

Identifying Information

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Paper Information

Title:	Virtual Influencers
Abstract:	<p>Increasingly, there are individuals who make their living as so-called social media influencers. Brands use social media influencers as part of their marketing by having the influencer reach their consumers by means of blogs and social networks. These social media influencers get paid by brands to promote products and activities, and their payments are usually driven by demonstration of the number of followers they have. One such social media influencer, Shudu Gram, is a South African Instagram model who wears and promotes lipstick and clothing that she models. Similarly, Miquela Sousa is a 19-year-old Brazilian-American model with over a million Instagram followers who wears both streetwear and luxury brands, hangs out in trendy restaurants, and complains about the weather. What both of these social media influencers have in common is that they are not real people at all, but rather CGI creations. Shudu Gram is the creation of British photographer, Cameron-James Wilson who refers to her as an “art piece.” Sousa is an avatar created by a mysterious L.A.-based start up who claim to have expertise in artificial intelligence and robotics. Many people, however, have indicated that they thought such virtual influencers were real. Numerous popular magazines from the New Yorker to Glamour, Vogue and Cosmopolitan have begun reporting on this phenomenon. To date, however, no legal scholarship has explored the legal implications of such virtual influencers. This Article seeks to fill that space by identifying the various legal challenges presented by the growth of virtual influencers. First, it examines whether such individually oriented concepts as the Right of Publicity, defamation, or privacy torts make any sense when the individual whose “rights” would be violated is not a real person. One of the most famous right of publicity cases addresses whether a robot could violate Vanna White’s right of publicity. But it is still worth exploring whether a robot could itself have its own right of publicity. Second, it identifies the various forms of IP protection and IP ownership that may be triggered by the unique situation of virtual influencers. Some of these IP issues arise with regard to the question of the role of the virtual influencer as a copyrightable creation consideration of the role of the useful article doctrine in Copyright as well as the applicability of the existing doctrines on the copyrightability of characters. Other IP ownership issues arise to the extent that the virtual influencers purport to themselves create intellectual property. Third, it addresses the false advertisement and other legal issues raised by the fact that consumers may be fooled into thinking the virtual influencers are real people. Specifically it explores the role of FTC enforcement with social media influencers more generally and addresses how some of these precedents should be adjusted to take into account the reality of virtual influencers. Finally, the paper addresses some of the concerns that arise to the extent that some of these social influencers appear to be representatives of traditionally underrepresented minorities, but often, as in the case of Shudu Gram, are actually the creations of white men. The article suggests that virtual influencers are likely to continue to grow in importance triggering the need for careful consideration of the various legal and ethical issues at stake.</p>