust that will allow the digital economy to develop across the internal market. »* Its Recital 2 states once again that protection of personal data is a fundamental right.

California is the first U.S. state to have a right to be forgotten, albeit only for minors. The law, enacted on September 23, 2013, added a chapter 22.1., *Privacy Rights for California Minors in the Digital World* to Division 8 of the California Business and Professions Code.[388] As of January 1, 2015, operators of web sites, online services, online or mobile applications, must provide their registered users, if minors, with a way to remove or to request the removal of content or information posted online. The law provides, however, an exception to that requirement to that requirement if the content or information was posted by a third party or if state or federal law requires the operator or the third party to maintain the content or information. The operator may instead anonymizing the content or information.

[387] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM/2012/011 final - 2012/0011 (COD).
[388] BIPA Section 15(b)(2).

California is the state where Snapchat is located. Images and videos posted using the Snap "Snaps" feature automatically disappear within one to 10 seconds after having been received, and Snapchat deletes them from its servers. [389] Those taking using Snapchat "Stories" feature disappear within 24 hours. It is an interesting example of "privacy by design." However, this does not mean that all picture are disappearing forever: Snap's privacy policy informs its users that other users may save the content they received from other users, by a screenshot for example. Also, if a Snap chat user "*submit content to one* of [*Snap's*] *inherently public features, such as Live, Local, or any other crowd-sourced service*, [*Snapchat*] *may retain the content indefinitely*." Also, Snapchat "*may also retain certain information in backup for a limited period of time or as required by law*." [390]

[389] SNAPCHAT PRIVACY POLICY, https://www.snapchat.com/privacy"Snapchat lets you capture what it's like to live in the moment. On our end, that means that we automatically delete the content of your Snaps (the photo and video messages that you send your friends) from our servers after we detect that a Snap has been opened or has expired."

[390] SNAPCHAT PRIVACY POLICY.