Editor’s Note: Pandemic
Victoria Prussen Spears

Leading By Example Is Difficult: Europe’s Approach to Regulating AI
Roch P. Glowacki and Elle Todd

Attorney General Charts Course for DOJ Counter-Drone Protection
James J. Quinlan and Elaine D. Solomon

What’s in the FAA’s Proposed Drone Remote Identification Rule
Brent Connor and Jason D. Tutrone

Insurance for Heightened Cyber Risk in the COVID-19 Era
Matthew G. Jeweler

Navigating Artificial Intelligence and Consumer Protection Laws in Wake of the COVID-19 Pandemic
Kwamina Thomas Williford, Anthony E. DiResta, and Esther D. Clovis

Does the FTC’s Recent Influencer Guidance Address Robots?
Holly A. Melton

Second Circuit Takes Expansive Approach on the Definition of an ATDS
Jessica E. Salisbury-Copper, Scott A. King, and Doori Song

“Deepfakes” Pose Significant Market Risks for Public Companies: How Will You Respond?
Thaddeus D. Wilson, William T. Gordon, Aaron W. Lipson, and Brian M. Thavarajah

Artificial Intelligence at the Patent Trial and Appeal Board
Braden M. Katterheinrich, Ryan L. Duebner, and Sean Wei

Autonomous Vehicles, Ride Sharing, and the University
Louis Archambault and Kevin M. Levy

New Biometrics Lawsuits Signal Potential Legal Risks in AI
Debra R. Bernard, Susan Fahringer, and Nicola Menaldo

All Aboard! Major Shipping Lines Secure Antitrust Immunity for TradeLens Blockchain Agreement
Jeremy A. Herschaft and Matthew J. Thomas

Everything Is Not Terminator: An AI Hippocratic Oath
John Frank Weaver
Editor’s Note: Pandemic
Victoria Prussen Spears

Leading By Example Is Difficult: Europe’s Approach to Regulating AI
Roch P. Glowacki and Elle Todd

Attorney General Charts Course for DOJ Counter-Drone Protection
James J. Quinlan and Elaine D. Solomon

What’s in the FAA’s Proposed Drone Remote Identification Rule
Brent Connor and Jason D. Tutrone

Insurance for Heightened Cyber Risk in the COVID-19 Era
Matthew G. Jeweler

Navigating Artificial Intelligence and Consumer Protection Laws in Wake of the COVID-19 Pandemic
Kwamina Thomas Williford, Anthony E. DiResta, and Esther D. Clovis

Does the FTC’s Recent Influencer Guidance Address Robots?
Holly A. Melton

Second Circuit Takes Expansive Approach on the Definition of an ATDS
Jessica E. Salisbury-Copper, Scott A. King, and Doori Song

“Deepfakes” Pose Significant Market Risks for Public Companies: How Will You Respond?
Thaddeus D. Wilson, William T. Gordon, Aaron W. Lipson, and Brian M. Thavarajah

Artificial Intelligence at the Patent Trial and Appeal Board
Braden M. Katterheinrich, Ryan L. Duebner, and Sean Wei

Autonomous Vehicles, Ride Sharing, and the University
Louis Archambault and Kevin M. Levy

New Biometrics Lawsuits Signal Potential Legal Risks in AI
Debra R. Bernard, Susan Fahringer, and Nicola Menaldo

All Aboard! Major Shipping Lines Secure Antitrust Immunity for TradeLens Blockchain Agreement
Jeremy A. Herschaft and Matthew J. Thomas

Everything Is Not Terminator: An AI Hippocratic Oath
John Frank Weaver
Articles and Submissions

Direct editorial inquiries and send material for publication to:

Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc.,
26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 646.539.8300.

Material for publication is welcomed—articles, decisions, or other items of interest to attorneys and law firms, in-house counsel, corporate compliance officers, government agencies and their counsel, senior business executives, scientists, engineers, and anyone interested in the law governing artificial intelligence and robotics. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the Editorial Content appearing in these volumes or reprint permission, please contact:

Morgan Morrissette Wright, Publisher, Full Court Press at mwright@fastcase.com or at 202.999.4878

For questions or Sales and Customer Service:

Customer Service
Available 8am–8pm Eastern Time
866.773.2782 (phone)
support@fastcase.com (email)

Sales
202.999.4777 (phone)
sales@fastcase.com (email)
ISSN 2575-5633 (print)
ISSN 2575-5617 (online)
Does the FTC’s Recent Influencer Guidance Address Robots?

Holly A. Melton*

The author discusses whether the Federal Trade Commission’s guidance for social media influencers applies to influencers that are not human.

Those in the advertising and retail industries have likely heard about the Federal Trade Commission’s (“FTC”) recent guidance entitled “Disclosures 101 for Social Media Influencers.” Since the document, directed toward social media influencers and the disclosure of endorsements, was released on November 5, 2019, players in this space have wondered about its implications for the FTC’s future enforcement tactics.

It might be beneficial, however, to also consider whether the FTC’s guidance documents relate to influencers that are not human.

AI Influencers

The concept of artificial intelligence (“AI”) influencers came into existence before 2016, but it did not seem to gain momentum until 2018. Since then, these influencers’ popularity has rapidly risen. AI influencers exist entirely in a virtual world, and in some cases are controlled by the brand they represent, but in all other ways behave like real human influencers. Best known for promoting fashion and lifestyle brands, they have often found the largest following on Instagram.

Recently, however, they have begun to gain fame on YouTube as well. Some of the most well-known AI influencers are Lil Miquela, Shudu, and SK-II’s Yumi.

What is especially interesting about AI influencers is the paradox they have seemingly created. At a time when people will pay to avoid ads, AI influencers are actually gaining followers, despite the fact that their audience knows the accounts are purely driven...
The new window AI influencers give businesses to reach people who might otherwise avoid their advertisements might induce more and more companies to engage in this mode of advertising. Not only do AI influencers have this wider audience-reaching advantage, but they are also much easier to control than a human influencer, making concerns like avoiding bad press and creating the “ideal” representation of a company all but disappear.

Non-Human Influencers

In light of the potential that AI influencers will be widely used in the near future, it might benefit companies to take another look at the FTC’s guidance documents and think about how they might relate to non-human influencers. The Disclosure 101 Guidance represents the first time the FTC has officially spoken to the public about endorsements since its revision of the Testimonial and Endorsement Guides in 2009, which it largely enforced against actors other than influencers.

However, starting in 2017 the FTC increasingly shifted its attention toward influencers, beginning with warning letters and culminating in the recent guidance. The Disclosure 101 Guidance restates the policies of the 2009 revision. Three of its fundamental points are that influencers must disclose material connections with brands, that they must ensure their reviews honestly reflect their experience with products, and that they must avoid making claims advertisers themselves cannot substantiate.

These policies raise many questions as related to AI influencers. For example, whose connection with the advertiser is considered material and thus must be disclosed, that of the AI influencer or those controlling it behind the scenes? Does it matter if the AI influencer’s creators are paid for their “endorsement”? The FTC’s guidance documents indicate that the answer to the first question is those controlling the AI, and that the answer to the second is a resounding “yes.”

However, there are questions to which the FTC’s guidance documents do not seem to provide an answer:

- Whose “experience” with the product matters, that of the AI influencer or of the creators?
■ When we say an AI influencer has an experience with a product, how can this even reflect an honest belief?
■ Does it matter that we cannot see or evaluate the credibility of those behind the AI?
■ What if consumers cannot even tell that an influencer is computer generated? After all, Lil Miquela pretended to be human until she announced in 2018 that she was a robot.
■ Finally, what happens when artificial intelligence advances and the AI influencers become more autonomous?

If the FTC’s guidance documents raise issues relevant to AI influencers (which seems to be the case), the same could be said for any non-human influencer. For example, if Doug the Pug promotes dog biscuits, does it matter if we could never truly know his opinion of the product?

What Would a Material Connection Mean for a Dog or Cat?

Although the FTC has not specifically addressed AI (or non-human) influencers, an agency spokesperson told CNNMoney that “advertisers using CGI influencer posts should ensure that the posts are clearly identifiable as advertising.” Unless and until the FTC issues further statements, only these words, the 2009 revision, and the Disclosure 101 Guidance exist to give companies direction as to how to use AI influencers without running afoul of the disclosure rules.

For now, and until some of the above questions are answered, companies should be particularly careful to be truthful when they use AI influencers to promote their products, both about the computer-generated nature of the influencer and about the sponsorship behind the advertisement. Moreover, they should use the same degree of oversight and careful contracting language that they would with a human influencer if they choose to engage with an AI influencer they do not control.

Note

* Holly Melton, a partner in the New York City office of Crowell & Morning LLP, is vice-chair of the firm’s Advertising and Media Group. She may be contacted at hmelton@crowell.com.