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THE NEW NORMAL: NAVIGATING LEGAL CHALLENGES IN THE WORLD OF INFLUENCER MARKETING & HOW ADR CAN HELP

Olivia Davis

I. INTRODUCTION

For many Americans, the first thing they see in the morning and the last thing they see at night is the electric glow of their smartphone screens. In fact, Americans on average check their phones about 344 times a day.¹ But more importantly, Americans are spending over half of their daily phone usage on social media.² In 2020, Americans spent an average of 325 hours per year on Facebook alone.³ Of these countless hours spent scrolling, users will come across posts from dear friends and family, news and pop culture updates, and various other types of content. But, strategically intertwined are posts from their favorite influencers, telling users about their new favorite products, vacation destinations, and more.⁴ According to a 2019 study from Rakuten

¹ Trevor Wheelwright, *Cell Phone Behavior in 2022: How Obsessed Are We?*, REVIEWS.ORG (Jan. 24, 2022), <https://www.reviews.org/mobile/cell-phone-addiction/>.

² *Id.* (On average, Americans spend three hours and nineteen minutes per day on their phones. Of this time, about an hour and twenty-nine minutes is spent on social media.). See also Catherine Hiley, *How Much of Your Time Is Screen Time?*, USWITCH (June 15, 2021), <https://www.uswitch.com/mobiles/screentime-report/> (This research showed that in 2020, there was a particular spike in social media usage (approximately three hours a day on average), which can be assumed to be largely due to the COVID-19 pandemic's effect on people's daily habits.).

³ Hiley, *supra* note 2.

⁴ Brent Barnhart, *Everything You Need to Know About Social Media Algorithms*, SPROUT SOCIAL (Mar. 26, 2021) <https://sproutsocial.com/insights/social-media-algorithms/> (explaining

Advertising, 87% of shoppers admit to having been influenced to make a purchase, and 84% of shoppers find this method of advertising particularly effective.⁵ Influencers have a strong grip on Americans and clearly impact their decision-making processes.⁶

Why does this matter? Because with this power comes the need for regulation. Since this industry is new and rapidly growing, it is important that brands and influencers are both held accountable for their respective roles in this massive form of marketing. Influencers have images to protect and brands of their own they strive to build—these should not be put at risk due to fear of standing up to the large corporations they work for. On the other hand, with the power they have to impact the daily lives of consumers, influencers need to be held to a standard that will ensure they are not taking advantage of those they are influencing. Methods of alternative dispute resolution (ADR) such as better tailored union opportunities and Federal Trade Commission (FTC) sponsored ADR fora may offer stronger protection and security that this industry would greatly benefit from.

II. BACKGROUND: THE INFLUENCER AND THEIR IMPACT

A. THE RISE OF THE INFLUENCER

The influencer is usually not your typical celebrity. Often, they confine their “brand” to social media and that is exclusively what they are known for—as opposed to being a celebrity who is famous for something outside of social media (for example, as an actor, singer, or supermodel). That is not to say that celebrities cannot also be influencers. In fact, celebrities frequently act as influencers as well: many people consider individuals like Paris Hilton and Kim Kardashian to be prime examples of celebrity influencers because they are “famous for being famous.” But merely being “instafamous” allows you to capitalize on your following by pairing with brands and “influencing” your followers to purchase their products. This means your local “mommy-

how social media algorithms work, which contributes to why influencer’s content pops up randomly on individuals’ pages).

⁵ Alexander Froloy, *Unlocking the Power of Influencer Marketing*, MARKETING (Feb. 25, 2021), <https://www.marketingmag.com.au/hubs-c/opinion-unlocking-the-power-of-influencer-marketing/>.

⁶ *Id.*; Emily Roberts, *Influencers Have Greater Impact than Celebrities on Americans’ Buying Behavior*, BUS. WIRE, (Apr. 20, 2022) <https://www.businesswire.com/news/home/20220420005279/en/Influencers-Have-Greater-Impact-Than-Celebrities-on-Americans%E2%80%99-Buying-Behavior>.

blogger,”⁷ virtually unknown outside of her following, can have an impact because her niche brand allows her to connect with companies who know that her following would be interested in the company’s products simply because they are interested in the blogger.⁸ These influencers often operate in specialized or target areas, encouraging their followers to trust them greatly because their followers perceive their endorsements to be honest and genuine.⁹ When an influencer posts about their new favorite product, consumers feel like they are getting a “real” opinion from a close friend, as opposed to an impersonal advertisement from a major marketing campaign.

In 2018, Instagram reached the milestone of having one billion users on the platform, making it an obvious favorite for purposes of influencer marketing.¹⁰ That same year, Google received an average of 61,000 searches for “influencer marketing” per month.¹¹ In 2019, Instagram expanded the ability of influencers by adding a tagging feature that allowed consumers to click on items in posts and buy directly from the influencer’s page—expediting consumer reactions by giving them the option to buy products instantaneously.¹² Also in 2019, the *Merriam-Webster Dictionary* officially recognized the word “influencer” and defined the term as “often, specifically: a person who is able to generate interest in

⁷ See Janice D’Arcy, “Mommy” Blogs: What Are They, and How Much Do They Matter?, WASH. POST (Jan. 30, 2012), https://www.washingtonpost.com/blogs/on-parenting/post/mommy-blogs-what-are-they-and-how-much-do-they-matter/2012/01/28/gIQA0VQUbQ_blog.html.

⁸ Evan Varsamis, *Are Social Media Influencers the Next Generation Brand Ambassadors?*, FORBES (June 13, 2018), <https://www.forbes.com/sites/theyec/2018/06/13/are-social-media-influencers-the-next-generation-brand-ambassadors/?sh=20481a0e473d> (“Although a large following is important, social media influencers need a lot more than an audience to be successful. Whether they’re on Facebook, Twitter, Instagram or YouTube, social media influencers need a niche theme in order to make it brand influencer-worthy.”).

⁹ See S. Venus Jin, Aziz Muqaddam & Ehri Ryu, *Instafamous and Social Media Influencer Marketing*, 37 MKTG. INTEL. & PLAN. 567, 567–79 (2019), <https://www.emerald.com/insight/content/doi/10.1108/MIP-09-2018-0375/full/html> (“The results indicate that consumers exposed to [an] Instagram celebrity’s brand posts perceive the source to be more trustworthy, show more positive attitude toward the endorsed brand, feel stronger social presence[,] and feel more envious of the source than those consumers exposed to [a] traditional celebrity’s brand posts.”).

¹⁰ Aaron Brooks, *A Brief History of Influencers*, SOCIALMEDIATODAY (May 9, 2019), <https://www.socialmediatoday.com/news/timeline-a-brief-history-of-influencers/554377/>.

¹¹ *Id.*

¹² *Id.*

something (such as a consumer product) by posting about it on social media.”¹³ As of recent, apps like TikTok have seen major growth, allowing for further expansion of influencer marketing.¹⁴ Brands are now capitalizing on “TikTok-famous” individuals—often younger Gen-Z creators—that have stumbled upon a large following due to a few viral posts.¹⁵

B. THE PROBLEM *WITH* INFLUENCERS

Unbeknownst to consumers, influencers could very well be posting advertisements for products they do not actually use, wear, or even like. While some may expect this from a celebrity endorsing a product in a televised commercial, finding out that an influencer is marketing a product for disingenuous reasons can result in a greater feeling of betrayal in consumers because there is a higher degree of trust in the influencer–follower relationship.¹⁶ This comes with health and safety concerns as well.¹⁷ Since the range of products that influencers promote can extend to dietary supplements or even medications, if the influencers themselves do not use the product or have not done their due diligence in researching the product, there is a dangerous potential that they are promoting a potentially unsafe product for some or all consumers.¹⁸ For example, celebrity Khloe Kardashian recently received backlash for promoting Flat Tummy

¹³ *Influencer*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/influencer> (last visited Nov. 6, 2021).

¹⁴ Joele Forrester, *TikTok Sees 375% Growth in the US, New Report Finds*, TALKING INFLUENCE (Jan. 17, 2020), <https://talkinginfluence.com/2020/01/17/tiktok-growth-us-report/> (“TikTok saw 375% year-on-year growth in the [U.S.] last year in terms of time spent on the platform according to App Annie’s The State of Mobile 2020 report. In addition, App Annie revealed that [U.S.] consumers spent 85 million hours on the platform, up from 15 million the previous year.”).

¹⁵ See Kristen Wiley, *4 Ways to Capitalize on Influencer Marketing Campaigns*, STATUSPHERE (Sept. 22, 2017), <https://brands.joinstatus.com/influencer-marketing-campaigns>.

¹⁶ See Do Yuon Kim & Hye-Young Kim, *Trust Me, Trust Me Not: A Nuanced View of Influencer Marketing on Social Media*, 134 J. BUS. RSCH. 223, 223–32 (2021), <https://www.sciencedirect.com/science/article/abs/pii/S0148296321003532> (citing various studies suggesting consumers trust influencers more than traditional marketing channels).

¹⁷ See Peter Suci, *Can We Trust Social Media Influencers?*, FORBES (Dec. 20, 2019), <https://www.forbes.com/sites/petersuci/2019/12/20/can-we-trust-social-media-influencers/?sh=3aa84ecd63e8>.

¹⁸ See *id.* (citing a report from Influence.co where on average 61% of responses indicated that influencers should be required to research products or services before promoting them on their platform).

shakes, a dieting shake that is not approved by the Federal Drug Administration (FDA) and can result in multiple negative side effects.¹⁹ Not only was it unlikely that Khloe herself was using this product, but in sharing it with her millions of followers, she was promoting potentially unhealthy behaviors without providing any educational information on the subject.²⁰

Additionally, these problems are heightened when influencers fail to disclose that the product they are promoting is the result of a paid advertising deal. Though it does not cure potential deception, at least when a post is labeled as a “#ad,” it gives consumers reason to wonder if the influencer is only posting this product because of a brand deal and not because they genuinely like and trust the product. This gives at least a small indication to consumers to investigate the product for themselves before purchasing. However, until 2019, there were no guidelines or requirements for influencer disclosures on social media.²¹ In 2019, the FTC finally took steps to increase influencer accountability by releasing a set of guidelines for influencers regarding when and how they must disclose that they are being paid to promote content on their platforms.²² This set of guidelines now requires influencers to disclose when they have “any financial, employment, personal[,] or family relationship with a brand.”²³ The guidelines further clarify where and how an influencer should disclose the brand relationship.²⁴

¹⁹ Gabby Landsverk, *Khloe Kardashian Promoted Flat Tummy Shakes Again, and Influencers Are Warning They Promote Risky Dieting Habits*, INSIDER (Jan. 10, 2020), <https://www.insider.com/khloe-kardashian-vogue-williams-flat-belly-shakes-instagram-controversy-2020-1>.

²⁰ *Id.* (Products such as the one Kardashian was advertising can result in lasting body-image issues, especially in young people. Additionally, many of these products cannot do what they claim to do (cause weight loss) and are actually filled with ingredients like laxatives that “can put your internal organs at risk of permanent damage.”).

²¹ Laura E. Bladow, *Worth the Click: Why Greater FTC Enforcement Is Needed to Curtail Deceptive Practices in Influencer Marketing*, 59 WM. & MARY L. REV. 1123, 1126 (2018).

²² *FTC Releases Advertising Disclosures Guidance for Online Influencers*, FED. TRADE COMM’N. (Nov. 5, 2019), <https://www.ftc.gov/news-events/press-releases/2019/11/ftc-releases-advertising-disclosures-guidance-online-influencers>.

²³ *Disclosures 101 for Social Media Influencers*, FED. TRADE COMM’N., https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf (last visited Jan. 31, 2022). Additionally, the guidelines clarify that “financial relationships aren’t limited to money,” that influencers must disclose if they got anything of value in exchange for promoting the product. *Id.*

²⁴ *Id.*

The creation of these guidelines followed many notable influencer lawsuits relating to the very issue of not disclosing when they were being paid to promote particular products—or in the case of one of the most infamous instances, the Fyre Music Festival, when they were paid to promote experiences.²⁵ In 2017, many celebrity influencers were posting for this mysterious, elite festival that was set to be hosted for the first time on a private and allegedly luxurious island in the Bahamas.²⁶ As eventually discovered by the concertgoers, and later exposed by major streaming platforms (in the form of documentaries), the festival was a complete disaster.²⁷ Performers cancelled last minute, there were not enough beds or food for guests who paid exorbitant amounts of money to attend, and the island was nothing like the paradise it was depicted to be in the numerous Instagram photos posted by influencers.²⁸ Following the nightmare of a festival, numerous lawsuits were filed against the influencers who posted for not disclosing that they were being paid to promote the supposed event; notably, a major lawsuit was filed against Kendall Jenner.²⁹ The complaint alleged that influencers like Jenner had made false promises, failed to disclose the festival paid them to advertise it, and never intended to attend the event despite giving the impression to the public that they would in fact be in attendance.³⁰ Jenner settled the suit for \$90,000, but people were left feeling that the influencers were not truly held accountable by the FTC for their actions, which would inevitably allow these situations to reoccur.³¹

²⁵ See Keith Cooper, *Influencers: Not So Fluent in Disclosure Compliance*, 41 LOY. L.A. ENT. L. REV. 77, 77 (2021).

²⁶ Matt Higgins, *Fyre Festival Aftermath: New Rules for Influencers?* U. CIN. L. REV. (March 25, 2019), <https://uclawreview.org/2019/03/25/fyre-festival-aftermath-new-rules-for-influencers/>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Complaint at 1, In re Fyre Festival LLC, Case No. 17-11883 (MG) (Bankr. S.D.N.Y. 2019), https://s.wsj.net/public/resources/documents/fyre_festival_trustee_lawsuit_kendall_jenner.pdf?mod=article_inline.

³⁰ *Id.* at 3–5.

³¹ Lisette Voytko, *Kendall Jenner Settles Fyre Festival Instagram Lawsuit for \$90,000*, FORBES (May 20, 2020), <https://www.forbes.com/sites/lisettevoytko/2020/05/20/kendall-jenner-settles-fyre-festival-instagram-post-lawsuit-for-90000/?sh=2b769bba5604>. See also Higgins, *supra* note 26 (“However, until the FTC decides to enforce its influencer guidelines, little will change and many influencers will continue to post sponsored content without disclosing that they were paid to post.”).

Even though the Fyre Festival fallout occurred prior to the FTC releasing its official guidelines for social media influencers, influencers are still not following these guidelines, and the FTC is not doing enough to hold them accountable. According to a study conducted on influencer marketing, “only about 14% of influencers are compliant with those [FTC] rules.”³² From a consumer-protection perspective, there should be a greater interest in holding influencers accountable so that their digressions from the rules do not negatively impact consumers. So, it is clear that the industry could benefit from a change in methodology when it comes to resolving FTC disputes.

C. THE PROBLEM *FOR* INFLUENCERS

While there is a clear issue with influencers following the guidelines set forth by the FTC, influencers are often vulnerable to the brands they work with and therefore need to protect themselves as well. Influencers are often subject to suits for failing to comply with brand deals, and additionally can be sued for advertising and marketing deficient products—such as those infringing on trademarks.³³ These suits can damage influencers’ curated brands and can have additional diverse impacts depending on the individual influencer.³⁴ If the influencer has a greater amount of fame and wealth, these suits can be an opportunity for the businesses they work with to reach into the influencer’s pockets; a micro-influencer, on the other hand, may not have the resources to defend themselves against big companies, so these suits may be more detrimental to their brands.³⁵

³² Michael Haenlein, Ertan Anadol, Tyler Farnsworth, Harry Hugo, Jess Hunichen & Diane Welte, *Navigating the New Era of Influencer Marketing: How to Be Successful on Instagram, TikTok, & Co.*, 63 CAL. MGMT. REV. 5, 5–25 (2020), <https://journals.sagepub.com/doi/full/10.1177/0008125620958166>.

³³ *When Brands Sue Influencers: An Industry Wake-Up Call*, MEDIAKIX, <https://mediakix.com/blog/influencer-lawsuits/> (last visited Nov. 11, 2021) (on file with author); Matthew Seror & Michael Ruth, *Social Media Influencers Could Become the Targets of Trademark Infringement Lawsuits*, JD SUPRA (Aug. 18, 2021), <https://www.jdsupra.com/legalnews/social-media-influencers-could-become-6765870/>.

³⁴ See Seror & Ruth, *supra* note 33.

³⁵ *Id.* (“If the influencer is well[-]known or wealthy, asserting claims against an influencer could provide the claimant with another potential source from which to collect monetary damages. Or it could simply turn the influencer and his or her followers against the brand that engaged that influencer to sponsor the product. It is conceivable that the influencer may

In a recent example, Petunia Products, Inc., a makeup brand, sued model and influencer Molly Sims for advertising a competing product that Petunia claimed infringed on its intellectual property.³⁶ Petunia’s allegations against Sims included trademark infringement, unfair business practices, and false advertising regarding its BROW BOOST product.³⁷ Sims moved to dismiss the case on the grounds that “liability for trademark infringement should not extend to third parties that sponsor a product without confirming whether it violates trademark rights.”³⁸ The U.S. District Court for the Central District of California refused to dismiss the case after determining that because she was paid to post an advertisement, there may be some liability for trademark infringement.³⁹ It is rare for an influencer to be sued on a trademark infringement claim since they are not the creators of the product. However, suits such as this one could open the door for influencers to become liable for the deficiencies of the brand they represent—a potentially dangerous liability.⁴⁰ If an influencer is contracted to promote a product and is not told of its potentially defective nature or the risk that it infringes on other intellectual property rights, is it the influencer’s responsibility to conduct independent research before following through with the contract?

Additionally, there are times when influencers may fall short of their contractual obligations to the brand they represent.⁴¹ For instance, influencer Luka Sabbat faced a lawsuit from PR Consulting for failing to meet his contractual obligations to promote Snap Spectacles.⁴² He only made one of the three required

do whatever it takes to get out the lawsuit as quickly and quietly as possible.”).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* (“The court determined that Sims’[s] post was a paid advertisement, and thus, “crossed from protected consumer commentary to commercial use.”).

⁴⁰ *Id.* (“[T]his potential shift could carry with it a number of implications for both influencers and brands. It may force influencers to perform more due diligence on the products or brands they are agreeing to endorse. It may require influencers to insist on strong indemnity provisions in their sponsorship agreements. Or it may even encourage them to explore whether this type of liability may be subject to and covered by business insurance.”).

⁴¹ See, e.g., Gene Maddaus, *Luka Sabbat Sued for Failure to Influence*, VARIETY (Oct. 30, 2018, 3:34 PM PT), <https://variety.com/2018/biz/news/luka-sabbat-snap-spectacles-1203015434/>.

⁴² *Id.*

Instagram story posts required by the contract.⁴³ Though Snapchat was not technically involved in the legal action, the suit probably cost it around \$90,000 via damage to its reputation.⁴⁴ In another instance, Studio 71 hired Bethany Mota to promote its skincare brand in Kauai, so the brand flew her and her father out for the campaign.⁴⁵ However, Mota did not end up including Kauai footage in her ensuing YouTube post.⁴⁶ The brand sued and Mota's lawyer claimed that this was nothing more than a "pre-emptive tactic to avoid payment of hundreds of thousands of dollars [they] believe are owed to Ms. Mota."⁴⁷ These situations and the hefty lawsuits they result in could have potential negative consequences not only on influencers' respective personal brands and followings, but may also cause irreparable damage to the relationship between the represented brands and the influencers, and even negatively impact the represented brands themselves.

Given that influencers are often at the mercy of the brands they represent, and major lawsuits can be detrimental to an influencer's individual brand, it is important to ensure influencers are protected from being strong-armed into litigation either by the brands they represent or because of the brands they represent. There should also be protection for influencers that market products that the brand may misrepresent so that influencers are not deterred from influencing in the first place out of fear of being sued. Additionally, given that the industry relies heavily on relationships between brands and influencers, dispute resolution processes could be beneficial to resolve these issues more amicably and effectively than litigation—so when things do go wrong, the outcome does not significantly damage the influencer or the brand.

III. ALTERNATIVE DISPUTE RESOLUTION AS A SOLUTION

A. COLLECTIVE BARGAINING

1. WHAT IS COLLECTIVE BARGAINING AND HOW IS IT IMPLEMENTED?

⁴³ *Id.*

⁴⁴ *Influencer Sued for Allegedly Not Being Influenced as Much as He Was Paid*, HITECHGLITZ.COM, <https://hitechglitz.com/influencer-sued-for-allegedly-not-being-influenced-as-much-as-he-was-paid/> (last visited Oct. 1, 2022).

⁴⁵ See Ashley Cullins, *YouTube Star Bethany Mota and Her Father Sued over Failed Skincare Campaign*, Hollywood Rep. (Aug. 21, 2017, 5:19 PM), <https://www.hollywoodreporter.com/business/business-news/youtube-star-bethany-mota-her-diva-dadager-sued-failed-skincare-campaign-1031387/>.

⁴⁶ *Id.*

⁴⁷ *Id.*

As defined by *Black's Law Dictionary*, collective bargaining is the “[n]egotiations between an employer and the representatives of organized employees to determine the conditions of employment, such as wages, hours, discipline[,] and fringe benefits.”⁴⁸ The main body of law that controls collective bargaining is the National Labor Relations Act (NLRA).⁴⁹ The NLRA requires that an employer negotiate with a representative of its employees to establish collective bargaining agreements.⁵⁰ These agreements could use arbitration to resolve employer–employee disputes where the parties present their issues to a neutral third-party arbitrator who in turn provides the parties with a binding decision.⁵¹ Arbitration's most notable benefits are that it typically saves time, money, and other resources.⁵² Additionally, while litigation is public, arbitration is often a private process, and therefore can offer protection especially in industries where publicity is a concern.⁵³ Since individual employees, especially unskilled laborers who are easily replaceable, typically have no leverage on their own, collective bargaining provides power in the form of numbers and allows employees to band together to make more forceful demands against their employers.⁵⁴

Collective bargaining is implemented through the establishment of a labor union that the employees may create and select as a bargaining representative.⁵⁵ Employees, through their representative, are required to bargain in good faith with their

⁴⁸ *Collective Bargaining*, BLACK'S LAW DICTIONARY (11th ed. 2019).

⁴⁹ *Collective Bargaining*, CORNELL L. SCH., https://www.law.cornell.edu/wex/collective_bargaining (last visited Nov. 12, 2021).

⁵⁰ *Id.*

⁵¹ See James R. Holland, *Arbitration Can Save Time and Money*, FISHER & PHILLIPS LLP (May 1, 2011), <https://www.fisherphillips.com/news-insights/arbitration-can-save-time-and-money.html> (discussing use of arbitration in employer–employee context).

⁵² See Clifton Brinson, *Tips for Maximizing the Benefits of Arbitration*, AM. BAR ASS'N. (Mar. 27, 2017), <https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2017/tips-for-maximizing-the-benefits-of-arbitration>; see also Holland, *supra* note 51.

⁵³ See Brinson, *supra* note 52.

⁵⁴ See Benjamin B. Hanson, *Defend the Williams Wall, Leave Professional Sports Drug Testing Policies in Shambles: The Decision and Consequences of Williams v. NFL*, 33 HAMLIN L. REV. 327, 337–38 (2010).

⁵⁵ See *Employer/Union Rights and Obligations*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/rights-we-protect/your-rights/employer-union-rights-and-obligations> (last visited Dec. 4, 2022).

employers; this means that both sides must enter negotiations with an open mind and a “sincere desire to reach an agreement.”⁵⁶

If parties do not make a good-faith effort, they would not reach a meaningful resolution and would likely find themselves back in litigation instead.⁵⁷ Additionally, employers must not threaten or take disciplinary action against an employee for choosing to join a union, nor may they otherwise unfairly interfere with union activities.⁵⁸ Similarly, the union itself cannot coerce an employee to join or try to negatively interfere with their employment for refusal to join.⁵⁹

Collective bargaining has been implemented in various industries to help prevent individual workers from being taken advantage of. For example, collective bargaining is used by professional sports organizations to manage relations between teams’ managements and their players.⁶⁰ Professional sports use “multi-employer bargaining” so that each team, operating as its own employer entity, adopts rules.⁶¹ These collective bargaining agreements are designed to protect multiple parties: the teams, the players, and even consumers.⁶² For example, salary caps, draft preference, and draft-rights limitations all clearly affect the teams’ and players’ interests, but they also largely impact consumer interest.⁶³ Consumers are kept in mind during collective bargaining, almost as if they are their own party to the negotiations, because the industry is so dependent on maintaining their support and interest.⁶⁴ Collective bargaining agreements in sports also address issues regarding substance abuse and performance-enhancing drugs.⁶⁵ The

⁵⁶ *Id.* Typically, employees are negotiating in good faith about “wages, hours, vacation time, insurance, safety practices and other mandatory subjects.” *Id.*

⁵⁷ *Id.* The NLRB considers objective factors when looking at whether negotiation has occurred in “good faith.” *Id.* This includes but is not limited to: “whether the party is willing to meet at reasonable times and intervals and whether the party is represented by someone who has the authority to make decisions at the table.” *Id.* Actions of the parties outside of negotiations can also be relevant to whether or not they are acting in good faith. *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Hanson, *supra* note 54, at 337.

⁶¹ *Id.* at 339.

⁶² *Id.* at 340.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 341. These policies were developed in the early 1980s, when substance abuse became more of a prevalent issue in the professional sports community. *Id.* The policy sets requirements for drug testing, suspension following a positive test, and further repercussions following

inclusion of various policies into collective bargaining agreements shows the importance of using negotiation as a tool in these processes—all parties involved are able to quickly adapt to changing circumstances and ensure mutually beneficial policies are created.

Another well-known labor union that supports actors, actresses, musicians, and other entertainers is SAG-AFTRA.⁶⁶ SAG-AFTRA represents two unions that merged: the “Screen Actors Guild” and the “American Federation of Television and Radio Artists.”⁶⁷ This major entertainment and media union represents approximately 160,000 performers and media professionals across the United States.⁶⁸ One of its primary benefits is providing collective bargaining and contracting services to help bolster the bargaining strength of members.⁶⁹ To qualify for membership, a performer must either prove SAG or AFTRA direct or related employment, or employment under another affiliated union.⁷⁰ SAG-AFTRA membership is coveted and difficult to acquire for aspiring actors, many of whom spend “months or even years as unnamed extras in order to earn enough credits to qualify.”⁷¹ However, despite the appeal, many performers may be dissuaded from joining SAG-AFTRA because of the cost implications.⁷² Not only are membership and yearly fees required, but SAG-AFTRA also takes a percentage of the performer’s earnings.⁷³ Thus, a performer must be committed to working and be confident that the union will generate sufficient employment

multiple positive tests. *Id.* at 341–42. Players are given the option to appeal suspension by entering a binding arbitration with the National Football League (NFL). *Id.* at 342. These policies create mutual obligations—both amongst the teams and the players—with an overall goal of protecting the integrity of the sports.

⁶⁶ See *About*, SAG-AFTRA, <https://www.sagaftra.org/about> (last visited Jan. 11, 2022).

⁶⁷ *Id.*

⁶⁸ *Membership & Benefits*, SAG-AFTRA, <https://www.sagaftra.org/membership-benefits> (last visited Jan. 11, 2022).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Taylor Lorenz, *TikTok Stars and Social Media Creators Can Now Join Hollywood’s Top Union*, N.Y. TIMES (Feb. 12, 2021), <https://www.nytimes.com/2021/02/12/style/influencer-union-hollywood-sag-aftra.html>.

⁷² See David Robb, *SAG-AFTRA Collects \$1 Billion in Member Dues & Non-Member Fees in Its First 10 Years as Membership Climbs to Record Highs*, DEADLINE (Aug. 3, 2022), <https://deadline.com/2022/08/sag-aftra-1-billion-dollars-dues-fees-since-2012-membership-record-high-1235084793/>.

⁷³ Nayeli Pena, *SAG/AFTRA vs. Non-Union, Explained*, CASTING DEPOT (July 6, 2020), <https://www.castingdepot.com/blog/posts/sag-aftra-vs-non-union-explained>.

opportunities that render the performer's membership investment financially viable.

2. SO HOW DOES COLLECTIVE BARGAINING RELATE TO INFLUENCERS?

Because many major talent industries have labor unions that allow their workers to benefit from collective bargaining practices, there may be an opportunity for a similar-style union to support influencers—especially given the influencer industry's boom. Influencers and brands could work together to develop mutually beneficial policies with consumer interest in mind—similar to what players, teams, and brands do in the sports industry⁷⁴—because social media “influencing” depends exclusively on consumer interest. They could use collective bargaining to incorporate current influencer issues into agreements so that issues such as FTC violations and brands' product misrepresentations are resolved.

So, what would a union for influencers look like? Interestingly enough, in early 2021, influencers became eligible to join SAG-AFTRA.⁷⁵ SAG-AFTRA approved an “influencer agreement” applicable to content creators “who are paid to advertise products on social media platforms.”⁷⁶ The addition of influencers to the union follows three and a half years of research on the industry's development—which has shown that, as the success of influencer marketing has become more apparent, brands are more willing to spend large sums of money on influencer marketing.⁷⁷ This is great for influencers because it not only legitimizes the profession, but also provides labor and fraud protections for an industry that otherwise has few protective mechanisms.⁷⁸ Lorenz's article, *TikTok Stars and Social Media Creators Can Now Join Hollywood's Top Union*, features commentary from Michelle

⁷⁴ See generally Daniel A. Rascher & Andrew D. Schwarz, *Competitive Balance in Sports: “Peculiar Economics Over the Last Thirty Years,”* CAL. LAWS. ASS'N, <https://calawyers.org/publications/antitrust-unfair-competition-law/competition-fall-2019-vol-29-no-2-competitive-balance-in-sports-peculiar-economics-over-the-last-thirty-years/> (last visited Dec. 22, 2022).

⁷⁵ Lorenz, *supra* note 71.

⁷⁶ *Id.*

⁷⁷ *Id.* (citing *Influencer Marketing: Social Media Influencer Market Stats and Research for 2021*, INSIDER INTEL. (July 27, 2021), <https://www.insiderintelligence.com/insights/influencer-marketing-report/> (finding that brands demonstrated a willingness to spend up to \$15 billion on influencer marketing in 2022, as opposed to the \$8 billion in 2019)).

⁷⁸ *Id.*

Gonzalez, a travel content creator, who mentioned that this is particularly beneficial because it will create transparency in the industry that can help influencers fight for equal pay—something that they cannot do if they are unaware of the industry's earning standards.⁷⁹ In instances like this, use of collective bargaining could serve as a perfect tool for influencers to establish earning standards across the industry.

However, while this appears to be an ideal solution for influencers in the ADR realm, the SAG-AFTRA requirements prove it to be less perfect than it may seem at first glance. While some of the industry's top-paid TikTok creators like Charli D'Amelio⁸⁰ and Addison Rae⁸¹ are now eligible for membership, many influencers will not be able to acquire SAG-AFTRA membership.⁸² First off, while *video* content creators are eligible for SAG-AFTRA membership, any influencers who are hired for “‘still’ campaigns” are not.⁸³ Additionally, the influencer must be an incorporated corporate entity, they must “retain ownership of the intellectual property rights in the deliverables,” and only the influencer themselves may appear in the deliverables.⁸⁴ Additionally, twenty percent of the influencer's compensation must be allocated to the union.⁸⁵ Smaller influencers may therefore miss the mark, either because their contracts do not yet allow for SAG-AFTRA-required content, or simply because their income does not yet justify the required SAG-AFTRA salary contribution. Another shortcoming of the new SAG-AFTRA union opportunity is that it only offers protections for influencers in disputes with brands the influencers specifically contract with.⁸⁶ SAG-AFTRA does not currently offer

⁷⁹ *Id.*

⁸⁰ See Charli D'Amelio (@charlidamelio), TIKTOK, <https://www.tiktok.com/@charlidamelio?lang=en> (last visited Dec. 21, 2022). D'Amelio has 149.3 million followers on TikTok. *Id.*

⁸¹ See Addison Rae (@addisonre), TIKTOK, <https://www.tiktok.com/@addisonre?lang=en> (last visited Dec. 21, 2022). Rae has 88.8 million followers on TikTok. *Id.*

⁸² See Lorenz, *supra* note 71.

⁸³ *Id.* Lorenz notes that “‘still campaigns,” which consist of photography only, and not video or audio, are becoming a rarer form of influencer marketing. *Id.* Nonetheless, this is an express limitation of the SAG-AFTRA influencer agreement.

⁸⁴ Dorian Thomas, *SAG-AFTRA New Influencer Agreement*, EXTREME REACH (Feb. 23, 2021), <https://extremereach.com/blog/sag-aftra-new-influencer-agreement/>.

⁸⁵ *Id.*

⁸⁶ Diep Tran, *What SAG-AFTRA's New Influencer Agreement Means for Brands*, BACKSTAGE (April 29, 2021), <https://www.backstage.com/magazine/article/what-sag-aftras-new-influencer-agreement-means-for-brands-73170/>.

support for deals made between influencers and independent advertising agencies or social media platforms.⁸⁷ This is an issue, because influencers have recently begun to shift away from individual brand deals.⁸⁸ Instead, they now favor “direct forms of monetization,” often through independent subscription businesses or the built-in advertisement programs that social media platforms individually offer.⁸⁹ If these influencers are breaking away to monetize themselves directly, rather than through a brand, do they still need protection? Yes, even more so. Lorenz cites Li Jin, the founder of Atelier, a venture capital firm that invests in the influencer economy, who expressed concern regarding the shift in the industry and the lack of protection.⁹⁰ The issue is that as this direct-monetization space in the industry gains more traction and popularity, it will also gain more leverage against the influencers, and they will further lose the ability to protect themselves.⁹¹ The platforms will then eventually “have more leverage than any individual brand does.”⁹² So, while SAG-AFTRA’s inclusion of influencers is a step in the right direction when it comes to providing the influencers with collective bargaining opportunities, its failure to tailor the space to the specific needs of influencers proves that the solution is far from perfect.

The music industry has faced similar issues with SAG-AFTRA. Recently, the discourse in the music industry has expressed concern with major legal issues such as artists owning the rights to their music or receiving adequate profits from streaming services.⁹³ Some musicians have even gone so far as to demand unionization, either completely unaware of or disregarding the fact that a major union already exists on their behalf.⁹⁴ Particularly alarming is that, regardless of their personal knowledge of these resources, many musicians are contributing salary percentages to the

⁸⁷ *Id.*

⁸⁸ Lorenz, *supra* note 71.

⁸⁹ *Id.* For example, platforms like “Patreon” and “OnlyFans” operate as subscription sites where influencers can directly market on their own behalf. *Id.* Additionally, social media platforms like YouTube and TikTok feature their own advertisement programs: YouTube’s AdSense and TikTok’s Creator Fund. *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Elias Leight, *There’s a Musician’s Union. Many Musicians Are Unaware—or Unable to Join*, ROLLING STONE (May 6, 2019), <https://www.rollingstone.com/music/music-features/theres-a-musicians-union-many-musicians-are-unaware-or-unable-to-join-831574/>.

⁹⁴ *Id.*

union simply because of their label contracts.⁹⁵ Even so, the unions are still deficient because there is a large number of artists that fall through the gap of union coverage.⁹⁶ SAG-AFTRA is largely catering to major-label vocalists (the top one percent of artists) and instrumentalists.⁹⁷ These issues prove that there is a disconnect between the union and its ability “to connect with the day-to-day needs of so many working musicians.”⁹⁸ This inevitably leads to what Leight describes as a “negative feedback loop”: Artists do not know about SAG-AFTRA because they are not staying up to date with current needs and addressing topical issues, and meanwhile SAG-AFTRA does not improve as a union because this population of artists that is not a part of the union is not able to drive conversation and growth.⁹⁹

So, while there are opportunities for influencers to unionize and thereby have the opportunity to strengthen their position against larger brands and platforms through collective bargaining, there are clear shortcomings in the current unions available. If even established musicians, some of the top talent that SAG-AFTRA was designed to represent, do not feel adequately represented by the union (or in many cases do not even know that there is a union), this is a clear indication that change is required. For influencers specifically, it is crucial that the union they join can address their very specific and unique needs. Since the industry is so fast-growing,¹⁰⁰ it will obviously take time to develop a system that truly understands the ins and outs of social media influencing; but for now, perhaps an entertainment super-union is not the influencers’ best option. If a prime method of influencer business revolves around contracts directly with social media and advertising platforms, and SAG-AFTRA does not currently offer these negotiation services, a large percentage of the influencer population still faces the absolute lack of protection that existed prior to this SAG-AFTRA opportunity.¹⁰¹ Potentially, if a union were

⁹⁵ *Id.* Rapper 2 Chainz interacted with former major-label rapper, Joe Budden, on his current podcast, and their conversation indicating their desire to start a union for musicians, as if they were unaware that they already had one. *Id.* Someone like 2 Chainz, who is under contract with a major recording label, is still contributing to the union whether he is a member or not (his label contributes 12.75% of his gross income). *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See *Influencer Marketing: Social Media Influencer Market Stats and Research for 2022*, INSIDER INTEL. (Mar. 15, 2022), <https://www.insiderintelligence.com/insights/influencer-marketing-report/>.

¹⁰¹ See, e.g., Tran, *supra* note 86.

established that could function in close connection with major social media platforms like Facebook, Twitter, and Instagram, the opportunity for collective bargaining in the influencer realm would be more genuine and effective. Additionally, given the breadth of influencers ranging from media moguls like Kim Kardashian to stay-at-home “mommy-bloggers,” it is crucial that there be avenues for union membership and collective bargaining for the range of creators. If the majority of influencers falls into the pit of ineligibility, or membership requirements are not logical considering the amount of business they do, the goal of protecting influencers, brands, and ultimately consumers will be fruitless.

3. THE FTC GETS INVOLVED

While the establishment of a collective bargaining system via an influencer-tailored union could address a lot of the issues faced by influencers and brands, platforms, or advertising companies they contract with, the consumer benefit would be merely a byproduct of these negotiations—because ultimately the consumers are not parties themselves. As such, to directly focus on consumer protection, the issues that specifically affect consumers must be addressed. As mentioned above, consumers are often negatively impacted because the regulations established to protect them from influencer fraud and dishonesty are frequently not enforced.¹⁰² In 2020, the FTC “issued only one ruling against individual influencers.”¹⁰³ Given that “[e]mpirical research strongly suggests” many consumers do not fully understand the influencer process, and therefore are vulnerable to being tricked or manipulated by influencer advertising, it becomes even more important that FTC guidelines are enforced.¹⁰⁴ As the FTC continues to overlook influencer violations of guidelines, it ultimately starts to lose value as a consumer protection authority.¹⁰⁵ Influencer marketing should be viewed no differently than any other type of advertising, and therefore should face similarly stringent regulations and monitoring.¹⁰⁶ Given that the issue at hand largely revolves around

¹⁰² See generally Christopher Terry, Eliezer J. Silberberg & Stephen Schmitz, *Throw the Book at Them: Why the FTC Needs to Get Tough with Influencers*, 29 J.L. & POL’Y 406 (June 2, 2021), <https://brooklynworks.brooklaw.edu/jlp/vol29/iss2/2>.

¹⁰³ *Id.* at 410. The one ruling accompanied the previous issuing of ninety education letters as well as twenty-one follow-up letters to influencers. *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 412 (The FTC is losing “efficacy and potency [] under Section 5 (as well as Section 13) of the FTC Act.” (citing 15 U.S.C. §§ 45(a), 53(b))).

¹⁰⁶ See generally Mary Azcuenaga, *The Role of Advertising and Advertising Regulation in the Free Market*, FED. TRADE COMM’N. (April 8, 1997), <https://www.ftc.gov/public-statements/1997/04/role->

the presence—or absence—of FTC regulations, a possible solution to address these problems could be brought about by getting the FTC involved in ADR.

a. ADR FORA

As ADR has grown in popularity, many law firms with ADR practice groups and private ADR firms have begun to market their services.¹⁰⁷ Three examples of major private-sector arbitration firms are the American Arbitration Association (AAA), JAMS, and the Center for Public Resources.¹⁰⁸ These arbitration firms may have different specialties and cater to resolving different types of disputes: The AAA, for example, specializes in “providing business-oriented arbitration services.”¹⁰⁹

Beyond selecting a firm to provide ADR services, it is also necessary to consider what particular ADR fora would be the most useful to resolve the type of disputes at issue in a particular situation.¹¹⁰ Considering whether to opt for mediation or arbitration as the default method of ADR is generally a good place to start. Mediation is often the first resort because “the parties are in control of the outcome,”¹¹¹ and mediation is also less formal and less

advertising-and-advertising-regulation-free-market. Azcuenaga explained the link between free trade and advertising as a way to communicate why regulations of the industry are so important. *Id.* Because a key aspect to the success of a free-market economy is the ability for people to obtain and process information about the economy, it is crucial that the information obtained is not deceitful or fraudulent. *Id.* When businesses use advertising to disseminate false information that consumers inevitably rely on, this results in “market failure.” *Id.* While Azcuenaga recognizes that advertising is primarily beneficial, its value rests on whether consumers are able to make informed decisions in the market. *Id.* This article goes to show the importance of regulating influencer marketing, since this method of advertising dominates the current market and largely impacts the type of information consumers have available to them.

¹⁰⁷ Jack M. Sabatino, *ADR as “Litigation Lite”*: Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution, 47 EMORY L.J. 1289, 1301 (1998).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1302.

¹¹⁰ *What Factors Influence Your Choice of Arbitration Forum When a Dispute Arises?*, THE LEGAL 500 (Jan. 24, 2019), <https://www.legal500.com/developments/thought-leadership/what-factors-influence-your-choice-of-arbitration-forum-when-a-dispute-arises/>.

¹¹¹ Ryan Hamilton, *Selecting an ADR Forum* (Jan. 1, 2009), <https://ccbjournal.com/articles/selecting-adr-forum>.

expensive than arbitration.¹¹² Mediation is a form of nonbinding dispute resolution whereby a mediator assists parties in resolving a dispute and reaching a “mutually agreeable solution.”¹¹³ Arbitration, on the other hand, does result in a final, binding decision that the parties choose a neutral arbitrator to make.¹¹⁴ To further illuminate the difference between these two methods of dispute resolution: “[M]ediation does not resolve a dispute, it merely helps the parties do so,” whereas in arbitration, “the . . . process itself will produce a resolution independent of the parties' acquiescence—an award which declares the parties' rights and which may be confirmed with the force of a judgment.”¹¹⁵ When deciding the preferred ADR forum, some factors to consider include: the amount of money at issue; what the actual dispute regards and whether there are many nuanced factual and legal issues; what area of law it pertains to (and also whether this area of the law is unique or considered a “specialty area”); and where the parties involved are located.¹¹⁶ When there is a lower-value case with more straightforward legal claims at issue, the cost is more likely to outweigh the benefit, since arbitration can involve more fees and resources.¹¹⁷

Given the options available to arrange a suitable ADR forum, tailored to the specific needs of the dispute at issue, it would be beneficial for the FTC to sponsor an ADR forum and make all of the FTC's resources available to influencers and the brands or social media companies they work for. If the FTC established a specific channel for influencer-related claims, it could ensure that there is a method for holding influencers accountable when it comes to FTC violations. Whether it be mediation or arbitration, the FTC could streamline a process for handling influencer FTC violations, so that these violations are not left to litigation, or even worse for consumer protection, ignored. Even simply educating about the impact dispute resolution can have on influencer-related disputes—for example, what parties can gain from including either mediation or arbitration provisions in their contracts—would benefit influencers

¹¹² *Arbitration Versus Mediation*, HG.ORG, <https://www.hg.org/legal-articles/arbitration-versus-mediation-31047> (last visited Jan. 17, 2022). Note that even though arbitration is more costly than mediation, it is still much less costly than litigation, proving it to still be highly valuable as a tool of ADR. *Id.*

¹¹³ *Mediation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

¹¹⁴ *Arbitration*, BLACK'S LAW DICTIONARY (11th ed. 2019).

¹¹⁵ *Mediation*, *supra* note 113 (citing *Advanced Bodycare Solutions, LLC v. Thione Int'l Inc.*, 524 F.3d 1235, 1240 (11th Cir. 2008)).

¹¹⁶ *What Factors Influence Your Choice of Arbitration Forum When a Dispute Arises?*, *supra* note 110.

¹¹⁷ *Id.*

and brands by providing them with ways to protect themselves from litigation.

While this could be seen as daunting to influencers, who likely do not wish for an easier way to get in trouble with the FTC, it should not be viewed this way for several reasons. First, influencers and brands alike should prefer for FTC standards to be clear and enforced, so that fraud can be kept at bay and the influencer industry can therefore maintain its credibility. If the already-occurring deception continues to run rampant throughout the industry, influencers will no longer be seen as a reliable source for marketing. If influencers lose their very ability to influence, they will lose their value amongst the brands they represent. Secondly, influencers can view an FTC-sponsored ADR process as beneficial to them in the long run, because it will save them time and money they would spend if they were prosecuted for their violations—as the influencers involved in the case of the Fyre Festival discussed above notoriously were. Aside from the obvious advantages ADR provides in terms of cost (because litigation can be extremely costly and time-consuming),¹¹⁸ ADR can be extremely valuable to influencers because it is private.¹¹⁹ If influencers that maintain brands that are largely based on their popularity can avoid being publicly prosecuted for an FTC violation, they can in turn avoid the threat of losing followers, public backlash, and the more extreme effects of “cancel culture.”¹²⁰

¹¹⁸ See James F. Henry, *Some Reflections on ADR*, 2000 J. DISP. RESOL. 63, 68 (2000), <https://scholarship.law.missouri.edu/jdr/vol2000/iss1/8>. Henry cites to many of the benefits of ADR, as opposed to litigation. *Id.* at 64. He notes that avoiding high costs is one of the most obvious advantages of ADR but there are other benefits that are equally if not more important. *Id.* He mentions the opportunity for greater control, the high level of success, and the ability to maintain relationships among parties. *Id.*

¹¹⁹ See Brinson, *supra* note 52 (discussing confidentiality as a comparative benefit of arbitration vis-à-vis litigation).

¹²⁰ “Cancel culture” may be defined as “the practice or tendency of engaging in mass canceling . . . as a way of expressing disapproval and exerting social pressure.” *Cancel Culture*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/cancel%20culture> (last visited Jan. 18, 2022). Cancel culture is a recent phenomenon. See Emily A. Vogels, Monica Anderson, Margaret Porteus, Chris Baronavski, Sara Atske, Colleen McClain, Brooke Auxier, Andrew Perrin & Meera Ramshankar, *Americans and “Cancel Culture”: Where Some See Calls for Accountability, Others See Censorship, Punishment*, PEW RSCH. CTR. (May 19, 2021), <https://www.pewresearch.org/internet/2021/05/19/americans-and-cancel-culture-where-some-see-calls-for-accountability-others-see-censorship-punishment/> (noting that “cancel culture” has become a contested political

With influencers on board, brands and individual influencers could work together alongside the FTC to bring ADR practices to life in the industry. Ultimately, if ADR can enable a more effective means of making sure FTC violations do not go unaddressed, the FTC can regain credibility and remain true to its mission to protect consumers.¹²¹

IV. CONCLUSION

The influencer industry is rapidly growing and is responsible for a large portion of Internet advertising. As consumers continue to rely on influencers, it is crucial that influencers are held accountable for their posting. It is also important that influencers are protected from frivolous claims by the brands they work for. While there are some opportunities currently for influencers to engage in collective bargaining and to gain other union protections, these must be tailored to specific influencer needs in order to be truly beneficial and effective. While SAG-AFTRA has taken the lead on introducing influencer union opportunities, its entry requirements can be overly limiting, and its policies do not extend to cover direct contracts with social media and advertising platforms.

This industry could also benefit from a potential system of ADR put in place by the FTC (because this entity is immediately responsible for the regulation of influencer advertising). With education on ADR remedies and how to stipulate ADR preferences in contracting, influencers can benefit by gaining protection and preserving their respective brands. Additionally, consumers can gain additional protection from the heightened degree of accountability that could result from an FTC-mandated ADR process for all influencer FTC violations. Then, the FTC can

topic over the last several years). Given the power of the media and the accessibility provided by social media, critics can share their opinions far and wide and gain strength in numbers. See Brooke Kato, *What Is Cancel Culture? Everything to Know About the Toxic Online Trend*, N.Y. POST (Aug. 31, 2021), <https://nypost.com/article/what-is-cancel-culture-breaking-down-the-toxic-online-trend/>. Celebrities, because their lives are frequently under a microscope, are extremely susceptible to being “cancelled”—and in severe cases, these celebrities can lose job opportunities and sponsorships. See *id.* Given that influencers are subject to considerable public scrutiny themselves, avoiding bad publicity can serve as encouragement to maintain private disputes. See *id.*

¹²¹ See *What We Do*, FED. TRADE COMM’N., <https://www.ftc.gov/about-ftc/what-we-do> (last visited Jan. 18, 2022) (“The FTC protects consumers by stopping unfair, deceptive[,] or fraudulent practices in the marketplace. We conduct investigations, sue companies and people that violate the law, develop rules to ensure a vibrant marketplace, and educate consumers and businesses about their rights and responsibilities.”).

strengthen its credibility as an agency that's main goal is consumer protection.