Making the FTC 🙂: An Approach to Material Connections Disclosures in the Emoji Age

Christina Sauerborn
Fordham University School of Law, csauerborn@fordham.edu

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Cover Page Footnote
Online Editor, Fordham Intellectual Property, Media & Entertainment Law Journal, Volume XXVIII; J.D. Candidate, Fordham University School of Law, 2018; B.A., Individualized Study, with a concentration in Art and Business, New York University, 2011. The Author would like to thank Professor Olivier Sylvain for his guidance and feedback in developing this Note, and the IPLJ Editorial Board and staff for their hard work throughout the editorial process, especially E. Alex Kirk, Matt Hershkowitz, and Jillian Roffer. The Author would also like to thank her family and friends, especially Kathryn and Gary Sauerborn, James DiStefano, and Jessica Drake, for their unconditional love and support.
Making the FTC 😊: An Approach to Material Connections Disclosures in the Emoji Age

Christina Sauerborn*

In examining the rise of influencer marketing and emoji’s concurrent surge in popularity, it naturally follows that emoji should be incorporated into the FTC’s required disclosures for sponsored posts across social media platforms. While current disclosure methods the FTC recommends are easily jumbled or lost in other text, using emoji to disclose material connections would streamline disclosure requirements, leveraging an already-popular method of communication to better reach consumers. This Note proposes that the FTC adopts an emoji as a preferred method of disclosure for influencer marketing on social media. Part I discusses the rise of influencer marketing, the FTC and its history of regulating sponsored content, and the current state of regulation. Part II explores the proliferation of emoji as a method of communication, and the role of the Unicode Consortium in regulating the adoption of new emoji. Part III makes the case for incorporating emoji as a method of disclosure to bridge compliance gaps, and offers additional recommendations to increase compliance with existing regulations.

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INTRODUCTION

If you have spent any amount of time scrolling through Instagram, Snapchat, or virtually any other image-focused social media platform, at some point you have probably been on the receiving end of influencer marketing. You know the type of post when you see it. It might be a photo of the author using a product, or maybe even holding the product while smiling directly into the camera.

Additionally, there’s an accompanying caption format that now feels all too familiar: “Thanks [brand] for inviting me to check out [product]. This thing is next level!” followed by #ad or #sponsored. There are infinite variations of this caption. Maybe it personalizes the message in the author’s tone of voice. Maybe it includes some interesting or funny anecdote about the author’s experience using the product. Maybe it simply reads “Thanks [brand]!” without giving the reader any other context. If the

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2 See David Lopez (@davidlopezfilms), INSTAGRAM (Jan. 19, 2016), https://www.instagram.com/p/BAV1oUwVOpLc/ [https://perma.cc/2ZYR-KGZ7] (“Thanks @xfinity for inviting me to check out X1. This thing is next level! More to come from our collaboration. #RealFansGetIt #ad.”).

3 See Maddie Greer (@maddiegreer), INSTAGRAM (Jan. 25, 2016), https://www.instagram.com/p/BA_LL9HJPGL/ [https://perma.cc/S3AB-N2NB] (“After watching the trailer for The Finest Hours, and seeing how they found courage in the midst of danger, it had me thinking. I’ve never been one to find myself in the face of danger, but I truly overcame one of my biggest fears this past year. I left everything I knew and was familiar with and headed out West to live. It’s been an unbelievable adjustment and something I would have never had the courage to do without a push. But I wouldn’t trade it for anything because since then, I have grown more than ever. I can’t wait to see #TheFinestHours and how being courageous pushes them. #sponsored.”).

author is really succinct, maybe it just tags a brand or company.\(^5\) The inclusion and placement of the hashtags\(^6\) —if any—is also varied. For example, perhaps it includes “#ad” at the beginning of the post. Maybe it buries “#ad” or “#sponsored” in an avalanche of other hashtags.\(^7\) Maybe you’ll need to click “more” to even see the hashtags.\(^8\)

Despite the myriad iterations of this content, all influencer marketing\(^9\) has two common threads: (1) it attempts to promote a product or service,\(^10\) and (2) it does so by paying an “influencer,” leveraging their social media presence to target a highly engaged demographic of viewers.\(^11\) Through influencer marketing, what once took the form of traditional advertisements now looks almost indistinguishably like other content created by your favorite celebrities and internet personalities. Influencer marketing is on the rise, and with companies spending ever-increasing allotments of advertising budgets on influencer marketing campaigns, the trend continues to gain momentum.\(^12\)

As influencer marketing has increased, attention has turned toward efforts to regulate it. In 2009, the Federal Trade Commission (“FTC”) revised their endorsement guidelines, designed to protect consumers while also giving marketers

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\(^6\) A hashtag, popularized by its use on Twitter, is a word or phrase preceded by the “#” symbol, commonly used to topically group or categorize user posts. See How to Use Hashtags, Twitter Help Ctr., https://help.twitter.com/en/using-twitter/how-to-use-hashtags [https://perma.cc/ZH9E-C6SH] (last visited Mar. 3, 2018); see also Lexi Pandell, An Oral History of the #Hashtag, WIRED (May 19, 2017), https://www.wired.com/2017/05/oral-history-hashtag/ [https://perma.cc/UV44-DP4M].

\(^7\) See, e.g., Christina Elmen (@chrissoyymariee), Instagram (Dec. 30, 2017), https://www.instagram.com/p/BdWP1wvF6r9/ [https://perma.cc/GW8U-JCP8] (including “#sponsored” at the end of the first paragraph, after three other hashtags, and “#ad” towards the very bottom of the caption, with approximately sixteen additional hashtags before it and two after it).

\(^8\) When viewed using the Instagram App for iPhone, hashtags are not visible until the viewer clicks “more.”

\(^9\) See infra Section I.B.

\(^10\) See infra Section I.B.

\(^11\) See infra Section I.B.

\(^12\) See infra Section I.B.
flexibility. On their website, the FTC has also assembled an informal FAQ that describes best practices for popular disclosure methods, including hashtags and other language. Despite the FTC’s efforts to educate the public, there remains a significant lack of understanding regarding disclosure requirements. A 2016 survey found that while two-thirds of marketers are aware of FTC guidelines, only eleven percent of marketers claim they understand them. While influencers seem to have a better grasp on disclosure requirements, another issue persists—in the same 2016 survey, three-in-ten influencers reported having been asked by a client or marketer to hide the sponsored nature of their post.

Regardless of marketers’ attitudes toward disclosure requirements, it is also questionable whether existing disclosure methods are even accomplishing their intended purpose. The digital world puts a premium on concise messaging, as the Internet increasingly caters to ever-diminishing attention spans.

13 Throughout this Note, a “marketer” generally refers to the marketing arm of a brand or company, an advertising agency or marketing firm working with a brand or company, or any other organization or individual seeking to promote a product or service through the use of a marketing strategy, including but not limited to influencer marketing. See infra Section I.A; cf. Definition of Marketer, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/marketer (last visited Mar. 12, 2018).
14 See infra Section I.A.4.
17 See McCarthy, supra note 15.
18 See infra Section I.A.1 (detailing the methods implemented by the FTC).
19 See, e.g., Timothy Egan, The Eight-Second Attention Span, N.Y. TIMES (Jan. 22, 2016), https://www.nytimes.com/2016/01/22/opinion/the-eight-second-attention-span.html [https://perma.cc/Y6X8-P7X] (“A New York friend used to send me clever, well-thought-out emails, gems of sprightly prose. Then he switched to texting, which abbreviated his wit and style. Now all verbs and nouns have vanished; he sends emojis, the worst thing to happen to communication in our time.”); Kevin McSpadden, You Now
Disclosure is also hamstrung by the limitations of social media platforms. For example, even the shortest FTC-approved disclosure, the commonly used “#ad,” still requires using three characters—which, though still very short, becomes important when crafting a message to fit within certain character limits. Additionally, on many platforms, influencers are unable to set off disclosures using bold type or contrasting colors that distinguish disclosures from other surrounding text. By allowing influencers and marketers considerable discretion to use hashtags and other language to indicate a sponsored post, the FTC leaves the door open for disclosure practices that consumers will eventually come to ignore.

20 See infra Section I.A.4.
22 In the Author’s experience, Instagram and Twitter do not allow users to change the color or typeface of caption text or tweets. Hashtags and hyperlinks appear in a contrasting color, but the individual user has no control over this feature. YouTube offers perhaps the most flexibility, in that content creators can utilize video editing software to add text to their videos.
23 See infra text accompanying notes 126–27.
In the meantime, advertisers have grabbed the attention of coveted demographics by using another trending method of communication—emoji.\textsuperscript{24} Since their limited introduction to Japanese cell phones in the late 1990s, emoji have ascended to worldwide popularity.\textsuperscript{25} Once primarily a novelty supplementing tweets and text messages, uses for emoji have rapidly evolved and expanded.\textsuperscript{26} Emoji have also taken on enormous significance in our daily conversations.\textsuperscript{27} As society has gradually assigned meaning to these tiny images, it has allowed us to contextualize our messages, or even replace aspects of them entirely.\textsuperscript{28}

In examining the rise of influencer marketing and emoji’s concurrent surge in popularity, it naturally follows that emoji should be incorporated into the FTC’s required disclosures for sponsored posts across social media platforms. While current disclosure methods the FTC recommends are easily jumbled or lost in other text, using emoji to disclose material connections would streamline disclosure requirements, leveraging an already-popular method of communication to better reach consumers.\textsuperscript{29} This Note proposes that the FTC adopt an emoji as a preferred method of disclosure for influencer marketing on social media. Part I discusses the rise of influencer marketing, the FTC and its history of regulating sponsored content, and the current state of regulation. Part II explores the proliferation of emoji as a method of communication, and the role of the Unicode Consortium in regulating the adoption of new emoji. Part III makes the case for incorporating emoji as a method of disclosure to bridge compliance gaps, and offers additional recommendations to increase compliance with existing regulations.

\textsuperscript{24} See infra Section II.C.
\textsuperscript{25} See infra Part II.
\textsuperscript{26} See infra Section II.C.
\textsuperscript{27} See infra text accompanying notes 230–32.
\textsuperscript{28} See infra Section II.C.
\textsuperscript{29} See infra Part III.
I. THE RISE OF INFLUENCER MARKETING

This Part discusses influencer marketing and the FTC’s evolving approach in providing guidance to companies, marketers, and influencers. Section I.A discusses the Federal Trade Commission Act and the FTC’s history of action surrounding influencer marketing. Section I.B discusses the mechanics of influencer marketing, with focus on Instagram as a preferred social media platform. Section I.C evaluates the Fyre Festival and its influencer marketing campaign as a cautionary case study.

A. The History of Regulation for Endorsement-Based Marketing

Endorsements have been a staple marketing tool in the United States for nearly a century, with celebrity endorsements rising sharply in popularity in the mid-1970s. 30 Celebrities have long played a role in television and print media advertising campaigns, offering their endorsements to promote brands. 31 In recent years, social media has broadened the playing field, giving value to the voices of anyone with strong opinions and above-average photography skills. 32 Meanwhile, celebrities now endorse products through social media, in addition to tried and true advertising media like television or print. 33

As influencers have taken endorsement-based marketing into a new age, regulations have raced to keep up. This Section discusses the history of regulatory tools for endorsement-based marketing.

31 See generally id.
1. The Federal Trade Commission Act

In 1914, the Federal Trade Commission Act (“FTCA”) was signed into law.34 Originally created in response to public concerns regarding the growth of monopolies and cartels, the FTCA aimed to protect consumers by prohibiting unfair competition,35 and created the FTC to enforce this prohibition.36 Under federal law, the FTC was empowered “to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce.”37

The FTCA was amended in 1938, and extended to prohibit “unfair or deceptive acts or practices in commerce.”38 This marked an important amendment since the Act’s original passage into law.39 The amendment’s primary purpose was to expand consumer protection by allowing the FTC to intervene in a wider variety of situations causing public harm.40 Ensuring this flexibility was a large part of early discussions regarding the amendment.41 The Senate Committee on Interstate Commerce engaged in substantial debate with the FTC regarding the inclusion of the words “acts or practices,” as opposed to “methods,” which had already been used in the FTCA in reference to competition.42 The FTC found that, while “methods” evoked a pattern of behavior that might be more

37 Id. § 45(a)(2).
40 See id. at 23 (“[S]ince the prime purpose of this amendment is the protection of the public, the Commission should have such discretion that it could stop a dangerous misleading act before it has been pursued far enough by the offender to constitute a plan or method of business.”).
41 See generally id. (discussing the need to amend the FTCA).
42 See id. at 19–24.
difficult to prove, the phrase “acts or practices” allowed the FTC
greater latitude to intervene.\footnote{43}

The FTCA defines “unfair” acts or practices as those that
“cause[] or [are] likely to cause substantial injury to consumers
which is not reasonably avoidable by consumers themselves and
not outweighed by countervailing benefits to consumers or to
competition.”\footnote{44} Today, the FTC’s primary mission is to protect
consumers by preventing unfair or deceptive business practices.\footnote{45}
The FTC accomplishes this primarily by using its rulemaking
authority to carry out the provisions of the FTCA.\footnote{46}

In 1975, the FTC adopted its first guide regarding the use of
testimonials and endorsements in advertising.\footnote{47} In 2009, the guide
was revised to provide additional guidance relevant for new media,
including social media.\footnote{48} An “endorsement” is defined as “any
advertising message . . . that consumers are likely to believe
reflects the opinions, beliefs, findings, or experiences” of the
endorser.\footnote{49} A statement is considered an endorsement “even if the
views expressed by [the endorser] are identical to those of the
sponsoring advertiser”—which means that even if the endorser
genuinely believes in the product being endorsed, the statement is

\footnote{43} Id. at 21 (“[W]e think it would be inadvisable to use the word ‘methods’ in this
connection . . . we think it would be construed as more restrictive than the term ‘unfair
methods of competition[,]’ as originally used, and would still subject the Commission
and consequently the Government to a constant heavy expense of meeting that issue.”).
\footnote{45} See About the FTC, FED. TRADE COMM’N, https://www.ftc.gov/about-ftc
\footnote{46} Cf. 15 U.S.C. § 46(g).
\footnote{47} See Guides Concerning the Use of Endorsements and Testimonials in Advertising,
§§ 255.0–255.5 (2017) (showing the most recent finalized codification of the FTC’s
endorsement rules).
\footnote{48} See Guides Concerning the Use of Endorsements and Testimonials in Advertising,
supra note 1.
\footnote{49} 16 C.F.R. § 255.0(b). For clarity, “endorser” is the language used by the FTC. See
id. (“The party whose opinions, beliefs, findings, or experience the message appears to
reflect will be called the endorser and may be an individual, group, or institution.”). An
“influencer” can be an endorser (for example, if they post sponsored content), but an
endorser is not necessarily an influencer.
still considered an endorsement by the FTC. An endorser can be an individual, a group, or another institution.

The FTC further provides that “[w]hen there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement . . . such connection must be fully disclosed.” The FTC reasons that knowing whether the endorser received compensation from the brand or product being endorsed, or whether the endorser has another relationship with the company that the average consumer might not know about, impacts the weight a consumer gives to an endorsement.

The FTC defines a “material connection” primarily by way of examples. Generally, an endorser is said to have such a connection to a brand, product, or company when some condition is present that an average viewer would not reasonably expect. For instance, an endorser need not disclose that they were paid to endorse a brand in a television commercial—since such endorsements are generally compensated, the average consumer would reasonably expect it and is therefore not deceived. Additionally, an endorser need not disclose that they are contractually obligated to use certain products in a public setting, such as on a television interview, so long as no representation is made about the product (aside from using it) within that setting. An endorser is not deceptively endorsing a product where they are merely using it in public without commenting on it or making any kind of representations about it.

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50 Id.
51 Id.
52 Disclosure of Material Connections, 16 C.F.R. § 255.5.
54 16 C.F.R. § 255.5.
55 Id.
56 Id. at ex. 2.
57 Id. at ex. 3.
58 Id.
Conversely, in less traditional advertising methods, such as blogs, online message boards, and “street team” guerrilla marketing techniques, the FTC requires that endorsers disclose their relationship with a brand. An endorser must disclose when they have received compensation, free merchandise, or any other incentive that might affect the objectivity of their representations. Ostensibly, this is because an average consumer might not be as aware in such situations that, in offering their “organic” opinions about using the product, the endorser is actually marketing on behalf of the company or brand.

2. FTC Actions Regarding Endorsements

Recently, the FTC has taken an active approach to educate the public on regulations. In March 2017, the FTC sent approximately ninety letters to “educate” recipients, including both influencers and marketing teams at various companies. Individuals who received letters included Jennifer Lopez,

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59 Id. at exs. 7–9. Guerrilla marketing, which gets its name from guerrilla warfare, relies on low-cost, unconventional strategies, the element of surprise, and reaching out to consumers on a highly personal level. See What Is Guerrilla Marketing?, CREATIVE GUERRILLA MARKETING, http://www.creativeguerrillamarketing.com/what-is-guerrilla-marketing/ [https://perma.cc/HKP6-RY56] (last visited Dec. 29, 2017); see also GUERRILLA MARKETING, http://gmarketing.com/ [https://perma.cc/YLD2-ZCYT] (last visited Dec. 29, 2017). A “street team” generally refers to a marketing strategy that engages consumers via brand ambassadors, who talk directly with consumers (on the street) about the brand or product being promoted. See, e.g., 16 C.F.R. § 255.5, ex. 9.

60 See 16 C.F.R. § 255.5, exs. 7–9.

61 See id.

62 See id.

63 See infra text accompanying notes 64–84.


Lindsay Lohan, Victoria Beckham, Sean Combs, Ciara, Luke Bryan, and Naomi Campbell; marketers included representatives from companies including Chanel, Adidas,


Cabela’s, Johnson & Johnson, and Dunkin’ Donuts. Each letter identified specific posts on social media where the influencer failed to properly disclose their material connection to the brand being promoted. The letters also included copies of the FTC’s endorsement guidelines FAQ, and additional educational material to educate recipients regarding proper disclosure requirements. For marketers, the letters also recommended evaluating the influencer’s post against any existing company social media


78 Cf. Letter from Mary K. Engle to {Exec.}, supra note 77; Letter from Mary K. Engle to {Influencer}, supra note 77. See generally infra Section I.A.4 (discussing the endorsement guidelines FAQ in more detail).

79 Cf. Letter from Mary K. Engle to {Exec.}, supra note 77; Letter from Mary K. Engle to {Influencer}, supra note 77.
policies, or more foundationally, implementing such a policy and taking care to include provisions that offer guidance to endorsers.80

On September 6, 2017, the FTC sent follow-up correspondence to approximately twenty-one influencers, all of whom had previously been sent the educational letter in March 2017.81 The September 2017 letters identify recipients’ specific Instagram posts that have inadequate disclosure of material connections—either the post does not disclose at all, attempts disclosure via “Thank you [Brand],” or attempts disclosure, but not until past line three of the description, after the viewer clicks “more.”82 In addition, the letters requested a written response by September 30, 2017 advising the FTC of whether the influencer has a material connection with the brands or businesses mentioned in the post.83 If they do, it asks what actions the influencer will take to ensure that their business relationships are clearly disclosed in the future.84

3. Recent FTC Actions

Generally, the FTC has cracked down most on companies using careless or deceptive tactics in their influencer marketing campaigns.85 Until recently, FTC complaints have generally left individual influencers unscathed.86 Influencer marketing campaigns on a variety of social media platforms have been the

80 Cf. Letter from Mary K. Engle to {Exec.}, supra note 77.
83 See id.
84 See id.
85 See infra text accompanying notes 87–122.
86 The FTC’s complaint against the two social media influencers behind virtual gambling website CSGO Lotto marked their first complaint against individual influencers. See CSGO Lotto Owners Settle FTC’s First-Ever Complaint Against Individual Social Media Influencers, supra note 81.
subject of FTC complaints. For example, in 2012, marketing firm Deutsch LA worked with Sony to promote the release of the PlayStation Vita, a new video game console.\(^8^7\) As part of their promotional strategy, Deutsch LA circulated a company-wide email directing its employees to tweet about the product using “#gamechanger” to generate buzz ahead of the campaign launch.\(^8^8\) However, it did not direct employees to disclose that they were promoting the product as members of Sony’s advertising agency.\(^8^9\) In their complaint, the FTC found this practice misleading because the tweets did not disclose the employment relationship, giving the appearance that they were coming from regular customers.\(^9^0\)

A couple of recent influencer marketing campaigns leveraging YouTube influencers have also caught the FTC’s attention. Video game and entertainment marketing company Machinima ran a campaign to promote the Xbox One video game console.\(^9^1\) Machinima paid two video game influencers thousands of dollars in exchange for content containing positive reviews of the Xbox One on their YouTube channels.\(^9^2\) In addition, Machinima also devised an incentive program, promising to pay other influencers


\(^8^8\) See id.


one dollar for every one thousand views of whatever content they posted promoting the Xbox One. The influencers produced over three hundred videos, generating more than thirty million views in the span of about a month-and-a-half. The FTC cited the influencers’ failure to disclose their relationship as a deceptive practice because it misled viewers into thinking that the influencers’ positive statements were impartial.

In 2016, Warner Brothers similarly came under fire for a marketing campaign utilizing YouTube influencers. Warner Brothers worked with an advertising agency that coordinated with several social media influencers to promote the video game *Middle Earth: Shadow of Mordor*. As part of the deal, the influencers agreed to certain stipulations regarding the content of their postings. The influencers, including YouTube star PewDiePie,

95 Id. at 4–5.
were required to post positive reviews about the game, and to include “a strong verbal call-to-action” to click a link taking the viewer to the game’s website.\footnote{Geuss, supra note 97 (quoting Warner Bros.’ criteria for paid influencer advertising about their game).} They were not permitted to show any bugs or glitches experienced during gameplay, nor offer “any negative sentiments about the game, Warner Bros., or its affiliates.”\footnote{Id.}

Warner Brothers also instructed the influencers to disclose the paid relationship in the information box below the video.\footnote{See Rich McCormick, PewDiePie and Other YouTubers Took Money from Warner Bros. for Positive Game Reviews, VERGE (July 12, 2016, 12:09 AM), https://www.theverge.com/2016/7/12/12157310/pewdiepie-youtubers-sponsored-videos-ftc-warner-bros [https://perma.cc/FPN3-LRUL].} Of the influencers who were part of the promotion, only PewDiePie actually disclosed that the video was sponsored—doing so, however, “below the fold,” with the disclosure visible only after the viewer clicked “show more.”\footnote{See id.; PewDiePie, Shadow of Mordor - Gameplay - Part [One] (Gamescom Demo) Ultimate Orc Slaying!, YOUTUBE (Sept. 4, 2014), https://www.youtube.com/watch?v=g-wdRroa4ms [https://perma.cc/92FB-LQQ9] (indicating “[t]his video was sponsored by Warner Brother [sic]” only after the viewer clicks “show more”).} Deeming this insufficient disclosure, the FTC filed a complaint against Warner Brothers.\footnote{Complaint, In re Warner Bros. Home Entm’t, Inc., supra note 96. The YouTube influencers produced approximately thirty videos to promote the campaign, which “were viewed over 5.5 million times by consumers, and were publicly available for over a year” before the FTC filed a complaint. Id. at 3.}

The FTC noted that the videos were especially deceptive because the lack of disclosure gave an impression that the reviews reflected the independent opinions of the influencers.\footnote{See id. at 3–4.}

A March 2015 Instagram influencer marketing campaign launched by Lord & Taylor also became the subject of an FTC complaint.\footnote{Complaint at 1, In re Lord & Taylor, LLC, No. C-4576 (F.T.C. May 20, 2016), FTC Matter/File No. 152-3181, https://www.ftc.gov/system/files/documents/cases/160523lordtaylorcmpt.pdf [https://perma.cc/3Z6X-Q35Y]. Over the course of one weekend, the “campaign reached 11.4 million individual Instagram users,” and generated upwards of 328,000 instances of user engagement (i.e., likes, comments, re-postings) with the Lord & Taylor Instagram handle. Id. at 2.} To promote a new women’s fashion collection, Lord & Taylor sent a dress—later known as the “Paisley Asymmetrical
Dress”—to fifty Instagram fashion influencers. Lord & Taylor paid the influencers between one thousand and four thousand dollars each to post a photo of themselves wearing the dress, styled in a manner of their choice, and tagged with the “@lordandtaylor” Instagram handle and “#DesignLab” hashtag. Additionally, Lord & Taylor preapproved the posts to ensure they were properly tagged, and made “stylistic edits” as desired to the influencers’ captions. The campaign was extremely effective—“[t]he posts reached more than [eleven] million Instagram users and the dress

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106 Id. at 2.


109 See Complaint at 2, In re Lord & Taylor, LLC, supra note 105.
quickly sold out.”

However, none of the influencers disclosed that Lord & Taylor had compensated them for the post. In their subsequent complaint, the FTC alleged that, by allowing the influencers to post their photos wearing the dress without disclosing that they had received compensation, Lord & Taylor had engaged in deceptive marketing practices. Without including proper disclosures, the FTC reasoned, the posts gave consumers the impression that they “reflected the independent statements of impartial fashion influencers.”

In 2017, the FTC settled its first-ever complaint against individual social media influencers. Trevor “TmarTn” Martin and Thomas “Syndicate” Cassell, two influencers who each have a large following on YouTube, used social media to promote CSGO Lotto, a website offering consumers the opportunity to gamble using a virtual currency. Martin and Cassell posted

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110 Ad or Not? That Paisley Asymmetrical Dress on Instagram, supra note 108.
111 Complaint at 2, In re Lord & Taylor, LLC, supra note 105.
112 See id. at 3.
113 See id.
114 See CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers, supra note 81.
betting videos, where they would record themselves gambling and winning large payouts using the service. However, Martin and Cassell failed to disclose that they were actually the president and vice president, respectively, of CSGO Lotto. Accordingly, the FTC alleged violations of section 5(a) of the FTCA, finding that Martin and Cassell had deliberately misrepresented their relationship with CSGO Lotto through these videos.

As part of the settlement in each of these cases, the FTC required the respondent to refrain from engaging in similar practices in the future. Additionally, the respondent was required to participate in a monitoring program, allowing the FTC to review
their marketing materials to ensure compliance with endorsement guidelines.122

4. What Constitutes Proper Disclosure?

Section 255.5 of the FTC’s endorsement guideline regulations, as codified in the Code of Federal Regulations, says that proper disclosure of a material connection between an endorser and an advertiser must be clear and conspicuous.123 The endorser must let consumers know that either: (a) the endorser was compensated or promised compensation in exchange for their endorsement, or (b) the endorser knew or had reason to know that they would receive a benefit in exchange for their favorable endorsement.124 Whether disclosure is appropriate or sufficient largely depends on the medium of the endorsement.125 To an extent, influencers and advertisers have flexibility to use their discretion.126 As long as the disclosure conveys the necessary information to consumers, there

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122 Decision and Order at 8, In re CSGOLotto, supra note 121; Decision and Order at 5, In re Warner Bros. Home Entm’t, Inc., supra note 121; Decision and Order at 5, In re Lord & Taylor, LLC, supra note 121; Decision and Order at 5, In re Machinima, Inc., supra note 121; Decision and Order at 5, In re Deutsch LA, Inc., supra note 121.
124 See id.
125 See id. For example, on Twitter, due to its character limit, disclosure may take the form of hashtags. The FTC’s Endorsement Guides: What People Are Asking, supra note 53 (“Starting a tweet with ‘Ad:’ or ‘#ad’”—which takes only [three] characters—would likely be effective.”). On Instagram, disclosure may take the form of hashtags or other explanatory language, but should appear towards the beginning of the caption so the user can view it without clicking “more.” See id. When people view Instagram streams on most smartphones, descriptions more than four lines long are truncated, with only the first three lines displayed. To see the rest, you have to click “more.” If an Instagram post makes an endorsement through the picture or the first three lines of the description, any required disclosure should be presented without having to click “more.” Id. On YouTube, disclosure may be included in the caption text before the viewer clicks “more”; however, the FTC has stated that ideally, a disclosure statement should be part of the video itself, because the videos are the main content featured on YouTube and it is possible that a viewer may not read the video’s caption. See id. (“[C]onsumers can easily miss disclosures in the video description. Many people might watch the video without even seeing the description page, and those who do might not read the disclosure. The disclosure has the most chance of being clear and prominent if it’s included in the video itself. That’s not to say that you couldn’t have disclosures in both the video and the description.”).
126 See 16 C.F.R. § 255.5.
is no specifically mandated language or typeface required for the disclosure.\textsuperscript{127}

Over the years, the FTC has informally narrowed these guidelines. In September 2017, the FTC announced that it had made updates to its endorsement guidelines FAQ, titled “What People Are Asking” (“the FAQ”).\textsuperscript{128} Last updated in 2015, the FAQ clarifies the FTC’s expectations regarding what constitutes “clear and conspicuous” disclosure of material connections.\textsuperscript{129} The updated September 2017 FAQ also broadens the list of situations where disclosure is needed. For example, the FTC notes that an endorsement can be “aspirational”—in other words, influencers must disclose that they were paid even if they have not used or tried the product they are writing about.\textsuperscript{130}

Acknowledging the increased use of social media as an influencer marketing tool, the FTC offers some specific recommendations regarding hashtags and the word choices used to make material connection disclosures.\textsuperscript{131} Hashtags are a symbolic and common method of disclosure, widely used in influencer marketing on both Twitter and Instagram, and the FTC’s guidance in the FAQ reflects a variety of commonly used tags.\textsuperscript{132} For example, the FTC notes that “#Thankyou” or “Thank you [Company] for the product”\textsuperscript{133} are ambiguous and insufficient to explain the relationship between the author and the company.\textsuperscript{134} “[Brand] asked me to try their product”\textsuperscript{135} is also ambiguous,

\begin{footnotesize}
\begin{enumerate}
\item[	extsuperscript{128}] See The FTC’s Endorsement Guides: What People Are Asking, supra note 53.
\item[	extsuperscript{129}] See id.
\item[	extsuperscript{130}] See id.
\item[	extsuperscript{131}] See infra text accompanying notes 132–39.
\item[	extsuperscript{132}] See The FTC’s Endorsement Guides: What People Are Asking, supra note 53.
\item[	extsuperscript{133}] See, e.g., Letter from Mary K. Engle to Jennifer Lopez, supra note 65 (showing a since-removed Instagram post by Jennifer Lopez, captioned “#TBT to my Birthday weekend in Vegas!! Thanks again @vodkabeluga #vodkabeluga”); Kendall Jenner (@kendalljenner), INSTAGRAM (May 20, 2017), https://www.instagram.com/p/BUU7P7zDvOS/ [https://perma.cc/4LUS-A3RP] (“[T]hank you @chopard @jenatkinhair @lmaryphillips @marnixmarni @giambattistavalliparis ❤️”).
\item[	extsuperscript{134}] See The FTC’s Endorsement Guides: What People Are Asking, supra note 53.
\item[	extsuperscript{135}] See, e.g., Valentina Vignali (@valentinavignali), Instagram (Nov. 6, 2016), https://www.instagram.com/p/BMeihtVhO4S/ [https://perma.cc/84HK-8KCB] (“I’m trying the new chewable @hairburst hearts! Simply chew two hearts per day to give your
\end{enumerate}
\end{footnotesize}
because without context, it is unclear whether the influencer received the merchandise for free.\textsuperscript{136} “[#Brand]ad” is also considered unclear, because in most cases it is difficult to read and therefore, difficult to understand.\textsuperscript{137} In contrast, “Thank you [Company] for the free product” is clearer because it highlights the compensated nature of the post vis-à-vis the receipt of the free item.\textsuperscript{138} Using “#ad” on its own is also sufficient, so long as it appears towards the beginning of the description text, and is uncluttered by other text, links, and hashtags.\textsuperscript{139}

For influencers who are brand ambassadors or company employees, the FTC offers slightly different recommendations regarding hashtags. While “#ambassador” or “#employee” are ambiguous and too general, “[#Brand]ambassador” or “[#Brand]employee” are clearer because it specifies the material connection and makes it easier for consumers to understand.\textsuperscript{140} The FTC also suggests incorporating “My employer’s product . . .” or “My company’s product . . .” into the description as the clearest way to explain an endorsement on behalf of an employer, because it discloses the relationship even if the average consumer would not know that the employer produces a particular product or brand.\textsuperscript{141}

The location of a disclosure within a post is also important for influencers to consider. For Instagram, the disclosure should

\begin{footnotesize}
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\item[\textsuperscript{136}] See The FTC’s Endorsement Guides: What People Are Asking, supra note 53.
\item[\textsuperscript{137}] See id.
\item[\textsuperscript{138}] Id. (emphasis added).
\item[\textsuperscript{139}] See id.
\item[\textsuperscript{140}] A 2017 Instagram post by Kendall Jenner is a good example of how this type of disclosure can be used effectively. See Kendall Jenner (@kendalljenner), INSTAGRAM (May 31, 2017), https://www.instagram.com/p/BUw05XIDCzT/ [https://perma.cc/E2ZB-35FH] (caption reading “officially joining the adidas fam! @adidasoriginals #adidasAmbassador #adidasOriginals” accompanied by a photo of Jenner wearing an Adidas tracksuit, sitting in a golf cart in front of a wall painted with the Adidas logo and the phrase “WELCOME TO THE FAMILY”).
\item[\textsuperscript{141}] See The FTC’s Endorsement Guides: What People Are Asking, supra note 53; see also note 126.
\end{itemize}
\end{footnotesize}
appear within the first three lines of the description; it should not require clicking “more” to see the disclosure. Disclosure does not have to be in the very beginning, but putting it in the middle or at the end might make it less clear. The FTC also mentions that using a built-in disclosure tool provided by the social media platform is not necessarily sufficient disclosure. The burden of disclosing is on the influencer and the brand, not the platform. Rather, the FTC will still evaluate the disclosure based on several factors, including: the placement of the disclosure, whether the text is in “a simple-to-read font with a contrasting background,” and whether the wording is easily “understandable to the ordinary reader.”

The updated FAQ also clarifies some avenues by which reviewers might have previously tried to evade disclosure requirements. Disclosure is required even if the reviewer posts on a different platform than directed—for example, if the company asks the reviewer to post on Twitter, disclosure is still required even if the reviewer later posts on Instagram too. Additionally, “likes” on social media could be subject to FTC action depending on the overall impression given to consumers.

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142 See The FTC’s Endorsement Guides: What People Are Asking, supra note 53.
143 See id.
144 See id. The FTC’s guidance in this regard is particularly interesting, since it comes on the heels of Instagram’s decision to add a “paid partnership with” sub-header on sponsored posts, specifically to help influencers comply with the FTC disclosure guidelines. See Todd Spangler, Instagram Will Add ‘Paid Partnership’ Tag to Sponsored Posts, After FTC’s Warnings to Celebrity Users, VARIETY (June 14, 2017, 3:28 PM), http://variety.com/2017/digital/news/instagram-paid-partnership-tag-sponsored-ftc-celebrity-warning-1202466310/ [https://perma.cc/HHD6-MHSH].
145 See The FTC’s Endorsement Guides: What People Are Asking, supra note 53.
146 See id.
147 See id.
148 See id.
149 See id. Clicking the “like” button, a functionality popularized on Facebook and Instagram, is a way that users can show their reaction to another user’s post. See How Do I Like a Photo or Video?, INSTAGRAM HELP CTR., https://help.instagram.com/459307087443937?helpref=uf_permalink [https://perma.cc/TUNY-466V] (last visited Feb. 11, 2018); What Does It Mean to “Like” Something?, FACEBOOK HELP CTR., https://www.facebook.com/help/110920455663362?helpref=uf_permalink [https://perma.cc/2XQ2-CQM7] (last visited Feb. 11, 2018). As some have observed, clicking “like” can communicate a variety of messages, intentionally or unintentionally. See Nicolas DiDomizio, Here’s What a ‘Like’ Really Means on Every Social Media
acknowledges that there is no avenue for disclosure by merely liking a post, it warns that advertisers should not encourage endorsements using this feature, presumably in situations where they are attempting to skirt the guidelines.\footnote{See The FTC’s Endorsement Guides: What People Are Asking, supra note 53.}

It might be argued that the FTC’s gradual narrowing of the once overly generalized disclosure mandate has caused more confusion than it has alleviated. At the same time, social media and other methods of communication continue to change. In September 2016, influencer marketing company IZEA petitioned the Unicode Consortium\footnote{The Unicode Consortium is a non-profit corporation. See The Unicode Consortium, UNICODE, http://unicode.org/consortium/consort.html (last visited Feb. 14, 2017). The Unicode Consortium’s main interest is in developing, maintaining, and promoting the Unicode Standard, a system of text representation used by virtually all modern software products and operating systems. See infra notes 254–57 and accompanying text.} to create a new emoji.\footnote{See IZEA Petitions the Unicode Consortium to Create #AD Emoji, IZEA (Sept. 26, 2016), https://izea.com/2016/09/26/emoji/ [https://perma.cc/TL4R-ZSN6].} The proposed design would include “#AD” on a styled, colored background. Examples include , , , and .\footnote{See id.} The emoji would serve a practical purpose—to allow influencers to clearly and conspicuously disclose when a post has been sponsored, or when they have other material connections to the promoted brand.\footnote{See id.}

\textbf{B. What Is Influencer Marketing, and Why Does It Matter?}

Influencer marketing “leverages the power of a social media ‘influencer’ . . . to expose a brand or product to the influencer’s...
large follower base." An influencer is usually an Instagrammer, YouTuber, blogger, or “vlogger” with “digital clout”: In other words, an individual using a media platform who is considered a thought leader, and whose content effectively influences the opinions (and often, purchasing decisions) of their followers. Influencers often have an interest in a particular niche or topic, and create content based on their interest in that topic. Some popular topics include travel, fashion, beauty, and tech.

Many influencers have strong, loyal relationships with their followers, who value their recommendations based on a perceived level of authenticity, knowledge of similar products, and

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157 See Wheeler, supra note 32.


159 See id.

expertise. These relationships ensure that audiences are more likely to pay attention to an endorsed brand or product—and more importantly, that they are more likely to take action prompted by the influencer’s recommendation and endorsement. This also makes working with an influencer particularly valuable for a brand looking to conduct a targeted marketing campaign.

Ideally, the influencer has amassed a following in a certain demographic or with a common interest. Brands and companies who work with influencers are able to leverage that powerful combination of loyalty and commonality to market a product to a receptive, targeted audience.

higher in categories “considered to have the highest correlation to influencing purchases among teens.” See id.


See Why Influencer Marketing Works, Section of What Is Influencer Marketing?, supra note 155.


See id.

Additionally, influencers can also be celebrities in the more traditional sense, who amass large followings via their fame, status in popular culture, or perceived cult of personality. Followers are often drawn to celebrities because they listen to their music, enjoy their movies, or find them attractive or meaningful in some other way. For example, singer Selena Gomez (“Gomez”) is currently the most followed person on Instagram, with over one hundred and thirty million followers. Based on metrics including user engagement, the size of her following, and her frequency of posting, a 2016 calculation estimated that a single promotional post by Gomez is worth approximately $550,000. The Kardashian/Jenner family also falls squarely into this category, and


166 See generally Leah W. Feinman, Note, Celebrity Endorsements in Non-Traditional Advertising: How the FTC Regulations Fail to Keep Up with the Kardashians, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 97 (2011) (detailing how the Kardashian family of celebrities are used for endorsements).


169 User engagement looks at how users interact with content by analyzing various factors. See Mallory Moyer, What Is User Engagement?, MNI TARGETED MEDIA INC. (2017), https://www.mni.com/what-is-user-engagement-and-what-metrics-measure-it.html [https://perma.cc/ZQC6-RWXW]. In online marketing, some of these factors can include time spent on a website, the number of clicks as the user browses through content, the extent to which users are commenting or otherwise interacting socially with the content, and how far down a user scrolls on a page. See id.

170 See Heine, supra note 168; see also Asano, supra note 33. The valuation is based on an algorithmic calculation by D’Marie, an analytic company that tracks social media reach. See FAQs, D’MARIE, http://www.dmariearchive.com/FAQs [https://perma.cc/UD9K-UQNW] (last visited Dec. 30, 2017); Heine, supra note 168. D’Marie’s algorithm uses “[fifty-six metrics,] including followers, post frequency, engagement, quality of post, click-thru and potential to create sales conversions from . . . social content,” to evaluate the social media reach of influencers and brands. Heine, supra note 168.
is well known for using their massive social media following to promote a wide variety of products and services.\textsuperscript{171}

As an industry, influencer marketing is rapidly growing, and now represents billions of dollars in advertising revenue.\textsuperscript{172} With 48% of U.S. marketers reporting plans to increase annual spend on influencer marketing, this rapid growth trend is expected to

\textsuperscript{171} The Kardashian/Jenner clan is known for their inconsistent (at best) habits regarding disclosure of material connections under FTC guidelines. See Kardashian/Jenner Database, TRUTH IN ADVERT., https://www.truthinadvertising.org/kardashianjenner-database [https://perma.cc/94HL-43KJ] (last visited Nov. 21, 2017) (cataloguing over three hundred instances where members of the Kardashian/Jenner family posted content promoting various companies and brands, without disclosing their relationship with the companies). For example, in posts where disclosure is included, the placement is often incorrect. See, e.g., Kendall Jenner (@kendalljenner), INSTAGRAM (Nov. 22, 2017), https://www.instagram.com/p/Bb0CsOjZIS/ [https://perma.cc/JZ3Q-APRK] (including “#ad” but at the very end of the caption); Kendall Jenner (@kendalljenner), INSTAGRAM (Dec. 22, 2016), https://www.instagram.com/p/BOVZOXwjehh/ [https://perma.cc/4RXF-BD25] (including “#ad” but at the very end of the caption); Kylie Jenner (@kyliejenner), INSTAGRAM (Dec. 7, 2016), https://www.instagram.com/p/BNU2s05BPZH/ [https://perma.cc/V7BX-KEDQ] (including “#ad” but buried at the end of the caption, in between other hashtags); Kim Kardashian (@kimkardashian), INSTAGRAM (Mar. 27, 2017), https://www.instagram.com/p/BSJxYFylq29/ [https://perma.cc/YMSY-GAKE] (including “#ad” but at the very end of the caption); Kourtney Kardashian (@kourtneykardash), INSTAGRAM (July 16, 2017), https://www.instagram.com/p/BWnZ85uDJLw/ [https://perma.cc/M975-K8FK] (including “#ad” but buried in the middle of the caption). There is also evidence that some posts have been edited later to comply with FTC disclosure requirements. See, e.g., Comparison-Kim-and-Jet-Lux-Life-[One], TRUTH IN ADVERT., https://www.truthinadvertising.org/wp-content/uploads/2017/09/Comparison-Kim-and-Jet-Lux-Life-1.jpg [https://perma.cc/UU5L-W5CD] (last visited Jan. 7, 2018) (showing a screenshot of an original version of a post by Kim Kardashian, where “#ad” was absent, compared with a later version where “#ad” was added, but to the middle of the caption); Kim Kardashian (@kimkardashian), INSTAGRAM (Feb. 13, 2017), https://www.instagram.com/p/BQefT1hFwsL/ [https://perma.cc/W872-JZCU] (showing “#ad” at the very beginning of the post’s caption, edited from prior versions); Khloe-Christofle-[One], TRUTH IN ADVERT., https://www.truthinadvertising.org/wp-content/uploads/2017/09/Khloe-Christofle-1.png [https://perma.cc/JR4E-JF2T] (last visited Jan. 7, 2017) (showing a screenshot of an original version of a post by Khloe Kardashian, where the ambiguous “#Partner” was used to give disclosure); Khloe Kardashian (@khloekardashian), INSTAGRAM (Nov. 11, 2016), https://www.instagram.com/p/BMshqMB7y/ [https://perma.cc/D5LK-NN2A] (showing “#Ad” at the very beginning of the post’s caption, edited from a prior version that led with the ambiguous “#Partner”).

Moreover, influencer marketing produces results. A 2015 market study by Schlesinger Associates for Augure found that “84% of marketing and communications professionals worldwide expected to launch” an influencer marketing campaign within the coming year—and of those who had already done so, 81% found the use effective. Instagram is an especially powerful influencer marketing platform, well-suited due to its image-heavy interface. Instagram influencers reach a potentially gigantic audience; as of September 2017, the platform boasts over 800 million users, with 500 million of them using the platform daily. On Instagram alone, worldwide influencer marketing revenues were estimated to have exceeded $570 million in 2016.

Influencer marketing is powerful because it surmounts some of the obstacles faced by traditional advertising. In 2016, it was estimated that over 69.8 million Americans used an ad blocker on their computer’s browser—a number that was expected to increase by 24% in 2017. Additionally, as of October 2016, two-thirds of millennials—a demographic coveted by marketers—
use an ad blocker on their desktop or mobile device.\footnote{Most Millennials Have Installed Ad Blockers, eMARKETER (Oct. 13, 2016), https://www.emarketer.com/Article/Most-Millennials-Have-Installed-Ad-Blockers/1014592 [https://perma.cc/GC3D-TYSL].} By directly engaging with targeted groups of consumers, influencer marketing allows a brand to tell its story through an influencer’s content, and avoid being cancelled out by ad blockers.\footnote{See Erin Nederbo, Attacking Ad Blockers with Social Media, SPROUT SOCIAL (Apr. 7, 2016), https://sproutsocial.com/insights/attacking-ad-blockers/ [https://perma.cc/R7GB-HY8B]. The rise of these alternative advertising strategies has naturally raised concerns that, eventually, advertisements and sponsored content will become indistinguishable from genuine content—a merging that arguably has already happened. See generally David A. Hyman et al., Going Native: Can Consumers Recognize Native Advertising? Does It Matter?, 19 YALE J. L. & TECH. 77 (2017); Andrew Griffin, Here’s Why You Should Delete AdBlock Right Now, INDEPENDENT (May 20, 2015, 2:58 PM), http://www.independent.co.uk/voices/comment/heres-why-you-should-delete-adblock-right-now-10264083.html [https://perma.cc/TF8P-83LZ] (arguing that the rise of ad blockers will deteriorate revenue streams, and eventually the Internet, because “ads [will] have to be so indistinguishable from proper, genuine content that ad blocking technology can’t tell the difference. The problem is that for ads to get that subtle, they’d no longer be distinguishable by humans, either. And if this happens, then nobody will read anything on a site they know anybody can pay to write stories in.”); Kevin O’Keeffe, John Oliver Takes on Native Advertising, Journalism’s Raisin Cookie, ATLANTIC (Aug. 4, 2014), https://www.theatlantic.com/entertainment/archive/2014/08/john-oliver-takes-on-native-advertising-journalisms-raisin-cookie/375513/ [https://perma.cc/5EUC-H2HY].}

Finally, influencer marketing breaks through the wall of skepticism\footnote{See Pauline de Pechpeyrou & Philippe Odou, Consumer Skepticism and Promotion Effectiveness, RECHERCHE ET APPLICATIONS EN MARKETING, June 2012, at 1, 3 (“Studies in the field of advertising have . . . highlighted a ‘skepticism’ variable, a product of the consumer’s experience and education. As they tend to be wary of advertising claims, skeptical consumers have a more unfavored attitude towards advertising messages and are less influenced by them, even avoiding them completely.” (citations omitted)).} that consumers typically have when viewing traditional advertisements. Influencer marketing accomplishes this by masquerading sponsored content as an influencer’s authentic content. Studies have shown that “84% of consumers claim to trust peer recommendations, compared to only 62% claiming that they trust traditional advertisements.”\footnote{Mobile Growth Agency, Don’t Get Fyred! Balancing the Risks and Rewards of Influencer Campaigns, MEDIUM (July 21, 2017), https://medium.com/@TMGA/dont-get-fyred-balancing-the-risks-and-rewards-of-influencer-campaigns-8958e4b12bb7 [https://perma.cc/U9YU-WGP6].} The high level of trust that consumers place in social media endorsements cannot be taken lightly—it can have potentially disastrous consequences, especially
where the object of an endorsement is inaccurate or even fraudulent.\textsuperscript{186}

There are polarizing views in the influencer and advertising communities regarding the FTC’s disclosure requirements.\textsuperscript{187} A faction of influencers feel that disclosure is important as a matter of honesty and transparency with their followers.\textsuperscript{188} Other influencers oppose disclosure—especially when a post reflects their actual opinions about a brand or product—because of the negative feedback it can generate with followers.\textsuperscript{189} There is also the observation that disclosure can lead to lower levels of user


\textsuperscript{188} See, e.g., Alex Ditty, \textit{How Influencers Think About FTC Disclosures}, SEEN (Oct. 31, 2017, 10:30 AM), http://blog.seenmoment.com/how-influencers-think-about-ftc-disclosures [https://perma.cc/3YSC-2CK4] (“[Instagram influencer Elise] Swopes is all for FTC enforcement on the brands and individuals who aren’t playing by those rules because it puts everyone on the same playing field. ‘It definitely puts a bad taste in your mouth when someone has millions of followers and they’re not [including the disclosures] and tricking everybody . . . .’” (second alteration in original) (quoting Elise Swopes)); Hazel Sheffield, \textit{How Instagram Became One Giant Ad}, VICE (Nov. 10, 2016, 7:00 PM), https://www.vice.com/en_nz/article/qbn33w/why-instagram-is-making-you-poor [https://perma.cc/UL4J-7CTS] (“I will never lie about when I’ve been paid to create content, because that would imply shame and I’m really not ashamed to admit that I’m paid to work, [Pandora Sykes, fashion features editor for the Sunday Times,] says.”); Influencers Sound Off on Why They Do Not Want to Disclose Sponsored Posts, supra note 187 (“As [fashion influencer] BryanBoy, one of the influencers that has been vocal about his practice of disclosing everything from sponsored posts to gifts from brands [reports,] ‘My readers respect me more by when disclosing I’m getting a check.’ His response to bloggers that do not like disclosing sponsored posts or free gifts from brands? ‘If you don’t want to feel icky then don’t get paid, plain and simple.’”).

\textsuperscript{189} See Kali Hays, \textit{Influencers Still Can’t Get Behind Disclosing Paid Posts}, WWD (Oct. 12, 2017), http://wwd.com/business-news/media/influencers-the-12ish-style-scout-sixteen-hummingbird-high-still-cant-get-behind-disclosing-paid-posts-11026614/ [https://perma.cc/Z73Z-WLJC] (“I hate telling people things are sponsored, especially when I really love the brand,” [Katie] Sturino[, founder of blog \textit{The 12ish Style} and the host of \textit{Project Runway} spin-off web series \textit{Behind the Seams}.,] said to an audience of brand representatives and other influencer types that groaned and nodded their assent. “Immediately it just feels like, “Ugh, she’s just getting a paycheck.” Everyone tries to work with brands that they feel good about.”’).
engagement. This may explain why three-in-ten influencers reported having been asked by a client or marketer not to disclose the sponsored nature of a post.

C. The Fyre Festival: A Case for Clear and Conspicuous Disclosure

In a slide deck designed for presentation to potential investors, Fyre Media described their premier event, the Fyre Festival (“the Festival”), as the “cultural experience of the decade.” Company co-founders Billy McFarland and Jeffrey Atkins (known as “Ja Rule”) pitched the Fyre Festival to investors as a two-weekend music festival to be attended by approximately forty thousand people. The Festival was to be held in Great Exuma, a remote island in the Bahamas advertised as once having been owned by Pablo Escobar. Musical performances were slated to include Major Lazer, Migos, and Blink-182, among others. The

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190 See id. (“Michelle Lopez, who has 122,000 Instagram followers and founded food blog Hummingbird High, admitted that she’s seen backlash to sponsored posts. ‘If your voice gets too erased, the audience can tell and the content tanks,’ Lopez said.”); Sheffield, supra note 188 (“Influencers report lower levels of engagement for posts marked #spon or #ad because they destroy that sense of being spoken to by someone the user trusts. Would India[, an unspecified writer for a women’s lifestyle website,] have bought the dress if she’d seen it in a sponsored post? ‘Probably not. It would have put me off.’”).

191 See McCarthy, supra note 15.


193 See Bilton, supra note 192.


event was marketed as a “journey and a destination, a place where music, culture, and food combine, igniting our curiosities and our passions over two weekends on one of the most sought after and secluded islands in the world.” There was even the promise of a “real-life treasure hunt,” offering the winner jewelry, watches, and oceanfront property valued at up to one million dollars. The advertising featured a bevy of supermodels clad in bathing suits, dancing along picturesque beaches and sunbathing on boats. Tickets were priced in the thousands of dollars, with some paying up to six figures for VIP packages with the promise of ultra-luxurious accommodations.

To raise the event’s profile, Fyre Media enlisted the help of over four hundred public figures, comprising a list of supermodels, DJs, athletes, and reality television stars. In exchange for tiers of compensation ranging into the hundreds of thousands of dollars, these influencers—referred to as “Fyre Starters”—engaged in a


200 Gaca, supra note 196.

201 See Fyre Festival, supra note 194.

202 See Brooks, supra note 198; see also Joe Coscarelli et al., In Wreckage of the Fyre Festival, Fury, Lawsuits and an Inquiry, N.Y. TIMES (May 21, 2017), https://www.nytimes.com/2017/05/21/arts/music/fyre-festival-billy-mcfarland-ja-rule-criminal-investigation.html [https://perma.cc/AE5X-QTMT] (“Ticket packages included the [four hundred thousand dollar] ‘Artist’s Palace,’ with four beds, eight V.I.P. tickets and dinner with one festival performer.”).

coordinated marketing campaign via social media.\textsuperscript{204} On December 12, 2016, the Fyre Starters posted a mysterious, nondescript orange square on their social media accounts.\textsuperscript{205} Additional posts featured glossy photos of Bella Hadid, Emily Ratajkowski, Rose Bertram, and other supermodels frolicking on a beach.\textsuperscript{206} The descriptive text accompanying many of the Fyre Starters’ posts gave the impression that this was to be a star-studded event, the veritable Coachella\textsuperscript{207} of the Bahamas.\textsuperscript{208}

\textsuperscript{204} See Bilton, supra note 192; Brooks, supra note 198.


\textsuperscript{206} Kristina Rodulfo, \textit{How Bella Hadid, Emily Ratajkowski, and More Models Vacation in the Bahamas Together}, \textit{ELLE} (Dec. 12, 2016), http://www.elle.com/culture/celebrities/news/41378/bella-hadid-emily-ratajkowski-models-bahamas-trip/ [https://perma.cc/P8UM-ASYX]. Fyre Media used images from the photoshoot in their promotional YouTube video to draw people to the Festival, but also ostensibly to give an impression that going to the Festival would allow attendees to hang out with and vacation like supermodels. \textit{See Fyre Festival, supra note 194.} Photos from the models’ weekend in the Bahamas for the photo shoot were widely posted on their individual Instagram accounts, giving Fyre Media yet another bite at the influencer marketing apple. \textit{See, e.g.,} Alessandra Ambrosio (@alessandraambrosio), \textit{Instagram} (Dec. 12, 2016), https://www.instagram.com/p/BN69NzKh2KO/ [https://perma.cc/4NT7-P8PB]; Hailey Baldwin (@haileybaldwin), \textit{Instagram} (Dec. 12, 2016), https://www.instagram.com/p/BN7PJXxhy57/ [https://perma.cc/WQ4M-8BX6]; Rose Bertram (@rose_bertram), \textit{Instagram} (Dec. 11, 2016), https://www.instagram.com/p/BN5FCAOgEae/ [https://perma.cc/4ZL9-35W3]; Bella Hadid (@bellahadid), \textit{Instagram} (Dec. 11, 2016), https://www.instagram.com/p/BN44acmA638/ [https://perma.cc/KQ96-87X3]; Emily Ratajkowski (@emrata), \textit{Instagram} (Dec. 11, 2016), https://www.instagram.com/p/BN4ihFKDH_g/ [https://perma.cc/A66S-DMGS]. All of this goes to the heart of why the Festival’s marketing campaign was so effective—because consumers targeted by influencer marketing are so drawn to emulating the appealing lifestyle that influencers post about in their social media feeds, they are more likely to make purchasing decisions based on their suggestions. \textit{See \textbf{What Is Influencer Marketing?}, supra note 155.}


\textsuperscript{208} \textit{See, e.g.,} Rose Bertram (@rose_bertram), \textit{Instagram} (Dec. 12, 2016), https://www.instagram.com/p/BN7uhYSAQEz/ [https://perma.cc/57EV-PLSB] (“Excited to announce #fyrefestival Join me there! @fyrefestival 🐢(ARG: www.fyrefestival.com].”). Many Fyre Starters quickly deleted their posts when news of
On April 27, 2017, attendees who arrived in Exuma to attend the Fyre Festival were met with horrifying conditions, later described as resembling a page from The Hunger Games or Lord of the Flies. The festival site allegedly lacked the infrastructure necessary to support an event of Fyre Festival’s size; certain parts of the site allegedly lacked basic necessities including running water. Instead of luxury accommodations, attendees were allegedly presented with empty, unfurnished tents bearing strong resemblance to those used following natural disasters. Meanwhile, attendees who were stranded on the island began signaling for help via social media. On Reddit, a photo of a “sad cheese sandwich” served in a Styrofoam box seemed emblematic of the bait-and-switch felt by festival attendees, and quickly went viral on other social media platforms. Another photo of the “Concierge” showed a shoddily constructed wooden booth, structured similar to a childhood lemonade stand, with no festival conditions began to surface. See Edgar Alvarez, Instagram Influencers Fanned the Flames of Fyre Festival Hype, ENGADGET (May 10, 2017), https://www.engadget.com/2017/05/10/fyre-festival-instagram-influencers-kendall-jenner/ [https://perma.cc/4NJY-WNEW] (“Kendall Jenner, for example, reportedly received $250,000 from Fyre Festival organizers to endorse the event on her account, although she never disclosed in her now-deleted post that it was an advertisement. Neither did her fellow influencers.”). 209 Fyre Festival Is Facing [Nine] Lawsuits, FBI Investigation, Organizer Arrested, FASHION L. (July 3, 2017), http://www.thefashionlaw.com/home/a-list-of-all-of-the-fyre-festival-lawsuits-that-have-been-filed-so-far [https://perma.cc/E2YF-26Y7]. See generally LORD OF THE FLIES (Metro Goldwyn Mayer 1990); THE HUNGER GAMES (Lionsgate 2012). Both Lord of the Flies and The Hunger Games depict survival-of-the-fittest scenarios under dangerous conditions. See Lord of the Flies (1990), IMDB, http://www.imdb.com/title/tt0100054/ [https://perma.cc/NJ23-2AKQ] (last visited Mar. 19, 2018); The Hunger Games (2012), IMDB, http://www.imdb.com/title/tt1392170/ [https://perma.cc/VRE3-8LK2] (last visited Mar. 19, 2018).


staff in sight. There were no musical performances to speak of; some had already cancelled as information regarding the conditions on Exuma began to surface. By all accounts, the event was a spectacular failure.

Numerous class-action lawsuits followed almost immediately, asserting claims for breach of contract, fraud, and negligent misrepresentation, among others. The failed festival also became the focus of a criminal investigation by the U.S. attorney’s office for the Southern District of New York and the FBI. In July 2017, McFarland was arrested on charges of wire fraud. McFarland subsequently plead guilty to both counts, admitting that he had defrauded investors and falsified financial documents to secure funding for the Fyre Festival.


214 See Brooks, supra note 198.


216 Fyre Festival is Facing [Nine Lawsuits], supra note 209.

217 See Coscarelli et al., supra note 202.


dollar forfeiture and is expected to face an approximately eight to ten year prison sentence.220

Beneath the colossal failure of the Fyre Festival is perhaps the ultimate example of influencer marketing at its most coordinated.221 It has been playfully noted that, while the rest of the event may have been a catastrophe, the influencer marketing campaign that promoted it was terrific, and even worth emulating.222 The Festival’s influencer marketing campaign set expectations sky high—many arrived at the Festival believing they would have an exclusive luxury experience, largely driven by images seen on YouTube and Instagram.223

In view of how powerful the influencer marketing campaign was, it was speculated whether the Fyre Starters might be held accountable via lawsuit.224 In a few of the class action complaints,

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221 See Burrough, supra note 205 (quoting an unnamed source: “[I]t was perfectly executed. It’s one of the greatest social-media campaigns I’ve ever seen. They got the most beautiful women in the world, with the largest social following. And then the photo shoot . . . . It was just incredible.”).
222 See Fanatics Media, No, the Fyre Festival Wasn’t the Fault of Influencer Marketing, YOUTUBE (May 7, 2017), https://www.youtube.com/watch?v=LNP1eBdPSw0 [https://perma.cc/QLB9-SBQJ] (“The one thing that worked was influencer marketing. Look what it did . . . . if you look at what these guys were able to do, if they don’t end up in prison, somebody should hire them to do their influencer marketing.”).
223 Eric Levenson & Deborah Bloom, Fyre Festival: When a [Twelve Thousand Dollar] Luxury Festival in Paradise Turns into Chaos, CNN (Apr. 29, 2017, 1:50 PM), http://www.cnn.com/2017/04/28/entertainment/fyre-festival-disaster-trnd/index.html [https://perma.cc/67U9-4X4A] (“If you turned up at the Fyre Festival wooed by its ads—and many, many fans did—you’d think you were in for a weekend of top-notch acts playing for your entertainment, as models in bikinis paraded around and private jets and yachts ferried you to and from the beautiful Caribbean paradise. Everything any good millennial needs for a strong Instagram post.”).
224 See Josh Dickey, ‘Social Influencers’ Who Hyped Fyre Festival Could Be the Next Legal Target, MASHABLE (May 13, 2017), http://mashable.com/2017/05/13/fyre-festival-social-influencers-lawsuit/#Arn_Sx4yDbkqM [https://perma.cc/2PDY-GKHF]. “Mark Geragos, the Los Angeles-based power attorney behind the leading class action suit against organizers of the infamous Fyre Festival, now says his firm is investigating whether social media ‘influencers’ who hyped the disastrous event could be dragged into the ever-expanding web of lawsuits.” Id.
the plaintiffs mention Fyre Media’s use of influencer marketing, and the disproportionate amount that Fyre Media spent to compensate the Fyre Starters. One specifically notes the failure on the part of nearly all of the Fyre Starters to properly disclose that they were compensated to post on social media about the event, though none of the complaints actually go so far as to name the influencers as defendants. Additionally, some have blasted the FTC’s failure to hold any of the influencers accountable. It is worth considering whether proper material connections disclosures might have affected the influencer marketing campaign, and the impact it clearly had on ticket sales.

II. THE DEVELOPMENT OF EMOJI

The Fyre Festival’s influencer marketing campaign highlights the importance of clear and conspicuous disclosure, and the need for streamlined, bold solutions to simplify disclosure methods. Though IZEA’s proposal has yet to gain traction, there are many reasons why using emoji could be a viable disclosure method. There are over six billion emoji sent every day. With an estimated ninety-two percent of people online using emoji—a third

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225 See Class Action Complaint at 5, Daly v. McFarland, No. 1:17-cv-03461 (S.D.N.Y. May 9, 2017) (“As part of Defendants’ marketing efforts, Defendants’ employed so-called online ‘influencers’—including Rose Bertram, Kendall Jenner, Bella Hadid, and Emily Ratajkowski—to use social media to generate ticket sales, and created extravagant websites and mock-ups of the luxurious villas in which attendees would be staying.”).

226 Burrough, supra note 205 (“Probably the largest outlay, a reported $250,000, went to the model and reality-television star Kendall Jenner, whom [Fyre Media CEO and co-founder Billy] McFarland had long admired.”).

227 Class Action Complaint at 5–6, Chinery v. Fyre Media, Inc., supra note 211.


229 See IZEA Petitions the Unicode Consortium to Create #AD Emoji, supra note 152.

of whom doing so daily—emoji have rapidly become a mainstay of communication in the digital age.232

This Part discusses the origin and development of emoji. Section II.A provides a brief history of emoji, and looks at the role of the Unicode Consortium in selecting and maintaining emoji. Section II.B discusses the requirements for proposing new emoji, as set forth by the Unicode Consortium. Finally, Section II.C looks at the evolving ways emoji are used to communicate.

A. A Brief History of Emoji, and the Unicode Consortium as Gatekeepers

Emoji were first created in the late 1990s by Shigetaku Kurita (“Kurita”), an engineer at NTT DoCoMo, a Japanese phone company.233 The name is a compound of the Japanese words “e,” meaning “picture”; “mo” meaning “writing”; and “ji” meaning “character.”234 The original emoji, a set of 176 black-and-white characters, were designed to be used in iMode, NTT DoCoMo’s first Internet service.235 Because the screens on cell phones in 1999 were not yet capable of displaying photos, the original emoji symbols were extremely simplified.236 Each twelve-pixel-by-twelve-pixel symbol corresponded to a unique two-byte code on the Shift-JIS encoding scheme,237 becoming part of the character

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232 See id.
235 See Somaiya, supra note 233.
236 Id.
237 Shift-JIS encoding is a character encoding system, originally developed for the Japanese language. See IBM-943 and IBM-932, IBM KNOWLEDGE CTR., https://www.ibm.com/support/knowledgcenter/en/ssw_aix_71/com.ibm.aix.nlsgrdf/ibm943_ibm932.htm [https://perma.cc/E3HV-5EBM] (“Each of the Japanese IBM® PC code sets are an encoding consisting of single-byte and multibyte coded characters. The encoding is based on the IBM PC code set and places the JIS characters in shifted positions. This is referred to as Shift-JIS or SJIS.”). Today, it has fallen largely out of use; as of April 2018, only 0.6% of websites use Shift-JIS encoding. See Historical Trends in
set that already came preloaded on all NTT DoCoMo phones.\textsuperscript{238} The designs drew inspiration from lots of graphic sources, including manga,\textsuperscript{239} kanji,\textsuperscript{240} and even the pictograms created to depict the various sporting events at the 1964 Olympic Games in Tokyo, Japan.\textsuperscript{241} The idea, Kurita said, was that these pictograms would allow users to avoid miscommunication via the sheer brevity of text messaging, by contextualizing a word or phrase with the inclusion of a symbol or tiny image.\textsuperscript{242}

By the early 2000s, emoji were becoming extremely popular among Japanese users, to the point where other Japanese cell phone carriers were interested in offering them to their customers.\textsuperscript{243} The other carriers, however, were inconsistent in assigning the same codes\textsuperscript{244} to particular characters—which meant that, in some cases, the sender might send one emoji, and the

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\textsuperscript{239} Manga refers to Japanese cartoons, comics, and animation. See \textit{A Short History of Japanese Manga}, \textsc{Widewalls} (Sept. 24, 2016), http://www.widewalls.ch/japanese-manga-comics-history/ [https://perma.cc/LDH4-YHLS]. They have a uniquely identifiable aesthetic and in recent years have become popular worldwide. See id.


\textsuperscript{241} See Somaiya, supra note 233.

\textsuperscript{242} See id.

\textsuperscript{243} See id.; Welcome to Macintosh: \textsuperset{[1]}{Will You Be My Emoji?}, Mark Bramhill (Aug. 18, 2017) (downloaded using Apple Podcasts) [hereinafter Will You Be My Emoji?].

\textsuperscript{244} Computers and other electronic devices can display sets of characters using systems of codes, called character encodings. See \textit{What Is Unicode?}, \textsc{Unicode}, http://www.unicode.org/standard/WhatIsUnicode.html [https://perma.cc/CY7G-TRZJ] (last visited Jan. 6, 2018). A character encoding system will assign a unique numeric code to each letter or symbol being displayed. See id. For computers to display different languages, the computer must support that language’s character encoding system—which becomes problematic where, for example, two different character encoding systems use the same numeric code for different characters, or alternatively, use different numbers for the same character. See id. The widespread adoption of Unicode, a character encoding system that supports most written languages worldwide, has largely addressed this issue. See id.
recipient would see a completely different one. The need for a standardized coding system for emoji became apparent, and in 2005 Japan’s cell phone carriers began mapping incoming signals to their own character sets, allowing cross-carrier messages between Japanese cell phones to result in the same emoji being received as the one originally sent.

Emoji remained exclusive to Japan until the late 2000s, when Google began talks to expand its free email service, Gmail, to Japan. At around the same time, Apple also expressed interest in adding emoji to the text messaging application for the iPhone. To facilitate the process, emoji were adopted into Unicode, a universal character encoding system used by most of the world’s software providers and widely considered the industry standard. Consequently, the Unicode Consortium—comprised of a group of individuals and member organizations consisting of tech companies, social media companies, academics, and even the governments of a few small countries—became the stewards of emoji. The Unicode Consortium’s Emoji Subcommittee (the “Emoji Subcommittee”) bears the responsibility for evaluating

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245 See Will You Be My Emoji?, supra note 243.
246 See Blagdon, supra note 238; see also Will You Be My Emoji?, supra note 243.
247 See Will You Be My Emoji?, supra note 243.
249 See Blagdon, supra note 238; see also Will You Be My Emoji?, supra note 243.
250 See The Unicode Consortium Members, UNICODE, http://www.unicode.org/consortium/members.html [https://perma.cc/434A-CVQK] (last visited Dec. 5, 2017). Member entities with full voting power include Adobe, Apple, Facebook, Google, Huawei Technologies, IBM, Microsoft, Netflix, Oracle, SAP, and the Sultanate of Oman’s Ministry of Aqwaf and Religious Affairs. See id. Institutional member entities, which receive a vote each in technical committees but no vote in board or full membership meetings, include the governments of Bangladesh, India, Tamil Nadu, and the University of California, Berkeley. See id.; see also Membership Levels and Fees, UNICODE, http://www.unicode.org/consortium/levels.html [https://perma.cc/AQH2-3FWZ] (last visited Dec. 30, 2017). Finally, Monotype Imaging and Emojipedia are supporting members, receiving half a vote each in technical committees and no vote in board or full membership meetings. See Membership Levels and Fees, supra; The Unicode Consortium Members, supra.
251 See Unicode® Technical Standard #51: Unicode Emoji, supra note 234.
proposals for new emoji and deciding whether new ones should be adopted.252

While emoji are incredibly popular, they comprise just one part of the Unicode Consortium’s mission.253 The Unicode Consortium is a non-profit corporation that focuses chiefly on software internalization standards and data.254 The organization was founded in 1988 by software engineers Joe Becker of Xerox Corporation, Lee Collins who was then with Xerox, and Mark Davis, then of Apple Corporation, and currently, the sitting President of Unicode and Co-Chair of the Emoji Subcommittee.255 Its main interest is in developing, maintaining, and promoting the Unicode Standard, a system of text representation in virtually all modern software products and operating systems.256 Unicode accomplishes this Herculean task by analyzing languages—even obscure and infrequently used ones, like medieval Cornish—and applying their coding system to make them available on devices around the world.257 While the idea of standardizing emoji falls readily within Unicode’s purview, the ubiquity of emoji has shined a bright spotlight on an organization that has previously operated with little attention, fanfare, or accountability.

254 See The Unicode Consortium, supra note 151.
256 See The Unicode Consortium, supra note 151.
B. Procedures for Proposing the Addition of New Emoji

Emoji as we know them today have evolved considerably from Shigetaku Kurita’s original set. To account for the many ways people have sought to supplement textual communication, over the years, new emoji have been added to the library. Version 11.0 includes over 2,700 unique emoji. New emoji are adopted via the Emoji Subcommittee of the Unicode Consortium, who make decisions internally based on perceived areas of need, or based on proposals received from the general public.

Per the requirements of Unicode’s Emoji Subcommittee, proposals for new emoji must have six parts: identification, images, selection factors for inclusion, selection factors for exclusion, sort location, and any other information the submitter wishes to provide. Identification and images are fairly straightforward; the submitter must offer a short name, keywords, and sample images for the proposed emoji, to give the Emoji Subcommittee an idea of how the emoji might be displayed. For sort location, the submitter must indicate where in the emoji catalog the new emoji might appear; for example, if the proposed

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258 See Somaiya, supra note 233 (showing the original set of 176, 12-by-12 pixel emoji). The impact of the original emoji designs has been deeply felt—so much so, that in 2016, New York’s Museum of Modern Art added the NTT DoCoMo emoji set to its collection. See Paul Galloway, The Original Emoji Set Has Been Added to the Museum of Modern Art’s Collection, MoMA (Oct. 26, 2016), https://stories.moma.org/the-original-emoji-set-has-been-added-to-the-museum-of-modern-arts-collection-c6060c14161 (https://perma.cc/3U9X-Y4UH) (”Today’s emoji . . . have evolved far beyond Kurita’s original 176 designs . . . . However, the DNA for today’s set is clearly present in Kurita’s humble, pixelated, seminal emoji.”).


261 See Submitting Emoji Proposals, supra note 252.

262 Id.

263 See id.
emoji were a flamingo, the proposed sort location might be in the “Animals & Nature” category, after the “owl” 🦉 emoji.264

The most involved portions of the proposal are the selection factors for inclusion, and the selection factors for exclusion. The former asks the submitter to address reasons and provide evidence supporting the addition of the proposed emoji; the latter asks the submitter to address reasons the emoji might not be adopted. 265 These factors are arguably the most important parts of a new emoji proposal, due largely to the permanent nature of emoji adoption—once new emoji are added, they are never retired from Unicode.266

The Emoji Subcommittee weighs several selection factors for inclusion in proposals for new emoji, including compatibility, image distinctiveness, completeness, how frequently the emoji has been requested, and expected usage level. 267 Compatibility looks at whether the emoji is needed to be compatible with highly-used emoji in existing systems. For example, if the proposed emoji were of a dumpling, it would be important to note if another platform had offered its own proprietary dumpling emoji-equivalent that was highly used, making the argument in favor of a compatible emoji available through Unicode.268 Image distinctiveness assesses whether the emoji can be represented through a recognizable image that can be easily differentiated from existing emoji—for example, an emoji for “stew” might be difficult to distinguish from the existing “pot of food” emoji, 🥘, especially due to the small size.270 Completeness, a minimally weighted factor, evaluates whether the proposed emoji would fill a gap in an existing type of

264 See id.
265 Id.
267 Submitting Emoji Proposals, supra note 252.
268 For example, prior to Unicode’s adoption of the “dumpling” emoji, 🥟, there were in fact over one hundred dumpling stickers available on Line, a mobile app that has gained popularity in Asia. See JENNIFER 8. LEE ET AL., DUMPLING EMOJI SUBMISSION, at *2 (2016), http://www.unicode.org/L2/L2016/16024-dumpling-emoji.pdf [https://perma.cc/UP7L-LADN].
269 See Submitting Emoji Proposals, supra note 252.
270 See id.
emoji. Frequency requested weighs the extent to which the emoji is requested, taking into account commercial petitions, bots, duplicate votes via petition, and other factors that can skew such a calculation.

Expected usage level—and its sub-factor, frequency—is “the most important factor for inclusion.” This factor evaluates all the ways the proposed emoji might be used. The extent to which the submitter anticipates the emoji will be used worldwide is critical. This can be shown by using trend aggregators, such as the frequency of Google searches for a particular word, or the frequency with which a hashtag is used on Twitter or Instagram. Essentially, this means that the overall concept must already be popular when it is proposed.

After reviewing the inclusion factors, the Emoji Subcommittee evaluates the exclusion factors, any of which can weigh against the adoption of an emoji. These factors are a bit narrower, and look at whether the new emoji is overly specific, open-ended, already representable, transient, or justified by a faulty comparison to existing emoji. They also look at whether the proposed emoji is essentially a logo, brand, or image of a specific person or a deity, all of which Unicode has determined render a concept unsuitable

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271 See id. A notable example is the recent addition of five emoji, including the “scorpion,” which effectively completed the set of emoji representing zodiac signs. See id.


273 See Submitting Emoji Proposals, supra note 252. Submitting a petition is actually considered an undesirable strategy because it does not demonstrate current actual demand; rather, it shows the submitter’s affirmative campaigning in support of an emoji. See Will You Be My Emoji?, supra note 243.

274 Submitting Emoji Proposals, supra note 252.

275 See id.

276 See id.

277 See, e.g., LEE ET AL., supra note 269.

278 See, e.g., BRAMHILL, supra note 272.

279 Will You Be My Emoji?, supra note 243.

280 Submitting Emoji Proposals, supra note 252.

281 See id.
for encoding as an emoji character. Specificity is especially important for emoji proposals; new emoji must distinctively convey an overarching concept, without creating excessive or unnecessary variations of something already existing. For example, requesting a general “dinosaur” emoji might not be distinctive enough. Conversely, requesting a “triceratops” emoji, in view of the recent availability of the “tyrannosaurus rex” and “brontosaurus” emoji, might be considered overly specific without further justification for adding a third type of dinosaur emoji.

After passing the Emoji Subcommittee, proposals are forwarded to the Unicode Technical Committee (“UTC”) for further consideration. The UTC then narrows the proposed emoji to a list of provisional candidates, which are added to a prioritized list for reevaluation the following year. This list is narrowed even further before it is distributed to vendors—Apple, Facebook, Google, and other platforms—who then begin work on their own proprietary emoji designs for the new characters. Finally, a corresponding character code for each new emoji is added into Unicode. After vendors push software updates, the new emoji finally appear on consumer devices for use. From start to finish, the approval process takes approximately a year-and-a-half.

282 See id.; Will You Be My Emoji?, supra note 243.
283 Will You Be My Emoji?, supra note 243.
284 See id.
286 Will You Be My Emoji?, supra note 243.
287 See id.
288 See id.
289 See Emoji & Pictographs, supra note 266.
290 Will You Be My Emoji?, supra note 243.
291 See Submitting Emoji Proposals, supra note 252.
C. Emoji as an Evolving Part of the Cultural Lexicon

Using tiny images is hardly an innovation in human language; linguists will readily point to the use of hieroglyphs and cuneiform in early Mesopotamia as a method of communicating. The popularity of emoji might generally be explained by their ability to supplement written text; a large part of communicating meaning lies in intonation, gesturing, and other nonverbal cues, and emoji adeptly demonstrate all of that in an astonishing economy of characters.

There is debate as to what extent emoji constitutes a new language. Since emoji are largely “content signifiers,” it is challenging to communicate entirely in emoji without grammar and syntax to tie a phrase or sentence together. Nevertheless, the

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292 Alice Robb, How Using Emoji Makes Us Less Emotional, NEW REPUBLIC (July 7, 2014), https://newrepublic.com/article/118562/emoticons-effect-way-we-communicate-linguists-study-effects [https://perma.cc/8MVD-G22M] (“Emoji could even mark a return to a more pictographic script. Our earliest examples of writing come from the pictographic hieroglyphs and cuneiform inscriptions from Mesopotamia around [five thousand] years ago. It was only around 1,200 BC that the Phoenicians developed the first alphabetic writing system.”).

293 See id. (quoting linguist Ben Zimmer: “It’s a recurrence of a very old impulse,” he said. “I don’t see it as a threat to written language, but as an enrichment. The punctuation that we use to express emotion is rather limited. We’ve got the question mark and the exclamation point, which don’t get you very far if you want to express things like sarcasm or irony in written form.”).

294 Thompson, supra note 231 (“Emoji assist in a peculiarly modern task: conveying emotional nuance in short, online utterances.”).

295 See Somaiya, supra note 233 (regarding whether emoji is a form of language, quoting engineer Shigetaku Kurita: “It may be separate from language. One can now communicate through the use of just letters. You can send emoji to foreigners and understand each other. So it is a new letter system. But there is no way to ‘read’ it. It’s not a language in that way.”); Thompson, supra note 231.

296 Samantha Lee, What Communicating Only in Emoji Taught Me About Language in the Digital Age, QUARTZ (Aug. 31, 2016), https://qz.com/765945/emojis-forever-or-whatever-im-a-poet/ [https://perma.cc/24A3-U2S2] (“The thing I perhaps missed most was grammar. As it turns out, the majority of emojis are, frustratingly, ‘content signifiers.’ The ‘pig snout,’ [ ], the ‘woman in red,’ [ ], the ‘setting sun,’ [ ]; these represent nouns and verbs, but I lacked a basic structure to tie them all together.”).

297 This might explain the reason that more than half of the strings of emoji that people use are repetitious. See O’Donoghue, supra note 259 (“[Linguist Gretchen] McCulloch notes that . . . [this practice] is ‘vanishingly rare with words.’ For example, most people are never simply happy, but rather ☺️😊, likewise, most folk are 🎉🎊, not just thirsty.”). In this respect, some linguists have compared emoji to pidgin, a type of language birthed out of necessity between two populations with no common language.
uses for emoji are growing beyond cheerful supplements to our tweets and text messages. In fact, a recent study conducted by Instagram suggests that, in some instances, emoji are replacing aspects of our communication entirely.298 For example, the “face with tears of joy” emoji, 😂, 299 often takes the place of “LOL” and its variants.300

The idea that a word or phrase could be substituted with an emoji is powerful—and evidently, not lost on technology companies and social media platforms.301 In May 2015, Instagram introduced emoji hashtags, allowing users even more character options to categorize posts.302 The popular money app Venmo also incorporated an “emoji autocomplete” feature, allowing users to easily add emoji to payment notes when sending money to other users after finding that close to twenty-five percent of all payment notes on the app used emoji.303 The following year, Apple upped the ante, introducing a similar “predictive emoji” feature that incorporated emoji substitutions into its predictive text feature on

See Lee, supra note 296 (“The rudimentary language typically lacks plural markers and functions exclusively in the present tense. Without conceptual words like ‘very,’ ideas are intensified by repetition: ‘extremely quick’ becomes ‘quickquick.’”).


299 Incidentally, the “face with tears of joy” emoji, 😂, was also the most popular emoji used on Twitter in 2017.

300 See Instagram Engineering, supra note 298 (“Emoji usage is shifting the people’s vocabulary on Instagram and becoming an important means of expression: their use is anti-correlated with internet slang like ‘lol’ [an acronym meaning ‘laughing out loud’] and ‘xoxo.’”).

301 See infra text accompanying notes 302–07.


the iPhone’s Messaging app. For example, typing the word “love” will now trigger some suggested options that now include the “red heart” 😍 emoji. Additionally, once a message is typed out, a user can select words that iOS 10 has identified and replace them with their corresponding emoji equivalents.

In recent years, there has been an uptick in companies using emoji to communicate directly with consumers, especially those following them on social media. A 2015 study conducted by social media analytics firm SocialBakers estimated that “[s]ix in [ten] of the [five hundred] most followed brands online used emoji[,] in [their] tweets in the fourth quarter of [that year].” Whether they knew it or not, those brands likely received an added benefit—a 2016 experiment, conducted by online advertising agency Wordstream, found that tweets containing emoji got 25.4% higher audience engagement than those without emoji.

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304 Matt Burgess, How to Use iOS 10’s New Emoji Features, WIRED UK (Sept. 15, 2016), http://www.wired.co.uk/article/ios-10-emoji-how-to-use-big-emoji-predictive [https://perma.cc/U2Z3-HAWW].

305 Cf. Mitchel Broussard, Messages in iOS 10: How to Use Emoji Replacement and Prediction, MACRUMORS (Sept. 10, 2016), https://www.macrumors.com/how-to/ios-10-messages-emoji/ [https://perma.cc/L4FA-QU48] (“In iOS 10, Apple is making it even easier to use emojis with an all-new replacement and predictive system that replaces key words and phrases with relevant emoji characters.”).


307 See id.

308 See infra text accompanying notes 309–14.


310 Kimberlee Morrison, This Is Why You Should Use Emojis to Boost Engagement on Social Media Ads, ADWEEK (Jan. 29, 2016), http://www.adweek.com/digital/this-is-why-you-should-use-emojis-to-boost-engagement-on-social-media-ads/ [https://perma.cc/UG8N-6HBH]. The usefulness of emoji to target consumers was evidently noticed by Twitter—several months later, the social media platform announced that it “would allow emoji keyword targeting for Twitter ads.” Michelle Castillo, When You Tweet an Emoji, Advertisers Can Now Find You, CNBC (June 16, 2016, 11:26 AM), https://www.cnbc.com/2016/06/16/when-you-tweet-an-emoji-advertisers-can-now-find-you.html [https://perma.cc/B8TS-T2UJ]. For example, if a user’s tweet included the “meat on bone” 🥩 or “poultry leg” 🍗 emoji, KFC could decide to target that user and push their ads to Twitter accounts who had used those emoji in their tweets. See id.
addition, companies have harnessed the power of emoji for advertising campaigns targeting younger generations. As part of an ad campaign in Puerto Rico, Coca-Cola registered URLs using the Samoan domain “.ws” for emoji characters conveying happiness, and then displayed the domains on giant billboards and bottle labeling. General Electric launched the promotional website emojiscience.com, featuring an “Emoji Table of Experiments,” a chart modeled off the periodic table of elements that featured icons of emoji linked to educational videos created by popular scientist Bill Nye. The irreverent anti-hero movie Deadpool even incorporated an emoji pun into their billboard marketing campaign.

The uses for emoji have even expanded beyond text messages. Domino’s Pizza launched an ordering system where users could order a pizza by simply tweeting the pizza emoji, 🍕, at the restaurant. A bank in the United Kingdom announced the launch of a service where customers could order products by tweeting emoji, a marketing strategy that could give savvy marketing teams a leg up on the competition.


of the first emoji-only passcode, designed to be “easier to remember and mathematically more secure than traditional passcodes.” Apple and Android devices even rolled out the first emoji ever with the exclusive purpose of advancing a social cause—an eye inside a speech bubble 🎥, designed to allow people who witness bullying to speak out.317

Because some of the biggest operating systems and social media platforms have commissioned their own emoji sets, a user’s emoji can look different depending on the platform they are using.318 Though Unicode provides a standardized coding system for emoji, it does not design the actual emoji characters.319 As previously mentioned, once an emoji is approved to be added by Unicode, it is then circulated to designers at companies like Apple, Twitter, Google, and Microsoft, who design the actual character that will appear on users’ devices when they communicate using their platform.320 Consequently, the intended meaning behind the

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318 See LUCAS, supra note 312, at 19.


320 See id.
emoji used can become confused. A 2016 study found that, in a selection of the popular “face” emoji, participants interpreted “sentiment” (i.e., how positive or negative the emoji’s meaning was) with consistently low variance only 4.5% of the time. Additionally, when participants rated the same rendering, they disagreed 25% of the time on whether the sentiment was positive, neutral, or negative. When considering cross-platform emoji symbols, interpretations became even more disparate. For example, while looking at “grinning face with smiling eyes,” participants described Google’s version (😊) as “blissfully happy,” while Apple’s version (😊) was described as “ready to fight.”

The potential for confusion intensifies when platforms unilaterally decide to change the designs of certain characters. For example, in August 2016, Apple quietly changed the design for the “pistol” emoji, from 🎃 to 🎃. Interpreted as a decision responding to increased gun violence worldwide, Apple’s decision was nevertheless criticized because of the retroactive impact it would have on prior text messages and other

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321 See Lucas, supra note 312, at 19.
322 Hannah Miller et al., GroupLens Research, Univ. of Minn., “Blissfully Happy” or “Ready to Fight”: Varying Interpretations of Emoji, at *2 (2016), https://grouplens.org/site-content/uploads/Emoji_Interpretation_Paper.pdf [https://perma.cc/54SE-2J82]. Importantly, the study notes its reasoning for limiting the emoji selection to those representing faces—besides the fact that the faces are commonly used, the study hypothesized that “misconstrual would be more likely among these emoji than those that characterize ‘things’ (e.g., an airplane, a balloon, flowers, flags, etc.).” Id. at *3.
323 See id. at *2.
324 See id.
327 Kelly, supra note 326. Prior to the change, uses of the pistol and other weapon emojis had led to arrests, with a French court even ruling that the “pistol emoji could constitute a death threat, sentencing a man to three months in prison for texting the gun to his ex-girlfriend.” Id.
communications containing the emoji. 

Furthermore, the change caused Apple’s “pistol” to differ even more dramatically from the images shown on other platforms, even triggering a warning on Emojipedia to “[u]se with caution.”

Nevertheless, there are some consistencies in the ways people use emoji. A 2015 study found that, after analyzing about seventy thousand tweets across thirteen languages, the inclusion of emoji generally added a positive nuance or tone, even where the message itself was otherwise negative. Linguists have also found that generally, emoji appear at the end of messages, as opposed to the

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328 See, e.g., Rob Price, There’s a Huge Problem with Apple’s Plan to Combat Gun Violence by Changing an Emoji, BUS. INSIDER UK (Aug. 2, 2016, 7:52 AM), http://www.thisisinsider.com/apple-change-pistol-emoji-toy-confusion-precedent-meaning-retroactive-2016-8 [https://perma.cc/F6VH-U9XN]. Subsequently, Apple’s response to public outcry when a redesign is perceived to alter an emoji’s commonly accepted use has been more receptive—for example, in November 2016, Apple received swift backlash when it contemplated changing the design for the “peach” emoji. See Madison Malone Kircher, Emergency: Apple’s New Peach Emoji Doesn’t Look Like a Butt (But We Are Getting a Face Palm), N.Y. MAG. (Nov. 1, 2016, 9:39 AM), http://nymag.com/selectall/2016/11/new-ios-10-2-emoji-peach-emoji-doesnt-look-like-a-butt.html [https://perma.cc/96HZ-XSKM]. While the redesign appeared to make the emoji look more “peach-like” ( japan emojis are often used to refer to actual fruit. See How We Really Use the Peach, EMOJIPIEDA (Dec. 16, 2016), https://blog.emojipedia.org/how-we-really-use-the-peach/ [https://perma.cc/SMK9-E2BB] (finding in a random sample of tweets containing the peach emoji that “33% of tweets used as shorthand for butt . . . . 27% have sexual connotations,” and “[o]nly 7% refer to the fruit”). Whatever the reason, Apple reversed course two weeks later. See Alex Fitzpatrick, Apple Just Saved the Peach Emoji, TIME (Nov. 15, 2016), http://time.com/4572130/apple-peach-emoji-butt-iphone/ [https://perma.cc/PK9M-5NDY].

329 Created by Jeremy Burge in 2013, Emojipedia is a well-regarded encyclopedia of emoji, cataloging their widely accepted meanings, cross-platform variations, emoji-related news, and a variety of other information. See Rob Price, This [Thirty-One]-Year-Old Australian Accidentally Built a Huge Empire by Cataloging All the World’s Emojis, BUS. INSIDER UK (Jan. 17, 2016, 1:00 PM), http://uk.businessinsider.com/emojipedia-jeremy-burge-emoji-encyclopedia-profile-2016-1?IR=T [https://perma.cc/K2SU-SS6C]. Emojipedia is a voting member of the Unicode Consortium. See The Unicode Consortium Members, supra note 250. Burge is also an individual member of the Unicode Consortium, and is currently Co-Chair of the Emoji Subcommittee. See id.; Unicode Directors, Officers and Staff, supra note 255.


middle or the very beginning. For many, emoji have become an everyday communication tool. As the international uses for emoji continue to build and evolve, the time is ripe for society to leverage the popularity of emoji in new, powerful ways.

III. THE CASE FOR DISCLOSURE VIA EMOJI, AND OTHER SUGGESTED IMPROVEMENTS FOR DISCLOSURE

This Part proposes several solutions to increase disclosure of material connections in influencer marketing. Section III.A proposes the adoption of a dedicated emoji as a preferred method of material connections disclosure. Section III.B discusses both the advantages and possible difficulties underlying the adoption of a disclosure emoji. Finally, Section III.C offers additional recommendations to increase voluntary compliance with FTC regulations regarding endorsements.

A. Proposal for the Adoption of a Dedicated Emoji for Disclosing Material Connections

Despite efforts to keep pace with social media’s ever-evolving uses, the FTC needs to consider new, creative solutions to facilitate disclosure compliance. The FTC has considerable latitude under the FTCA to protect consumers by curbing unfair or deceptive business practices, and promoting clarity and transparency in advertising. Adopting an emoji to disclose material connections in social media endorsements is a modern innovation that would


333 See MARCEL DANESI, THE SEMIOTICS OF EMOJI 55–56 (2017); Steinmetz, supra note 332.

334 See Somaiya, supra note 233 (regarding how emoji might develop in the coming years, quoting Shigetaku Kurita: “Emoji has become increasingly popular abroad these past few years. But that all is old news in Japan. Emoji was a hit in Japan over [ten] years ago. It has become standard in Japan. It is a norm and there is nothing special about it—it is now a language that people use on an everyday basis.”).

335 See supra Section I.A.1.
clarify and standardize requirements for disclosure. A disclosure emoji would leverage a communicative behavior that influencers are already inclined to use anyway.\textsuperscript{336} Adding such a powerful, ubiquitous tool to the disclosure toolbox would increase voluntary compliance, preventing future Fyre Festivals—or, at least, mitigating them—by keeping consumers better informed.

The capacity for emoji to bridge language barriers eliminates the need for disclosure in a particular language. On an extremely basic level, emoji are symbols.\textsuperscript{337} Using symbols to communicate essential information, especially across languages, is not a new concept; there are numerous symbolic conventions throughout the world that we use to convey meaning.\textsuperscript{338} There are also plenty of symbols—such as, $, §, ¶, ™, and ®—that convey meaning with legal significance.\textsuperscript{339} Throughout history, symbols are created as shorthand for meaning that would be otherwise cumbersome to convey with ordinary text.\textsuperscript{340} A “disclosure emoji,” no matter the

\begin{footnotesize}
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\item For example, most of the supermodels who posted on Instagram about their photoshoot for the Fyre Festival marketing campaign used emojis in the accompanying captions. See supra note 206 (listing social media posts by influencers that also contain emoji).
\item In fact, Wingdings and other font software comprised entirely of symbols and shapes are cited as the conceptual predecessors to emoji. See Lucas, supra note 312, at 10–11.
\item See Keith Houston, Shady Characters: The Secret Life of Punctuation 3 (2013) (explaining that ¶, also known as the pilcrow, “crop[s] up with surprising frequency . . . teaming up with the section symbol in legal documents to form picturesque arrangements such as §3, ¶7”); Christopher Beam, Where Do Currency Symbols Come from?, SLATE (July 15, 2010, 6:33 PM), http://www.slate.com/articles/news_and_politics/explainer/2010/07/__.html [https://perma.cc/MZM8-7KXE] (briefly citing the historical evolution of many symbols used to represent currency, including the United States dollar, the British pound, and the European Union’s euro); Trademark Symbols, Part of Fact Sheets Introduction to Trademarks, Section of About INTA, INT’L TRADEMARK ASS’N, http://www.inta.org/TrademarkBasics/FactSheets/Pages/TrademarkSymbolsFactSheet.aspx [https://perma.cc/5JF8-PGNV] (last visited Jan. 8, 2018) (explaining briefly what the ™ and ® symbols mean, and how they should be used to provide notice of rights to a trademark).
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design, if used often enough could easily become part of the cultural lexicon, understood to mean that a post has been sponsored.

The universality and permanence of emoji would also simplify disclosure across many social media platforms. Since the interface of every social media platform is different, there is no uniform disclosure method that works across all of them. Emoji can easily be incorporated into Instagram captions, tweets, Facebook posts, and on-screen text in YouTube videos.\textsuperscript{341} Having a dedicated emoji to disclose sponsored content would therefore eliminate the necessity for disclosure tags, which have been created by some social media platforms, and which the FTC feels are unreliable anyway. Furthermore, emoji are used worldwide\textsuperscript{342} and are never removed from the Unicode Standard once adopted.\textsuperscript{343} This would ensure that users could continue using a disclosure emoji for the foreseeable future.

\begin{footnotesize}
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  \item a theory that “@” was created by medieval monks, who wanted a shorter way to represent the Latin word “ad,” meaning “toward”); Beam, supra note 339; Origin of Everything, Where Does the #Hashtag Symbol Come From?, PBS DIGITAL STUDIOS (Oct. 3, 2017), http://www.pbs.org/video/where-does-the-hashtag-symbol-come-from-vtyi5h/ [https://perma.cc/VC3D-JPS7] (explaining that “#” evolved from the Roman abbreviation “lb,” to stand for “libra pondo” or “pound by weight”).
  \item Emoji can be typed just like regular text, and Facebook, Twitter, Instagram, and Snapchat all support emoji in their text captions. On YouTube, emoji can be added to on-screen text captions.
  \item See Emoji & Pictographs, supra note 266 (“At this point, nearly [ninety percent] of all text data created and interchanged on the [I]nternet is already in Unicode . . . and that percentage keeps growing.”).
  \item See id. (“[E]moji can have and take on different meanings. For example, U+1F336 HOT PEPPER [pictured by Apple as 🌶] is a plant symbol that represents a food item commonly called a hot pepper or a chili pepper. It’s also frequently used as a menu symbol to indicate the degree of spiciness in menu items, like the stars used in movie reviews. It could take on another entirely different meaning in the future, but even if it does, it will remain stable as the encoded character U+1F336, with that same numeric value and with the ‘HOT PEPPER’ name, so anybody could still look it up in the standard, and could interchange it accurately via whatever future version of software and hardware might be involved in exchanging textual data.”).
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B. Advantages and Potential Difficulties Underlying Disclosure via Emoji

Adopting an emoji to disclose material connections would set an important precedent, and it is arguable that doing so could create the potential for overdependency on one form of technology. Adopting a disclosure emoji would ostensibly require the FTC to draft a proposal to the Unicode Consortium, placing a large decision in Unicode’s hands.344 Once adopted, if a disclosure emoji were to become popular to the point of being a preferred disclosure method, this could create a dependence on Unicode’s continuous global adoption and seamless maintenance.345 This is further complicated by the fact that emoji are controlled by the Unicode Consortium, which is itself governed by a board whose members have interests in social media and technology companies.346 Altogether, this could force Unicode to bear a heavy burden that it was not designed for and could not have reasonably anticipated.

These problems diminish, however, in view of technology’s rapid pace. Communication trends have changed dramatically within the last few decades alone—instant messaging platforms have come and gone,347 entire social media networks have fallen in and out of favor.348 Though emoji are a permanent fixture of the Unicode Standard, it is impossible to say how long society’s enchantment with emoji will sustain itself. Adopting emoji while they remain in such widespread use is an effective solution in the interim, as this would take advantage of a communication phenomenon at its height of popularity. Even if emoji should fall

344 See generally supra Section II.B.
345 See generally supra Section II.B.
346 See supra note 250 and accompanying text.
out of use, adopting a disclosure emoji is, at worst, a no-loss stopgap measure that strategically positions the FTC to utilize new communication trends as they are introduced.

It might also seem that current disclosure methods are already easy to comply with—including something as simple as “#ad” in a tweet or Instagram post is straightforward enough. Incidentally, hashtags serve a unique functional purpose of their own; they allow us to categorize messages, using relevant keywords to allow other users to see other messages discussing a similar subject. Using “#ad” therefore discloses sponsored content, but it also serves an additional purpose (intentionally or not)—tying together a large swath of sponsored content and making it readily accessible.

By this logic, the view that something as short as “#ad” is already easy to include misses the point. It is unlikely that influencers are using “#ad” because disclosure necessitates the functionality of hashtags—they are using “#ad” ostensibly because it contains few characters, is recognized by consumers, and is perhaps the most succinct disclosure method that the FTC approves. Therefore, assuming arguendo that consumers notice “#ad” when it is used and understand that its presence in a post means that the author has some material connection with the post’s subject, we find that, at its most basic level, “#ad” is already operating as a makeshift “symbol.” In other words, “#ad” is just doing the work in three characters that an emoji could accomplish in one.

Thinking back to the requirements for proposing a new emoji, especially image distinctiveness, there is the question of when a potential design might become sufficiently recognizable to be

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349 See generally supra Section I.A.4.
350 See generally Pandell, supra note 6.
351 See id. For example, when a user clicks on “#ad” in an Instagram post caption, they will see all of the Instagram posts that have used that tag, and therefore see all of the sponsored content that has been disclosed using “#ad.” See id.
352 See generally supra Section I.A.4.
353 The recognizability of “#ad” is strong enough that IZEA incorporated it into the design for their proposed disclosure emoji. See IZEA Petitions the Unicode Consortium to Create #AD Emoji, supra note 152.
354 See supra notes 267–85 and accompanying text.
authoritative. Even if a disclosure emoji would fulfill a practical need, its purpose and usefulness is limited if people do not understand what it is. This is further complicated by the fact that a disclosure emoji would be conceptual, rather than a pictorial representation of a concrete, tangible object. Here, the FTC has two options: (1) similar to the IZEA proposal, it can find a design concept that people are already familiar with and associate with its intended purpose;\(^355\) or (2) it can invent its own design concept, promote it, and then advocate for its adoption as an emoji.

If the FTC decides to take the second route, it would still be advisable for the public to have at least minimal exposure to the design before it is released as an emoji. On this point, the FTC may find the Ad Council’s “I Am A Witness” Campaign instructive.\(^356\) The Ad Council\(^357\) launched the campaign in October 2015.\(^358\) As part of the campaign launch, the campaign’s “eye in speech bubble” 🎨 emoji began quietly appearing on Apple and Android devices.\(^359\) The emoji’s debut was described as “puzzling,” “weird,” and “mysterious”—it was simply not obvious what the symbol was supposed to mean or be used for.\(^360\) Although a viral video may have brought the campaign back into the national conversation in recent months, it is unclear to what extent the anti-bullying emoji is used, or what effect, if any, the emoji has had on anti-bullying efforts.\(^361\) Therefore, a promotional effort in the few

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355 See IZEA Petitions the Unicode Consortium to Create #AD Emoji, supra note 152.
356 See How to Use the Emoji, supra note 317.
358 See Gonzalez, supra note 317; see also How to Use the Emoji, supra note 317.
359 See Gonzalez, supra note 317; see also note 317 and accompanying text.
months leading up to a disclosure emoji’s official release—logically, after final approval, once a design concept has been finalized—would communicate the new emoji’s purpose and encourage use.

C. Additional Recommendations to Increase Voluntary Compliance with Material Connections Disclosure Requirements

In addition to streamlining disclosure methods, there are other steps that the FTC can take to increase voluntary compliance from the public. One of the biggest problems with current methods of disclosure is that, beyond receiving strongly-worded letters from the FTC, influencers are not incentivized to care about disclosure requirements. For example, it has been observed that with regard to sponsored content, the fashion industry tends to “treat[] the issue of transparency . . . as little more than optional, as opposed to legally required and ethically advisable.” Besides CSGO Lotto, the FTC has yet to take any real action against deceptive influencer marketers. It does not make an example of—or take even a minimal hand-slap action against—some of the worst offenders who consistently fail to disclose. The FTC does not openly disclose the names of the individuals it sends the “Dear Influencer” letters to. Meanwhile, watchdog groups such as Truth in Advertising have taken a more aggressive approach, singling out student Keaton Jones and tying in the “I Am A Witness” campaign); Selyukh, supra note 360.

_362_ See supra notes 286–91 and accompanying text.

_363_ Influencers favoring disclosure cite their desire to be transparent with their followers; conversely, influencers against disclosure cite lower user engagement and lack of authenticity. _See generally_ text accompanying notes 187–91. In both cases, these views appear unrelated to any messaging from the FTC. _See generally_ text accompanying notes 187–91.


_366_ Although there is no explanation available as to why the FTC did not openly disclose the recipients of their educational and warning letters, the names of recent recipients have come out via a Freedom of Information Act request. _See Who Got Those Social ‘Influencer’ Letters From the FTC?,_ supra note 65.
the Kardashians and others who frequently post sponsored content without disclosures, with mixed results.\textsuperscript{367}

Another message that remains absent from the FTC’s approach to regulating influencer marketing is the idea that failure to disclose paid relationships will breed consumer distrust over time, effectively damaging influencers’ brands.\textsuperscript{368} This might be less meaningful to those like the Kardashians, whose massive cult of celebrity makes the potential threat of a forty thousand dollars penalty and brief spate of bad publicity seem almost quaint.\textsuperscript{369} However, for influencers who have expended significant effort carefully crafting their image and building a following over time, it should be impressed upon them that even one deceptive post (intentionally or not) could cause irreparable damage via reputational harm. With so much focus on protecting consumers by obligating influencers to be up front when money changes hands, the FTC ignores what might be the most effective message of all. Disclosure shouldn’t just be “standard practice”—it’s crucial to

\textsuperscript{367} See Ad Watchdog TINA.org Follows Up on Kardashians’ Deceptive Advertising, TRUTH IN ADVERT. (Sept. 26, 2017), https://www.truthinadvertising.org/ad-watchdog-tina-org-follows-kardashians-deceptive-advertising/ [https://perma.cc/9QQT-R6KU] (finding in a follow-up sample of more than two hundred posts from Instagram, Facebook, and Snapchat, that while some posts had been revised to meet guidelines, many still fell short of the FTC’s “clear and conspicuous” standard); Exposure Without Disclosure: Cashing in with the Kardashians, TRUTH IN ADVERT. (Aug. 22, 2016), https://www.truthinadvertising.org/exposure-without-disclosure-cashing-kardashians/ [https://perma.cc/33MX-DQZD] (reporting that “only about [twenty percent] of [offending] posts had been corrected with the addition of #ad,” following a direct letter to the Kardashian/Jenner family notifying them of their deceptive marketing campaigns).

\textsuperscript{368} See Vanessa Friedman, The Rise and (Maybe) Fall of Influencers, N.Y. TIMES (May 10, 2017), https://www.nytimes.com/2017/05/10/fashion/kendall-jenner-fyre-festival-pepsi-bella-hadid-influencers.html [https://perma.cc/2DT8-EDEW] (“It is increasingly clear that a disconnect exists between the imperative to make as much money as possible out of your influence as fast as possible, and the need to be highly selective about how you wield your influence in order to preserve its equity.”).

\textsuperscript{369} See Davis Richardson, Blame the Fyre Festival Fiasco on the Plague of Celebrity Influencers, WIRED (May 4, 2017, 10:30 AM), https://www.wired.com/2017/05/blame-fyre-festival-fiasco-plague-celebrity-influencers/ [https://perma.cc/2AQF-R3YM] (noting that the Kardashians seem “mostly undeterred” by Truth in Advertising’s direct approach, and the $40,000 penalty imposed under the FTCA).
Finally, although adopting an emoji would eliminate the need for disclosure tags on social media, it is advisable that the FTC take a collaborative approach, coordinating its education and enforcement strategies with social media platforms and the Unicode Consortium. Future guidance from the FTC will be most effective if the FTC can demonstrate a deeper understanding of the way consumers behave online. For example, the FTC and the public at large might be better served if Instagram offered a functionality that the FTC felt clearly communicated material connections to consumers. Pursuing a proactive approach, rather than simply cautioning influencers that a “paid partnership” tag on Instagram is insufficient, will signal that the FTC is interested in working collaboratively towards solutions, rather than merely identifying potential problems. Coordinating efforts with social media platforms and the Unicode Consortium will provide the FTC with valuable information regarding consumers’ online behaviors, and in the long run will lead to disclosure options that are common sense and not overly burdensome.

CONCLUSION

This Note’s proposed approaches would ease influencers’ and marketers’ existing obligations for disclosing material connections, and incentivize voluntary compliance. The FTC has considerable latitude under the FTCA to implement policies that protect consumers by promoting fair business practices. By reducing disclosure requirements to the inclusion of one symbol, the FTC could leverage the popularity of emoji to convey valuable

370 See Friedman, supra note 368 (“[B]eing an Influencer means you are often thought of as a ‘friend’ by your followers. And that comes with a host of expectations that may not attach to a more traditional kind of talent. ‘Youth culture can see through anything they think is inauthentic,’ Ms. [Lucie] Greene, worldwide director of the Innovation Group at J. Walter Thompson[,] said. And because followers have what at least seems to be direct access to their ‘friend’ on Twitter or Instagram, they can respond directly. Also publicly.”).
371 See supra note 144 and accompanying text.
372 See supra note 144 and accompanying text.
information to protect consumers. Adopting an emoji will also set important precedent for the FTC to leverage new communication trends, if and when they become popular. Finally, promoting transparency as an authentic, ethically advisable part of influencer marketing will allow consumers to make informed decisions about the content they view online, rehabilitating public trust.