

NOTES & COMMENTS

CANCELLED: MORALITY CLAUSES IN AN INFLUENCER ERA

by
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Morality clauses have been a contractual staple in the entertainment, sports, and advertising industries for over a century. Designed to curb illegal and immoral behavior, morality clauses that are used strategically and effectively can provide a powerful safeguard for both parties involved. This Note breaks down traditional morality clauses into three component parts and updates these provisions for the brand–influencer relationship. Doing so allows companies and influencers alike to harness the unparalleled effectiveness of this emerging market while protecting themselves against illegal escapades and shifting social viewpoints on morality.

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INTRODUCTION

Contracts in the United States have included morality clauses for roughly a century. From its beginnings in the studio system to its potential use in the #MeToo movement, the clause provides companies and talent alike with a powerful opportunity to terminate their contractual relationship with an unseemly partner. Given this benefit, use of the provision has become widespread in the lucrative field of endorsement advertising. The inclusion of a morality clause in an endorsement contract enables a company to harness the effectiveness of celebrity validation while reserving an exit strategy in case the celebrity falls into public disrepute. As endorsement advertising has adapted to the Internet Age, a new class of spokesperson has emerged in the form of “social-media influencers.” Influencer advertising shares the

effectiveness of traditional endorsement deals and has become an increasingly popular marketing strategy in its own right. However, the tactic also comes with its own unique slew of challenges. Developing a thorough understanding of these risks, and how best to address them, is vital for a brand looking to include an effective morality clause in its influencer contracts.

This Note begins by providing an overview of morality clauses. Part I discusses how the clause originated, tracks its widespread use, and details its affirmation under judicial review. From the inception of the clause, courts have regularly upheld and enforced morality provisions as valid contractual stipulations. This judicial “seal of approval” provides employers with a powerful tool to insulate themselves from the liabilities of their talent while still being able to benefit handsomely from their work. As such, the clauses have simultaneously become more ubiquitous and also more contentious. Talent with significant bargaining power understand that negotiating for a narrow morality clause can save them significant amounts of time and money if they wind up committing, accidentally or intentionally, some grievous wrong. The scope of a contract’s morality clause has, as a result, become one of the most negotiated provisions in the employment discussion.

In order to understand the true power and promise of a morality clause, it is helpful to understand what the provision entails. Part II facilitates this by developing a three-part framework through which to view the clause. An effective morality clause should address each of these three component parts, with each component part providing either party with varying degrees of protection during the relationship. The first component part of a morality clause involves identifying the particular behavior that will fall under the purview of the clause. Generally, this behavior is categorized as “illegal or unlawful conduct” and “immoral behavior.” The second component part discusses when that behavior will trigger the morality provision. The way in which the parties have drafted the clause plays a particularly important role in this component. The provision may be a “reputational impact” clause or a “bad behavior” clause. Both of these styles provide different strengths and weaknesses, depending on the parties’ goals, and should be afforded great attention. Finally, the third component part recognizes that the company will almost always have the sole responsibility to determine whether the talent has breached the contract. Part II also discusses potential explicit or implicit restrictions that the parties can place upon that power, and why a company may be inclined to oblige with those restrictions.

Part III delves into the industry of endorsement advertising, which has long enjoyed the use of morality clauses in its contracts. In addition to explaining why endorsement advertising is effective, and lucrative, for brands, the Part introduces a new form of endorsement advertising, the social-media influencer. Influencers provide companies with a means by which the companies can reach their target consumers in a more authentic and organic way than traditional advertising. With this

value, however, comes several potential challenges for brands working with spokespeople online. Part IV uses the three-component framework to investigate these challenges as they relate to drafting an effective morality provision.

Finally, Part V provides a sample morality clause for influencer contracts. The proposal builds upon the strengths and weaknesses identified in the traditional morality clause and updates the provision for the Internet Age. While morality clauses have generally withstood the test of time, they do run the risk of being too ambiguous, unfair, or out of touch with contemporary demands. This proposal seeks to tighten up the morality clause such that both parties involved will be able to avoid lengthy and expensive litigation. It also aims to encourage the evolving influencer industry to modernize the morality clause in order to safeguard the interests both of the immediate parties as well as consumers at large.

I. HISTORY OF MORALITY CLAUSES IN THE ENTERTAINMENT AND SPORTS INDUSTRIES

A. *Origins of Morality Clauses*

Morality clauses originate, perhaps appropriately, from a party. In the summer of 1921, silent film comedian Roscoe “Fatty” Arbuckle was at the height of his career. Fresh off of a three-year stint with Paramount, Arbuckle had starred in a whopping 18 films and raked in an unprecedented \$3 million over the last few years.¹ His latest film, *Crazy to Marry*, had just premiered in movie houses across the country and the studio had signed him for another year-long, million-dollar contract.² To anyone watching—and people were certainly watching—it was clear that Arbuckle was poised to solidify his title as a king of Hollywood comedy.

To celebrate his friend’s recent success, director Fred Fischbach rented out a suite at the St. Francis Hotel in San Francisco for a three-day, Prohibition-banned celebration in honor of Arbuckle.³ By the time Labor Day arrived, the suite was full of music, liquor, and eclectic characters. Two such visitors were Maude Delmont, a local madam, and Virginia Rappe, an aspiring actress and model who was well known on the Hollywood social scene.⁴ The details of the raucous party would later become hotly contested,⁵ but the affair ended with Rappe, moaning in pain, sequestered in one of the suite’s bedrooms and being tended to by a local

¹ Gilbert King, *The Skinny on the Fatty Arbuckle Trial*, SMITHSONIAN MAG. (Nov. 8, 2011), <https://www.smithsonianmag.com/history/the-skinny-on-the-fatty-arbuckle-trial-131228859/>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *This Day in History: Silent Film Star Fatty Arbuckle Arrested for Murder*, HISTORY, <https://www.history.com/this-day-in-history/silent-film-star-arrested-for-murder> (Sept. 9, 2020).

physician.⁶ Delmont told the police that Arbuckle had raped her friend and, the inference went, had ruptured her bladder under the weight of his 266-pound frame.⁷ Arbuckle and his attorneys would go on to insist upon his innocence, claiming that Rappe had fallen ill during the party and become “hysterical,” but their protestations fell on deaf ears.⁸ Before the week was up, Virginia Rappe was dead and Fatty Arbuckle was on “felony row” facing charges of rape and manslaughter.⁹

Local and national newspapers swiftly seized on the scandal and provided salacious coverage of the saga. William Randolph Hearst’s chain of papers would later boast that their coverage of the Arbuckle trial sold more papers than the sinking of the British ocean liner *Lusitania* during World War I.¹⁰ Despite the fact that the jury would ultimately acquit Arbuckle of both counts, the star had a swift and hard fall from grace. The nation reeled at the sensational tales of debauchery, and moviegoers across the country boycotted Arbuckle’s films.¹¹ Paramount pulled the freshly released *Crazy to Marry* for fear of further backlash.¹² Will Hays, of Hays Code fame,¹³ publicly banned Arbuckle from appearing on screen,¹⁴ and, in late September of 1921, the Universal Film Company announced that talent under the studio’s purview would thereafter be subject to something called a “morality clause.”¹⁵

B. Widespread Adoption of Morality Clauses

The novel provision took hold of the entertainment industry with remarkable fervor. Within a year of the Arbuckle affair, for example, the clause had worked its way into the world of professional sports. Despite the fact that they finished at the top of the American League with a 94–60 record for the 1922 season,¹⁶ the New

⁶ King, *supra* note 1.

⁷ *Id.*

⁸ *Id.*; accord *This Day in History*, *supra* note 5.

⁹ King, *supra* note 1.

¹⁰ *Id.*

¹¹ *This Day in History*, *supra* note 5.

¹² See King, *supra* note 1.

¹³ See Bob Mondello, *Remembering Hollywood’s Hays Code, 40 Years On*, NPR (Aug. 8, 2008, 5:58 PM), <https://www.npr.org/templates/story/story.php?storyId=93301189> (“Hollywood studios banded together under former Postmaster General Will Hays to come up with a list of 36 self-imposed ‘Don’ts and Be Carefuls’ . . .”).

¹⁴ *Roscoe Arbuckle*, ENCYC. BRITANNICA, <https://www.britannica.com/biography/Roscoe-Arbuckle> (Mar. 20, 2022).

¹⁵ Fernando M. Pinguelo & Timothy D. Cedrone, *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, 19 SETON HALL J. SPORTS & ENT. L. 347, 354 (2009); *Morality Clause for Films: Universal Will Cancel Engagements of Actors Who Forfeit Respect.*, N.Y. TIMES, Sept. 22, 1921, at 8. The text of the Universal Studios morality clause is reprinted in Part III.

¹⁶ *1922 New York Yankees Roster*, BASEBALL ALMANAC, <https://www.baseball-almanac.com/>

York Yankees knew that they needed to make a change. For the second year in a row, they had suffered a World Series defeat at the hands of their rivals (and landlords) the New York Giants.¹⁷ Particularly troubling were the antics and misadventures of the team's star player, baseball phenom Babe Ruth. Ruth enjoyed a public reputation as a "glutton, womanizer, spendthrift, heavy drinker, and smoker."¹⁸ He had started the 1922 season on suspension for participating in a "barnstorming" tour after the 1921 World Series, and his performance had deteriorated quickly upon return to the field.¹⁹ In one notable incident, shortly after Ruth's reemergence, the Yankees faced off against the Washington Senators on the Yankees' home turf at the New York Polo Grounds.²⁰ Trying to capitalize on a fumbled catch, Ruth rounded first and made a mad dash for second—only to be tagged out in a close play. Infuriated, the phenom grabbed a handful of dirt, leapt to his feet, and flung it in the face of game's umpire. As he lumbered off the field, many of the 10,000 fans started to heckle and jeer at the "Great Bambino." Ruth returned the favor, mockingly tilting his cap at the stands, when one fan shouted, "*You goddamned big bum, why don't you play ball?*"²¹ In the blink of an eye, Ruth hurled himself into the stands, looking for the rabblouser. When he was unable to find him, Ruth returned to the dugout, where he would remain, again on suspension, for the following game.²²

The Yankees had bet big on Ruth, trusting him to lead the team and paying him handsomely for his efforts,²³ and they were frustrated at how volatile their investment was turning out to be. In an effort to cure Ruth's performance *on* the field, the team decided to set their sights on remedying his performance *off* the field. The Yankees approached Ruth with an amendment to his playing contract.²⁴ The amendment contained a provision requiring Ruth "to abstain from drinking alcohol and to be in his bed by 1:00 a.m. during the baseball season," threatening legal action for the player's breach.²⁵ Though the team never actually chose to enforce the

teamstats/roster.php?y=1922&t=NYA (last visited July 11, 2022).

¹⁷ *1922 World Series*, BASEBALL ALMANAC, <https://www.baseball-almanac.com/ws/yr1922ws.shtml> (last visited July 11, 2022).

¹⁸ Porcher L. Taylor, III, Fernando M. Pinguelo & Timothy D. Cedrone, *The Reverse-Morals Clause: The Unique Way to Save Talent's Reputation and Money in a New Era of Corporate Crimes and Scandals*, 28 CARDOZO ARTS & ENT. L.J. 65, 75 (2010).

¹⁹ Mike Lynch, *May 25, 1922: Babe Ruth's Ejection Costs Him Yankees Captaincy*, SOC'Y FOR AM. BASEBALL RSCH., <https://sabr.org/gamesproj/game/may-25-1922-ruths-ejection-costs-him-yankees-captaincy/> (last visited July 11, 2022).

²⁰ *Id.*

²¹ *Id.*

²² *See id.*

²³ *See 1922 New York Yankees Roster*, *supra* note 16.

²⁴ Taylor et al., *supra* note 18, at 75.

²⁵ *Id.*

clause,²⁶ its presence in Ruth's contract provided the Yankees with a safeguard against the rocky public image of their star player.

C. *Morality Clauses Get the Judicial Seal of Approval*

Morality clauses came front and center again in the 1940s and 50s. In the midst of McCarthyism, Hollywood studios chose to invoke the clause in the contracts of "The Hollywood Ten," the group of producers, screenwriters, and directors who had publicly criticized the work of the House Un-American Activities Committee (HUAC) during its investigation of alleged Communist influence in Hollywood.²⁷ The studios claimed that the political leanings of the Hollywood Ten put them in breach of their morality provisions and terminated their employment.²⁸

Three members of the Hollywood Ten sued the studios, claiming wrongful termination.²⁹ In *Loew's Inc. v. Cole*, screenwriter Lester Cole sued Loews, Inc. (MGM) for letting him go after refusing to answer whether he was, or ever had been, a member of the Communist Party.³⁰ The Ninth Circuit, reversing the trial court, held that the termination was proper because a jury could reasonably infer from Cole's silence in front of HUAC that he was a Communist.³¹ This inference, according to the court, put Cole in breach of the morality provision in his contract.³² A similar case unfolded in *Twentieth Century-Fox Film Corp. v. Lardner*, wherein Fox fired screenwriter Ring Lardner, Jr. for breaching his morality clause by being cited for contempt because of his silence in the HUAC hearings.³³ While the jury, again, found in favor of the talent, the Ninth Circuit, again, reversed. The court held that the term "decency and morality" in Lardner's contract precluded him from refusing to answer questions during his testimony.³⁴ The last case in the so-called "Hollywood Ten Trilogy," *Scott v. RKO Radio Pictures, Inc.*, evolved in much the same fashion: RKO terminated Adrian Scott's employment under the morality provision in his contract after HUAC cited him in contempt for his silence.³⁵ A bench trial found in favor of the studio and the Ninth Circuit affirmed, holding that in-

²⁶ *See id.*

²⁷ Caroline Epstein, Note, *Morals Clauses: Past, Present, and Future*, 5 N.Y.U. J. INTELL. PROP. & ENT. L. 72, 76–78 (2015).

²⁸ *Id.* at 77–78.

²⁹ *See id.*

³⁰ *Loew's, Inc. v. Cole*, 185 F.2d 641, 645 (9th Cir. 1950).

³¹ *Id.* at 648–49.

³² *Id.*

³³ *Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844, 847 (9th Cir. 1954).

³⁴ *Id.* at 850.

³⁵ *See Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87, 90–91 (9th Cir. 1957).

curing the contempt order breached the morals provision and that the studio, therefore, had just cause for termination.³⁶

D. *Morality Clauses in the Twenty-First Century*

Hollywood has continued its use of morality clauses in the decades since the Hollywood Ten and the clauses are now ubiquitous in many talent agreements.³⁷ While the Minimum Basic Agreements for both the Directors Guild of America (DGA)³⁸ and the Writers Guild of America (WGA) now expressly prohibit the use of morality clauses,³⁹ the Minimum Basic Agreement of their more public peers in the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) is silent on the issue,⁴⁰ enabling studios and networks to include the clause at their discretion.

A morality clause, for example, came to the forefront of litigation in 2011 when Charlie Sheen sued Warner Brothers over his termination from the television program *Two and a Half Men*.⁴¹ The clause in question, made public through the litigation, appears to specify that only actions constituting a felony offense would establish a breach.⁴² The case ultimately settled with sources reporting that Warner

³⁶ *Id.* at 90–92.

³⁷ Most professional sports leagues in the United States also include a morality provision in their collective bargaining agreements, including the NFL, MLB, NBA, and NHL. Teams have invoked the provision in notable cases such as quarterback Michael Vick (convicted of financing a dogfighting ring); Adam “Pacman” Jones (arrested five times and violated probation); and University of Washington coach Rick Neuheisel (gambled on college sports). See Nathan Law, Comment, *Manufacturing a Run: How Major League Baseball Can Use the Morals Clause to Clean Up Baseball*, 48 J. MARSHALL L. REV. 539, 549–50, 549 nn.80–82 (2015).

³⁸ DIRECTORS GUILD OF AMERICA, INC. BASIC AGREEMENT OF 2017, at 279 (2017), <https://www.dga.org/-/media/E912CA508ACF4446BA1C0DEB1B49ED89.pdf>.

³⁹ 2017 WRITERS GUILD OF AMERICA WEST—ALLIANCE OF MOTION PICTURE AND TELEVISION PRODUCERS THEATRICAL AND TELEVISION BASIC AGREEMENT 309 (2017), <https://www.wga.org/uploadedfiles/contracts/mba17.pdf>.

⁴⁰ See PRODUCER-SAG-AFTRA CODIFIED BASIC AGREEMENT OF 2014 (2014), https://www.sagaftra.org/files/2014_sag-aftra_cba_1.pdf.

⁴¹ Matthew Belloni, *Official: Charlie Sheen Settles Lawsuit with Warner Bros.*, *Chuck Lorre*, HOLLYWOOD REP. (Sept. 26, 2011, 3:18 PM), <https://www.hollywoodreporter.com/thr-esq/official-charlie-sheen-settles-lawsuit-240214>; Lindsay Powers, *Charlie Sheen Files \$100 Million Lawsuit Against Warner Bros.*, *Chuck Lorre*, HOLLYWOOD REP. (Mar. 10, 2011, 10:23 AM), <https://www.hollywoodreporter.com/news/general-news/charlie-sheen-files-100-million-166537/>.

⁴² Eriq Gardner, *Charlie Sheen’s Contract: Was There Actually a Morals Clause? (Analysis)*, HOLLYWOOD REP. (Mar. 8, 2011, 9:13 AM), <https://www.hollywoodreporter.com/thr-esq/charlie-sheens-contract-was-actually-165309>. Sheen’s clause read:

If Producer in its reasonable but good faith opinion believes Performer has committed an act which constitutes a felony offense involving moral turpitude under federal, state or local laws, or is indicted or convicted of any such offense, Producer shall have the right to delete

Brothers paid the actor around \$25 million.⁴³

Popular talent, like Sheen, often use their bargaining power to remove, or at least narrow, morality provisions in their contracts. However, arguments in favor of less forgiving morality clauses have sprung forward in the wake of the #MeToo movement.⁴⁴ Harvey Weinstein, the infamous Hollywood producer, had a narrow morality clause with his eponymous production company, which could be triggered only by his failing to pay fines or costs incurred by the company because of his behavior.⁴⁵ Though the company still managed to remove Weinstein from his position,⁴⁶ the limited scope of his morality clause shed a new light on the issue. Similarly, Netflix terminated its relationship with Kevin Spacey after more than three dozen men came forward with sexual abuse allegations against the actor.⁴⁷ Spacey's contract did not contain a morality clause, providing that he could only be fired if he became "unavailable" or "incapacitated."⁴⁸ Netflix ultimately suspended the actor based on a sexual-harassment policy, rather than moral grounds, losing an estimated

the billing provided for in this Agreement from any broadcast or other uses which are thereafter made of the episode(s) in which Performer appears. In addition, to the extent such event interferes with Performer's ability to fully and completely render all material services required hereunder or Producer's ability to fully exploit the Series, Producer shall have the right to treat such act as a default under the applicable provisions hereof.

⁴³ Belloni, *supra* note 41.

⁴⁴ See, e.g., Allyn Davidson, Note, *#MoralsToo: The Film Industry Must Implement an International Morals Clause*, 26 SW. J. INT'L L. 376 (2020); David E. Fink & Sarah E. Diamond, *Morality Clauses in the Age of #MeToo and Time's Up*, COMM. LAW., Winter 2019, at 4; Caysee Kamenetsky, Note, *The Need for Strict Morality Clauses in Endorsement Contracts*, 7 PACE INTELL. PROP., SPORTS & ENT. L.F. 289 (2017); Tatiana Siegel, *#MeToo Hits Movie Deals: Studios Race to Add "Morality Clauses" to Contracts*, HOLLYWOOD REP. (Feb. 7, 2018, 6:50 AM), <https://www.hollywoodreporter.com/news/metoo-hits-movie-deals-studios-race-add-morality-clauses-contracts-1082563>.

⁴⁵ Sally Helppie & Amy E. Mitchell, Off-Screen Behavior Matters: Morals Clauses for Performers, SXSWSW CLE 1, 5 (Mar. 15, 2018), <https://www.sxsw.com/wp-content/uploads/2018/03/SXSWSW-2018-Morals-Clauses-Presentation.pdf>; see also Bryan Sullivan, *Kevin Spacey and Harvey Weinstein Employment Agreements Say a Lot About Hollywood*, FORBES (Nov. 15, 2017, 2:39 PM), <https://www.forbes.com/sites/legalentertainment/2017/11/15/kevin-spacey-and-harvey-weinstein-employment-agreements-say-a-lot-about-hollywood> (exploring the use of morality clauses in Hollywood in the wake of the Weinstein and Spacey scandals).

⁴⁶ Megan Twohey, *Harvey Weinstein Is Fired After Sexual Harassment Reports*, N.Y. TIMES (Oct. 8, 2017), <https://www.nytimes.com/2017/10/08/business/harvey-weinstein-fired.html>.

⁴⁷ Helppie & Mitchell, *supra* note 45, at 4; Aja Romano, *The Sexual Assault Allegations Against Kevin Spacey Span Decades. Here's What We Know.*, VOX, <https://www.vox.com/culture/2017/11/3/16602628/kevin-spacey-sexual-assault-allegations-house-of-cards> (Aug. 25, 2020, 12:03 PM).

⁴⁸ Helppie & Mitchell, *supra* note 45, at 4; see also Suzanne Lucas, *Kevin Spacey: Netflix Can't Fire Me*, INC. (Nov. 14, 2017), <https://www.inc.com/suzanne-lucas/kevin-spacey-netflix-cant-fire-me.html> (explaining contractual employment relationships, including that of Kevin Spacey and Netflix).

\$39 million to Spacey projects that it refused to air.⁴⁹ If these men, and others like them, had been subjected to a wider morality clause, their terminations would have been quicker, easier, and less costly for both companies involved.

In addition to the call for broader morality provisions in Hollywood, reverse morality clauses have also gained support in recent years. These clauses are “reverse” in that they allow talent to terminate a contractual relationship with a company that has fallen into disrepute.⁵⁰ The clause first emerged in 1968, when religious singer Pat Boone negotiated an agreement with his record company that provided him the option to terminate the relationship if the label, which had just released the *Two Virgins* record album with a naked John Lennon and Yoko Ono on its cover, did anything further to upset Boone’s conscience.⁵¹ The need for reverse morality clauses was famously underscored in 2002 by the relationship between the Houston Astros and the Enron Corporation. The parties had entered into a long-term contract wherein the energy company agreed to pay \$100 million over 30 years for naming rights to the team’s baseball field.⁵² After Enron’s epic fall from grace, the Astros were forced to pay Enron’s creditors \$2.1 million to buy back the naming rights to the field and distance themselves from the tarnished brand.⁵³ The Enron scandal made it clear that while companies may need protection from bad actors, actors also need protection from bad companies.

II. ANATOMY OF A MORALITY CLAUSE

Early morality clauses were essentially non-negotiable and encompassed a wide scope of unfavorable conduct.⁵⁴ Over the course of the last century, the clauses have become both more widespread and more contentious than their early antecedents.⁵⁵ Nowadays, popular talent like Charlie Sheen and Kevin Spacey have the wherewithal to negotiate for much narrower morality provisions, recognizing that it is in their best interest to curtail their employer’s encroachment on their life outside the studio. A company that is contracting with individuals who have such star power will need to make the necessary concessions in order to get the deal done. However, since the days of Fatty Arbuckle and Babe Ruth, the underlying formulation of the

⁴⁹ See Natalie Robehmed, *The Morality Clause: How #MeToo Is Changing Hollywood Dealmaking*, FORBES (Mar. 29, 2018, 11:22 AM), <https://www.forbes.com/sites/natalierobehmed/2018/03/29/the-morality-clause-how-metoo-is-changing-hollywood-dealmaking/>.

⁵⁰ Epstein, *supra* note 27, at 96.

⁵¹ *Id.*

⁵² Chris Isidore, *Astros Strike Out Enron*, CNN MONEY (Feb. 27, 2002, 1:37 PM), https://money.cnn.com/2002/02/27/companies/enron_astros/.

⁵³ *Id.*

⁵⁴ John Gibeaut, *Hold that Tiger: After Woods Scandal, More Lawyers are Teeing Up ‘Morals Clauses,’* A.B.A. J., Sept. 2010, at 16, 17.

⁵⁵ *Id.* at 17.

morality clause has largely stayed the same and courts have long held them valid and enforceable.⁵⁶ This Part breaks morality clauses into three component parts: identifying the prohibited conduct, specifying how to trigger the clause, and providing the means by which a breach will be determined. The Sections that follow will explore each of these component parts in turn, using Universal Studio's morality clause, issued in the wake of the Arbuckle scandal,⁵⁷ as a guide. The Universal clause states:

The actor (actress) agrees to conduct himself (herself) with due regard to public conventions and morals and agrees that he (she) will not do or commit anything tending to degrade him (her) in society or bring him (her) into public hatred, contempt, scorn or ridicule, or tending to shock, insult or offend the community or outrage public morals or decency, or tending to the prejudice of the Universal Film Manufacturing Company or the motion picture industry. In the event that the actor (actress) violates any term or provision of this paragraph, then the Universal Film Manufacturing Company has the right to cancel and annul this contract by giving five (5) days' notice to the actor (actress) of its intention to do so.⁵⁸

A. *Identifying the Prohibited Conduct*

To be effective, a morality provision should clearly identify what behavior will come under its purview. This ensures that the clause puts the talent on reasonable notice as to what behavior the company expects of him. The most common forms of behavior targeted by a morality provision are illegal or unlawful acts and immoral behavior.

1. *Illegal or Unlawful Acts*

Illegal or unlawful acts will be determined by the black letter law. The parties do not need to define the conduct per se, but they will need to specify whether the clause focuses only on felony offenses or if it will include any infraction of federal, state, or local law. They should also agree upon what point in the legal process will trigger the clause. The talent will generally push for the clause to apply later in the process, upon indictment or conviction, and only in the case of a felony offense. These concessions narrow the scope of the morality clause and delay the point at which the company can invoke the provision. The company, on the other hand, can protect itself by stipulating that the clause will be triggered upon a mere allegation or arrest and by drafting the clause to encompass any sort of illegal or unlawful

⁵⁶ *Nader v. ABC Television, Inc.*, 150 F. App'x 54, 56 (2d Cir. 2005) (citing 19 WILLISTON ON CONTRACTS § 54:45 (4th ed. 1993); RESTATEMENT (SECOND) OF AGENCY § 380 (AM. L. INST. 1958)).

⁵⁷ See *supra* Section I.A.

⁵⁸ Taylor et al., *supra* note 18, at 77 n.53 (quoting *Morality Clause for Films*, *supra* note 15, at 8).

behavior. These modifications allow the employer to distance itself quickly and easily from the talent. As in most contractual provisions, the party with the most bargaining power is likely to prevail.

2. *Immoral Conduct*

The latter type of conduct, immoral behavior, is more difficult to measure.⁵⁹ As discussed below in Part IV,⁶⁰ “immoral” conduct will inevitably shift over time. In order to effectively identify the prohibited behavior, then, a morality clause must be relatively flexible. The Universal provision does this quite well. The clause begins by requiring that the talent conduct herself “with due regard to public conventions and morals” and goes on to reaffirm the sentiment by barring behavior that “tend[s] to shock, insult or offend the community or outrage public morals or decency.”⁶¹ Both of these requirements anchor the elicited behavior in contemporary definitions of morality, setting the prevailing public sentiment of the day as the behavioral benchmark. In doing so, the provision identifies prohibited behavior that will modernize with time without requiring a revision to the contract.

While the Universal provision primarily focuses on immoral behavior, the morality clause in *Team Gordon, Inc. v. Fruit of the Loom, Inc.*⁶² serves as a helpful example of a clause that targets both illegal or unlawful acts and immoral conduct. It also illustrates the fact that a morality clause must walk the tight line between flexibility and ambiguity. In this case, Fruit of the Loom agreed to sponsor a NASCAR team, reserving the right to terminate the Sponsorship Agreement if the driver:

[C]ommits or has committed any act, or is charged with a felony, or has been or becomes involved in any situation or occurrence involving fraud, moral turpitude or otherwise reasonably tending to bring him into public disrepute, contempt, scandal or ridicule, or reasonably tending to shock, insult or offend any class or group of people, or reflecting unfavorably upon [Fruit of the Loom’s] reputation or its products.⁶³

A few years into the relationship, the driver, Robby Gordon, wrecked with another driver on the speedway.⁶⁴ Gordon’s car ran into the racetrack wall while the other driver continued on. As the opposing car rounded the track again, Gordon, who had exited his vehicle, ran at the car, and threw his helmet at its window. He then left the track and, during his post-accident interview, called the other driver a

⁵⁹ Pinguelo & Cedrone, *supra* note 15, at 352.

⁶⁰ See *infra* Section IV.A.2.

⁶¹ See *supra* note 58 and accompanying text.

⁶² *Team Gordon, Inc. v. Fruit of the Loom, Inc.*, No. 3:06-cv-201-RJC, 2009 WL 426555 (W.D.N.C. Feb. 19, 2009).

⁶³ *Id.* at *4.

⁶⁴ *Id.* at *3.

“piece of shit” on live television.⁶⁵ The next day, Fruit of the Loom terminated the relationship pursuant to Gordon’s morality clause, claiming that the driver had “brought himself into public disrepute, contempt, scandal, and ridicule.”⁶⁶

The question in this case focused in part on a dispute surrounding an unpaid payment incurred prior to termination. Fruit of the Loom attempted to argue that it was excused from making the payment because it had 30 days to cure the missed disbursement and it was during those 30 days that the unbecoming conduct occurred.⁶⁷ The court disagreed, holding that Gordon’s subsequent behavior did not absolve Fruit of the Loom of its payment obligation.⁶⁸ In granting summary judgment on the point to Gordon, the court recognized that the contract was valid,⁶⁹ but it did not address whether his actions constituted a valid breach of the morality provision. When measured against prevailing standards of morality in 2005, the year that the incident occurred, Gordon’s behavior likely did bring him into public disrepute, contempt, scandal, or ridicule, especially because his conduct occurred in front of a live audience and was memorialized via television broadcast. That being said, reasonable minds can differ, and it is possible that a court would find that the driver’s tantrum did not rise to the level required to support valid termination. This case underscores the fact that, while contemporary standards of morality can be a beneficial touchstone for determining whether or not the talent has triggered the clause, the company must aim to be as specific as possible in delineating those standards.

B. *Specifying How to Trigger the Clause*

In addition to delineating *which* behavior will trigger the provision, a morality clause should also describe *how* the behavior will trigger the provision. In doing so, the clause will likely take one of two forms: a “reputational impact” clause or a “bad behavior” clause.⁷⁰ Public reaction to the talent’s behavior will trigger a “reputational impact” clause; these clauses focus on the impact that the conduct has, rather than the conduct itself. By placing the emphasis on impact, a “reputational impact” clause provides the employer with much stronger protection. The company does not need to prove whether or not the behavior actually occurred, which may be difficult if the alleged incident occurred under private or semi-private circumstances,

⁶⁵ *Id.* at *4.

⁶⁶ *Id.*

⁶⁷ *Id.* at *5.

⁶⁸ *Id.* at *6.

⁶⁹ *Id.* at *7.

⁷⁰ Patricia Sánchez Abril & Nicholas Greene, *Contracting Correctness: A Rubric for Analyzing Morality Clauses*, 74 WASH. & LEE L. REV. 3, 10 (2017).

it must only prove that its reputation or the reputation of its talent has been harmed.⁷¹

On the other hand, the talent's actions themselves, rather than their impact, will trigger a "bad behavior" clause.⁷² This type of clause affords more protection for talent, especially those whose behavior may be subject to intense media scrutiny and who are likely to fall victim to embellishments or other inaccuracies as the story gets retold. As noted above, it also may greatly increase the evidentiary burden on the company. While a business can substantiate public reaction by news reports, public discussion, or customer complaints, proving the details of the talent's behavior is more likely to require evidence that is not easily accessible by the company. As a result, this type of morality provision may be more likely to require prolonged litigation or settlement, and less likely to be disposed of on summary judgment.

Note, however, that these types of clauses are not mutually exclusive, and some provisions may contain both within their scope.⁷³ Moreover, while there appears to be a stark difference between a "reputational impact" and a "bad behavior" clause, it is not always easy to distinguish between the two. The Universal clause requires that the talent assert that she will not "do or commit anything tending to degrade her in society or bring her into public hatred, contempt, scorn or ridicule."⁷⁴ On first blush, this appears to be a "reputational impact" clause because the emphasis is on whether or not the talent has been degraded in society or is the subject of public hatred, contempt, scorn, or ridicule. However, an almost identical provision was at issue in *Williams v. MLB Network, Inc.*,⁷⁵ and the court construed the clause as a "bad behavior" clause, costing the network over \$1.5 million in compensatory damages.⁷⁶

In *Williams*, sports commentator Mitchell Williams brought a breach of contract claim against Major League Baseball Network ("MLB Network") after the network terminated his employment contract pursuant to the contract's morality clause.⁷⁷ The clause allowed MLB Network to fire Williams for engaging in conduct that brought him "into (non-trivial) public disrepute, scandal, contempt or ridicule or which shocks, insults or offends a substantial portion or group of the community or reflects unfavorably (in a non-trivial manner) on any of the parties."⁷⁸ The network exercised the provision after two articles came out alleging that Williams had

⁷¹ *Id.* at 11–12.

⁷² *Id.* at 10–11.

⁷³ *Id.* at 10.

⁷⁴ *See supra* note 58 and accompanying text.

⁷⁵ *Williams v. MLB Network, Inc.*, No. A-5586-16T2, 2019 WL 1222954 (N.J. Super. Ct. App. Div. Mar. 14, 2019).

⁷⁶ *Id.* at *3, *10, *31.

⁷⁷ *Id.* at *6.

⁷⁸ *Id.* at *3.

spewed profanity and ordered a “beanball” (i.e., that the pitcher throw the ball directly at the batter so as to hit or scare him) on another player while he was coaching a children’s baseball tournament.⁷⁹ Williams vehemently denied that he had behaved in any such fashion. At trial, both sides presented a number of witnesses to testify as to what occurred during the two games in question. While some witnesses asserted that Williams had acted inappropriately, none were able to affirm conclusively that he had acted in the alleged manner. Ultimately, the jury found that MLB Network failed to prove that Williams had actually engaged in conduct that violated the morality provision.⁸⁰

The state appellate court affirmed, asserting that a court should judicially analyze a morality clause like it does any other contractual provision.⁸¹ A court must consider the plain language of the clause and the parties’ mutual intent and understanding.⁸² In *Williams*, the language of the provision required that the conduct at issue be “non-trivial.” The contract did not define what “non-trivial” conduct might mean, but the court found that the parties’ intent in forming the contract was that the behavior be “significant.”⁸³ Additionally, both the plain meaning of the contract and the parties’ mutual intent indicated that the conduct in question must have actually occurred. With the evidence entered at trial unable to prove by a preponderance of the evidence that Williams had, in fact, engaged in a Little League tirade, the appellate court held that the jury reasonably concluded that he had not violated the morality provision and that MLB Network breached the contract when they let the commentator go.⁸⁴

The *Williams* case highlights how difficult it can be to draft a morality provision. The network appears to have believed that the provision in question was a “reputational impact” clause. Despite this, the court examined the provision under a traditional contract analysis and found that both the meaning of the plain language and the parties’ mutual intent in forming the clause indicated that it was a “bad behavior” clause. As this case illustrates, distinguishing between the two can make all the difference at trial. It also underscores the notion that both parties will benefit from drafting the clause unambiguously. The parties should ensure that the plain language of the clause accurately reflects the type of provision that they have settled on and that they preserve this mutually understood intent during negotiations and their course of performance.⁸⁵ In doing so, though one party may favor one type of

⁷⁹ *Id.* at *3–5.

⁸⁰ *Id.* at *9–10.

⁸¹ *Id.* at *13, *15.

⁸² *Id.* at *13.

⁸³ *Id.*

⁸⁴ *Id.* at *10, *13–15.

⁸⁵ The traditional rules for interpreting contracts are set out in the RESTATEMENT (SECOND) OF CONTRACTS § 202 (AM. LAW INST. 1981). Under § 202(1), the court will interpret the parties’

clause over the other, both parties will save the time and expense of litigation by creating a clause that, if necessary, a future court can easily understand.

C. Providing for the Means by Which a Breach Will Be Determined

Once a morality provision addresses the prohibited behavior and how that behavior will trigger the clause, it should also delineate how to determine whether or not that trigger will constitute a breach. Not all clauses provide that the relationship will automatically terminate upon the occurrence of the illicit behavior.⁸⁶ Nor, perhaps to the chagrin of talent everywhere, do they require that the decision be a mutual one.⁸⁷ Rather, almost all morality clauses reserve unilateral determination of a breach to the company in its sole discretion.⁸⁸

In the Universal clause, for example, if the talent breached the morality provision, Universal retained “the right to cancel and annul [the] contract by giving five (5) days’ notice to the actor (actress) of its intention to do so.”⁸⁹ Likewise, in *Nader v. ABC Television, Inc.*,⁹⁰ the network reserved the right to, upon written notice, “immediately terminate” the contractual relationship if an actor engaged in conduct that “might tend to reflect unfavorably on ABC” or any of its sponsors, sponsors’ ad agencies, stations, licensees, series, or programs.⁹¹ The Second Circuit held that, despite the network’s 20-day delay in termination, ABC was well within its rights to fire actor Michael Nader after his well-publicized arrest for attempting to sell cocaine to an undercover police officer.⁹² The unambiguous text of the contract granted such power to the network and the court refused to upend the parties’ negotiated terms.

words and conduct “in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.” Additionally, § 202(4) notes that if there are “repeated occasions for performance” by either party under the contract, then the court will also give great weight to “any course of performance accepted or acquiesced in without objection” in interpreting the contract. For morality clauses, this means that if the talent repeatedly engages in questionable behavior and the company does not invoke the morality provision in response, the court will likely find that the contract does not cover that particular behavior. The logic behind this rule of interpretation is that if a company is so offended by a particular action, or does not believe that the action satisfies the contract, it would not have just sat idly by and allowed the talent to continue to act in such a fashion without utilizing the morality clause.

⁸⁶ Pinguelo & Cedrone, *supra* note 15, at 374–75.

⁸⁷ *See id.* at 371.

⁸⁸ *See id.* If the talent has sufficient bargaining power, they may (and should) try to negotiate for an arbiter to review the determination of a breach, rather than vesting such power exclusively in the company. This provides the talent with at least some assurance that a neutral third party will review their termination.

⁸⁹ *See supra* note 58 and accompanying text.

⁹⁰ *Nader v. ABC Television, Inc.*, 150 F. App’x 54 (2d Cir. 2005).

⁹¹ *Id.* at 56–57; *Nader v. ABC Television, Inc.*, 330 F. Supp. 2d 345, 346 (S.D.N.Y. 2004).

⁹² *Nader*, 150 F. App’x at 56–57.

This unilateral power to determine breach, some commentators have argued, runs the risk of causing the provision to be excised as unconscionable.⁹³ To prove that a provision is unconscionable, the challenging party needs to prove both procedural unconscionability and substantive unconscionability.⁹⁴ Procedural unconscionability occurs when the drafting party, that is, the company, presents the contract to the non-drafting party, that is, the talent, on a take-it-or-leave-it basis or where there is a marked difference in bargaining power between the entities.⁹⁵ Substantive unconscionability is present where the terms of the contract itself are unduly one-sided.⁹⁶ As such, when a contract containing a morality provision is presented to talent that lacks bargaining power, such as someone just starting out in the industry, and the morality clause allows the employer to terminate the relationship at its sole discretion, a court may potentially invalidate the provision on unconscionability grounds.

However, this theory is not frequently realized in practice.⁹⁷ It is more likely that a court will respect the agreed-upon terms but cabin the company's discretion using the implied covenants of good faith and fair dealing. For example, in *Mendenhall v. Hanesbrands, Inc.*,⁹⁸ the company had amended the clause in question from this:

If Mendenhall is arrested for and charged with, or indicted for or convicted of any felony or crime involving moral turpitude, then HBI shall have the right to immediately terminate this Agreement.⁹⁹

To this:

If Mendenhall commits or is arrested for any crime or becomes involved in any situation or occurrence (collectively, the "Act") tending to bring Mendenhall into public disrepute, contempt, scandal, or ridicule, or tending to shock, insult or offend the majority of the consuming public or any protected class or group thereof, then *we shall have the right to immediately terminate this Agreement. HBI's decision on all matters arising under this Section 17(a) shall be conclusive.*¹⁰⁰

NFL player Rashard Mendenhall, a spokesperson for Hanesbrands's Champion line, produced a series of controversial tweets in the wake of the killing of

⁹³ Sánchez Abril & Greene, *supra* note 70, at 65–66.

⁹⁴ See Richard L. Barnes, *Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability*, 66 LA. L. REV. 123, 151 (2005).

⁹⁵ *Id.* at 165.

⁹⁶ *Id.*

⁹⁷ As of the time of this writing, no reported case appears to have overturned a morality clause on unconscionability grounds.

⁹⁸ *Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717 (M.D.N.C. 2012).

⁹⁹ *Id.* at 719.

¹⁰⁰ *Id.* at 720 (emphasis added).

Osama bin Laden, criticizing those who were celebrating his death. Three days later, Hanesbrands sent Mendenhall a notice terminating their relationship. When Mendenhall sued for breach of contract, the company defended itself by arguing that it retained the “conclusive authority” to exercise the provision. Mendenhall pointed out that some of the responses to his tweets had been positive.¹⁰¹ He argued, and the court agreed, that Hanesbrands may have invoked the provision merely because it disagreed with his statements, rather than because the morality provision truly applied.¹⁰² The court noted that even when a contract clause appears to provide one party with unfettered discretion, the implied restrictions of good faith and fair dealing require the party exercising that discretion “not to act arbitrarily or irrationally” in exercising its power.¹⁰³ In this case, the court found that it may have been unreasonable for Hanesbrands to determine that the tweets actually constituted prohibited behavior merely because it disapproved of their content. If proven at trial, the clothing brand would have failed to abide by the implied covenants of good faith and fair dealing and the termination itself would be a breach of contract.

This case nicely illustrates that, while courts will often uphold a negotiated term providing the company with unilateral power, there are still implied duties of fairness that can harness this control. Additionally, talent with superior bargaining power may require that the parties explicitly include the reasonableness requirement in the contract.¹⁰⁴ Though a company might not be inclined to make such an allowance, *Mendenhall* suggests that doing so may ultimately save them from running the risk of prolonged litigation in which the court will impose the restriction anyway. As such, it may be in the best interest of the company to allow for a “reasonable” determination from the outset. This is especially true if the business can make the concession in exchange for gaining more ground in the first or second component part, where the talent can glean more power under the clause. For example, if the talent is requesting that the clause restrict illegal or unlawful acts only to felony offenses (the first component part) or that the trigger focus on the behavior itself, rather than public impact (the second component part), making small allowances in this third component part can provide the company with a useful bargaining chip to defend against those modifications.

Part V will use these three component parts to create a sample morality provision for influencer contracts. First, however, the following Part orients us within the

¹⁰¹ *Id.* at 721–22, 727.

¹⁰² *Id.* at 726.

¹⁰³ *Id.* at 725.

¹⁰⁴ *See, e.g.*, NAT’L FOOTBALL LEAGUE & NAT’L FOOTBALL LEAGUE PLAYERS ASS’N, COLLECTIVE BARGAINING AGREEMENT 339 (2020), https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA_CBA_March_5_2020.pdf (“If at any time, in the sole judgment of Club . . . Player has engaged in personal conduct reasonably judged by Club to adversely affect or reflect on Club, then Club may terminate this contract.”).

landscape of endorsement advertising. It begins with an overview of endorsement advertising and then introduces “influencers,” the key to endorsement advertising in the Internet Age. After that, Part IV utilizes the component parts to explore the unique challenges inherent to morality provisions in influencer contracts. Developing an understanding of the problems and pitfalls of endorsement advertising and influencer contracts will then inform the proposed morality provision that follows.

III. MORALITY CLAUSES IN ENDORSEMENT ADVERTISING

A. *Overview of Endorsement Advertising*

Companies spend billions of marketing dollars on advertising campaigns featuring celebrity endorsements each year;¹⁰⁵ Nike’s endorsement deals alone were worth nearly \$1 billion in fiscal year 2015.¹⁰⁶ The popularity of these types of advertisements does not stem solely from the fact that celebrities are likely to catch the public eye. Rather, the method’s appeal draws from the fact that, when used appropriately, endorsement deals work extremely well.¹⁰⁷ The success of the marketing tactic is rooted in a concept called “meaning transference.”¹⁰⁸ With meaning transference, consumers reassign the feelings they associate with a particular celebrity to the product that the celebrity is promoting.¹⁰⁹ Studies have examined the various factors that play into meaning transference, including the celebrity’s attractiveness and likeability, their product category expertise, and the celebrity–brand fit.¹¹⁰ Notable endorsement deals today include Serena Williams as a spokesperson for Nike, a deal worth up to \$55 million;¹¹¹ George Clooney on behalf of Nespresso, worth

¹⁰⁵ See Daniel R. Avery & Joseph S. Rosen, *Complexity at the Expense of Common Sense?: Emerging Trends in Celebrity Endorsement Deals*, 23 ENT. & SPORTS LAW., Summer 2005, at 13, 14–15.

¹⁰⁶ Chris Isidore, *How Nike Became King of Endorsements*, CNN BUS. (June 5, 2015, 3:33 PM), <https://money.cnn.com/2015/06/05/news/companies/nike-endorsement-dollars/index.html>.

¹⁰⁷ Steve Olenski, *How Brands Should Use Celebrities for Endorsements*, FORBES (July 20, 2016, 2:43 PM), <https://www.forbes.com/sites/steveolenski/2016/07/20/how-brands-should-use-celebrities-for-endorsements>.

¹⁰⁸ Felicia M. Miller & Chris T. Allen, *How Does Celebrity Meaning Transfer? Investigating the Process of Meaning Transfer with Celebrity Affiliates and Mature Brands*, 22 J. CONSUMER PSYCH. 443, 444 (2012).

¹⁰⁹ *Id.*

¹¹⁰ Lars Bergkvist, Hanna Hjalmarson & Anne W. Mägi, *A New Model of How Celebrity Endorsements Work: Attitude Toward the Endorsement as a Mediator of Celebrity Source and Endorsement Effects*, 35 INT’L J. ADVERT. 171, 171 (2016).

¹¹¹ *Endorsement Deal with Nike Confirmed*, ESPN (Dec. 11, 2003), <https://www.espn.com/sports/tennis/news/story?id=1684248>.

\$40 million;¹¹² and Beyonce representing Pepsi for an estimated \$50 million.¹¹³

The problem, of course, is when feelings towards a particular celebrity turn sour. Meaning transference is not limited to positive emotions.¹¹⁴ When a celebrity acts out, either in their personal or professional capacity, audiences can easily divert their negative reactions towards the brand as well.¹¹⁵ Take, for example, former actor and producer Bill Cosby. Cosby rose to fame as a stand-up comedian and sitcom star, eventually playing Dr. Cliff Huxtable in the popular sitcom, *The Cosby Show*.¹¹⁶ The show, which was praised by many for featuring an upper-middle class Black family, ran for eight seasons on NBC between 1984 and 1992.¹¹⁷ Garnering close to \$1 billion in advertising revenue during its time on air,¹¹⁸ *The Cosby Show* is one of only two American television shows to be ranked first by the Nielsen television ratings for five consecutive seasons.¹¹⁹ The show's reputation, however, became tarnished in 2014, when allegations of sexual assault against Cosby began to gain traction publicly.¹²⁰

Nearly sixty women eventually came forward accusing Cosby of rape, sexual assault, sexual battery, or other sexual misconduct perpetrated between 1965 and 2008.¹²¹ In April 2018, Cosby was found guilty of three counts of aggravated indecent assault and, on September 25, 2018, he was sentenced to three to ten years in

¹¹² Andrew Lisa, *Celebrity Endorsement Deals with Insane Payouts*, YAHOO! LIFE (Sept. 17, 2020), <https://www.yahoo.com/lifestyle/celebrity-endorsement-deals-insane-payouts-090030383.html>.

¹¹³ Andrew Hampp, *Beyonce Partners with Pepsi for \$50 Million Deal*, BILLBOARD (Dec. 10, 2012), <https://www.billboard.com/articles/news/1481503/beyonce-partners-with-pepsi-for-50-million-deal>.

¹¹⁴ See Bergkvist et al., *supra* note 110, at 172.

¹¹⁵ See *id.* at 173, 181–82.

¹¹⁶ Wesley Morris, *How to Think About Bill Cosby and "The Cosby Show"*, N.Y. TIMES (June 18, 2017), <https://www.nytimes.com/2017/06/18/arts/television/how-to-think-about-bill-cosby-and-the-cosby-show.html>.

¹¹⁷ *Id.*

¹¹⁸ TIMOTHY HAVENS, *BLACK TELEVISION TRAVELS: AFRICAN AMERICAN MEDIA AROUND THE GLOBE* 80 (2013).

¹¹⁹ *The Cosby Show*, ENCY. BRITANNICA, <https://www.britannica.com/topic/The-Cosby-Show> (July 8, 2021).

¹²⁰ Matt Giles & Nate Jones, *A Timeline of the Abuse Charges Against Bill Cosby [Updated]*, VULTURE (Dec. 30, 2015), <https://www.vulture.com/2014/09/timeline-of-the-abuse-charges-against-cosby.html>.

¹²¹ *Id.*

prison.¹²² As a result of the allegations and subsequent conviction, nearly every syndication network removed *The Cosby Show* from its lineup.¹²³ The public backlash also motivated major brand Jell-O, for whom Cosby used to be a spokesperson, to make a public statement emphasizing that the company had no “working relationship” with Cosby.¹²⁴ A man who had once seemed like an aspirational father figure to millions of viewers was revealed to be a sexually violent predator.¹²⁵ Television networks,¹²⁶ companies,¹²⁷ charities,¹²⁸ and universities¹²⁹ alike could barely move fast enough to detach themselves from his name.

The Cosby conviction is just one in an array of high-profile celebrity scandals. When photographs surfaced of supermodel Kate Moss using cocaine in 2005, clothing brands Burberry, H&M, and Chanel were quick to sever their contracts with her, eating into Moss’s estimated \$7.22 million yearly-contract earnings.¹³⁰ Likewise, when cyclist Lance Armstrong came clean about his steroid use and was stripped of his seven Tour de France wins, he lost several lucrative endorsement deals, including Nike, Anheuser-Busch, and RadioShack.¹³¹ These advertisers, from

¹²² Eric Levenson & Aaron Cooper, *Bill Cosby Sentenced to 3 to 10 Years in Prison for Sexual Assault*, CNN, <https://www.cnn.com/2018/09/25/us/bill-cosby-sentence-assault/index.html> (Sept. 26, 2018, 10:03 AM).

¹²³ See, e.g., Whitney Friedlander, *Bounce TV Pulls ‘Cosby’ Reruns, BET’s Centric Yanks ‘The Cosby Show,’* VARIETY, <https://variety.com/2015/tv/news/cosby-reruns-bounce-tv-1201535254/> (July 7, 2015, 9: 36 AM).

¹²⁴ Ahiza Garcia, *Bill Cosby, Jared Fogle and Other Pitchmen Gone Bad*, CNN BUS., <https://money.cnn.com/2015/12/30/media/bill-cosby-pitchmen-scandal/> (Dec. 30, 2015, 2:00 PM).

¹²⁵ Nancy Coleman, *Bill Cosby’s Father’s Day Tweet Using ‘America’s Dad’ Yields Outrage*, N.Y. TIMES (June 17, 2019), <https://www.nytimes.com/2019/06/17/arts/television/bill-cosby-twitter.html>.

¹²⁶ See, e.g., Friedlander, *supra* note 123.

¹²⁷ Garcia, *supra* note 124.

¹²⁸ Maria Puente, *Cosby’s Philanthropy Also Affected by Rape Claims*, USA TODAY, <https://www.usatoday.com/story/life/people/2014/11/26/cosbys-philanthropy-also-affected-by-rape-claims/70100242/> (Nov. 27, 2014, 1:53 PM).

¹²⁹ Sydney Ember & Colin Moynihan, *To Revoke or Not: Colleges that Gave Cosby Honors Face a Tough Question*, N.Y. TIMES (Oct. 6, 2015), <https://www.nytimes.com/2015/10/07/arts/television/to-revoke-or-not-colleges-that-gave-cosby-honors-face-a-tough-question.html>.

¹³⁰ Noah B. Kressler, Note, *Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide*, 29 COLUM. J.L. & ARTS 235, 235 (2005); *Kate Moss: Sorry I Let People Down*, CNN (Sept. 22, 2005, 3:13 PM), <http://www.cnn.com/2005/WORLD/europe/09/22/kate.moss/>.

¹³¹ See Reed Albergotti, Vanessa O’Connell & Suzanne Vranica, *Lance Armstrong Gets Dumped*, WALL ST. J., <https://www.wsj.com/articles/SB10000872396390444868204578062313532317222> (Oct. 18, 2012, 1:29 PM); Law, *supra* note 37, at 554; *Lance Armstrong Verdict Upheld*, ESPN (Oct. 22, 2012) https://www.espn.com/olympics/cycling/story/_id/8536389/uci-agrees-strips-lance-armstrong-7-tour-de-france-titles.

RadioShack to Oakley, sought to mitigate the negative impact of meaning transference on their brand; and they were able to do so because of morality provisions in their endorsement deals.¹³² Just as they do for Hollywood studios, morality clauses play an important role in preserving a company's ability to harness star power while still protecting their brand from dishonorable associations.

B. *Endorsement Deals on Social Media*

"Influencers" are a new breed of endorsement spokesperson who have built up a large or devoted following on various Internet platforms.¹³³ These spokespeople blend in with your other "friends" on social-media platforms, appearing to be just another online connection. The level of normalcy and familiarity that an influencer exudes is essential because consumers have become conditioned to tune out many forms of traditional advertising.¹³⁴ Utilizing influencer marketing allows a brand to covertly place its products in front of consumers, oftentimes without their recognition.¹³⁵

Influencer advertising has been steadily growing in popularity in recent years, due in part to the rapid growth of the e-commerce industry.¹³⁶ Estimates suggest that the influencer market on social-media platform Instagram alone is poised to grow 15% in 2021.¹³⁷ In 2019, a survey of professionals in the marketing industry found that 92% believe influencer advertising to be effective and 82% believe that it reaches a higher "quality of customers" than other forms of marketing.¹³⁸ It pays off, too: brands earn an average of \$4.87 of earned media value per every \$1 put towards an influencer's promotion on Instagram.¹³⁹ The effectiveness of influencer advertising largely mirrors that of its traditional counterpart.¹⁴⁰ In fact, research indicates that 61% of consumers are likely to trust a recommendation made to them by an influencer, while only 38% felt that way towards messaging made by the brand itself.¹⁴¹

¹³² See Albergotti et al., *supra* note 131; Law, *supra* note 37, at 554.

¹³³ *Brands and Influencers: Navigating Influencer Agreements from Macro to Micro*, LATHAM & WATKINS (Oct. 29, 2018), <https://www.lw.com/thoughtLeadership/Brands-Influencers-Navigating-Agreements-Macro-Micro>.

¹³⁴ Robert Elder, *The Ineffectiveness of Digital Video and Traditional TV Ads*, INSIDER (June 13, 2016, 9:00 PM), <https://www.businessinsider.com/the-ineffectiveness-of-video-ads-online-and-on-tv-2016-6>.

¹³⁵ *But see* discussion of the Federal Trade Commission Act *infra* Section IV.A.1.

¹³⁶ See Alexandra J. Roberts, *False Influencing*, 109 GEO. L.J. 81, 89–90 (2020).

¹³⁷ HYPEAUDITOR, STATE OF INFLUENCER MARKETING 2021, at 8 (2021).

¹³⁸ Roberts, *supra* note 136, at 89–90.

¹³⁹ HYPEAUDITOR, *supra* note 137, at 17.

¹⁴⁰ See *supra* notes 107–109 and accompanying text.

¹⁴¹ *Matter Survey Reveals Consumers Find Influencers More Helpful and Trustworthy than Brands During the Pandemic*, BUSINESSWIRE (May 26, 2020, 8:45 AM), <https://www>.

The psychological phenomenon of “social proof” also supports the power of influencer endorsements. Social proof suggests that people mirror their own decision making after the decisions made by others.¹⁴² It is our innate desire, the theory goes, to fit in. In order to effectuate this goal, we look to those around us for guidance. The use of a “laugh track” in sitcom television is one of the most well-known examples of social proof.¹⁴³ Love them or hate them, the pre-recorded guffaws provide audiences with a clear cue that the line is supposed to be comedic, and that they should respond accordingly. When it comes to consumers, social proof means that when other people covet a particular good, that good is more likely to pique the interest of those around them as well.¹⁴⁴ Influencers, as well as online reviews and auto-generated product suggestions, provide consumers with the nudge necessary to make them consider a promoted service or product.¹⁴⁵

C. *Types of Influencers*

As the influencer industry has developed, three classes of influencers have emerged: the celebrity influencer, the macro-influencer, and the micro-influencer. There are benefits and drawbacks to each category of influencer, and a brand should think critically about which type of spokesperson is best for them and their marketing goals prior to engaging their services.

1. *Celebrity Influencers*

Celebrity influencers are traditional, run-of-the-mill celebrities who tend to have, often automatically, a large following on social media.¹⁴⁶ Think, Jennifer Aniston (40.7 million Instagram followers)¹⁴⁷ or Oprah Winfrey (43.2 million Twitter followers).¹⁴⁸ The clout that these entertainers have developed through their careers translates easily to a web-based presence which, in turn, the stars can leverage for lucrative brand deals. Take, for example, reality star and makeup magnate, Kylie

businesswire.com/news/home/20200526005058/en/Matter-Survey-Reveals-Consumers-Find-Influencers-More-Helpful-and-Trustworthy-than-Brands-During-the-Pandemic.

¹⁴² Jen Cardello, *Social Proof in the User Experience*, NIELSEN NORMAN GRP. (Oct. 19, 2014), <https://www.nngroup.com/articles/social-proof-ux/>.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *See id.*

¹⁴⁶ *See, e.g.*, Roberts, *supra* note 136, at 90 (“Singer Ariana Grande has 203 million followers on Instagram; followers may view her endorsements similarly to the way they view celebrity endorsements in traditional media.” (footnote omitted)).

¹⁴⁷ Jennifer Aniston (@jenniferaniston), INSTAGRAM, <https://www.instagram.com/jenniferaniston/> (last visited July 11, 2022).

¹⁴⁸ Oprah Winfrey (@Oprah), TWITTER, <https://twitter.com/Oprah> (last visited July 11, 2022).

Jenner. As of July 2022, Jenner has 357 million followers on Instagram.¹⁴⁹ That is, at least in theory, 357 million pairs of eyes on the content she shares online. It should come as little surprise, then, that Jenner can demand up to \$1 million *per post* from brands who want to work with her, making her one of the most expensive influencers currently online.¹⁵⁰

2. Macro-Influencers

Macro-influencers are social-media personalities who have amassed anywhere from 100,000 to tens of millions of followers on their social-media channels.¹⁵¹ Cameron Dallas, for example, is a 26-year-old macro-influencer with an audience of 23 million people on Instagram,¹⁵² 14.8 million people on Twitter,¹⁵³ 5.11 million subscribers on YouTube,¹⁵⁴ and 17.5 million followers on the newest social-media darling, Tik Tok.¹⁵⁵ Dallas parlayed his success on the now-defunct social-media platform Vine into a blossoming career as a Calvin Klein model, a musician, and as the star of his own television show.¹⁵⁶ Like thousands of others with their very own corner of the Internet, Dallas built a thriving business out of publishing his private life online and engaging with the audience he attracted.

3. Micro-Influencers

Micro-influencers (and their even smaller counterparts, nano-influencers) do not have the broad range of social-media followers that macro-influencers have. Instead, they tend to have a few thousand followers who are heavily invested in their platform.¹⁵⁷ These types of influencers often focus on some sort of niche, like yoga or travel, and can often provide much higher returns on investment compared to macro-influencers.¹⁵⁸ In fact, some industry experts argue that micro-influencers are

¹⁴⁹ Kylie Jenner (@kyliejenner), INSTAGRAM, <https://www.instagram.com/kyliejenner/> (last visited July 11, 2022).

¹⁵⁰ Zameena Mejjia, *Kylie Jenner Reportedly Makes \$1 Million per Paid Instagram Post—Here’s How Much Other Top Influencers Get*, CNBC, <https://www.cnbc.com/2018/07/31/kylie-jenner-makes-1-million-per-paid-instagram-post-hopper-hq-says.html> (Aug. 1, 2018, 10:33 AM).

¹⁵¹ Roberts, *supra* note 136, at 90.

¹⁵² Cameron Dallas (@camerondallas), INSTAGRAM, <https://www.instagram.com/camerondallas/> (last visited July 11, 2022).

¹⁵³ Cameron Dallas (@camerondallas), TWITTER, <https://twitter.com/camerondallas> (last visited July 11, 2022).

¹⁵⁴ Cameron Dallas (@Cameron Dallas), YOUTUBE, <https://www.youtube.com/camerondallas> (last visited July 11, 2022).

¹⁵⁵ Cameron Dallas (@camerondallas), TIK TOK, <https://www.tiktok.com/@camerondallas> (last visited July 11, 2022).

¹⁵⁶ Marissa G. Muller, *Cameron Dallas Shared His Mug Shot and an Explanation for His Arrest for Alleged Assault*, W MAGAZINE (Jan. 1, 2019), <https://www.wmagazine.com/story/camerondallas-mugshot-arrest>.

¹⁵⁷ *Brands and Influencers*, *supra* note 133, at 1.

¹⁵⁸ *Id.*; see also Gary Drenik, *Influencer Marketing Was the Biggest Breakout Star of 2020; Why*

the best bet for advertisers because they cost less to engage and they tend to have much stronger rates of engagement with their followers.¹⁵⁹ For example, shoe brand Sperry invited 100 micro-influencers to submit photographs of themselves wearing the brand's shoes.¹⁶⁰ Sperry did not pay the influencers, but rather "tagged" them in the final marketing campaign, which was pushed out to the company's followers online.¹⁶¹ The deal was a win-win; Sperry received a hundred curated photos of real people wearing their shoes and the micro-influencers were able to get their profiles in front of an audience 10 to 20 sizes larger than their own.¹⁶²

D. Contracting with Influencers

As social-media influencers have become more ubiquitous and brands have grown to recognize their value, endorsement deals with social-media spokespeople have become a new norm. While some brands will work with influencers directly, it has become increasingly common for companies to utilize third-party talent and marketing agencies to match them with potential talent.¹⁶³ Traditional talent agencies represent some influencers, while other social-media stars have found representation in agencies created specifically to cater to the new industry.¹⁶⁴ As a result, 930 new platforms and influencer marketing agencies emerged between 2016 and 2020 alone.¹⁶⁵

The partnership between a brand and an influencer may span from a single post to a full-fledged "brand ambassador" deal comprised of several posts, integrated videos, or product giveaways.¹⁶⁶ Regardless of the level of commitment that the parties are engaging in, however, they should always memorialize the deal in a formal contract to protect both entities involved. For smaller brands who are working directly with potential talent, this may mean downloading one of the several free or low-cost templates available online.¹⁶⁷ For larger brands, and companies working

Brands that Bank in on This Trend Will Win 2021, FORBES (Feb. 9, 2021, 10:00 AM), <https://www.forbes.com/sites/garydrenik/2021/02/09/influencer-marketing-was-the-biggest-breakout-star-of-2020-why-brands-that-bank-in-on-this-trend-will-win-2021>.

¹⁵⁹ *Brands and Influencers*, *supra* note 133, at 2; Drenik, *supra* note 158.

¹⁶⁰ Christopher Heine, *How Sperry's 'Micro-Influencers' Reach Impressive Heights for Little Cost on Instagram*, ADWEEK (Dec. 13, 2016), <https://www.adweek.com/performance-marketing/how-sperrys-micro-influencers-reach-impressive-heights-little-cost-instagram-175053/>.

¹⁶¹ *Id.*

¹⁶² *See id.*

¹⁶³ Roberts, *supra* note 136, at 94.

¹⁶⁴ *Brands and Influencers*, *supra* note 133, at 1–2.

¹⁶⁵ Roberts, *supra* note 136, at 94–95.

¹⁶⁶ *Brands and Influencers*, *supra* note 133, at 3.

¹⁶⁷ *See, e.g.*, Pat Killoren, *How to Craft a Rock-Solid Influencer Contract*, TAGGER (Sept. 1, 2001), <https://www.taggermedia.com/craft-rock-solid-influencer-contract>; Werner Geyser, *Influencer Contract Template*, INFLUENCER MARKETING HUB, <https://www.influencermarketinghub.com/influencer-contract-template/>.

through an intermediary agency, the influencer contract will likely be an amalgamation of brand values and influencer demands.¹⁶⁸ In general, however, all influencer agreements should include negotiated provisions such as expected deliverables, exclusivity, usage rights, intellectual property rights, fees, and timelines.¹⁶⁹ They should, and often do,¹⁷⁰ also contain a morality provision, especially when the relationship is expected to be long-term.

IV. MORALITY CLAUSE PROBLEMS IN INFLUENCER CONTRACTS

Even with a contractual relationship, however, influencer advertising poses an interesting challenge for brands. On the one hand, it can be far more effective than alternative avenues in traditional marketing. On the other, companies are not able to exert the same degree of control over an influencer than they can over a traditional advertisement. Influencers are often working with several brands at once and each company is fighting for precious space in their social-media feed.¹⁷¹ Moreover, the more popular an influencer becomes, the more bargaining power they obtain. With the number of social-media users increasing year after year, an influencer's potential audience, and therefore their contracting prowess, continues to grow.¹⁷² Brands are clamoring for the opportunity to capitalize on the levels of engagement that influencers can offer, and they may be willing to sacrifice their long-term wellbeing in order to do so. As a result, the industry is at risk of repeating history: bad actors with a lot of power have the opportunity to insulate themselves from comprehensive morality provisions.

influencermarketinghub.com/influencer-contract-template (Oct. 24, 2018).

¹⁶⁸ Many advertisers and agencies engage influencer talent through the SAG-AFTRA Commercials Contract. Notably, in spring 2021, SAG-AFTRA released an exception, called the Influencer Waiver, to the Commercials Contract that allows union agencies to deduct pension and healthcare payments from an influencer's contract, rather than add those expenses on top of the influencer's fee. The union also unveiled a new "Influencer Agreement," which allows influencers to become union members themselves. See *Influencer Agreement 101*, SAG-AFTRA, <https://www.sagaftra.org/contracts-industry-resources/influencer-resources/influencer-agreement-101> (last visited July 11, 2022); *2021 Waiver for Influencer-Producer Sponsored Content*, SAG-AFTRA 1–2 (2021), <https://www.sagaftra.org/files/SAG-AFTRA2021WaiverforInfluencer-ProducedSponsoredContent.pdf>.

¹⁶⁹ Killoren, *supra* note 167; Geysler, *supra* note 167.

¹⁷⁰ *Brands and Influencers*, *supra* note 133, at 3.

¹⁷¹ It is common for brands to negotiate exclusivity provisions in their influencer contracts to guard against any overlap with competing companies, but influencers are generally free to work with unrelated brands. See *Brands and Influencers*, *supra* note 133, at 4.

¹⁷² *Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/social-media/>.

Companies should create specific morality provisions that are unique to the influencer industry. Though influencer advertising is still a relatively nascent business and case law on the subject is sparse, there have been enough public mishaps to provide an idea of the particular problem areas plaguing the industry. These problems can be viewed through the three-component framework developed in Part II: identifying the prohibited conduct, specifying how to trigger the clause, and providing for the means by which a breach will be determined. This Part will walk through each of those component parts, highlighting the difficulties in each that are distinct to influencer advertising.

A. *Identifying the Prohibited Conduct*

As discussed above,¹⁷³ a morality clause should identify the particular behavior targeted by the clause. Generally, this behavior will be illegal or unlawful acts, and immoral conduct. In putting such a high level of control in the hands of the talent, influencer advertising presents several notable pitfalls for both of these classifications of behavior. Influencers, and the companies they represent, have been subject to increasingly intense regulation by the Federal Trade Commission (FTC) in recent years. Moreover, because many brands let influencers exert substantial creative control over their individual advertisements, companies run the risk of having an influencer that runs afoul of copyright, trademark, and even defamation laws. Likewise, defining “immoral” in the twenty-first century is an exceedingly difficult task. A brand must keep its finger on the pulse of the national conscience in order to effectively guard itself against influencers who fail to appropriately conduct themselves in the public eye.

1. *Illegal or Unlawful Acts*

Perhaps one of the most infamous examples of influencer advertising gone awry is the case of Olivia Jade Giannulli.¹⁷⁴ Giannulli, along with her older sister, were among the dozens of students whose parents had paid tens—often hundreds—of thousands of dollars to get their children into prestigious universities across the country.¹⁷⁵ Fashion designer Mossimo Giannulli and *Full House* actress Lori Loughlin paid half a million dollars to get their daughters into the University of Southern California as “recruits” for the school’s crew team.¹⁷⁶ The scheme, orchestrated by a man named William Singer, involved funneling bribes to a coach at the university,

¹⁷³ See *supra* Section II.A.

¹⁷⁴ Haley Soen, *The College Admissions Scandal: Who is Olivia Jade and Were is She Now?* TAB (Mar. 2021), <https://thetab.com/uk/2021/03/18/olivia-jade-giannulli-now-the-college-admissions-scandal>.

¹⁷⁵ *Id.*; Kate Taylor, *Lori Loughlin Released from Federal Prison*, N.Y. TIMES (Dec. 28, 2020), <https://www.nytimes.com/2020/12/28/us/lori-loughlin-released-prison.html>.

¹⁷⁶ Soen, *supra* note 174.

who would then vouch to the administration that the sisters were competitive athletes.¹⁷⁷ Loughlin and her husband were eventually prosecuted for their participation in the arrangement.¹⁷⁸ Both parents pleaded guilty and spent a short stint in federal prison for their involvement.¹⁷⁹

Though Giannulli and her sister were allowed to remain enrolled at USC, it appears that they have since dropped out of the school.¹⁸⁰ In addition to her forfeited education, Giannulli incurred a devastating blow to her burgeoning career as an influencer. Before the scandal, she boasted 1.3 million followers on Instagram and just shy of 2 million subscribers on YouTube,¹⁸¹ making a living promoting the likes of Amazon Prime and Hewlett Packard online. Once news of the wrongdoing broke, however, the public backlash against the young woman was severe. Comments on Giannulli's online posts swelled, accusing her of cheating her way into higher education.¹⁸² Though Giannulli was never prosecuted for the misdeeds,¹⁸³ the affair significantly tarnished her name and several brands rushed to terminate their endorsement relationships with her. Giannulli lost deals with Hewlett Packard, Sephora, Lulus, Amazon, Dolce & Gabbana, Marc Jacobs Beauty, Smashbox Beauty, Smile Direct Club, Too Faced Cosmetics, clothing brand Boohoo, and TRESemmé before ultimately undertaking a months-long hiatus from social media.¹⁸⁴ She has since resumed her life on the public platforms,¹⁸⁵ though it remains to be seen whether or not she will be able to lure back the big-name brands with whom she once worked.

The Giannulli scandal may involve exceptional circumstances, but it is a useful anecdote for two reasons. First, it illustrates the need for companies to keep in mind

¹⁷⁷ *Id.*; see also Christopher Rim, *The Money Lori Loughlin Used to Allegedly Bribe USC Coaches Could've Made Olivia Jade An Olympian*, FORBES (Mar. 16, 2019, 7:20 PM), <https://www.forbes.com/sites/christopherrim/2019/03/16/the-money-lori-loughlin-used-to-allegedly-bribe-usc-coaches-couldve-made-olivia-jade-an-olympian/>.

¹⁷⁸ Taylor, *supra* note 175.

¹⁷⁹ *Id.*

¹⁸⁰ Soen, *supra* note 174. Lauren Frias, *Lori Loughlin's Daughters Olivia Jade and Isabella Giannulli Are No Longer Enrolled at USC as She Faces up to 40 Years in Prison*, INSIDER (Oct. 9, 2019, 7:07 PM), <https://www.insider.com/lori-loughlin-olivia-jade-isabella-giannulli-not-enrolled-at-usc-2019-10>.

¹⁸¹ Soen, *supra* note 174.

¹⁸² *Id.*

¹⁸³ See *id.*; Taylor, *supra* note 175.

¹⁸⁴ Todd Spangler, *Olivia Jade, Lori Loughlin's Daughter, Stands to Lose Brand Deals Over College-Admissions Scandal*, VARIETY, <https://variety.com/2019/digital/news/olivia-jade-lori-loughlin-college-scam-influencer-brand-deals-1203162624/> (Mar. 13, 2019, 12:31 PM); Kelly McLaughlin, *Olivia Jade Dropped out of USC and Left Her Thriving YouTube Career Amid the College Admissions Scandal. Now She's Back on Instagram.*, INSIDER, <https://www.insider.com/olivia-jade-giannulli-no-longer-attending-usc-year-later-2019-9> (Aug. 21, 2020, 1:03 PM).

¹⁸⁵ Soen, *supra* note 174.

that when they are working with influencers, they are working with individuals who have built an entire brand upon inviting a public audience into their private lives. Friends and family of the influencer, who may not be engaged in influencer marketing themselves, can end up in the limelight merely because of their proximity to the influencer. This means that companies are not only taking on the risk that their own talent will commit an illegal act, but also that somebody close to the influencer will engage in illicit behavior. As demonstrated by the Giannulli incident, the mere association of their influencer with someone on the wrong side of the law can be enough to send some brands running. Companies should take the time to thoroughly vet their talent, including those who make recurring appearances on their platforms, before deciding to engage their services.

The second reason that the Giannulli example is illustrative is that it exhibits some of the legal issues unique to contracting with a social-media influencer. This leads to perhaps the most common legal pitfall that influencers face: abiding by the requirements imposed by the Federal Trade Commission Act.¹⁸⁶ Under Section 5 of the Act, “unfair or deceptive acts or practices in or affecting commerce” are deemed unlawful.¹⁸⁷ The FTC has made it clear that, just like traditional advertising, online endorsements are subject to all general prohibitions against misleading or deceptive advertising, including truth in advertising requirements and disclosure obligations.¹⁸⁸ The agency has also indicated that brands may be held liable for the transgressions of their influencers.¹⁸⁹ To best protect their business, a company should make sure that each of its influencers are aware of FTC guidelines and establish a program to train and monitor its social-media spokespeople.¹⁹⁰

Under the guidelines, influencers must refrain from making false or misleading statements. Spokespeople cannot make claims about a product if the brand does not have proof to substantiate that claim.¹⁹¹ Thus, if an influencer publishes a post about how a brand’s vitamins cured his receding hair line, and the brand lacks substantive proof that its vitamins will, in fact, provide luscious locks, the FTC may hold the influencer liable under the Act. Brands that are in the science and health industries should be especially conscientious about what purported benefits their influencers are touting. Tea company Teami, for example, incurred a \$1 million fine from the FTC for encouraging its influencers to promote unsubstantiated claims that the

¹⁸⁶ See Federal Trade Commission Act, 15 U.S.C. §§ 41–58.

¹⁸⁷ Federal Trade Commission Act § 5, 15 U.S.C. § 45.

¹⁸⁸ *Disclosures 101 for Social Media Influencers*, FED. TRADE COMM’N (Nov. 2019), https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf.

¹⁸⁹ *The FTC’s Endorsement Guides: What People Are Asking*, FED. TRADE COMM’N, <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking> (Aug. 27, 2020).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

company's detox teas could aid weight loss, clear blocked arteries, and even fight cancer.¹⁹² Though, in this case, the company was in on the deception, brands should be wary of enterprising influencers who try to boost sales, and consequently their perceived marketing value, by making colorful claims about the company's products or services.

Perhaps even more pervasive than individuals who make unsubstantiated claims are influencers who fail to meet the disclosure standards prescribed by the FTC. The agency requires that influencers divulge when they have a "material connection" with a brand.¹⁹³ A material connection includes any financial, employment, personal, or familial relationship with the company where the influencer is receiving "something of value" to promote a product.¹⁹⁴ In other words, even if she is not directly paid for her services, an influencer must disclose that she received the pair of shoes for free or a discount on the meal prep service in exchange for her online referral. Moreover, the influencer should not bury the disclosure somewhere in a wall of text, nor should they tuck a quick "#ad" into the corner of a photograph. The FTC recommends that the influencer make the disclosure in the endorsement message itself, not included as a haphazard afterthought or in a physical location entirely distinct from the promotion (e.g., in a separate page dedicated to listing out the person's partnerships).¹⁹⁵ Warner Bros. learned this lesson the hard way in 2014 when it engaged well-known YouTuber PewDiePie, among others, to promote its new video game *Middle Earth: Shadow of Mordor*.¹⁹⁶ While the influencers did, in fact, note that their videos were part of a sponsored partnership, they only did so in the video descriptions. The FTC declared that these disclosures were not clear and conspicuous enough to be "adequate sponsorship disclosure[s]" and prohibited Warner Bros. from pulling the stunt again.¹⁹⁷

Brands should also be aware that, while they may be inclined to abide by FTC restrictions for fear of a fallout like that of Teami or Warner Bros., their influencers may have other motivations at play that could drive them to skirt the regulations. To be an influencer is, essentially, to be a small advertising agency and the real value-

¹⁹² Paige Leskin, *Detox Tea Maker Fined \$1 Million Over 'Deceptive' Instagram Influencer Ads Claiming Its Tea Could Help You Lose Weight and Fight Cancer*, INSIDER (Mar. 9, 2020, 12:57 PM), <https://www.businessinsider.com/instagram-influencers-teami-detox-tea-sponsored-posts-ftc-settlement-2020-3>.

¹⁹³ *The FTC's Endorsement Guides*, *supra* note 189.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Warner Bros. Settles FTC Charges It Failed to Adequately Disclose It Paid Online Influencers to Post Gameplay Videos*, FED. TRADE COMM'N (July 11, 2016), <https://www.ftc.gov/news-events/press-releases/2016/07/warner-bros-settles-ftc-charges-it-failed-adequately-disclose-it>.

¹⁹⁷ *Id.*

added of the influencer model is that the individual appears authentic.¹⁹⁸ In an attempt to protect this unique strength, influencers may be tempted to downplay the number of posts they are getting paid to share by obscuring their required disclosures or forgoing them altogether. For example, advertising watchdog organization Truth in Advertising has archived over 1,700 advertisements across 50 different influencers promoting the liquor brand Ciroc with nary a disclosure in sight.¹⁹⁹ A group of social-media users even brought a class action lawsuit against a group of influencers for their participation in promoting the botched music festival Fyre Festival in 2017.²⁰⁰ The festival promoters paid over 400 influencers, including celebrity influencers like model and television star Kendall Jenner and models Bella Hadid, Hailey Baldwin, and Emily Ratajkowski, to publicize the event on their Instagram profiles.²⁰¹ The influencers did so by posting a mysterious orange square to their social-media feeds and linking the post to the Fyre Festival website. The plaintiffs alleged that, because none of these posts contained an FTC disclosure, the influencers “deliberately and fraudulently” advertised the event and that their endorsement caused the plaintiffs to purchase tickets to the festival.²⁰² While the partygoers later dropped the suit, it made headlines as an indication that both the FTC and consumers themselves are becoming increasingly determined to hold influencers to their duties to disclose.

In addition to ensuring that their talent abides by FTC requirements, companies should also be attuned to the nuances of intellectual property law, such as copyright and trademark, and tort law, such as defamation. To prove a copyright claim, a plaintiff must show that he owned the allegedly infringed work, and that the defendant copied protected elements of that work.²⁰³ Though brands may retain approval rights for their influencer’s work,²⁰⁴ it is possible that the influencer, in the course of the representation or on behalf of another brand or the influencer himself, will copy the work of another creator. For example, influencer and fashion designer Danielle Bernstein has been publicly accused of copying her clothing patterns from

¹⁹⁸ Roberts, *supra* note 136, at 91–92, 96.

¹⁹⁹ *Ciroc*, TRUTH IN ADVER., <https://truthinadvertising.org/brands/ciroc> (last visited July 11, 2022); see also *Influencer Marketing: A Research Guide*, LIBR. OF CONG., <https://guides.loc.gov/influencer-marketing/regulations> (last visited July 11, 2022).

²⁰⁰ Matt Higgins, *Fyre Festival Aftermath: New Rules for Influencers?* U. CIN. L. REV. (Mar. 25, 2019), <https://uclawreview.org/2019/03/25/fyre-festival-aftermath-new-rules-for-influencers>.

²⁰¹ See *id.*

²⁰² *Id.* (citing Complaint at 2, *Chinery v. Fyre Media, Inc.*, No. BC659938 (Cal. Sup. Ct. May 2, 2017)).

²⁰³ *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 984 (9th Cir. 2017) (citing *Pasillas v. McDonald’s Corp.*, 927 F.2d 440, 442 (9th Cir. 1991)).

²⁰⁴ Luke Toft, *Social Media Influencers and Infringement Concerns*, FOX ROTHSCHILD (Feb. 28, 2019), <https://advertisinglaw.foxrothschild.com/2018/02/social-media-influencers-infringement-concerns/>.

other designers on nine separate occasions.²⁰⁵ In 2020, a New York based lingerie company filed a copyright infringement and unfair competition suit against Bernstein's company.²⁰⁶ Though the progression of the lawsuit is unclear, the media coverage of the influencer's alleged infringement brought to light her apparent pattern of infractions. Companies that desire to work with influencers like Bernstein, who has 2.9 million followers on Instagram alone,²⁰⁷ should pay particular attention to include copyright infringement in their morality provision. If the brand has enough negotiating prowess, it could even consider pushing for a mere allegation of copyright infringement, rather than the instigation of an actual suit or the rendering of a judgment, to trigger the provision.

Likewise, a plaintiff may bring a trademark infringement claim against an influencer under the Lanham Act.²⁰⁸ To prevail on such a claim, the plaintiff must be the holder of the registered mark and the defendant must be employing an imitation of the mark in commerce where "such use is likely to cause confusion, or to cause mistake, or to deceive."²⁰⁹ Celebrities, athletes, and other public figures have been encouraged in recent years to trademark various aspects of their online persona.²¹⁰ Taking this step empowers an influencer to safeguard their creative work. For example, pop sensation Ariana Grande sued fashion retailer Forever 21 for trademark infringement in 2019 after the clothing store released an advertising campaign featuring a model that looked significantly like the singer in her music video for the song, "7 Rings."²¹¹ Though trademark cases related to influencer advertising are still relatively rare, as more brands seek to protect their public image on social media, trademark claims against influencers or, more likely, the companies they represent, may increase substantially.²¹² It is therefore in the best interest of a company to keep

²⁰⁵ Rachel Premack, *Some Fashion-Industry Insiders Allege a Mega-Influencer's Retail Empire is Bolstered by Stolen Designs*, BUS. INSIDER (Jan. 27, 2021, 3:32 PM), <https://www.businessinsider.com/weworewhat-danielle-bernstein-stolen-designs-sources-say-2021-1>.

²⁰⁶ *WeWoreWhat, Danielle Bernstein Want Infringement Suit Over "Copycat" Print Tossed Out of Court*, FASHION L., <https://www.thefashionlaw.com/accusing-the-great-eros-of-trying-to-avoid-an-already-pending-action-weworewhat-wants-case-filed-against-it-dismissed/> (Feb. 23, 2021).

²⁰⁷ Danielle Bernstein (@weworewhat), INSTAGRAM, <https://www.instagram.com/weworewhat/> (last visited July 11, 2022).

²⁰⁸ Lanham Act of 1946, 15 U.S.C. §§ 1051–1141n.

²⁰⁹ *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 117 (2004) (quoting 15 U.S.C. § 1114(1)(a)).

²¹⁰ See, e.g., Barret R. Arthur, Comment, *Always Protect Your Brand: Trademark Infringement Protection for Athletes Using Social Media Sites*, 10 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 83, 90–91 (2014).

²¹¹ Complaint for Damages at 9, *Grande-Butera v. Forever 21, Inc.*, No. 2:19-cv-07600 (C.D. Cal. Sept. 2, 2019). Forever 21 filed for Chapter 11 bankruptcy, causing an automatic stay of proceedings. *Grande-Butera v. Forever 21, Inc.*, No. 2:19-07600 (C.D. Cal. Nov. 6, 2019) (Gee, J., in chambers) (order staying the action).

²¹² Cf. Roberts, *supra* note 136, at 83 (advocating for private companies to sue under the

a keen eye on the work product that their influencers are producing, and to move quickly if they observe their spokesperson running afoul of the Lanham Act.

Defamation lawsuits based on online statements may also be on the rise. The elements of a defamation claim vary from state to state, but, generally, to prevail on a defamation claim, a plaintiff must demonstrate that the defendant made a false and defamatory statement of fact which caused the plaintiff to suffer harm.²¹³ When the plaintiff is a public figure, he must also show that the defendant had actual malice in making the statement.²¹⁴ Though much of what is said online will be protected by users' First Amendment rights,²¹⁵ statements proven to be defamatory can get the defendant into decidedly hot water. Influencers, as avid users of social-media platforms, may be especially susceptible in this regard. In 2019, for example, designer brand Dolce & Gabbana filed a defamation lawsuit in a Milan court against the Instagram account Diet Prada.²¹⁶ The complaint alleged that Diet Prada, an account well-known for speaking out against injustice in the fashion industry, caused the company €3 million in damages after it detailed multiple instances of racism on the part of the company and one of its founders against Asian individuals.²¹⁷ As a result of the social-media disclosures, Dolce & Gabbana was forced to cancel an upcoming fashion show in Shanghai and, according to the complaint, lost potential partnerships with well-known celebrities who distanced themselves from the tarnished brand.²¹⁸ Whether or not the company will succeed in its lawsuit remains to be seen, but companies who wish to work with influencers, especially those who are more vocal or controversial on their platforms, should take note of the occasion. While accounts like Diet Prada, which has been described as “watchdog” of sorts,²¹⁹ can encourage candid and valuable dialogue online, they also run the risk of attracting the ire of the people and businesses that they target.

Lanham Act “when competitors engage in ‘false influencing’—by disseminating deceptive claims via influencers”).

²¹³ *Tesla, Inc. v. Tripp*, 487 F. Supp. 3d 953, 969 (D. Nev. 2020) (quoting *Rosen v. Tarkanian*, 453 P.3d 1220, 1225 (Nev. 2019)).

²¹⁴ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

²¹⁵ See *id.* at 264.

²¹⁶ *Diet Prada's Founders Respond to Dolce & Gabbana Defamation Suit Over Alleged “Smear Campaign,”* FASHION L., <https://www.thefashionlaw.com/diet-pradas-founders-respond-to-dolce-gabbana-defamation-suit-over-alleged-smear-campaign/> (Mar. 7, 2021).

²¹⁷ See, e.g., *id.*; Maureen O'Connor, *The Trials of Diet Prada*, VANITY FAIR (Sept. 16, 2021) <https://www.vanityfair.com/style/2021/09/diet-prada-roasting-the-runway>; Moises Mendez II, *Instagram Fashion Watchdog Diet Prada Pushes Back on Dolce & Gabbana Defamation Lawsuit*, INSIDER (Mar. 4 2021, 4:03 PM), <https://www.insider.com/diet-prada-dolce-and-gabbana-dandg-lawsuit-defamation-2021-3>.

²¹⁸ *Diet Prada's Founders Respond to Dolce & Gabbana Defamation Suit Over Alleged “Smear Campaign,”* *supra* note 216.

²¹⁹ *Id.*

Finally, there is an array of colorful examples of other illegal behavior perpetrated by social-media stars that should be at least briefly noted. One influencer, Raymond “Hushpuppi” Abbas, described himself as a “property developer” and flaunted private jets, luxury hotel stays, and over a dozen luxury cars to his 2.4 million Instagram followers.²²⁰ Unfortunately for Abbas, the FBI was not impressed by his stable of Ferraris and G-Wagons. A combined force of the FBI, Interpol, and the Dubai police arrested the influencer in June 2020 for a \$430 million scheme that allegedly involved “money laundering, cyber fraud, hacking, and scamming.”²²¹ Another influencer, Tammy Steffen, was arrested after creating at least 369 fake Instagram accounts to threaten and harass several of her colleagues in the fitness industry.²²² She pleaded guilty in December 2018 and was sentenced to nearly five years in federal prison.²²³ Finally, and perhaps most bizarre, influencer and MTV reality star Julia Rose was arrested along with five accomplices for overlaying a tarp on the landmark Hollywood sign so that the sign read “Hollyboob.”²²⁴

2. Immoral Conduct

In addition to illegal or unlawful acts, a morality provision should identify the “immoral” conduct covered by the clause. This is no easy task. Back in the days of Fatty Arbuckle and Babe Ruth, heavy drinking or promiscuity may have been sufficient to trigger a morality provision. Today, those stringent definitions of morality have, in many places, fallen to the wayside. There are now podcast programs dedicated entirely to discussing sex,²²⁵ celebrity memoirs about their experiences with drug and alcohol addiction,²²⁶ and music lyrics along the lines of “I let him hit it ‘cause he slang cocaine / He toss my salad like his name Romaine.”²²⁷ Given this

²²⁰ Chris Tsui, *Instagram Influencer and Prolific Car Collector Arrested for \$430M ‘Cyberscam,’* DRIVE (June 29, 2020), <https://www.thedrive.com/news/34482/instagram-influencer-and-prolific-car-collector-arrested-for-430m-cyberscam>.

²²¹ *Id.*

²²² Paige Leskin, *A Fitness Influencer Will Serve Nearly 5 Years in Jail for Using 369 Instagram Accounts to Harass Bodybuilding Colleagues and Allegedly Faking Her Daughter’s Kidnapping*, BUS. INSIDER (Sept. 27, 2019, 8:42 AM), <https://www.businessinsider.com/fitness-influencer-tammy-steffen-jailed-instagram-fake-kidnapping-florida-2019-9>.

²²³ *Id.*; *Pasco Woman Sentenced to 57 Months in Federal Prison for Cyberstalking and Making Online Threats*, U.S. DEP’T OF JUST. (Sept. 20, 2019), <https://www.justice.gov/usao-mdfl/pr/pasco-woman-sentenced-57-months-federal-prison-cyberstalking-and-making-online-threats>.

²²⁴ Adam Schrader, *Welcome to HOLLYBOOB! Six Pranksters Including MTV Reality Star Julia Rose Are Arrested for Changing Letters on the Iconic Hollywood Sign*, DAILY MAIL (last updated Feb. 2, 2021, 2:16 PM), <https://www.dailymail.co.uk/news/article-9212973/Six-including-Instagram-influencer-arrested-changing-letters-iconic-Hollywood-sign.html>.

²²⁵ See, e.g., *Call Her Daddy: Dirty Deets from the #1 Playboy Bunny (ft. Holly Madison)*, SPOTIFY (Apr. 6, 2021) (downloaded using Spotify).

²²⁶ See, e.g., CARRIE FISHER, *WISHFUL DRINKING* (2008).

²²⁷ NICKI MINAJ, *ANACONDA* (Young Money Entertainment 2014).

evolution, determining what behavior should trigger a morality clause has become exceedingly difficult. Different brands will have different thresholds for what behavior satisfies this requirement. Companies that consider themselves to be family-friendly, such as Disney,²²⁸ should have a lower tolerance for questionable behavior than a brand, like Redbull,²²⁹ which prides itself on being in-tune with younger consumers. Moreover, this threshold may change depending on the brand's marketing strategy; what may be acceptable behavior for a 25-year-old, after all, might be quite startling if executed by a pre-teen online.

In addition to specifying conduct that the company will find egregious based on brand values or marketing strategy, all companies must be aware of—and adapt to—the modern phenomenon known as “cancel culture.” Despite loosened standards of what conduct “shocks, insults, or offends” the community,²³⁰ many contemporary consumers have made it clear that they will not tolerate public figures who perpetrate racist, sexist, homophobic, or other intolerant behavior. When such conduct does occur, it has become increasingly common for that person to be “cancelled.”²³¹ In other words, there will be a public call for others to boycott or otherwise discipline the individual, effectively ending, or at least stunting, their career in the public eye.²³²

Since 2015, a sampling of cancellations, or attempted cancellations, include: talk show host Ellen DeGeneres,²³³ children's book author J.K. Rowling,²³⁴ fast food

²²⁸ See Amelia Tait, *Mouse Whisperers: Meet the Disney Influencers Making a Living at the Magic Kingdom*, GUARDIAN (Oct. 13, 2019, 6:00 PM), <https://www.theguardian.com/global/2019/oct/13/mouse-whisperers-meet-the-disney-influencers-making-a-living-at-the-magic-kingdom>; David Ng, *Disney Has a Wholesome, Family-Friendly Image. Will Acquiring Fox Create a Culture Clash?*, L.A. TIMES, <https://www.latimes.com/business/hollywood/la-fi-ct-disney-culture-clash-20171214-story.html> (Dec. 15, 2017, 6:05 PM).

²²⁹ John Arlidge, *How Red Bull Woke Up the Teen Market*, GUARDIAN (Dec. 5, 2004, 5:02 AM), <https://www.theguardian.com/media/2004/dec/05/advertising.formulaone>; see also Bruce Rogers, *Grin Aims to Be Universal Platform for Customer Advocacy*, FORBES (Apr. 13, 2021, 2:22 PM), <https://www.forbes.com/sites/brucerogers/2021/04/13/grin-aims-to-be-universal-platform-for-customer-advocacy/>.

²³⁰ See *supra* note 58 and accompanying text.

²³¹ Aja Romano, *Why We Can't Stop Fighting About Cancel Culture*, VOX, <https://www.vox.com/culture/2019/12/30/20879720/what-is-cancel-culture-explained-history-debate> (Aug. 25, 2020, 12:03 PM).

²³² *Id.*

²³³ Libby Torres, *Why 2020 Was the Year of Backlash Against Ellen DeGeneres*, INSIDER, <https://www.insider.com/ellen-degeneres-mean-backlash-nikkietutorials-timeline-2020-4> (Jan. 26, 2021, 1:31 PM).

²³⁴ Gwen Aviles, *J.K. Rowling Faces Backlash After Tweeting Support for 'Transphobic' Researcher*, NBC NEWS (Dec. 19, 2019, 11:10 AM), <https://www.nbcnews.com/feature/nbc-out/j-k-rowling-faces-backlash-after-tweeting-support-transphobic-researcher-n1104971>.

restaurant Chick-fil-A,²³⁵ and several prominent *New York Times* journalists.²³⁶ The practice is often linked to those who are politically progressive and to those who are younger, such as Millennials and the up-and-coming Generation Z.²³⁷ Proponents of the trend argue that it holds public figures accountable for their actions.²³⁸ These entities and individuals rely on public consumption in order to be successful; if the public threatens to take away that attention by “cancelling” them after they have done something deemed offensive, then those entities and individuals will be forced to account for their behavior.²³⁹ In theory, cancel culture paves the way for a society that, essentially, is intolerant of the intolerant.

Opponents, however, contend that the tactic does not actually create the social change that it might accomplish if executed in a vacuum.²⁴⁰ Arguments against the approach, including those made by many Republican lawmakers,²⁴¹ emphasize the notion that cancel culture places individuals squarely into categories of “good” and “bad,” which is not an accurate representation of human nature.²⁴² Cancelling someone, the theory goes, does not allow for the fact that humans are imperfect beings. In cancelling an individual, we do not allow that person to take accountability for their mistakes and learn from them. Rather, we call for their swift and merciless execution. Not only is the process too rigid and unforgiving, opponents assert, but it is also often ineffective in actually motivating people to change their behavior.²⁴³ In this regard, cancel culture, itself, has faced calls to be cancelled.

Whether or not a company is in favor of cancel culture, however, it should be aware of its impact on the marketplace. Just as audiences have called to “cancel” many notable celebrities and companies, several influencers have found themselves in a similar position.²⁴⁴ Take, for example, YouTube sensation Shane Dawson.

²³⁵ Allison Hope, Opinion, *Chick-fil-A Backlash Is Nothing Short of ‘Cancel Culture,’* CNN, <https://www.cnn.com/2019/11/20/opinions/chick-fil-a-lgbtq-backlash-cancel-culture-hope> (Nov. 20, 2019, 9:26 AM).

²³⁶ Lindsey Ellefson, *NY Times Newsroom in ‘Chaos’ Over Departures, Fears of Cancel Culture,* WRAP (Feb. 11, 2021, 9:13 AM) <https://www.thewrap.com/ny-times-newsroom-in-chaos-over-departures-fears-of-cancel-culture/>.

²³⁷ Romano, *supra* note 231 (linking cancel culture to those with progressive political beliefs); Lexi Lane, Opinion, *David Dobrik Got Gen Z Watching and Brands’ Money to be a Jerk. Why Did No One Care Before?*, NBC NEWS (Mar. 23, 2021, 3:02 PM), <https://www.nbcnews.com/think/opinion/david-dobrik-got-gen-z-watching-brands-money-be-jerk-cnca1261837> (linking cancel culture to younger generations).

²³⁸ Nicole Dudenhofer, *Is Cancel Culture Effective?*, U. CENT. FLA.: PEGASUS (Fall 2020), <https://www.ucf.edu/pegasus/is-cancel-culture-effective/>.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ Romano, *supra* note 231.

²⁴² Dudenhofer, *supra* note 238.

²⁴³ *Id.*

²⁴⁴ Zoe Haylock, *The Best, Fakest, and Most Teary Influencer Apologies of 2020*, VULTURE

Dawson had once been deemed the “King of YouTube,” boasting over 19 million subscribers on the platform.²⁴⁵ However, Dawson had also been criticized repeatedly for his behavior, including donning blackface, using racial slurs, and making sexual comments about an underage girl.²⁴⁶ Perhaps an illustration of our culture’s shifting moral compass, this criticism did little to impair the influencer’s brand when it first surfaced in 2014, nor when it sprung up again in 2018.²⁴⁷ Dawson was not finally held accountable for his immoral behavior until 2020. Amidst calls to “cancel” the influencer, retail giant Target announced that it would be removing Dawson’s products from its inventory and YouTube indefinitely shut down his ability to monetize his three channels on the platform.²⁴⁸ The influencer posted a video to his YouTube channel titled “Taking Accountability” on June 26, 2020, then did not post on the platform again for six months.²⁴⁹

It is also traditional for morality clauses to capture past immoral behavior that comes to light during the lifetime of the contract.²⁵⁰ This can pose particular challenges for morality clauses in influencer advertising because the nature of the business is so inextricably intertwined with the Internet. It is nearly impossible to erase something from the web, especially if you are posting it on a public platform. Thus, even conduct from before an influencer becomes widely popular can be forever frozen in time. Moreover, because the definition of “immoral” behavior shifts over time, as exemplified by the Dawson example, public posts that may have been acceptable at one point in time might resurface again to a much less forgiving audience.

Influencer and reality television star Stassi Schroeder illustrates this point. In 2018, Schroeder and her *Vanderpump Rules* co-star Kristen Doute publicly reported one of their former cast members, Faith Stowers, to the police for a crime that she

(Dec. 17, 2020), <https://www.vulture.com/2020/12/influencer-apologies-2020-shane-dawson-jenna-marbles.html>.

²⁴⁵ Shane Dawson (@shane), YOUTUBE, https://www.youtube.com/channel/UCV9_KinVpV-snHe3C3n1hvA (last visited July 11, 2022); Lindsay Dodgson, *How Shane Dawson Went from ‘King of YouTube’ to the Biggest Fall from Grace the Platform Has Ever Seen*, INSIDER (July 2, 2020, 5:53 AM), <https://www.insider.com/how-shane-dawson-went-from-king-of-youtube-to-canceled-2020>.

²⁴⁶ Dodgson, *supra* note 245.

²⁴⁷ Katie O’Malley, *Shane Dawson: Who Is the YouTuber and Why Are His Comments Causing Controversy?*, INDEP. (Mar. 18, 2019, 11:52 AM), <https://www.independent.co.uk/life-style/shane-dawson-youtube-cat-sex-comment-paedophilia-twitter-social-media-podcast-a8827911.html>.

²⁴⁸ Dodgson, *supra* note 245; Kat Tenbarger, *YouTube Suspended Monetization on All 3 of Shane Dawson’s Channels After His Controversial Content Resurfaced*, INSIDER (June 30, 2020, 9:41 AM), <https://www.insider.com/shane-dawson-channels-demonetized-youtube-confirms-why-offensive-content-2020-6>.

²⁴⁹ Shane Dawson (@shane), *Taking Accountability*, YOUTUBE (June 26, 2020), https://www.youtube.com/watch?v=ardRp2x0D_E.

²⁵⁰ See, e.g., Helppie & Mitchell, *supra* note 45, at 6.

did not commit.²⁵¹ The only connection between Stowers and the true perpetrator of the crime? The color of their skin. Though Schroeder and Doute appeared to walk away from the racist incident unscathed a few years ago,²⁵² Stowers recounted the episode on social media in 2020.²⁵³ Within a week, both Schroeder and Doute were fired from their positions on the show and calls rang out online for Schroeder's cancellation.²⁵⁴ She ultimately lost several endorsement deals, including Billie razors, Secret deodorant, and Ritual vitamins, and has since stepped out of the limelight to be "completely focused" on being a mother.²⁵⁵

Perhaps the most difficult aspect of drafting a morality provision in an influencer contract is identifying the "immoral" behavior prohibited by the clause. The subjective nature of the conduct makes it a slippery concept to grasp, let alone harness into an enforceable contractual provision. Agreeing on which illegal or unlawful acts to include, though flexible regarding timing and type, is generally much more straightforward. However, it is imperative for both parties to work together to carefully craft the provision to address both types of conduct. The increasing threat of FTC regulation, copyright and trademark infringement claims, and defamation lawsuits, among other legal landmines online, suggest that morality clauses will continue to play an increasingly important role in influencer advertising. Coupled with the modern trend of "cancelling" a person who makes a misstep, it is crucial for a company to have a means by which it can quickly and easily terminate its relationship with an influencer. Furthermore, an air-tight morality clause will also provide influencers with a better idea of when they can expect a company to stand by them—and when they should call their attorney.

B. *Specifying How to Trigger the Clause*

This leads into the second component part of a morality clause: specifying how the clause will be triggered. As explored in Part II, morality provisions are either

²⁵¹ Kate Aurthur & Elizabeth Wagmeister, 'Vanderpump Rules' Fires Stassi Schroeder and Kristen Doute for Racist Actions, VARIETY (June 9, 2020, 10:36 AM), <https://variety.com/2020/tv/news/stassi-schroeder-kristen-doute-fired-vanderpump-rules-1234629172/>.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ Elizabeth Wagmeister, 'Vanderpump Rules' Star Stassi Schroeder Dropped by Publicist, Agency Following Racist Actions Against Co-Star Faith Stowers (Exclusive), VARIETY (June 8, 2020, 6:58 PM), <https://variety.com/2020/tv/news/stassi-schroeder-kristen-doute-faith-stores-vanderpump-rules-racist-cops-1234628058/>; Emily Yahr, *Reality TV Stars Are Finally Facing Consequences for Racist Acts*, WASH. POST (June 10, 2020), <https://www.washingtonpost.com/arts-entertainment/2020/06/10/vanderpump-rules-fires-stassi-kristen-racist-acts/>.

²⁵⁵ Wagmeister, *supra* note 254; Meredith Nardino, *Stassi Schroeder is 'Grateful' Motherhood Has Kept Her 'Away from Anything Toxic': She's 'Completely Focused,'* US WEEKLY (Apr. 7, 2021), <https://www.usmagazine.com/celebrity-moms/news/stassi-schroeder-is-completely-focused-on-life-as-a-new-mom/>.

“bad behavior” clauses or “reputational impact” clauses.²⁵⁶ The former clause focuses on the action itself; the ultimate issue being whether the talent did, in fact, commit the alleged behavior. On the other hand, a “reputational impact” clause does not require that the employer prove that their talent has actually gone awry; rather, the employer must demonstrate that the public reaction to the allegations has damaged the reputation of the company or the individual. Remember that these types of clauses are not mutually exclusive, and some companies will be able to incorporate both into the scope of their provision.

A “reputational impact” clause is better suited to protect a company against the effects of cancel culture. As seen above, the heart of cancel culture is not necessarily whether or not the target has actually acted immorally.²⁵⁷ Rather, it is the vocal public backlash that the person must face. Attempting to draft a “bad behavior” clause for immoral conduct is nearly impossible, given the shifting nature of what constitutes immorality and the fact that different consumers will have different definitions of what behavior is “immoral.” What may be acceptable to people in one part of the country or in one generation may be completely shocking to someone in a different walk of life. Moreover, as noted in the discussion of the *Williams* case, if the company does not have to prove that the conduct actually occurred, the evidentiary burden is significantly lessened.²⁵⁸

Companies that work with influencers are especially lucky in this regard. Given the industry’s ties to the internet, there are several ways that a company can track an influencer’s performance.²⁵⁹ Not only can a company track which sales originated with which influencer, thereby determining which spokespeople are more effective than others, they also have access to instant, organic feedback by monitoring the number of “likes” each post receives, how often the post is shared with other users, and whether the influencer is receiving positive or negative feedback in the comment section.²⁶⁰ Moreover, unlike traditional advertising, companies can also view many of these statistics for any other brand that the influencer is working with on their public platforms. As a result, a company with a dedicated marketing department is able to easily track public sentiment about the influencer, both as it relates to their partnership with the company itself, as well as with other brands.

With regard to illegal or unlawful acts, on the other hand, a “reputational impact” clause may not suffice. As seen with Danielle Bernstein, who was accused of

²⁵⁶ See *supra* Section II.B.

²⁵⁷ See *supra* Section IV.A.2.

²⁵⁸ See *supra* notes 75–84 and accompanying text.

²⁵⁹ *11 Ways to Measure Influencer Marketing ROI*, FORBES (June 4, 2020, 8:15 AM), <https://www.forbes.com/sites/forbesagencycouncil/2020/06/04/11-ways-to-measure-influencer-marketing-roi>.

²⁶⁰ *Id.*

copying other designers nearly ten times,²⁶¹ and with the dozens of other influencers promoting the liquor brand Cîroc without FTC disclosures,²⁶² sometimes evidence that an influencer has engaged in illegal or unlawful conduct is not enough to provoke a major public outcry. Sure, there will always be salacious cases like that of Olivia Jade Giannulli, but it appears that there are some influencer infractions to which the public is less sensitive.

A “bad behavior” clause addresses these potential problems by allowing the brand to terminate the relationship even if public sentiment surrounding the spokesperson does not seem to change. Rather, the clause will specify the exact type of illegal offenses that will make the clause applicable. The key question, of course, will become at what point the talent triggers the provision. The morality clause in *Team Gordon* was limited to instances where the driver was “charged with a felony,” though it did also include a prohibition against involvement in “any situation or occurrence involving fraud,” which may be interpreted as requiring less than a formal charge for fraudulent crimes.²⁶³ The original *Mendenhall* provision, in contrast, ran the gamut from “arrested for and charged with” to “indicted for or convicted of,” seeming to encompass any behavior beyond mere allegations within its scope.²⁶⁴ A company that is particularly worried that their influencer may run afoul of the law, perhaps because of the talent’s past conduct or industry reputation, should push for a morality provision that will be triggered at an earlier point in the legal proceedings. The company should not limit the behavior, like in *Team Gordon*, to law enforcement charging the talent with a felony,²⁶⁵ and it certainly should not wait for the influencer to be “indicted for or convicted of” the crime. Given the speed with which the Internet operates, avoiding the months, or even years, that the company might have to wait for a court to render judgment can be crucial in preserving the brand’s reputation.

Since “reputational impact” clauses tend to provide the company with more protection over their influencer’s immoral conduct while “bad behavior” clauses can afford more coverage for the company in terms of the influencer’s illegal conduct, the company should attempt to incorporate both types of clauses into the scope of its morality provision. Where this is impossible due to the bargaining power of the influencer, the company should determine which type of behavior is likely to be a bigger problem for that particular spokesperson and utilize the corresponding type of morality clause. In an ideal world, however, the company should utilize a “bad behavior” clause to delineate specific instances of illegal or unlawful acts, including

²⁶¹ See *supra* notes 205–207 and accompanying text.

²⁶² See *supra* note 199 and accompanying text.

²⁶³ See *supra* notes 62–69 and accompanying text.

²⁶⁴ *Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717, 719 (M.D.N.C. 2012).

²⁶⁵ *Team Gordon, Inc. v. Fruit of the Loom, Inc.*, No. 3:06-cv-201-RJC, 2009 WL 426555, at *4 (W.D.N.C. Feb. 19, 2009).

the point in those proceedings, that will trigger the clause. For immoral conduct, on the other hand, the company should employ a “reputational impact” clause in order to adequately guard itself against changing moral standards and the quick and unforgiving circumstances wherein their influencer becomes “cancelled.” Accurately delineating how the talent can trigger the morality provision will save both parties time and money down the road.

C. Providing for the Means by Which a Breach Will Be Determined

Once the clause has identified the prohibited behavior and the parties have agreed upon the trigger, the parties should round out their morality clause by addressing how a breach will be determined. This component part is perhaps the most straightforward. As our treatment of this component in Part II suggests, the morality clause will almost always reserve decision of a breach to the company in its sole discretion.²⁶⁶ As a result, brands working with influencers have little incentive not to reserve this power for themselves. While courts appear content to enforce such a provision, the implied contractual duties of good faith and fair dealing will curtail the company’s discretion. Therefore, before providing notice of termination, a company should be sure to critically examine all of the facts surrounding the influencer’s alleged misconduct.

This may be especially true, as seen in *Mendenhall*, where the influencer is receiving both negative and positive feedback online. In that case, the court reasoned that it may have been unreasonable for Hanesbrands to terminate the endorsement agreement, despite the fact that the company maintained complete control over determining if a breach occurred.²⁶⁷ The implied requirements of good faith and fair dealing imposed a duty on the brand to act reasonably in exercising the morality clause. The brand claimed that Mendenhall breached the provision when he published a series of controversial tweets online. However, the court denied the company’s motion for summary judgment because the case presented a genuine issue of fact as to whether it was “reasonable” for the company to terminate the relationship merely because it disagreed with his views, especially since some social-media users appeared to agree with Mendenhall’s opinions.

Though the case went on to settle,²⁶⁸ *Mendenhall* suggests that some courts may be hesitant to grant companies a wide berth in terminating a morality provision due to an influencer’s online behavior if he receives substantive positive feedback for his actions. In order to protect themselves in this regard, companies should be sure to catalog any negative responses to the influencer, using the methods of social-

²⁶⁶ See *supra* Section II.C.

²⁶⁷ *Mendenhall*, 856 F. Supp. 2d at 726.

²⁶⁸ Sánchez Abril & Greene, *supra* note 70, at 42.

media tracking discussed above.²⁶⁹ Preserving these responses in real time, especially because users can edit or delete their online posts, will assist the company if it must prove that it acted “reasonably” in future litigation. Companies can also take heart that, though this threat may exist, the number of brands who have successfully distanced themselves from unfortunate influencers suggests that it is not a threat that regularly plagues companies in influencer advertising.

This ability to preserve unilateral power for itself is one of a company’s strongest tactics in negotiating a morality clause. When paired with a provision that targets a wide array of illegal or unlawful acts early in the legal process and that can effectively guard the business against “cancel culture” and other responses to immoral behavior, a morality clause in an influencer contract is one of the most useful provisions for a company that is engaged in this emerging industry. The following Part proposes a sample morality clause utilizing the now familiar three-component part framework. Each component part discusses the reasoning behind the proposal and suggests alternatives based upon the balance of the parties’ bargaining power.

V. RECOMMENDED MORALITY CLAUSE FOR INFLUENCER CONTRACTS

This sample morality provision offers a relatively neutral clause, aimed to provide a realistic contractual term, but notes particular areas where either party may want to negotiate for stronger protection. As noted in Part II, morality clauses in talent agreements have largely stayed the same since 1921.²⁷⁰ As such, this proposal draws upon the traditional language of the clause, while updating the provision for the Internet Age.

If the Influencer is arrested for and charged with a felony offense, or has committed or commits any violation of the Federal Trade Commission Act (15 U.S.C. §§ 41–58) which causes the Federal Trade Commission to send a Warning Letter to the Company and/or to the Influencer, the Company has the right to terminate this Agreement in its sole and reasonable discretion upon five (5) days’ notice to the Influencer of its intention to do so.

If the Influencer is brought into public disrepute, contempt, scandal, or ridicule, or has been or becomes involved in any situation or occurrence reasonably tending to offend, shock, or insult any person or class of persons, or which reflects unfavorably upon the Company or its products or services, the Company has the right to terminate this Agreement in its sole and reasonable discretion upon five (5) days’ notice to the Influencer of its intention to do so.

²⁶⁹ See *11 Ways to Measure Influencer Marketing ROI*, *supra* note 259; see also *supra* notes 259–260 and accompanying text.

²⁷⁰ See *supra* Part II.

A. *Identifying the Prohibited Conduct*

Before drafting a morality clause, the company must identify which behavior it is most concerned about and how the clause will measure that behavior. This analysis will include deciding whether the influencer is more likely to engage in illegal or unlawful acts or immoral conduct, based upon the influencer's current online persona. If, as will probably be the case for most influencers, there is no indication that the person is more likely to undertake either type of behavior, the business can proceed with a comprehensive provision like the kind set forth above. If the influencer has a history of potentially problematic behavior, but the company believes that the partnership is worth the risk, it should tailor its provision to target those particular areas of concern more heavily.

1. *Illegal or Unlawful Acts*

While influencers, as humans, will always be at risk of committing any illegal or unlawful act, there are some laws that social-media spokespeople will be more susceptible to breaking due to the nature of their occupation. This proposal addresses this fact by beginning with a catch-all provision ("If the Influencer is arrested for and charged with a felony offense"), drawn from the morality clause in *Mendenhall*, and then continuing on to specify any circumstance under which the influencer's conduct will result in the influencer or the brand receiving a warning letter from the FTC. This inclusion affords strong protection for the company. The influencer may attempt to push back on the timing element of the clause, requesting that the provision only be triggered if the FTC actually files suit, and a spokesperson with enough bargaining power may be able to effectuate this change. However, given the fact that an FTC warning letter calls for the company to respond to the notice with confirmation of action taken to correct the issue, the warning itself may be enough of a burden for the company to desire termination rights on those grounds alone.²⁷¹

Either way, the morality clause should expressly identify that the contract requires compliance with the FTC regulations. The company ought to pair this inclusion with a thorough training and moderation program for its influencers in order to best protect itself from liability. The company may desire to include additional illegal or unlawful acts, such as copyright or trademark infringement and defamation, in the clause. This determination will be based on an evaluation of the influencer's past, as well as the type of campaign that the influencer will be undertaking. If the influencer will be creating original artwork for the brand, for example, the company will have a stronger incentive to include copyright or trademark infringement in the contract. On the other hand, if the influencer has built her brand

²⁷¹ *About FTC Warning Letters*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/media-resources/truth-advertising/about-ftc-warning-letters> (last visited July 11, 2022).

upon reporting news or gossip, the company may choose to incorporate acts of defamation.

2. *Immoral Conduct*

Given the fact that influencers operate very public lives but may otherwise be relatively “normal” people, there will always be a chance that they commit a public gaffe. Especially because 85% of influencers in 2019 were between the ages of 18 and 34,²⁷² immaturity or ignorance may make them particularly susceptible to ending up in hot water. The influencers explored in this Note provide just a sampling of social-media users who have been held accountable for their immoral conduct. However, because “immorality” is difficult to define, traditional morality clauses tend to include broad language such as “tending to bring [the talent] into public disrepute, contempt, scandal, or ridicule.”²⁷³ This language lays a strong foundation for the provision, and it has largely withstood the test of time, but it can be strengthened slightly by being tweaked into a “reputational impact” clause.

B. *Specifying How to Trigger the Clause*

A company that would like to guard itself against “cancel culture” and general public backlash for its influencer’s immoral conduct should draft that portion of its morality clause as a “reputational impact” clause. This will allow the company to avoid becoming tangled up in the unpleasant task of attempting to define “immoral” behavior. Rather, it will shift the focus of the clause to public reaction and reputational harm. The company can achieve this, as proposed here, by altering the traditional morality clause from focusing on whether or not the talent has committed some action that “tend[s] to bring [the talent] into public disrepute” to stipulating that the clause will be triggered “if the Influencer is brought into public disrepute.” This change from active voice to passive voice, though grammatically less desirable, removes the requirement that the company prove that the influencer actually committed the alleged act and, instead, requires only that they show evidence of the public’s reaction.

This small, but important, revision provides the company with a large safety net against the influencer who becomes the focus of widespread distaste. To buttress this strength, the provision also includes the stipulation that the company will have grounds for termination if the influencer “has been or becomes involved in” offensive conduct or does something that reflects unfavorably on the company, both of which are traditional inclusions for a morality clause and effectively include past

²⁷² *Distribution of Influencers Creating Sponsored Posts on Instagram Worldwide in 2019, by Age Group*, STATISTA (Jun. 7, 2021), <https://www.statista.com/statistics/893733/share-influencers-creating-sponsored-posts-by-age/>.

²⁷³ *Team Gordon, Inc. v. Fruit of the Loom, Inc.*, No. 3:06-cv-201-RJC, 2009 WL 426555, at *4 (W.D.N.C. Feb. 19, 2009).

behavior under their purview. Given the fact that employers regularly incorporate these two provisions into morality clauses, most influencers are unlikely to push back on their inclusion. However, some influencers, especially more sophisticated parties, may try to push back against the proposed passive voice revision. If they recognize that keeping the clause focused on their behavior will make it more difficult for the brand to sever ties, as discussed in Part II, it might be in their best interest to request that the clause remain unchanged. This is especially true considering that coverage of salacious spokespeople often makes note of which brands are standing by the individual.²⁷⁴ For influencers, whose value improves by being engaged in multiple partnerships, having a business that apparently weathers the storm with them can salvage some of the influencer's brand.

The influencer may also object to having the illegal or unlawful conduct drafted as a "bad behavior" clause, specifying discrete illegal acts that will trigger the clause in addition to a blanket prohibition against the influencer being arrested for, or charged with, a felony. However, especially given the fact that the purview of the clause would not otherwise include FTC infractions, it is imperative that the provision in an influencer contract include such behavior. Provided that an influencer's business will almost always be subject to FTC restrictions, this should not be an argument for them that is worth staking the deal on. The influencer should ensure that they are well-versed in the regulations and abide by them regardless of whether the contract so demands. If they develop a reputation as someone who frequently fails to follow the guidelines, it is not likely that their career as an influencer will last very long, especially as the FTC and consumers begin to enforce the regulations more seriously.

Instead, the influencer who retains sufficient bargaining power should focus on challenging the temporal element of the legal action. Rather than allowing for termination upon mere arrest or charge, an influencer would prefer that only indictment or conviction trigger the clause. The reasoning behind this preference mirrors that of the immoral conduct above: if a brand must stand behind an influencer because it is unable to employ the morality clause or another contractual provision to terminate the contract, both the public and other companies may be led to believe that the influencer's conduct is not as reprehensible as it may appear. Given how long it may take to receive a ruling at trial, the influencer can essentially buy herself some time by adjusting this provision at the outset. Of course, for these very reasons, companies with significant bargaining power may attempt to revise the provision such that mere allegations of wrongdoing allow for avoidance of the contract.

²⁷⁴ See, e.g., Suzanne Vranica & Khadeeja Safdar, *Tiger Woods Rewards Nike's Loyalty with Masters Win*, WALL ST. J., <https://www.wsj.com/articles/tiger-woods-rewards-nikes-loyalty-with-masters-win-11555351215> (Apr. 15, 2019, 6:32 PM).

C. Providing for the Means by Which a Breach Will Be Determined

Finally, the morality clause must state how a breach will be determined. Just because the influencer engaged in unbecoming conduct or received some bad press does not mean that the company will terminate the relationship. As previously explored,²⁷⁵ it is common for a morality clause to reserve termination rights solely for the company and this proposal reflects that. However, the requirement that the determination be “reasonable” restricts this power slightly. While this may put a slight burden on the company, courts will imply the reasonableness requirement regardless, so explicitly providing for it can serve as a reminder to the company that their decision must be rooted in reason for the termination to be effective. Including the reasonableness requirement can also help the company build good will with their influencer.

Likewise, by requiring that the company provide the influencer with five days’ written notice prior to termination, the influencer will have time to adjust her behavior accordingly. This may mean attempting to negotiate with the company and proposing some cure for her behavior, or it may mean the opportunity to prepare a public statement or otherwise arrange for the relationship to conclude. While a company might prefer to be able to terminate the contract immediately upon a breach, this five-day notice period is a small price to pay if the business can use it as a bargaining chip to gain more ground in one of the first two component parts. Moreover, providing the influencer with five days’ notice prior to termination encourages their attempt to cure the problem, which may be good for both the company and for consumers at large. By providing the influencer with the opportunity to come up with a genuine remedy for their behavior, the morality clause can encourage the development of an industry that rewards talent for doing good, in addition to punishing those who behave badly.

CONCLUSION

Morality clauses were born from scandal. From an unruly party at the St. Francis Hotel, the provision evolved into a powerful tool to protect employers and talent alike. Whether drafted narrowly, in favor of the individual, or broadly, to safeguard the company, a clearly drafted morality provision can save both parties from expensive and exhausting litigation. However, the clause needs to grow into the Internet Age. Brands who want to harness the power of endorsement advertising in the influencer era need to protect themselves against the unique stumbling blocks inherent to the digital landscape.

As explored throughout this Note, morality clauses consist of three component parts. These parts each address a discrete element of morality provisions that can protect talent and employers alike when the partnership turns sour. First, by clearly

²⁷⁵ See *supra* Section II.C.

identifying which behavior will trigger a morality clause, the company puts the talent on reasonable notice as to what behavior is not acceptable. In providing a behavioral benchmark, the morality clause can serve as a guide for both parties as they tread into new endeavors. Moreover, by anchoring itself to the black letter law and to contemporary conventions and morals, the clause imbues the partnership with the flexibility necessary to hold the talent accountable to shifting legal and societal standards. Second, by recognizing and utilizing the differences between a “bad behavior” clause and a “reputational impact” clause, a company can afford specific attention to potential problem areas unique to the relationship. The talent, too, can protect itself using the second component, either by negotiating that the “bad behavior” be limited to certain types of offenses or to certain points in the legal process. Finally, morality clauses will almost always provide the company with the unilateral power to decide if a breach has occurred. This, of course, offers a lot of power to the business, but the parties can tweak it slightly to afford more protection to the talent. Including a notice period, for example, coupled with express or implied duties of reasonableness can help ensure that the morality clause is fair to both parties (and a court will not strike it down as unconscionable).

When viewed through the lens of influencer advertising, many of the traditional morality clause considerations remain true. Companies can still use the three-part component framework to develop a morality provision for the Internet Age. However, there are small changes that can adapt the morality clause to the influencer industry. First and foremost, by reworking traditional morality clause language to passive voice, a company can shift the emphasis of the provision from the influencer’s actions to the effect of that behavior. In doing so, a brand will be able to insulate itself from being attached to an influencer facing public backlash, or worse, being “cancelled.” Additionally, placing an emphasis on the particular areas of law that influencers may be most susceptible to infringing upon can insulate the company from liability while encouraging both entities to stay educated as to applicable laws and regulations as the industry develops.

Making these small changes to morality clauses can have a lasting impact, both on the parties involved and to the industry at large. Incorporating provisions like the clause suggested here can facilitate communication and goodwill between companies and their influencers, while ensuring that a brand will not find itself caught up in a digital firestorm if the influencer engages in illegal or unlawful conduct or finds herself facing public backlash online. Though business on the web can sometimes feel like the Wild West, morality clauses can be employed to help protect the company, the influencer, and consumers as a whole.