

INFLUENCER MARKETING: ADVERTISING IN THE AGE OF SOCIAL MEDIA

RESEARCH REPORT

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Option consommateurs

MISSION

Option consommateurs is a non-profit association whose mission is to promote and defend the rights and interests of consumers and to ensure that they are respected.

HISTORY

Option consommateurs has been in existence since 1983, when it arose from the Associations coopératives d'économie familiale movement, more specifically, the Montreal ACEF. In 1999, it joined forces with the Association des consommateurs du Québec (ACQ), which had already pursued a similar mission for over 50 years.

PRINCIPAL ACTIVITIES

Option consommateurs helps consumers experiencing difficulties, by offering them budget consultation and information sessions on budgeting, debt, consumer law and the protection of privacy.

Each year we produce research reports on important consumer issues. We also work with policy makers and the media to denounce unacceptable situations. When necessary, we institute class action suits against merchants.

MEMBERSHIP

In its quest to bring about change, Option consommateurs is active on many fronts: conducting research, organizing class action suits, and applying pressure on companies and government authorities. You can help us do more for you by becoming a member of Option consommateurs www.option-consommateurs.org.

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Summary

Influencer marketing is a phenomenon that is increasingly present in our daily lives and one that raises a host of concerns. This research focuses on the advertising generated by this marketing technique. We approach the topic with an eye to transparency, asking whether the current regulations governing advertising are equal to the challenges raised by influencer marketing. Our analysis is structured around the principle of advertising identification: that the consumer must be made aware whenever a message or other communication is in fact an advertisement.

Our research began by identifying a range of techniques used in influencer marketing in order to verify their impact on users. The next step was a qualitative field analysis of a population composed up of both adults and children in order to assess how the practice is received by the public. Then in order to elucidate the data collected in the light of this corpus, we proceeded to a study of relevant legislation, standards, social networking policies, doctrine and jurisprudence,

This research revealed that participants are generally more favourable to influencer marketing techniques than to traditional advertising. It also showed the marked impact that these techniques are having on young people. However, the research also found that some of the techniques used in influencer marketing create confusion about their status as advertisements among participants in the study, especially those under the age of 13, since for these young people, advertising is a rather abstract concept.

The advertising identification conventions used in this marketing technique (e.g., #ad and #sponsored —#pub and #commandité in French) revealed that in adults, the nuances between the hashtags used online are not very well understood by all. Among children, few recognized the #ad or #pub symbols or their equivalents (especially young French speakers). As for including the label *advertisement* on a post, some participants disliked this as much as traditional advertising, while others considered it to be a more transparent means. Finally, this research revealed an absence of uniformity between the symbols proposed by Ad Standards and those actually utilized by certain networks,

Even though the laws in force in Canada are applicable to influencer marketing and although certain provisions relating to misleading advertising may, in their current wording, be applicable to various forms of advertising, none of these laws specify the way in which the advertising nature of a message must be disclosed.

Our analysis of practices in other jurisdictions led us to discover some inspiring examples, including the UK's agreement with Facebook Ireland, which committed itself to implementing technology to identify Instagram posts that are not compliant with regulations. We also cite the example of Germany, which intervened to demand that influencers use the German terms #werbung or #anzeige in full, rather than the #ad sign, to make it easier for consumers to understand.

CHAPTER 1. INTRODUCTION AND ISSUES

The phenomenon of influencers, and more especially influencer marketing and the advertising it generates, raises new questions, not only about the actors and their practices, but also the applicability of traditional advertising rules to this environment.

This research explores several key issues raised by influencer marketing. We begin by defining it as a marketing phenomenon, and proceed by focusing on a number of considerations related to marketing, child psychology, and the law.

1.1. Factual context

1.1.1. Influencer marketing: the phenomenon

Influencer marketing is a practice by which companies enter into agreements with influencers to promote their goods or services in exchange for sums of money, products or invitations to exclusive events.¹ The practice is expanding rapidly. According to some projections, companies are expected to spend up to \$15 billion on influencer marketing by 2022.²

Influencer marketing is therefore evolving in step with influencing as a profession.³ Influencers are defined as producers of creative content on social media who started off as passionate, independent and unpaid amateurs. After a while, as a result of intensified competition and the growing professionalization of the influencer industry, their amateur activity on social media status transformed into a lucrative occupation, turning them into semi-celebrities in everyday life.⁴ In other words, when influencers are active and they spark the interest of loyal followers, there is a good chance that advertisers will pay them to give their opinion⁵ on products and services, which, needless to say, will be favourable. This, then, is what influencer marketing consists of.

Very often, these advertisers want to reach their target audience in a way that the latter feels is “authentic.”⁶ Since influencers are followed by very specific groups of consumers—sports or yoga enthusiasts, for example — they are highly attractive to the advertisers of certain brands, who can easily incorporate them within their business strategy. These influencers then include content from various brands into their reviews, recommendations and tutorials. Since they have tried the products themselves and promote them in an “authentic” way, consumers feel

1. M. De Veirman, V. Cauberghe, L. Hudders, “Marketing through Instagram influencers: the impact of number of followers and product divergence on brand attitude,” 2017 *Int. J. Advert.* 36, pp. 798–828.

2. Audrey Schomer, “Influencer Marketing: State of the Social Media Influencer Market in 2020,” 2019. Online: <https://www.businessinsider.com/influencer-marketing-report>.

3. Marie-Andrée Hould, *#momlife: Maternité et marketing d'influence. Comment les mères exposent-elles leur maternité sur Instagram? Une analyse de contenu de leurs publications*, master's thesis, University of Ottawa, 2019, p. 27.

4. Crystal Abidin, “#family goals: Family Influencers, Calibrated Amateurism, and Justifying Young Digital Labor,” 2017. Online: <https://journals.sagepub.com/doi/10.1177/2056305117707191>.

5. <https://www.competitionbureau.gc.ca/eic/site/cb-bc.Nsf/eng/04372.html>.

6. Marijke De Veirman et al, “What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research,” *Frontiers in Psychology* 2019; 10: 2685. Online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6901676/>.

confident trying them.⁷ The promotional content prepared by the influencer is presented in the same visual style and blends in with the original content on their page. The practice of influencer marketing can thus be considered a form of “native” advertising,⁸ defined as “any paid advertising that takes the specific form and appearance of the editorial content of the publisher itself.”⁹

Influencer marketing is also considered a word-of-mouth technique.¹⁰ By using a range of tactics such as posting photos, videos or text messages, influencers attempt to get through to a community and gain its commitment.¹¹ Once obtained, this commitment will allow them to hold on to their followers and attain greater popularity. In addition, the messages exchanged between members of the same network increase the influencer’s follower feed, making them ever more popular and, consequently, more and more attractive to brands. The influencer may be able to modify their audience’s perceptions or even its behaviour towards a brand. In some cases, an influencer may complement or be an integral part of an advertising strategy.¹² Some advertising agencies¹³ even consider influencer marketing to be an affordable way to advertise in a context in which traditional advertisements are becoming increasingly expensive. These agencies are abandoning traditional tools or introducing influencer marketing techniques into social networks. For example, they can collaborate with influencers by producing sponsored publications. Ad agencies see several advantages over traditional advertising, including more accurate customer targeting, as the influencers can be chosen based on the profile of the followers who follow them. Other advantages for ad agencies include the immediate, visible impact and the ease with which results can be measured.

It has often been remarked that the influencer phenomenon is not new, since celebrities have a long history of endorsing brands. What makes the current phenomenon so different are the particular consequences that arise when it is transposed onto social networks. For one thing, the influencer may be just an ordinary person whose followers are members of an online community, and for another, the ad may appear to form part of the regular content of the post. This can be confusing: it is hard to tell whether the message being conveyed is advertising or not. There is also the fact that Internet users can react to advertising by posting “likes” and that the traffic generated by the advertising can be measured directly online.

7. Alexander P. Schouten et al, “Celebrity vs. Influencer endorsements in advertising: the role of identification, credibility, and Product-Endorser fit,” 2019. Online:

<https://www.tandfonline.com/doi/full/10.1080/02650487.2019.1634898>.

8. W. Bartosz et al, “Going Native: Effects of Disclosure Position and Language on the Recognition and Evaluation of Online Native Advertising,” 2016, *Journal of Advertising*, 45: 2, 157-168, DOI: 10.1080 / 00913367.2015.1115380.

Online: <https://www.tandfonline.com/doi/full/10.1080/00913367.2015.1115380>

9. W. Bartosz et al, “Going Native: Effects of Disclosure Position and Language on the Recognition and Evaluation of Online Native Advertising,” 2016, *Journal of Advertising*, 45: 2, 157-168, DOI: 10.1080 / 00913367.2015.1115380.

Online: <https://www.tandfonline.com/doi/full/10.1080/00913367.2015.1115380>.

10. Robert v. Kozinet et al, “Networked Narratives: Understanding Word-of-Mouth Marketing in Online Communities,” March 2010, *Journal of Marketing* 74 (2): 71-89, DOI: 10.1509 / jmk.74.2.71. Online:

https://www.researchgate.net/publication/255600900_Networked_Narratives_Understanding_Word-of-Mouth_Marketing_in_Online_Communities

11. Commitment is seen as a fundamental aspect of interactions. This is defined as the fact of maintaining a certain intellectual and emotional attention, a certain mobilization of one’s psychological resources. See: Marie-Andrée Hould, *#momlife: Maternité et marketing d’influence. Comment les mères exposent-elles leur maternité sur Instagram? Une analyse de contenu de leurs publications*, Master’s thesis, University of Ottawa, 2019, p. 37.

12. Interview with Laurence Moroté of the marketing firm BICOM, Friday January 17, 2020.

13. Interview with Laurence Moroté of the marketing firm BICOM, Friday January 17, 2020.

1.1.2. Influencer marketing issues

Influencer marketing presents several challenges, particularly with regard to privacy and consent. In this study, we have limited ourselves to presenting three types of issue: marketing issues, psychological issues (its impact on children) and legal issues (its relation to the laws on advertising).

1.1.2.1. Marketing issues

The following marketing issues have consequences for both consumers and marketing firms.

A. Astroturfing

Astroturfing is a practice some companies use to raise their ratings or lower those of competitors. The Competition Bureau defines astroturfing as the practice of disguising commercial representations as authentic experiences or unbiased consumer opinions. They may take the form of fake testimonials or fake reviews.

Astroturfing is on the rise, according to the Competition Bureau. Indeed, as more and more consumers consult online reviews to decide on the pros and cons of a product before purchasing it, the company could encourage its employees to post positive reviews on review websites and review platforms, or give customers incentives that encourage them to write positive reviews. Other companies may engage the services of “reputation enhancement” or “search engine optimization” firms that pay third parties to post fake online reviews.¹⁴

Consumers looking for neutral information tend to trust reviews posted by other consumers because they see them as “genuine”; hence the importance given to recommendations by influencers. On the subject of authenticity, so sought after by consumers, the Competition Bureau points out: “consumers are more likely to accept representations about products made by other consumers when apparently based on practical use and conveyed with a candour that may itself vouch for the reliability of the representations.”

We are also witnessing the emergence of virtual influencers, another subterfuge companies have devised to get their message across. Do consumers who trust influencers whom they believe to be authentic realize that they are not dealing with a human being but a robot remotely controlled by a brand? We rather doubt it.

B. Inflated performance indices

Another practice of influencers worldwide is to lead consumers into falsely believing that they have multiple followers. This practice is current in influencer marketing. Since a high number of “followers” and “likes” (key indicators for brands or agencies) is likely to increase the reach of their commercial message, some influencers purchase fake “followers” and fake “likes” to

14. https://www.competitionbureau.gc.ca/eic/site/cb-bc.Nsf/eng/03946.html#s3_0.

artificially inflate their influencer status.¹⁵ Their objective here is to pretend they have a high number of followers and thereby secure the trust of consumers who are swayed by influencers' testimonials.

In the United States, the Federal Trade Commission (FTC) has concluded that such a practice is illegal because it tends to mislead consumers.¹⁶ For example, the DEVUMI company operated several sites, including Devumi.com, TwitterBoost.co, Buyview.co, and Buyplays.co where users could buy fake followers, reviews, and "likes" for their social media accounts. In such a context, it is difficult to trust the number of followers influencers claim to have—and this represents just as much of a challenge for consumers as for competing companies or marketing firms.

In addition, the marketing practices used in this industry raise a number of psychological issues, especially when it comes to children.

1.1.2.2. Psychological issues: children

First of all, it should be noted that even though an increasing number of studies¹⁷ are showing an interest in influencer marketing in adults, few have been devoted to how influencer marketing affects young children.¹⁸ However, to get an idea of the effect advertising can have on youngsters, we need to recall the advertising process involved in influencer marketing. Brands appear inside influencer content and act as implicit recommendations. Branded content or advertising is fully integrated with content intended for children without their realizing that it is advertising.¹⁹ As a result, children,²⁰ and even their parents,²¹ may not realize that the YouTube video they are watching is primarily a kind of advertisement. Despite the existence of standards related to disclosure in the United States, some of the literature on the topic reveals that many influencers do not adequately disclose the commercial nature of their posts.²² For example, only

15. M. De Veirman, V. Cauberghe, L. Hudders, "Marketing through Instagram influencers: the impact of number of followers and product divergence on brand attitude, 2017" *Int. J. Advert.* 36, p. 798–828. Online: <https://www.tandfonline.com/doi/abs/10.1080/02650487.2017.1348035>.

16. https://www.consumer.ftc.gov/blog/2019/10/fake-followers-social-media-hoax?utm_source=govdelivery.

17. See in particular Chen Lou and Shupe Yuan, "Influencer Marketing: How message value and credibility affect consumer trust of branded content on social media," published online February 12, 2019, pp. 58-73.

18. With the exception of: Marijke De Veirman et al, "What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research," *Frontiers in Psychology* 2019; 10: 2685. Online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6901676/>.

19. See Liselot Hudders et al, "Shedding new light on how advertising literacy can affect children's processing of embedded advertising formats: A future research Agenda," *Journal of advertising* 46 (2), 2016.

20. See [Folkvord et al., 2019](#), Cited by: Marijke De Veirman et al, "What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research," *Frontiers in Psychology* 2019; 10: 2685. Online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6901676/>.

21. [Evans et al., 2018](#) Cited by Marijke De Veirman et al, "What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research," *Frontiers in Psychology* 2019; 10: 2685. Online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6901676/>.

22. See Marijke De Veirman et al, "What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research," *Frontiers in Psychology* 2019; 10: 2685. Online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6901676/>.

25% of active Instagram influencers are compliant with the FTC best practices guide.²³ In addition, there is the whole phenomenon of child influencers, which is now attracting ever increasing attention.

A. Kid influencers or influencer marketing aimed at children

The phenomenon of child influencers and influencer marketing aimed at children is becoming prevalent worldwide. One of the most famous kid influencers, Ryan from *Ryan's World*, has over 19 million followers. He was already a social media influencer at the age of seven.²⁴

Many brands have added kid influencers²⁵ to their marketing strategies. Although these children may appear to be just “ordinary kids,” some are very well paid. For example, Ryan reportedly earned \$22 million in 2018.²⁶ In exchange for free promotional products or payment, brands ask these influencers to endorse their products on their social network profiles, particularly in their feeds or in their “stories” on Instagram, in videos broadcast on YouTube or TikTok, or via Facebook updates. Their YouTube channels also earn ad revenue due to their large viewing audience.

Considering that the key factor in influencer marketing is the seeming authenticity projected by the influencer, children would appear to be perfect vehicles for this market because of the innocence we associate with them. Indeed, the families and children chosen as influencers seem to perfectly embody the authenticity so sought after in this industry. However, it is not new to see families featured on the internet; family influencers have been popping up everywhere for quite some time. In family blogs, however, children are peripheral, the emphasis being on the daily experiences of parents. Kid influencers have become micro-celebrities, products of the exposure and fame of influencer mothers.

It seems that these micro-celebrities are literally grown (in the womb) and groomed (in the home) to inherit their influencer mothers’ social capital.²⁷ Even though platforms such as YouTube and Instagram specify that users must be at least thirteen (13) years old, some manage to circumvent this regulation by stating, for example, that the account is managed by parents.

23. See James Harrison, “The Monetization of Opinions: Consumer Responses to Covert Endorsement Practices on Instagram,” 6 J. Promotional Comm. 395, 397 (2018): <https://promotionalcommunications.org/index.php/pc/article/view/144/159>.

24. See Marijke De Veirman et al, “What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research,” *Frontiers in Psychology* 2019; 10: 2685. Online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6901676/>.

25. For example, Stella and Blaise, The McClure Twins, Annie Leblanc or Evan Tube HD, see [Marijke De Veirman](#) et al, “What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research,” *Frontiers in Psychology* 2019; 10: 2685 .

26. See Marijke De Veirman et al, “What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research,” *Frontiers in Psychology* 2019; 10: 2685. Online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6901676/>.

27. See Marijke De Veirman et al, “What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research,” *Frontiers in Psychology* 2019; 10: 2685. Online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6901676/>

Some observers think it is clear that companies are using kids as influencers in order to target an audience of children.²⁸

B. The effect of influencer marketing on children

An article in *Frontiers in Psychology* magazine²⁹ points out that sponsored content presented by children appears to have a very strong influence on other young children and may alter their preferences. Given their slight knowledge of advertising and limited ability to think critically about it, children under 12 are a vulnerable target group for hidden persuaders. Moreover, some studies show that children who are often exposed to influencer content stay on the lookout for new posts. As a result, this young audience is constantly exposed to the marketing messages of influencers, which is sometimes focused on food and drink products that are widely considered unhealthy.³⁰ Social media stars influence the consumption decisions of their young audiences. They offer their followers insight into the brands they love and use in their daily lives, and they even give direct advice on which products their followers should and should not be using.³¹

Unlike child actors, kid influencers do not pretend, for example, to play and have fun with toys. They really do. In doing so, they improve their relationship with the public and blur any appearance of persuasion or selling. For psychologist Rose-Marie Charest,³² the main issue for children in relation to influencers is the question of identity, which is formed from the outside rather than from the inside. Advertising aims at creating a sense of amazement, by projecting an image of someone who has been made happy thanks to the product. The child therefore deduces that, to be happy, they must use the featured product. There is a risk that this will result in a harmful reciprocal effect: if the product is attractive because the person is popular, the child can become popular if they use the product. There is therefore a threat of identity dysfunction in children who are constantly exposed to such an environment.

Ervin Goffman emphasizes that the identity of the individual is constructed in the relationship between identity for others and identity for oneself.³³ Accordingly, our social interactions leave an informational trace in others that cannot be erased. We are therefore influenced and characterized as human beings by the gaze of others, a gaze which is internalized. All of the issues referred to above have legal implications. Below are some of the issues that have been raised around the world in connection with the practice of influencer marketing.

28. See Marijke De Veirman et al, "What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research," *Frontiers in Psychology* 2019; 10: 2685. Online:

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6901676/>.

29. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6901676/>.

30. Marijke De Veirman et al, "What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research," *Frontiers in Psychology* 2019; 10: 2685. Online:

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6901676/>.

31. Steffi De Jans et al, "Unravelling the power of social media influencers: a qualitative study on teenage influencers as commercial content creators on social media," *The regulation of social Media Influencers* (pp.126-166). January 2020.

32. Interview conducted as part of this research with Rose-Marie Charest, psychologist, former president of the Ordre des psychologues du Québec.

33. Christopher ALCANTARA and Martine CORRAL-REGOURD, « E-Réputation-Cadrage théorique d'un concept complexe et polymorphe », Francine CHAREST et al (dir.) *E-réputation et influenceurs dans le médias sociaux-Nouveaux enjeux pour les organisations*, Presse de l'université du Québec, 2017, p. 15

1.1.2.3. Legal issues

The legal issues referred to here relate to business practices, the liability of influencers in the event of contractual non-compliance, and the presence of children on social networks.

A. Regarding practices in general

a) False or misleading representations

The website of the Competition Bureau of Canada explicitly states: “Influencers should clearly disclose any material connections they have with the companies whose products or services they feature.”³⁴ In other words, influencers need to make sure their followers know that endorsing or reviewing a certain product is actually a commercial representation. In addition, s. 52 (1) of the *Competition Act* prohibits false or misleading advertisements, which includes those published on the internet.

The provisions of the *Competition Act* fall under federal jurisdiction, but similar provisions are to be found in provincial consumer protection laws. However, at the time of writing, we have not found any decisions in which these provisions have been applied to the context of influencer marketing in Canada. There are, however, some to be found in the United States, where the tea maker Detox Tea Teami³⁵ was fined \$1 million for a deceptive Instagram ad claiming its tea helped those who drank it lose weight and fight cancer. Also in the United States, the Federal Trade Commission (FTC) sued Global Offensive, an online gaming company, which had signed a contract with influencers to promote its products. The deal stipulated that influencers could not make statements that might adversely affect the name of the company. For their part, the influencers falsely claimed that the opinions put forward were independent and did not disclose their material connection to the company.³⁶

b) Lawsuits against an influencer for breach of contract

In the United States, more and more lawsuits are being brought against influencers³⁷ by the companies or advertising firms that hire them. These lawsuits often relate to non-respect of a clause in the contract. For example, it might be a clause stating that the influencer must make a certain number of posts or personal appearances in exchange for payment. In 2017, a lawsuit was brought against YouTube star Bethany Mota and her father by Studio 71 with regard to an advertising contract. This contract stipulated that Bethany Mota was to create videos and posts to promote a brand of skin care products in exchange for a sum of \$325,000. The video produced by the influencer was supposed to show her applying the product while getting ready for her day, on site, in Kauai, Hawaii. However, no footage shot in Kauai was included in the videos. The influencer’s father was also prosecuted for encouraging his daughter not to meet her obligations. Another lawsuit involved actor Luka Sabbat, who allegedly signed a contract with the public relations firm PR Consulting to promote Spectacles by Snap, on Instagram, a

34 <https://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/eng/04372.html>

35 <https://www.businessinsider.com/instagram-influencers-teami-detox-tea-sponsored-posts-ftc-settlement-2020-3>

36 <https://www.ftc.gov/news-events/blogs/business-blog/2017/09/three-ftc-actions-interest-influencers>

37 <https://www.tubefilter.com/2017/08/22/studio71-sues-bethany-mota-dad-fraud-breach-of-contract/>;
<https://mediakix.com/blog/influencer-lawsuits/>

competing social networking service. The firm claimed that the deal called for the influencer to create one Instagram Feed post and three Instagram Story posts. These were to be presented in the context of fashion shows, including New York Fashion Week, for a fee of \$60,000 paid in advance to the influencer. However, Sabbath produced only one Instagram Feed post and one Instagram Story post.

c) Class action suits against influencers

The United States has also witnessed the emergence of class action suits against influencers. One such case arose as a consequence of the Fyre Festival, which brought together several famous influencers to promote the luxury music festival on a private island in the Bahamas in April 2017. After several problems on the first day, the festival was cancelled, even though some participants had paid up to \$12,000 for a VIP package. Three participants filed a class action against 100 influencers for failing to declare that they were paid to promote the festival.

B. Regarding practices affecting children

a) Advertisements targeting children

Some jurisdictions, including Québec, prohibit advertising that is directed at children.³⁸ There is an almost total ban in the province on advertising to this audience, not merely a ban on misleading advertising.³⁹ The prohibition also applies to the context of influencer marketing. We are starting to see lawsuits related to advertising aimed at children. In the United States, Ryan's World kid influencer Ryan has been accused of misleading children through "sponsored videos, which often appear to be genuine content," according to an official complaint filed with the Federal Trade Commission by the watchdog group Truth in Advertising.⁴⁰ The complaint also stated that the way Ryan's World is presented does not permit children to understand that the YouTube content they are watching is essentially an advertisement. At the time of writing, we had not found any complaints in Canada related to influencer marketing in children.

b) The work done by child influencers

The advent of child influencers raises the question of the work done by children and how the income generated by this type of work is managed. It's one thing to show off your kid on social media, but it's another to make them participate in advertising. Certain jurisdictions, such as France,⁴¹ have started to legislate on the issue. As a matter of fact, on June 25, the French Senate adopted a law to regulate the work of child influencers. As in the case of child actors and models, their schedules and filming time will be regulated and the remuneration paid will be largely withheld by the Caisse des Dépôts et Consignations until the child reaches the age of majority. There is as yet no similar legislation in Québec and the rest of Canada,

38. *Consumer Protection Act (CPA)*, CQLR, cP-40.1, s. 248.

39. Pierre-Claude Lafond, *Droit de la protection du consommateur: Théorie et pratique*, Montréal, Éditions Yvon Blais, 2015, p. 288.

40. <https://www.nytimes.com/2019/09/04/business/media/ryan-toysreview-youtube-ad-income.html>

41. https://www.lemonde.fr/pixels/article/2020/06/25/le-senat-adopte-la-loi-pour-encadrer-le-travail-des-enfantsinfluenceurs_6044204_4408996.html?fbclid=IwAR3MiQA7dpLOG4QyaThmxlnntpGJZceZceZaHmxIntvGJZceZceZceZiHmxIntpGJZceZce

The factual context presented later in this report outlines both the various practical issues related to marketing and child psychology and their legal consequences to date. These practical issues are, in an important sense, symptoms of the deeper conceptual questions underlying them.

1.2. Conceptual context

1.2.1. Between authenticity and the sale of authenticity

Influencer marketing is founded on the idea of influencer authenticity. Influencers, in fact, are ordinary people who have become online celebrities for a small group of consumers interested in a certain niche. Advertisers then come along and use these microcelebrities as a means for marketing their products. Influencer marketing allows advertisers to target the audience they are interested in more precisely than through traditional media.⁴² At the marketing level, the success of this method is made possible thanks to the dual role played by the influencer, who acts both as a member of a community and as a marketing agent.⁴³

The marketing techniques employed involve an interpersonal communication between consumer and influencer being transformed into an act of persuasion. This has caused some authors to remark that word-of-mouth marketing, of which influencer marketing is one example, is based on the assumption that marketers can exploit the gullibility of consumers.⁴⁴ In addition, Felicia Wu Song⁴⁵ explains that in the United States, influencer mothers (“mommy bloggers”) offer “authenticity that can be used” and have been seen as an effective way to reach and influence a consumer market niche composed of mothers (the “momblogosphere”) that was worth more than \$1.7 billion in annual spending in 2016.

This notion of usable authenticity becomes all the more questionable when we observe a virtual influencer whose followers⁴⁶ are not always aware that the influencer is not a human, but a robot.

This method of marketing products, which can be thought of as a new form of word-of-mouth marketing, may have its own special pitfalls. Certain authors⁴⁷ explain that in word-of-mouth

42. <https://www.bureaudelaconurrence.gc.ca/eic/site/cb-bc.nsf/eng/04372.html>.

43. Robert V. Kozinets et al, “Network narratives: Understanding Word-of-Mouth Marketing in online communities,” in *Journal of Marketing*, March 2010. Online:

https://www.researchgate.net/publication/255600900_Networked_Narratives_Understanding_Word-of-Mouth_Marketing_in_Online_Communities

44. Robert V. Kozinets et al, “Network narratives: Understanding: Word of Mouth Marketing in Online Communities” in *Journal of Marketing*, March 2010. Online:

https://www.researchgate.net/publication/255600900_Networked_Narratives_Understanding_Word-of-Mouth_Marketing_in_Online_Communities.

45. Felicia Wu Song “The Serious Business of Mommy Bloggers: Understanding people in their social worlds,” 2016, *Contexts*, 15 (3), pp. 42-49. <https://journals.sagepub.com/doi/full/10.1177/1536504216662234>

46. <https://blogfr.influence4you.com/top-5-des-influenceurs-virtuels/> <https://mbamci.com/les-influenceurs-virtuels-la-nouvelle-ere-de-linfluence/>

47. Robert V. Kozinets et al, “Network narratives: Understanding Word-of-Mouth Marketing in online communities,” in *Journal of Marketing*, March 2010. Online:

https://www.researchgate.net/publication/255600900_Networked_Narratives_Understanding_Word-of-Mouth_Marketing_in_Online_Communities

marketing, where the consumer, who in this case is an influencer, is also a marketer, the traditional social contract that requires separation between commercial and human relations is violated, thus giving rise to a certain tension. The marketer resolves this tension by modifying the communication so as to make the marketing message more credible and acceptable to the community. Previous marketing theories attempted to explain consumers' resistance in psychological terms: consumers resent marketing specialists clearly seeking to directly influence their attitudes and purchases. In such a situation, there is a risk that consumers could abandon a brand or an influencer due to a loss of trust.

The Competition Bureau apparently agrees, as it makes it clear that consumers feel cheated by such a practice,⁴⁸ seeing it as a lack of transparency on the part of the influencer. True transparency involves disclosing the link binding the influencer to a brand, the central issue being to allow consumers access to the information needed to arrive at an informed decision.

It is clear that influencer marketing takes on a special character owing to the relationship created between the influencer and their followers. When the followers are children, this relationship makes them even more vulnerable to advertising. Remember, the influencer does not pretend to play and have fun with toys, as in traditional ads, he really does this. Influencers interact with their followers. The content they publish is very personal. Their social media posts give followers a glimpse into their real lives, which makes them feel like they have a lot in common with the influencer, or even that he is just like them.⁴⁹ As a result, children are more likely to build a relationship with influencers, who then become sources of information and inspiration for them, all of which has an impact on their consumption choices.⁵⁰ This type of relationship, from a psychological point of view, can be classified as being parasocial in nature.

1.2.2. Parasocial relationships and advertising

The relationships consumers develop with characters in ads are classified as parasocial, making them important sources of information.⁵¹ Accordingly, when consumers identify with a source and observe their brand usage behaviour, they are likely to engage in the same behaviour as them.⁵² The need for companionship seems to be the main driver in forming such a relationship. Children are more likely to engage in such relationships. Their cognitive abilities are still limited,

48. <https://www.bureaudelaconurrence.gc.ca/eic/site/cb-bc.nsf/eng/04372.html>.

49. Marijke De Veirman et al, "What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research," *Frontiers in Psychology* 2019; 10: 2685. Online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6901676/>.

50. See Marijke De Veirman et al, "What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research," *Frontiers in Psychology* 2019; 10: 2685. Online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6901676/>.

51. Rubin et al., "Loneliness, parasocial interaction, and local television news viewing," *Human communication Research*, Volume 12, Issue 2, December 1985, pp.155-180: <https://onlinelibrary.wiley.com/doi/10.1111/j.1468-2958.1985.tb00071.x>.

52. Brigitte Naderer et al., "Children's attitudinal and behavioral reactions to product placements: investigating the role of placement frequency, placement integration, and parental mediation," *International Journal of Advertising*, 2018.

so they are most attracted to amusing, likable characters, which then may lead to their developing a preference for the products they endorse.⁵³

The problem is that on social networks this phenomenon is amplified, because the perceived distance between consumers (children) and their favourite characters is reduced, which can increase the impression of parasocial interaction.⁵⁴ In fact, on social networks, pairing brands with media characters is no longer limited to traditional packaging and advertising, but can also occur in more integrated ways. Moreover, the characters can interact with the children. In some cases, brands may be incorporated into highly interactive, absorbing advertising games featuring cool, even customizable, avatars.⁵⁵ Because these games are integrated within the content that is presented to children, children may have great difficulty recognizing their persuasive intent.⁵⁶

One study⁵⁷ examined how advertising disclosure can lessen the persuasiveness of embedded influencer marketing ads. Also, it has been shown that clear disclosure of the advertising nature of a message has an educational impact on users. According to this study, advertising disclosure increases advertising recognition and advertising literacy among consumers, which may alter their perception of the influencer's credibility, the parasocial relationship, and consequently, their intent to purchase. The credibility of the source is considered to play a vital role in how highly consumers rate brands and products. For example, a positive assessment of a source's credibility is likely to translate into positive advertising results.⁵⁸ Other studies have attempted to measure the effectiveness of this marketing technique. One of these examined the impact of influencer marketing on children's food consumption.⁵⁹ In that study, 176 children aged between 9 and 11 were exposed to mock profiles of two popular influencers on Instagram promoting healthy or unhealthy snacks. The results showed that influencer marketing of unhealthy foods immediately increased children's consumption of such foods, while equivalent marketing of healthy foods had no effect on them.

Influencer marketing and the advertising it generates have certain peculiarities. When it is broadcast on social networks, the ad is integrated within the influencer's message. The message then has a dual status because on the one hand, it transmits authentic content, and on the other hand, it transmits content for which it receives financial or other compensation. Due to

53. See Marijke De Veirman et al, "What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research," *Frontiers in Psychology* 2019; 10: 2685. Online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6901676/>.

54. See Marijke De Veirman et al, "What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research," *Frontiers in Psychology* 2019; 10: 2685. Online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6901676/>.

55. See Bailey et al., 2009, cited by Marijke De Veirman et al, "What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research," *Frontiers in Psychology* 2019; 10: 2685 .

56. Cited by Marijke De Veirman et al, "What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research," *Frontiers in Psychology* 2019; 10: 2685. Online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6901676/>.

57. Marijke De Veirman et al, "What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research," *Frontiers in Psychology* 2019; 10: 2685. Online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6901676/>.

58. See Sternthall et al., 1978; Ohanian, 1991, cited by Marijke De Veirman et al, "What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research," *Frontiers in Psychology* 2019; 10: 2685. Online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6901676/>.

59. Anna E. Coates et al, Social Media Influencer Marketing and Children's Food Intake: A Randomized Trial, 2019. Online: file:/// C: /Users/client/Downloads/Social_Media_Influencer_Marketing_and_Childrens_F.pdf.

the growth of parasocial relationships on social media, influencer marketing now has a greater effect on consumers than traditional advertising. Moreover, new practices such as performance index inflation and planned disinformation are raising serious questions about the applicability of the current legal framework to these new phenomena.

1.2.3. Confusion and need for transparency. Which standards and which applications?

The current advertising rules have been designed with traditional paradigms in mind. However, with the advent of the Internet and influencer marketing, the issues have changed, both for those involved in advertising and in the way in which advertising generates value. This situation once more leads us to raise the issue of consumer protection, specifically with regard to advertising in the realm of social media. Canadian regulations are full of rules about advertising, and many of them could very well apply to the context of influencer marketing. But how well adapted are they to its particular characteristics?

In Canada, provisions related to the rules governing advertising are set forth in the *Competition Act* and also in the laws of the provinces. These provisions generally have two objectives: to prohibit misleading advertising and to impose restrictions on certain types of advertising, such as advertising aimed at children. To this must be added certain specific laws that will not be studied in the context of this research, such as regulations on advertising prescription drugs. There are also self-regulatory mechanisms set in place by the industry, such as the Canadian Code of Advertising Standards, which is published by the Advertising Council of Canada. However, this code does not have the status of a law or a regulation.⁶⁰ Finally, with regard to cyber advertising, we note the emergence of various technology-related laws, including *Canada's Anti-Spam Legislation (CASL)* and *Québec's Act to Establish a Legal Framework for Information Technologies (AELFIT)*.⁶¹

A. How practices are regulated

The Competition Act

The Competition Bureau calls the attention of influencers to the practice of competition, which it associates with misleading representation: "influencers should ensure that their followers will know that a particular reference to or review of a product is a marketing representation."⁶² The interpretation of s. 52 of the *Competition Act*⁶³ states: "No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect."

60. Pierre-Claude Lafond, *Droit de la protection du consommateur: Théorie et pratique*, Montréal, Éditions Yvon Blais, 2015, p. 257.

61 RSQ, c. C-1.1.

62. <https://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/eng/04372.html>

63 *Competition Act*, RSC, c. C-34.

Professor Lafond⁶⁴ points out that the Act uses the terms “representations” and “indications” rather than “advertising,” which makes it possible to encompass all forms of information given to consumers, including in-person statements and advertisements on websites. The Competition Bureau points out that this law applies both to influencers and to advertisers.⁶⁵

Provincial consumer protection laws

Most provinces have adopted consumer protection legislation to strengthen the protections offered by the federal government. Some of these laws have provisions to deal with false and misleading representations. In Québec, s. 219 of the *Consumer Protection Act* prohibits any false or misleading representation. We can therefore deduce that a lack of transparency on the part of an influencer could be considered a false representation.

Ontario’s *Consumer Protection Act 2002*⁶⁶ governs consumer contracts. Its s. 14 prohibits any unfair practice, i.e. any false or misleading claims about quality, use, conditions or price. Section. 4 (4) of the Act prohibits any exaggeration, innuendo or ambiguity about an important fact that could mislead the consumer.

British Columbia’s *Business Practices and Consumer Protection Act*⁶⁷ makes no mention of advertising practices that may be associated with deceptive practices. Consumers can still refer to the *Competition Act* and *Advertising Standards*, which apply across Canada.

Finally, Alberta’s *Consumer Protection Act*⁶⁸ (formerly the *Fair Trading Act*) prohibits unfair trading practices before or after a transaction. This includes certain abuses such as exerting pressure or influence on a consumer to get them to buy a product, or taking advantage of the situation when a consumer does not understand certain aspects of a transaction. It also includes deceptive practices such as lying about the quality of a product or its performance and longevity. Basically, this law prohibits giving consumers false information about the quality of a product.

As these laws do not apply directly to individuals but rather to merchants and manufacturers,⁶⁹ any recourse must be sought from the merchant or the manufacturer. Nevertheless, the *Competition Act* provides that people who make false or misleading representations may also be held responsible for prohibited practices. In advertising matters, the Competition Bureau is the body empowered to establish the roles of the various parties.⁷⁰ The degree of responsibility accorded to each party depends on how much control it has over the content. It involves determining which party has decision-making power over what is presented. This therefore implies that while certain influencers might exert total control over the published content, others might only receive information or representations for them to include in an

64. Pierre-Claude Lafond, *Droit de la protection du consommateur: Théorie et pratique*, Montréal, Éditions Yvon Blais, p. 258.

65. <https://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/eng/04372.html>

66. <https://www.ontario.ca/en/acts/loi/02c30>.

67. <https://www.consumerprotectionbc.ca/2017/05/misleading-advertisements-what-can-be-done-about-it/>.

68. https://www.qp.alberta.ca/1266.cfm?page=c26p3.cfm&leg_type=Acts&isbncln=9780779820047;

69. For example, the provisions of s. 2 of the *Consumer Protection Act* (CPA) apply only to the contract concluded between a merchant and a consumer in the course of the activities of a trade and having as its object a good or a service.

70. Competition Bureau Of Canada, *Guidelines: Application of the Competition Act to Internet Disclosures*, 2009.

advertisement, sent either by a merchant or an advertising agency. Thus, if it is the merchant who decides the content of the post, it is he who is responsible. The liability of the advertising agency is also determined on the basis of its role in the post. For example, if it created the advertisement, it will be deemed responsible.

The legal status of the influencer

This question is not settled in the literature. However, when we observe the different symbols used by influencers to disclose their connection to a company, either *hashtag ad* (#ad) or *hashtag partner* (#partner), we can guess that the role played by the influencer with regard to the published content may vary depending on the involvement of the advertising agency or other company they collaborate with. An analysis of the question will be performed in part 4 of this report. We should nonetheless mention that, according to a report published by the survey firm Léger,⁷¹ the majority of content creators (influencers) have another job (7 out of 10 influencers), and nearly three-quarters of them fail to earn the average influencers' salary of \$54,630. In fact, 41% of influencers make less than \$10,000 annually from their business. In contrast, nearly a third of influencers claim to have created a business and nearly 4 out of 10 influencers plan to start one. According to the same report, Instagram is still the highest paying platform, but YouTube and TikTok offer other benefits.

The Canadian Code of Advertising Standards

This code was put in place by Ad Standards to build and maintain public confidence in advertising. It determines what is acceptable and what is not in this matter.

It defines advertising as follows: “‘Advertising’ and ‘advertisement(s)’ are defined as any message (other than those excluded from the application of this Code), the content of which message is controlled directly or indirectly by the advertiser expressed in any language and communicated in any medium (except those listed under Exclusions) to Canadians with the intent to influence their choice, opinion or behaviour.”

In setting out the criteria that an advertisement must satisfy, the Code states: “Testimonials, endorsements or other representations of opinion or preference, must reflect the genuine, reasonably current opinion of the individual(s), group or organization making such representations, and must be based upon adequate information about or experience with the identified product or service and must not otherwise be deceptive.” These criteria apply quite well to the context of influencer marketing.

Act to Establish a Legal Framework for Information Technology (AELFIT)

In Québec, this is the law governing the liability of online intermediaries such as search engines and internet hosting providers. However, pursuant to s. 27, para 1 of the Act, it imposes no monitoring obligation on them, and pursuant to s. 36, para 1, it does not hold them responsible for any content stored by them or whose transmission they allow. According to Professor Pierre

71. Léger, Étude jeunesse imaginée par Léger. Dans la tête des créateurs de contenu, 2021 See: <https://isarta.com/infos/etude-jeunesse-leger-a-quoi-ressemble-les-influenceurs-canadiens/>.

Trudel,⁷² it is the author of the content transmitted on the Internet, also called the publisher, who has primary responsibility, which raises serious questions about the responsibility of the influencers. These intermediaries may be held responsible, however, in cases where they have become aware of the illegal nature of the content and have not acted promptly to render access impossible.

Furthermore, at the international level, if an advertising message does not respect the applicable rules of a State in which the message is accessible, the authorities of that State can instruct the intermediary to stop transmitting the message. This leads some to say that technical intermediaries are subject to a regime of a posteriori control,⁷³ considering the degree to which knowledge is a determining factor in prohibiting advertising that might be illegal.

B. Practices affecting children

Influencer marketing can involve children in two ways: either the influencer is a child or the influencer is an adult whose advertising is aimed at children. Both of these cases are subject to the rules on advertising aimed at children and also to the rules on child labour. Even though these rules extend beyond the subject of our study, advertising, they are interrelated. In addition, in various countries, they are considered to be a central issue in influencer marketing affecting children. They cannot therefore be ignored.

B.1. Advertising targeting children

Companies that use children as influencers target audiences made up of children.⁷⁴ Thus, whenever we see an advertisement or a recommendation made by a child influencer we may assume that it is in fact an advertisement intended for children. More and more studies⁷⁵ are showing that children who are regularly exposed to influencer content go on the lookout for new posts and are often influenced by their messages, which do not always promote healthy products.⁷⁶

The content published by these influencers is clearly advertising. In Québec, ss. 248 and 249 of the *Consumer Protection Act*, which deal with the prohibition of advertising aimed at children, also relate to new advertising strategies, including those on the internet.⁷⁷ However, s. 249 sets forth certain criteria for determining whether one is dealing with advertising intended for children.⁷⁸ These relate to the context of the presentation, the nature and destination of the advertised product, the way in which the message is presented, as well as when and where it appears (e.g. if this is on Saturday morning between 7 a.m. and 12 p.m., children may well be

72. Pierre Trudel, "La responsabilité des acteurs du commerce électronique," in Vincent Gautrais (ed.), *Droit du commerce électronique*, Montréal, Éditions Thémis, 2002, p. 623 et seq.

73. Arthur Oulai, *Place du consentement dans la cyberpublicité*, dans Pierre-Claude Lafond (dir.), *Actes du colloque du 19 octobre 2011*. « La publicité, arme de persuasion massive: les défis de l'encadrement législatif », Éditions Yvon Blais, 2012, p. 165.

74. <https://www.nytimes.com/2019/03/01/business/media/social-media-influencers-kids.html>.

75. (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6901676/>).

76. (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6901676/>).

77. Nathalie Jackson, "La publicité commerciale destinée aux enfants," in Pierre-Claude-Lafond (ed.), *La publicité, arme de persuasion massive: Les défis de l'encadrement législatif*, Montréal, Éditions Yvon Blais, 2012, p. 71.

78. See Pierre-Claude Lafond, *Droit de la protection du consommateur: Théorie et pratique*, Éditions Yvon Blais, Montréal, 2015, p. 289.

present). Note that the application of these criteria to the context of influencer marketing is not always very clear, either for traditional advertising aimed at children or for influencer marketing.⁷⁹

B.2. Child labour

Influencer marketing in children raises the issue of managing the income generated by children through what is essentially a type of work. Moreover, in terms of the income they may generate, the situation of child influencers is comparable to that of child actors. In Québec, the parents of a minor have the duty to administer their property and income. When the sums are considerable, as in the case of child actors, the parents can ask the court to set the amount that the minor can receive immediately for their personal use; the rest must be managed by the parents.

In the case of sums over \$25,000, the parents are obliged to set up a tutorship council and to send an inventory of the patrimony and annual management accounts to the public curator.⁸⁰ In Québec and Canada, there is as yet no specific legislation for managing the income of child influencers. Some jurisdictions, however, do tend to protect such children. For example, in France,⁸¹ on June 25, the Senate adopted a law to regulate the work of child influencers. As in the case of child actors and models, schedules and filming time will be regulated and remuneration for content (through online advertising or product placement) will be largely blocked at the *Caisse des Dépôts et Consignations* until the child reaches the age of majority.

Could such regulations be relevant for Canada?

What is certain is that influencer marketing has its own peculiarities and challenges. Indeed, beyond the internet environment, the integrated nature of advertising messages and the entire context as explained previously, pose serious difficulties with regard to transparency. Does the current legal framework ensure the appropriate balance between the rights of each? Does it adequately protect consumers? When it comes to advertising in Canada, we find both restrictive laws and non-coercive standards. What would be more suited to the context of influencer marketing? Should it have its own set of standards?

This context naturally leads to the following research question:

RESEARCH QUESTION: From the standpoint of transparency, do the current regulations in Canada respond effectively to the issues raised by the advertising techniques employed in influencer marketing?

79. See Suzie Pellerin, "Le marketing destiné aux enfants: forces et faiblesses du modèle québécois," in Pierre-Claude Lafond (ed.), *La publicité, arme de persuasion massive: Les défis de l'encadrement législatif*. Éditions Yvon Blais, Montréal, 2012, p. 75.

80. <https://www.lapresse.ca/societe/2020-02-15/enfants-acteurs-poursuivre-les-parents-ou-renonce-a-son-argent>.

81. https://www.lemonde.fr/pixels/article/2020/06/25/le-senat-adopte-la-loi-pour-encadrer-le-travail-des-enfants-influenceurs_6044204_4408996.html?fbclid=IwAR3MiQA7dpLOGTpYhmxJIntpE_RiFNKya70

CHAPTER 2. ANALYTICAL FRAMEWORK AND METHODOLOGY

These reflections on the issues inherent in influencer marketing lead inevitably to a consideration of new paradigms in advertising and, therefore, to the applicability and adaptability of traditional regulations to this context in the interest of ensuring transparency. In general, in consumer law, transparency is closely allied to the disclosure of information that permits consumers to make an informed choice,⁸² given that the absence of relevant information could make the consumer vulnerable. From this point of view, transparency can be seen as a form of fairness.

There are certain elements of influencer marketing that are likely to create uncertainty for the social media user. On the one hand, the influencer, who is perceived as an authentic member of a community, is also a marketing agent for an advertising agency or a company. On the other hand, the advertising techniques these influencers use on social networks are integrated within the message they send their followers and are presented as authentic experiences. The combined effect of all this, at the psychological level, is the creation of a parasocial relation in which the consumer identifies with the character and imitates their behaviour, sometimes without fully realizing it (particularly for the youngest consumers), making it difficult to distinguish between what is advertising and what is reality.

The regulations in force in Canada with regard to advertising seem generally applicable to cyber advertising. However, according to the guidelines on the application of the *Competition Act* to online representations⁸³ and messages, this legislation would be applicable to the content of the representation but not the means employed.⁸⁴ One wonders if this would significantly reduce its effectiveness with regard to influencer marketing practices, especially as these relate to transparency.

In fact, in a report on the changes to be made to the *Consumer Protection Act*, Professor Vincent Gautrais points out that the *Competition Act* and the *Consumer Protection Act* deal only with the content of the advertising message and not the forms it may take. Is this also the case with influencer marketing? In this instance, it is the forms that the advertising message takes that constitute the real issue, particularly as concerns their disclosure and recognition by users. Moreover, research has shown that advertising disclosure increases recognition of advertising and improves advertising literacy among consumers.⁸⁵

For the Competition Bureau, the *Competition Act* is applicable to influencer marketing. Given that the context of influencer marketing is able to create confusion about what belongs to the field of advertising and what belongs to the private life of influencers, we feel that the principle

82. Michelle Cumyn, « L'équité: définition et concepts », in Pierre-Claude Lafond et Benoît Moore (dir.), *L'équité au service du consommateur*, Montréal, Éditions Yvon Blais, 2010, pp. 1-18.

83. Competition Bureau, Guidelines on the Application of the *Competition Act* to Internet Representations, 2009.

84. Vincent Gautrais and Mouhamadou Sanni Yaya, *Rapport relatif aux changements à opérer auprès de la Loi sur la protection du consommateur au regard du commerce électronique*, 2008: <https://www.gautrais.com/publications/rapport-relatif-aux-changements-a-operer-aupres-de-la-loi-sur-la-protection-du-consommateur-au-regard-du-commerce-electronique/rapportfinal31082008v2/>

85. See What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6901676/>

of advertising identification is an appropriate choice of analytical framework for addressing the issue of transparency in influencer marketing.

The chosen analytical framework will first of all enable us to identify influencer marketing practices related to our research topic and their impact on users, and second, to determine whether, and to what degree, the legislative and normative provisions applicable to this context oblige influencers to disclose the advertising nature of their representations. Later in the analysis, this will allow us to determine whether these provisions are sufficient with regard to the issues raised, and whether there is a discrepancy between the current regulation and the situation on the ground (to be determined with the help of field research conducted with the public). It will then be possible to confirm whether the current legal framework in Canada is comprehensive enough to address the transparency issues raised by influencer marketing.

We will therefore start from the concept of advertising identification as it relates to the concerns raised and the context of influencer marketing to build an analytical model that will serve as a basis for interpreting future data.

2.1. Advertising identification: choice of principle and concept

Definition of principle

The aim of the principle of advertising identification is to clearly present the advertising nature of a message or piece of information.⁸⁶ According to the literature,⁸⁷ the interest in such a principle lies in the difficulty inherent in identifying the source of the advertising message, which may be the owner of the website where the message is published or a company that wishes to promote its products and services. This principle could also be applied to the resolution of problems resulting from the possible confusion between information of an advertising nature and other types of information. It is this second aspect that interests us, because of the way it ties in with the issues raised by this research.

Choice of principle

The principle of advertising identification was chosen because it is one of the cybersecurity recommendations formulated in *Rapport relatif aux changements à opérer auprès de la Loi sur la protection du consommateur (LPCA) au regard du commerce électronique* (Report on changes to be made to the *Consumer Protection Act (CPA)* with regard to electronic commerce) presented to the Claude Masse Foundation by Vincent Gautrais and Mouhamadou Sanni Yaya. In this report, the authors suggest seeking inspiration in the principle of advertising identification already used in other jurisdictions such as France, Belgium and Spain for obvious transparency-related reasons. They also point out that the other provisions applicable to

86. Arthur Oulai, "La place du consentement dans l'encadrement de la cyberpublicité au Canada," in Pierre-Claude Lafond (ed.), *La publicité, arme de persuasion massive: Les défis de l'encadrement législatif*, Montréal, Éditions Yvon Blais, 2012, p. 133.

87. Vincent Gautrais and Mouhamadou Sanni Yaya, *Rapport relatif aux changements à opérer auprès de la Loi sur la protection du consommateur au regard du commerce électronique*, 2008: <https://www.gautrais.com/publications/rapport-relatif-aux-changements-a-operer-aupres-de-la-loi-sur-la-protection-du-consommateur-au-regard-du-commerce-electronique/rapportfinal31082008v2/>.

advertising in the CPA apply very well to advertising. One of the report's recommendations reads as follows: "As in the French law, ensure that **an advertisement is identified as such** and includes the word 'advertisement' in a legible, visible and unequivocal manner. This inexpensive solution seems to us to be the most efficient answer in this case." [TRANSLATION]

The authors explain their recommendation by asserting that protecting consumers from cyber advertising involves recognizing what is an advertisement and what is not. In their view, this is the most important issue in cyber advertising. In addition, they suggest verifying the effectiveness of the legislation for online advertising, since cyber advertising is different from traditional advertising, particularly since it can be incorporated seamlessly within the creator's content. We believe that such a verification is justified in the case of influencer marketing.

The principle can be applied in various ways, in particular through the use of distinctive features that make it possible to clearly differentiate advertising content from other information. This implies that users recognize these features. It also implies that these features have an impact on users and that their use should be obligatory in current legislation and standards.

We have thus identified three components of the phenomenon that are explored within the framework of this study: a marketing component, a psychological component and a regulatory component. The distinctive features of advertising can be linked to the marketing component, which acts on the recognition and impact of the advertising message among users, which falls under the psychological component. Finally, the regulatory component permits the integration of legislative and normative requirements related to advertising identification.

Our analytical framework will be structured around these three components in order to determine if one can truly speak of transparency in influencer marketing, and whether, in general, the legislative or normative response is adequate. Consequently, by applying variables from the marketing component, i.e. techniques related to the creator and techniques related to products, it will be possible for us to assess whether users perceive the techniques used in influencer marketing as advertising.

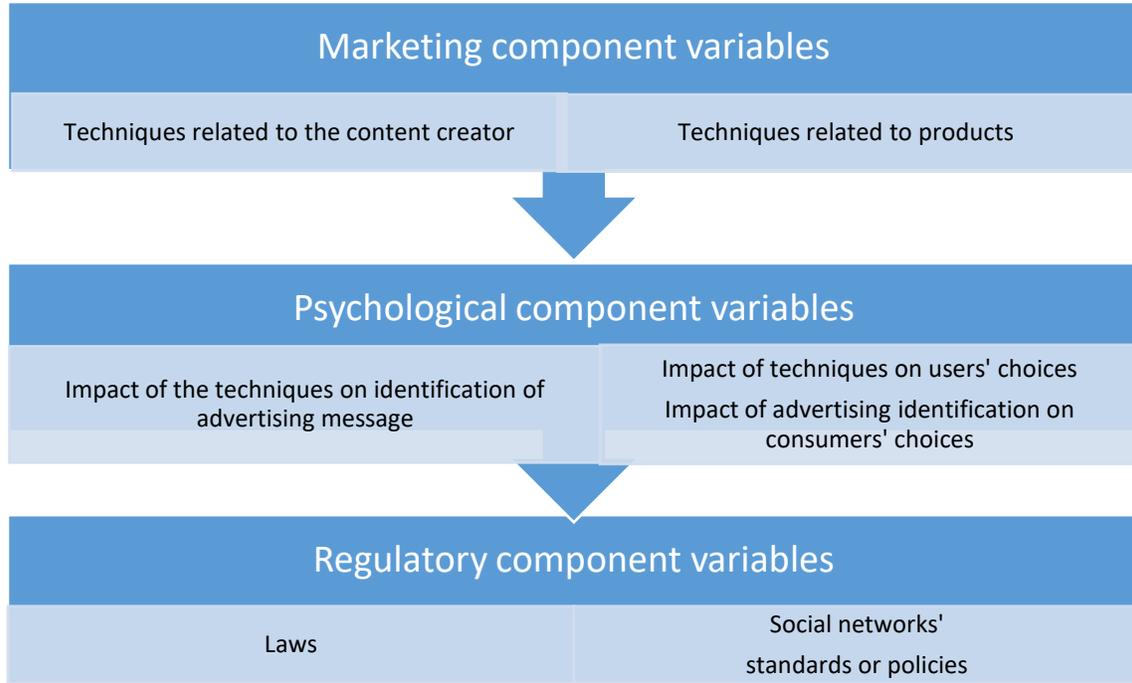
The variables of the psychological component are *the impact of the techniques on the identification of the advertising message*, *the impact of the techniques on users' choices*, and *the impact of advertising identification on consumers' choices*. These variables will allow us to determine whether the different techniques create confusion among users and, if so, what creates this confusion. In addition, we will be able to validate what this translates to; for example, is it in the form of purchases or greater trust in the influencer? We will then be able to validate whether advertising identification makes a difference to the users' perception of these techniques.

Finally, the variables of the regulatory component will allow us to determine whether the requirements set forth in the current regulation resolve the issues to be identified using the two other components.

These components and variables were retained because they are directly linked to the problem at hand and are interconnected. The variables of the marketing component have direct consequences on those of the psychological component, and the normative component should flow directly from the other two components in determining whether the legal framework

makes it possible to respond to the transparency-related challenges that are revealed through the marketing and psychological components.

THE VARIABLES⁸⁸



2.2. Marketing component variables. Techniques related to the content creator and techniques related to products

Marketing techniques are part of the approach adopted by the content creator and may have a distinct impact on consumers. These techniques are therefore central to advertising, particularly since they may be misleading for those who are exposed to them. The literature of media studies teaches that the effect of the medium is powerful and can even incorporate another medium as content.⁸⁹ There is a parallel to be drawn here with influencer marketing, in which the practice of advertising is performed indirectly, because the consumer is not explicitly encouraged to buy a product or a service but is implicitly led, thanks to the techniques used, to accept what is presented. The techniques presented within the context of this study are selected because of their relevance to the theme of transparency. Moreover, according to the

88. We felt we needed to elaborate a little more on the “context” in order to properly situate readers and allow them to fully understand the nuances of the summary table of variables and research sub-questions presented below.

89. According to Marshall McLuhan, the message transmitted by a medium is twofold, since it combines the very medium that conveys it and the effects generated by the latter: “The ‘message’ of any medium or technology is the change of scale or pace or pattern that it introduces into human affairs.” <https://designopendata.files.wordpress.com/2014/05/understanding-media-mcluhan.pdf>

literature, the principle of advertising identification is manifested on two levels: that of the author of the advertising message and that of the identification of the advertisement itself.⁹⁰

First of all, we will present the techniques related to the role and the identity of the influencer, which are grouped under the heading of *creator-related techniques*, and second, we will present the techniques directly related to the products and events, which are grouped under the heading of *product-related techniques*.

2.2.1. Creator-related techniques

Influencer marketing is founded on the idea of authenticity, and the authenticity of the advertising message is communicated through the personality of the influencer, who is seen as an assurance of credibility. The value at the heart of influencer marketing is thus the “authenticity” of the influencer. Moreover, it is generally accepted that an influencer who frequently publishes sponsored content is perceived as being less reliable than one who publishes less often.⁹¹ In this context, it is the perceived authenticity of the influencer that is key to fostering commitment among their followers.⁹² Hence it is crucial to distinguish between the two hats that the influencer can wear: the hat of a *simple influencer* and the hat of an *advertiser* (when applicable). It is also necessary to clearly identify other influencer marketing models such as those characterizing *virtual influencers (robots)*⁹³ and *child influencers*, who would target a young audience. Such sharp distinctions are justified by the fact that when a company is looking for an influencer, it is primarily interested in being able to reach the type of followers the influencer has, in order to decide whether they could be a target clientele.⁹⁴

- *The virtual influencer or “robot” model.* Since influencer marketing is based on the idea of authenticity, this practice threatens to blur distinctions. There could for instance be a transparency issue for users if they imagine they are in the presence of a human while the influencer they are following is actually a robot, a creation of marketing. This is all the more problematic given that followers generally follow influencers because of their perceived authenticity. In addition, the time influencers spend interacting with their followers lends them value in the eyes of consumers and helps build a measure of trust.
- *The child-influencer model.* The literature presents the child-influencer as a way for brands to target a young clientele.⁹⁵ In such a context, the literature considers that the physical appearance or attractiveness of the source can play an important persuasive

90. Arthur Oulai, “La place du consentement dans l’encadrement de la cyberpublicité au Canada,” in Pierre-Claude Lafond (ed.), *La publicité, arme de persuasion massive: Les défis de l’encadrement législatif*, Montréal, Éditions Yvon Blais, 2012, p. 137.

91. <https://www.meltwater.com/en/blog/the-complete-guide-the-role-of-instagram-stories-in-social-influencer-marketing>.

92. Engagement is seen as a fundamental aspect of interactions. This is defined as being the fact of maintaining a certain intellectual and emotional attention and a certain mobilization of one's psychological resources. See: Marie-Andrée Hould, *#momlife: Maternité et marketing d’influence. Comment les mères exposent-elles leur maternité sur Instagram ? Une analyse de contenu de leurs publications*, master's thesis, University of Ottawa, 2019, p. 27.

93. <https://blogfr.influence4you.com/top-5-des-influenceurs-virtuels/>.

94. Marketing and PR in Social Media: <https://www.diva-ortal.org/smash/get/diva2:625012/FULLTEXT01.pdf>.

95. <https://www.usatoday.com/story/money/2018/08/06/social-media-influencers-social-media-influencers/725842002/>.

role.⁹⁶ In children, it has been shown that the use of attractive peer models increases advertising effectiveness. This technique is likely to create confusion in children who have not attained a sufficient level of discernment or who are not informed enough to distinguish what is being advertised from what is not.

Transparency is therefore given an updated new meaning in the merging of two roles each likely to give rise to confusion. In the final analysis, as McLuhan would say, the real message is the medium itself.

2.2.2. Product techniques

As defined above, influencer marketing is a set of practices aimed at exploiting the recommendation potential of influencers. This is achieved through a variety of techniques, one of the peculiarities of which is to implicitly suggest products or activities without clearly identifying that they are being advertised. The identification of these techniques as such by influencers could be considered a form of advertising identification. Among these techniques, we can cite producing sponsored posts, organizing competitions, proposing take-overs,⁹⁷ offering free products, organizing special events, and using affiliate marketing. These are some of the varied techniques that may be deployed in the accounts of influencers who practice influencer marketing. Below is a brief definition of each of these techniques. As the literature on the subject is poorly developed, some of the descriptions come from testimonials by users of these networks.

- **Sponsored posts.** Influencers can choose to present products sent to them by a company, and by way of posts or stories (on Instagram), comment on their effectiveness in an attempt to spark the interest of their followers. And it works. One teenager managed to get 52,000 people to buy bottles of anti-aging serum in one weekend using a TikTok video.⁹⁸

Instagram permits stories to be posted for a 24-hour period. This practice, which lets the influencer grab the attention of their followers by means of storytelling, has the advantage of discouraging users from unsubscribing after receiving a large number of sponsored posts.⁹⁹

- **Affiliate Marketing.** On some networks, including Instagram, an influencer can also include an affiliate link in their bio. This may sometimes include links in the form of a swipe up (promo code) that redirects followers to the company's website or a product

96. Lynn R. Kahle and Pamela M. Homer, "Physical attractiveness of the celebrity Endorser: A social Adaptation Perspective," *Journal of Consumer Research*, February 1985. Online: https://www.researchgate.net/publication/24098403_Physical_Attractiveness_of_the_Celebrity_Endorser_A_Social_Adaptation.

97. Practice that allows a brand to entrust the management of its social accounts to an influencer for a fixed period: <https://www.definitions-marketing.com/definition/takeover-de-compte-social/#:~:text=A%20takeover%20de%20compte%20social,plus%20often%20d%27une%20jour%20C3%A9e>.

98. <https://www.instyle.com/beauty/skin/the-ordinary-peeling-solution-tik-tok-viral-video>.

99. <https://www.meltwater.com/en/blog/the-complete-guide-the-role-of-instagram-stories-in-social-influencer-marketing>

they are promoting. Online affiliation seems to play an important role in the strategies of many brands.¹⁰⁰ For example, by placing links in the content they offer, publishers create traffic to the websites of the brands they are affiliated with. In exchange, they receive payment based on this traffic, on potential customers or purchases generated.¹⁰¹ The influencer receives a commission each time followers use the affiliate link.¹⁰²

- **Contests.** Contests are widely recognized as a participatory marketing technique.¹⁰³ Participatory marketing covers a set of marketing techniques aimed at involving consumers in defining and publicizing the business. A contest profoundly modifies the relationship between the company that launches it and the consumer, who is then promoted to the rank of partner, or even considered an extension of the company's marketing organization.¹⁰⁴ In influencer marketing, an influencer can propose a contest (to win a trip, for example) by explaining the steps their followers need to take to participate. The influencer does this by asking their followers (and non-followers who want to participate in the contest) to participate and post the contest on their profiles, thereby giving added visibility to the brand that is the subject of the contest. We have chosen this technique because, in the context of traditional advertising, it has already been the subject of debate in a legal proceeding.¹⁰⁵
- **Takeovers.**¹⁰⁶ This is a practice that allows a brand to entrust the management of its social media accounts to an influencer for a fixed period—most often one day. This may be done in order to improve the company's image or recruit new followers.¹⁰⁷ For example, the Garage clothing store did a Takeover of the account @blackcreativesmontreal. Some followers¹⁰⁸ felt that this move was successful in increasing the store's black clientele. For these followers,¹⁰⁹ the Garage store demonstrated an interest in their cause or their reality, which could improve their perception of the company and, consequently, stimulate sales.
- **Unboxing videos.**¹¹⁰ Unboxing is defined as a video presentation in which influencers comment on certain products, including toys, as they unwrap them. It is a phenomenon that attracts a considerable number of Internet users and is especially useful for product

100. Daphné Salerno, Affiliation marketing en ligne: vers un élargissement du rôle des affiliés, Université de Lille. Online: <http://archives.marketing-trends-congress.com/2014/pages/PDF/076.pdf>.

101. Daphné Salerno, Affiliation marketing en ligne: vers un élargissement du rôle des affiliés, Université de Lille. Online: <http://archives.marketing-trends-congress.com/2014/pages/PDF/076.pdf>

102. Katrina WU, YouTube Marketing: Legality of sponsorship and endorsement in Advertising, Selected Works, spring 2016: https://www.scmv.com/_images/content/YouTube-Marketing_Katrina-Wu_stamped.pdf

103. Ronan Divard, *Le marketing participatif*, Dundod, Paris, 2010.

104. Ronan Divard, *Le marketing participatif*, Dundod, Paris, 2010.

105. *Richard v. Time Inc.*, 2012 CSC 8, [2012] 1 RCS, para. 192: In fact, William Miller, Director of Promotion Policy for Time Consumer Marketing Inc., personally testified that “the sweepstakes are used to draw attention to our subscription promotions” (da, vol. II, p. 4).

106. <https://www.definitions-marketing.com/definition/takeover-de-compte-social/#:~:text=Un%20takeover%20de%20compte%20social,plus%20souvent%20d%27une%20journ%C3%A9e>

107. <https://www.definitions-marketing.com/definition/takeover-de-compte-social/#:~:text=Un%20takeover%20de%20compte%20social,plus%20souvent%20d%27une%20journ%C3%A9e>

108 Interview with a social media user, Chelsea Musoko, college student.

109 Interview with a social media user, Chelsea Musoko, college student.

110 <https://www.definitions-marketing.com/definition/unboxing-video/>

placement. The products are sent free of charge to the “unboxers,” who are invited to participate in a carefully staged unboxing session.¹¹¹

- **Special Events.** The organization of special events is a recognized marketing tool. In influencer marketing, some companies invite influencers to such events. In return, these influencers advertise the event on their accounts, which helps attract followers. One of the most striking examples is that of the *Coachella festival*¹¹² in the USA, an event often promoted by influencers. Some followers, in fact, go there specifically to meet influencers.

The marketing component variables will allow us to validate the study participants’ knowledge of these practices as advertising techniques.

2.3. Variables of the psychological component: The impact of influencer marketing techniques on users

These variables were selected given that the subtlety of influencer marketing techniques is likely to confuse users about what is advertising and what is not. The particular issue here is the ability to recognize the marketing techniques employed as advertising mechanisms, in particular by children, and awareness of the impact that these techniques exert over their choices.

2.3.1. The impact of influencer marketing techniques on identifying the advertising message

One of the objectives of advertising identification is the recognition of an advertisement as such by those to whom the message is addressed. The subliminal nature of some of the techniques used in influencer marketing help obscure the advertising message. The challenge for consumers is therefore to recognize advertising messages despite the techniques used.

As previously mentioned, the heightened feeling of parasocial interaction that children experience on social networks could make it particularly difficult to recognize the persuasive nature of the message. There are some findings that could potentially be considered with regard to initiatives to improve advertising literacy among consumers.

Advertising literacy refers not only to a person's knowledge of advertising, but also their ability to recognize and critically assess that advertising.¹¹³

2.3.2. The impact of influencer marketing techniques on user choice

111 <https://www.definitions-marketing.com/definition/unboxing-video/>

112 <https://www.livedesignonline.com/xlive/how-coachella-has-become-olympics-for-influencers>.

113 Marian Friestad and Peter Wright, *The Persuasion Knowledge Model: How People Cope with Persuasion Attempts*. Online: http://www.skateboardingalice.com/papers/1994_Friestad.pdf.

The literature teaches that the impact of advertising is related to the reliability of the source. We also know that trustworthiness and expertise improve advertising effectiveness.¹¹⁴ Reliability is associated with the honesty, credibility and moral character of the endorser, while expertise relates to their competence and knowledge.¹¹⁵ This may partly explain the development of the phenomenon of influencer marketing, which has been built around the authenticity of the influencer. Authenticity here implies conformity with truth.

For some users, the impact of authenticity is so powerful that they develop a correspondence bias. This bias is defined as the tendency to believe that a person's behaviour is a true reflection of their beliefs, whereas it may be motivated by other factors. For instance, an influencer may recommend a product because he is being rewarded for doing so. This fact was confirmed by the results of a study conducted among teenage influencers who stated, during interviews, that the comments (recommendations) they made about the products they received were not made out of satisfaction with the products but were aimed at persuading users to purchase them.

For children, following a child influencer would help them identify with the source. It would increase the likelihood of their adopting the influencer's beliefs, attitudes and behaviour,¹¹⁶ in addition to purchasing the products they use.¹¹⁷ This is the result of their forming a parasocial relationship.

This variable will make it possible to validate with study participants, particularly children, the impact that influencer marketing has on their confidence and on their consumption habits. It will clarify whether influencer marketing has the same, or a different, effect on the study participants as traditional advertising.

2.3.3. The impact of advertising identification on consumer choice

As noted above, advertising identification is proposed as a response to advertising transparency issues. In France, for an example, this principle is expressed by a clear mention of the term “advertisement” within the post: “Make sure, as in French law, that an advertisement is identified as such and includes the label “Advertisement” in a legible, conspicuous and unambiguous manner. This inexpensive solution seems to us to be the most efficient answer in this case.”¹¹⁸ [TRANSLATION]

114. Clinton Amos et al, Exploring the relationship between celebrity endorser effects and advertising effectiveness: A quantitative synthesis of effect size,” *International Journal of Advertising*, 2008, 27 (2): 209-234.

115. Andrew J. Flanagin and Miriam J. Metzger, The role of site features, user attributes, and information verification behaviors on the perceived credibility of web-based information,” April 2007: <https://doi.org/10.1177/1461444807075015>.

116. See Marijke De Veirman et al, “What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research,” *Frontiers in Psychology* 2019; 10: 2685. Online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6901676/>

117. See Marijke De Veirman et al, “What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research,” *Frontiers in Psychology* 2019; 10: 2685. Online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6901676/>.

118. Vincent Gautrais and Sanni Yaya Mouhamadou, *Rapport relatif aux changements à opérer auprès de la Loi sur la protection du consommateur au regard du commerce électronique*, 2008: <https://www.gautrais.com/publications/rapport-relatif-aux-changements-a-operer-aupres-de-la-loi-sur-la-protection-du-consommateur-au-regard-du-commerce-electronique/rapportfinal31082008v2/>.

It is important to remember this variable, because it will allow us to measure how advertising identification is received among the participants interviewed and to assess whether this could change the way they view the techniques used in influencer marketing.

2.4. Variables of the regulatory component: Reflections of transparency requirements and identification symbols in legislation, standards and platform policies

Advertising identification is not, in itself, a new principle. Its pertinence to this research stems in particular from the possible confusion for the public or the possible difficulty they may have in dissociating the personal experience of an influencer from the advertising message. If certain practices of influencers are an integral part of the advertising context, it is legitimate to wonder whether the regulations favour advertising identification in this domain. To ensure that advertising is identified as such, certain jurisdictions clearly state this obligation in their laws. France, for example, states in *la Loi pour la confiance dans l'économie numérique*:

“Any advertising, in any form whatsoever, that is accessible through an online communication service to the public, must be clearly identified as such. It must make the natural or legal person on whose behalf it is carried out clearly identifiable.” [TRANSLATION]

In Canada advertising is regulated as much by laws (*Competition Act* and provincial consumer protection laws) as by other standards, such as Ad Standards and ethical industry standards. Ad Standards, for example, has issued guidelines to promote transparency in influencer marketing. In addition, most social networks have established conditions for regulating the use of advertising.

These variables will allow us, first of all, to determine what there is in the legislation that favours advertising identification. Second, we will take from Ad Standards the symbols designed to promote advertising identification in influencer marketing and will use these later to validate the study participants' knowledge and perception of these symbols. Thirdly, we will see whether social networks have mechanisms for promoting advertising identification.

2.4.1. Laws

Although the principle of advertising identification is not totally absent¹¹⁹ from Canadian law, the literature on the subject shows that it is not clearly formulated within it. In the following, we will attempt to detect, in the provisions applicable to influencer marketing, particularly those in the *Competition Act* and in the provincial consumer protection laws, what can be identified as, or best approximates, an advertising identification requirement.

About the practices

119. Arthur Oulai, “La place du consentement dans l'encadrement de la cyberpublicité au Canada,” in Pierre-Claude LAFOND (ed.), *La publicité, arme de persuasion massive: Les défis de l'encadrement législatif*, Montréal, Éditions Yvon Blais, 2012, p. 137.

In general, the objectives of the *Competition Act* of Canada and the consumer protection laws of the provinces are to prohibit misleading advertising and to impose certain restrictions on advertising.

Regulations on prohibited and misleading advertising

Legislation at the federal and provincial levels prohibits any false or misleading representation or indication. At the federal level, s. 52 of the *Competition Act* states: “No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.”

The Competition Bureau considers this law to apply to influencer marketing strategies, regardless of the method used. It emphasizes the responsibility of advertisers and influencers with regard to representations made on online platforms.¹²⁰

In Québec, the *Consumer Protection Act* stipulates¹²¹: “No merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer.”

Professor Pierre-Claude Lafond¹²² notes that both laws use the words “representation” and “indication” rather than “advertising” in order to encompass all forms of information given to consumers. According to Lafond, these laws address the message, the substance, and not to the medium, which makes it possible to cover various modes of communication, including statements in person and advertising on Internet sites.

Even though the regulations do not explicitly address advertising identification, it is clear that the provisions of these laws and the interventions of the authorities in interpreting them are aimed at promoting transparency.

The *Consumer Protection Act*¹²³ also prohibits commercial advertising aimed at children under the age of 13. However, in order to determine that the advertisement is intended for such children, certain criteria, including the context, and the nature and purpose of the advertised product, need to be taken into account.

On the form of the message

The *Competition Act*, which applies to all business practices, does not use the term “influencer marketing” within its provisions. In its Deceptive Marketing Practices Digest,¹²⁴ the Competition Bureau stresses that advertisers and influencers need to realize that they are making commercial representations to consumers and that, like any other commercial representation,

120. <https://www.competitionbureau.gc.ca/eic/site/cb-bc.Nsf/eng/04372.html#sec01>.

121. RSQ, c.P-40.1.

122. Pierre-Claude Lafond, *Droit de la protection du consommateur: Théorie et pratique*, Montréal, Éditions Yvon Blais, p. 258.

123. RSQ, cP-40.1.

124. Competition Bureau: Deceptive Marketing Practices Digest - Volume 4:
<https://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/eng/04372.html>

there are rules that must be followed. It states: “*The Competition Act* prohibits misleading advertising and deceptive marketing practices. These provisions apply to influencer marketing just as they do to any other form of marketing.”

The Competition Bureau recommends¹²⁵ that influencers ensure that disclosures are as visible as possible, so that consumers do not have to search to see them, that they disclose important links in every post, that they use clear images and words that are appropriate to the context, that they ensure that disclosures are inseparable from the content so that they appear directly following it if shared, that they base any assessment or opinion on actual experience, and that they avoid ambiguous references and abbreviations (e.g., thank you, company X).

Québec’s *Consumer Protection Act* specifies, in s. 216, that a representation can take the form of an affirmation, an omission or a behaviour. We can therefore deduce that an influencer who recommends obtaining a product when it is not justified is engaging in false or misleading advertising.

Professor Lafond emphasizes the importance of distinguishing informational content from advertising,¹²⁶ whether this be the information contained in the advertising message, the persuasive nature of the advertisement, or the techniques of persuasion used. The difference is important because the law only regulates the informational content of the advertisement. Techniques of persuasion remain unregulated. The Act is not concerned with persuasion and innuendo; its scope is limited strictly to the information contained in the advertisement.

Regulations respecting advertising aimed at children

One of the criteria for determining whether advertising is aimed at children is the way in which the message is presented.¹²⁷

Section 249 (b) of the *Consumer Protection Act* states that, in determining whether an advertisement is directed at children under the age of 13, consideration must be given to the manner in which the message is presented. One example is the use of cartoons or mascots. The literature¹²⁸ attests to the fact that, in addition to child influencers, interactive mascots are often used to attract children. Our semi-structured interviews¹²⁹ will allow us to determine how such practices are received by young people between the ages of 6 and 17.

The corollary of these techniques is child labour. Even though this issue is not centrally related to the problem studied here, it needs to be emphasized. In Canada, there is still no legislation specifically devoted to child influencers. On the other hand, the *Civil Code of Québec* contains provisions related to the management of affairs in general, which might be applicable in this context.

125. Competition Bureau: <https://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/eng/04372.html>

126. Pierre-Claude Lafond, *Droit de la protection du consommateur: Théorie et pratique*, Montréal, Éditions Yvon Blais, p. 266.

127. RSQ, c.P-40.1, s. 249.

128. See Marijke De Veirman et al, “What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research,” *Frontiers in Psychology* 2019; 10: 2685. Online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6901676/>

129. For more information, see chapter 3.

This variable will allow us to analyze the provisions contained in the law with regard to advertising and to determine whether they respond to the issues raised by the influencer marketing techniques presented above. It will also make it possible to validate the participants' knowledge of the rules applicable to influencer marketing.

2.4.2. Ad Standards and proposed identification symbols

In Canada, Ad Standards has developed a set of standards aimed at complementing legislation on advertising; these are contained in a code of conduct called the *Canadian Code of Advertising Standards*. One of the points it addresses is the form that advertising should take on social networks. With regard to children, the Code states that advertising directed at children should not exploit their credulity, lack of experience or their sense of loyalty.¹³⁰ In addition, products whose sale is prohibited to minors must not be advertised in such a way as to make them particularly attractive to them.¹³¹

According to the interpretation in the *Ad Standards Guidelines*, the Code requires the disclosure of any material connection under Clause 7 and also Interpretation Guideline #5, entitled Testimonials, Endorsements, Reviews.¹³² According to these guidelines, the purpose of this disclosure is to assure transparency and honesty to any party affected by the sponsored post.¹³³

Ad Standards states that disclosure is necessary and must be clear, visible and understandable to anyone. Disclosure is effected by the use of certain symbols recommended by the disclosure guidelines, which specify indicating how an influencer should disclose the material connection¹³⁴ that links it to a brand.

The symbols take into account the manner of disclosure and also where the disclosure should appear, in order to facilitate advertisement identification for users.

We interpret these symbols as a form of advertising identification. Here are some examples:

- **How to disclose**

According to the guidelines, disclosures must be:

130. Clause 3 of the *Canadian Code of Advertising Standards*.

131. Clause 13 of the *Canadian Code of Advertising Standards*.

132. <https://adstandards.ca/wp-content/uploads/2019/02/Disclosure-Guidelines.pdf>

133. <https://adstandards.ca/wp-content/uploads/2019/02/Disclosure-Guidelines.pdf>

134. Advertising Standards defines this as follows: "Material connection" is defined as any connection between an entity providing a product or service and an endorser, reviewer, influencer or person making a representation that may affect the weight or credibility of the representation, and includes: benefits and incentives, such as monetary or other compensation, free products with or without any conditions attached, discounts, gifts, contest and sweepstakes entries, and any employment relationship, but excludes nominal consideration for the legal right to identify publicly the person making the representation." - ASC

- *Clear, and the hashtags used should be widely recognized.* The Standards therefore recommend different symbols depending on the language of use. Here are some examples:
 - In English: #ad, #sponsored, #XYZ_ambassador, #XYZ_partner;
 - In French: #pub, #commandité, #XYZ_ambassadeur, #XYZ_partenaire (where “XYZ” is the name of the brand).

Advertising Standards consider the following hashtags to be ambiguous: #Ambassador, #partner, #spon, #PR, #promo, #PRHaul, #brand, #collab. #com. The organization also finds that the concept of material connection to be unclear, and that the terms used are overly subjective.

Some authors¹³⁵ differentiate between the #ad hashtag and the #sponsor hashtag. In their view, the #ad hashtag lets the audience know that the content they are viewing is influenced by a brand, thus preserving the transparency of both the brand and the influencer. Furthermore, the use of this hashtag enables the parties to avoid breaking relevant advertising laws and regulations and subsequently being accused of deceiving the public.

The hashtag #sponsored, on the other hand, should only be used in certain limited circumstances when the influencer has received compensation (financial or otherwise) from the brand, but the brand has no editorial control over the published content. The hashtags #pub and #sponsored are therefore not interchangeable.

- *Specific about the brand, product and what has been given.* Influencers must specify the nature of the material connection that links them to a brand or a company, whether this be free products, financial compensation or an exclusive invitation to an event. They should specify the name of the brand that gives them a product or benefits as well as the specific product they are promoting. General statements that are unrelated to the product are therefore to be avoided.
- *Independent of the social media channel or channel-specific settings.* The different platforms offer a function making it possible to disclose the links between the influencer and a brand or a company, but the tools offered do not necessarily allow clear and express disclosure. To be exemplary, disclosures must catch the viewer’s attention and be placed where they are not likely to be overlooked.
- *Made in the language of the endorsement.* If the content and captions are in English, the disclosures must be made in English. Likewise, if the content is in French, the disclosures must be made in French.
- *Transparent.* Thus, a mention such as “Thank you XYZ” is not sufficient because it does not specify that the influencer received something in exchange for their work. It is

135. Gowling WLG, The Basis of Influencer Law: Labels and Disclosures - Gowlessence: A Behind-the-Scenes (Legal) Journey of the Influencer Marketing Industry: <https://gowlingwlg.com/en/insights-resources/articles/2019/influence-law-101-labels->

possible to thank a brand for the gift received if it is the only thing received. As an example: “Thank you XYZ for the free product” or “Thanks XYZ for the gift of ABC product” is acceptable.

Note that viewers must be able to see or hear the disclosure in the context in which the brand is mentioned. Some mediums may require both visual and audio disclosures.

- **Placement of disclosure**

In videos, disclosures should be upfront and identifiable. The disclosures should appear close to the beginning; viewers should see them before clicking to get more content.

They should also be referred to verbally, or visually displayed in the video itself (i.e. during the first 30 seconds). The disclosure should also be identified in the description of the video. It is recommended that multiple disclosures be inserted throughout the video. It should be clearly stated that a brand paid for a collaboration and had a say in developing the content.

Finally, disclosures should be as close as possible to each message and should “travel” with it. They must be placed before URLs (clickable or non-clickable). The brand mentions must be seen together with the disclosure. Include the disclosure in each post and in the video, where applicable. Therefore, one general, single mention in a profile, bio or “About” section that reads “Many of the products I discuss on this site are provided to me free by their manufacturers” does not meet the mandatory disclosure criteria, because people visiting the site might read a review or watch a video without noticing the disclosure.

This variable will provide the opportunity to validate adult and child participants’ knowledge and interpretation of advertising symbols, which permit the effect of these symbols on the transparency of the advertising message to be evaluated.

2.4.3. Social networks’ terms of use

As we know, influencer marketing is widely practiced on social networks. The latter have adopted conditions of use to regulate user practices. Analysis of four social networks most used among the participants in our study will allow us to assess whether they are provided with mechanisms that promote advertising identification or transparency.

SUMMARY TABLE OF VARIABLES

<u>VARIABLES</u>	
<i>A. MARKETING COMPONENT</i>	<i>B. PSYCHOLOGICAL COMPONENT</i>
<ol style="list-style-type: none"> 1. Creator-related Techniques 2. Product-related techniques 	<ol style="list-style-type: none"> 1. The impact of influencer marketing techniques on identification of the advertising message by users 2. The impact of influencer marketing techniques on user choices 3. The impact of advertising identification on consumer choices
<i>C. REGULATORY COMPONENT</i>	
<ol style="list-style-type: none"> 1. Laws 2. Standards 3. Terms of Use 	

RESEARCH SUB-QUESTIONS

Our research sub-questions were devised to help us answer the general research question: From the standpoint of transparency, do the current regulations in Canada respond effectively to the issues raised by the advertising techniques used in influencer marketing?

These sub-questions are:

1. Are influencer marketing techniques considered to be advertising techniques?
2. What impact do influencer marketing techniques have on users?
3. What impact does advertising identification have on users?
4. What remedies do consumers have in the event of a problem?
5. What can we learn from other jurisdictions?

2.5. Methodology

The aim of our research is to find out whether current advertising regulations meet the challenges of transparency posed by the practices and techniques employed in influencer marketing. To achieve this goal, we performed a transparency analysis of the principle of advertising identification as it applies to regulations in force in Canada.

In attempting to answer the research question and the accompanying sub-questions, we employed a methodology that combined conceptual and field approaches. We began with a documentary analysis of articles, books and legal texts. This allowed us not only to construct an analytical framework to analyze the techniques used in influencer marketing and their impact on users, but also to assess whether the regulatory response is adequate to the challenges raised by the phenomenon.

We then carried out qualitative field research with two profiles of users. These were composed, on the one hand, of a population of adults interviewed within the context of focus groups and, on the other, a population of children accompanied by their parents interviewed during semi-supervised interviews. This way of proceeding enabled us to note the users' perceptions of the phenomenon, to assess whether reception of influencer marketing in the two groups was similar, and to determine the pertinence of having a specific regulation applicable to children in this regard.

We set up 7 focus groups. Due to the context of the COVID-19 pandemic, the activity was conducted out online. It took place from November 16 to November 19, 2020. Discussions were led by the firm BIP Recherche. The meetings lasted two hours, from 5:30 pm to 7:30 pm. The participants were from 5 regions of Canada. The groups were distributed as follows: 2 in Québec, 2 in Ontario, 1 in the Maritime provinces,¹³⁶ 1 in Alberta and 1 in British Columbia.

The recruitment criteria respected gender parity and gave priority to people 40 years of age and under who are targeted by this type of marketing. Since we wanted participants with some social media experience, participants had to browse at least 5 hours per week on the internet, using social media and follow influencers. In particular, these focus groups made it possible to present examples of advertisements used in influencer marketing to the participants in order to note their perceptions.

The semi-structured interviews (15 in total) were conducted via videoconference with young Canadians aged 6 to 17 (8 girls and 7 boys). These interviews, each lasting 35 minutes, took place from December 4, 2020 to January 14, 2021. Among these young people, 10 were 6 to 12 years old while 5 were 13 to 17 years old. They were from 5 regions of Canada: 6 from Québec, 5 from Ontario, 1 from the Maritimes, 2 from Alberta and 1 from British Columbia. These interviews made it possible to collect the young people's perceptions about the phenomenon, to understand how they were influenced by it, and to compare this data with that from the focus groups made up of adults.

To complete our data, we analyzed the Terms of Use and the Advertising Rules and Community Rules of the 4 social networks most used by the participants in order to analyze these rules with regard to influencer marketing practices. One of those networks—YouTube Kids—was aimed at children. The objective was to check whether these documents contained specific provisions for children.

136. These are New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland and Labrador.

In addition, interviews were conducted with certain marketing firms and one influencer. This made it possible to understand how influencer marketing works, and the motivations of those involved in this domain.

We then analyzed the regulations in force in Canada with regard to the practices identified in the context of this research. The data collected during the focus groups and interviews was analyzed to determine whether these regulations responded to the issues raised at the time. All the data we collected allowed us to highlight the differences between the field data and the legislation, as well as the standards in force.

To complete the analysis, we invited experts to comment on our results. Some of these were consulted at the beginning and throughout the research to help us address the subject most effectively. These experts included Agnès Parmentier, associate professor at HEC Montréal (marketing component), Rose-Marie Charest, psychologist and former president of the Ordre des psychologues du Québec (psychology component), Arthur Oulai, head of bachelor's-master's program in law and life sciences at Université de Sherbrooke (law component), as well as Pierre Trudel and Pierre-Claude Lafond, both professors in the Faculty of Law of Université de Montréal (law component). Throughout this study, we benefited from the methodological support of Bruno Marien, course lecturer in the department of political science and law at l'Université du Québec à Montréal (UQAM).

To determine whether we might find inspiration in other jurisdictions so as to better define the recommendations to be made, we surveyed the regulations in force in the United Kingdom, the European Union, Germany, Australia and the United States.

Following this study, we produced two video clips, one in French and the other in English, to educate children about the most important findings of the research. Finally, a web page devoted to the topic was produced to provide information about influencer marketing to the general public.

CHAPTER 3. PRESENTATION OF THE DATA

We began this research by looking at influencer marketing practices on social networks to determine how users perceive them and whether the regulatory framework is suited to the various issues observed in this domain. There were 3 components to the analytical framework presented: the marketing component, the psychological component and the regulatory component. The data we present here follows the same logic and is qualitative in nature. This data¹³⁷ comes from focus groups for adults, and semi-structured interviews for minors and their parents.

3.1. Focus Group Data: Adult Influencer Marketing

This section presents the data collected online from 7 focus groups each composed of 7 participants. These were social network users aged 18 and over from 5 regions of Canada,

137. The data transcription was performed by an external firm, BIP Recherche

namely Québec, Ontario, the Maritimes, Alberta and British Columbia. The sessions for two of the groups were conducted in French, while the other 5 were conducted in English. The participants had to answer questions and also comment on screenshots of images used in influencer marketing as well as disclosure symbols recommended by Ad Standards.

Following is a summary of the responses the participants gave about their knowledge of influencer marketing and their perceptions of the phenomenon and their experiences with it.

3.1.1. Data related to the marketing component

*Preliminary discussion about knowledge of influencers and influencer marketing*¹³⁸

The questions relating to this theme were designed mainly to find out whether the participants knew about influencers, the phenomenon of influencer marketing and the techniques used in this domain.¹³⁹ The result: they were generally familiar with them. Here is an overview, presented by topic, of what they told us. Each time we provide an overall summary of what they said, followed by direct quotations.

- ✓ Participants follow influencers for their expertise and see them as references in the fields that have made them popular.

“They're active and vocal in one space, someone can be a lifestyle influencer or a mom influencer, a musician, they're experts in their space.” (Group 4, Ontario)

“Somebody who has some type of expertise in a particular area or niche.” (Group 6, Alberta)

“They are mostly people who have been very successful in their field.” [TRANSLATION] (Group 1, Québec)

- ✓ Most of the participants emphasized influencer marketing in their definition of the role that influencers play, as illustrated by the comments of participants from Québec:

“They are connected with products or services or companies and will try to promote them, sometimes in directly, sometimes less directly.” [TRANSLATION] (Group 1, Québec)

“(…) They receive products, they use them in front of us and try to get us to buy them. It ranges from cosmetics to decoration, clothes, fast food, glasses, anything.” [TRANSLATION] (Group 2, Québec)

However, some participants question the sincerity of influencers the moment they start doing business with brands:

“I'm sure most of them, when they start out, they were saying what they really think and they're sincere but I think, when the sponsorships start coming in, you're getting freebies from companies and getting paid to promote products, it's just human nature, they become corrupted, I suppose.” (Group 6, Alberta)

A) Data related to the creator

138. Most of the questions posed in this part of the work can be found in Section 1 of the Discussion Guide.

139. These were the introductory questions, mostly to be found in section 1 of the questionnaire.

The data presented here is taken from the responses to the questions discussed in Section 1 of the Discussion Guide, for the first topic, and in section 2 of the Discussion Guide, for the second.

About the influencer's "double hat":

- ✓ Participants admit that they have difficulty distinguishing paid, brand-driven ads from genuine, disinterested recommendations from influencers.

"I'm really wary (...) because I never know what they've been paid to say (...) or whether it's something they actually believe themselves. "(Group 4, Ontario)

"I'm a little undecided between the real (...). Has he got that Oakley cap on his head just because he likes it or was it planned for him to be wearing it at that moment that week? I really wonder."

[TRANSLATION] (Group 2, Québec)

"When we get influencers that are so broad, it comes across as very not genuine. I find that I follow more niche influencers, (...) I don't tend to follow a lot of broad-based, across-the-board influencers, because it comes across as non-genuine and not their own experience. "(Group 7, British Columbia)

About the robot influencer

- ✓ The majority of participants did not appear to be aware of the existence of robot influencers. Respondents were skeptical, even suspicious and distrustful of the phenomenon. In their opinion, these non-human influencers are, at best, pure marketing products in the hands of companies or, at worst, dishonest, fraudulent accounts. In any event, no respondent has any interest in following an influencer who is not a human being. It even goes against what is most sought after in an influencer, namely their unique personality, their background and their authentic experiences, their objective, independent opinions, the impression of closeness, even identification, etc.

B) Technical data related to the products

The data presented here are the answers to the questions discussed in Section 2 of the Discussion Guide. In this section, images that employ different marketing techniques were presented to the participants, who were invited to comment.

Participants in all groups appeared familiar with many of the techniques used. However, the Takeover technique was the one the French-speaking groups knew least. When they had to decide whether the purpose of the message in a screenshot was to promote a product, the participants' responses were most mixed with regard to Unboxing, Takeover and Special Events.¹⁴⁰

- ✓ ***Production of sponsored posts (product post sharing)***

140. These techniques are described in part 2 of this report.

In general, in the screenshots presented, the participants spotted several clues that led them to say that it was a promotion:

- The presence of the name of the brand being promoted

“When there's a link to the company's name, is it always an ad? Not always. Sometimes they could try to get the company's attention, maybe they want a sponsorship, it doesn't have to be an ad but it kind of looks like it just by the way he holds it and talks about it. (Group 7, British Columbia, re image 1)

- The aesthetics of the image

“It looks so staged, so posed and perfect. It doesn't look like a genuine photo that the average person would post on Instagram (...). You know right away when you see it, it looks manufactured. (Group 6, Alberta, re image 2)

- Advertising rhetoric is laudatory and not very nuanced and sometimes includes inconsistencies that reinforce the impression of inauthenticity

“He writes in his post a lot of information that would have been on the package but he doesn't actually talk about how or what it does truly for him. (Group 7, British Columbia, re image 1)

- Emphasizing procedures relating to products and services (waitlist, reservation platform)

“It's absolutely marketing. (...) She wrote a blog on the concept of how to book a hotel room, (...) explaining the reservation platform at this hotel. Would she mention that it if it wasn't marketing? In my opinion, absolutely not. (...) She would post something else, (...) her friends, her clothes, her hobbies and trips, her boyfriend, but not really a specific hotel room and its reservation platform.” [TRANSLATION] (Group 1, Québec, re image 3)

“The first thing before I even thought of the ad hashtag was “join the waitlist “and the link in his bio, quickly it's a giveaway.” (Group 5, Maritimes, re image 1)

- The absence or omission of certain elements in the description to give the influencer an opportunity to self-promote in order to earn money and enter into partnerships

“Influencers, when it's not a product placement, often tend to say they bought it with their own money. If they talk about it in a positive way and it say they paid for it with their own money, it's really because they liked it. Otherwise, it's product placement.” [TRANSLATION] (Group 2, Québec, about image 3)

✓ **Affiliate Marketing:**

All the respondents clearly associated the screenshots with advertising, in particular because of the presence of a promotional code and the application of a discount on the purchase of products. They considered these elements to be widely recognized

incentives in commercial practice. In addition, the personalization of promotional codes is seen as a way for companies to assess the selling power of their influencers and to compensate them accordingly.

“They get a discount code with his name, the reason why he has ryan50, they will know how many people he influenced to buy that product, so it's like a commission. If he has 100 people using that code, that's how they can tell “on the contract, this is what we agreed, 100,000 people used your code, we'll pay you that.” (Group 5, Maritimes, re image 3)

✓ **Contests**

Respondents recognized contests in the screenshots. In fact, contests seemed to be the easiest promotional tool to recognize. Respondents know that participating in a contest helps followers show support for a brand and its products publicly, either by liking the contest, subscribing to it, or sharing it on social media. They are aware that this makes them brand ambassadors for the duration of the contest and that they are giving the company publicity for free.

“It's actually a very smart way of promoting their product by having people do it for them and using their hashtag and in return they offer free tickets.” (Group 6, Alberta, re image 2)

“I consider it a kind of cheap advertising. You see a lot of it on Facebook.” [TRANSLATION] (Group 2, Québec, re image 1)

“I don't think these things are expensive; they should cost next to nothing to manufacture, so getting their followers to win them shouldn't cost much. On the other hand, the subscriptions they get are worth an enormous amount.” [TRANSLATION] (Group 2, Québec, re image 1)

Other respondents consider contests to be a technique targeting a young audience made up of adolescents, aimed at establishing a list of contacts in order to make a financial profit, either by selling it to a third party, or by remarketing¹⁴¹ it. Most respondents are fully aware that the prizes offered are far from generous. In their opinion, offering something for free on social networks is often just an advertising tactic and the participants tend to consider the prizes they win as a form of remuneration, a transaction to reward them for playing the brand's game. *“No company will give you free Wonderland cards without any purpose.” (Group 3, Ontario, re image 2)*

“I have to make the decision whether it's worth it to buy it, to take that photo and with the ultimate goal of getting a reward, getting an ice cream and possibly go to Wonderland. (...) It's a question of what risk am I going to take to get something that I want to do.” (Group 7, British Columbia, re image 2)

✓ **Takeover**

Regardless of the image presented to them, English speakers showed themselves to be more familiar with the Takeover technique than French speakers.

141. <https://blog.octave.biz/remarketing-definition-formes-et-outils-a-votre-disposition/>.

"I see Netflix do it a lot so they will hand over their account to an actor for the day and they post from their social media so it's essentially a corporate account given to a person and they post on behalf of the brand or corporation." (Group 4, Ontario, re image 2)

- However, not all respondents considered this post to be advertising.

"I don't think they're advertising; they're just marketing themselves." (Group 4, Ontario, re image 2)

"I don't see it as very promotional, they're advertising an airport." (Group 3, Ontario, re image 2)

"Every time you're promoting your organization, I think it's an advertisement but it's not as clear-cut in your face with the #ad in front of you." (Group 4, Ontario, re image 2)

- All the same, some respondents understood that the aim of the exercise was to increase the company's sympathy capital by giving it a human face.

"They're trying to be more than just a corporate face, but trying to put a personal spin to their companies by understanding the people who are part of their success other than the top executives of the company, show the human side of that airline or airport." (Group 5, Maritimes, about image 2)

"They're trying to get the users to feel more familiar, closer to the company by introducing them to the people who work there and give them a little bio of them. Trying to get them closer or more open, transparent to the user." (Group 7, British Columbia, re image 2)

✓ **Free Products and Unboxing**

The respondents all seemed familiar with the technique behind these products, but did not agree on the objectives pursued. The promotional and advertising aspect was emphasized more by English-speaking groups.

- So, for some, the goal is to evaluate the product and make an objective recommendation about it.

"They sent him the console, he'll test it, and he'll tell us if it is worth upgrading our Play Station." [TRANSLATION] (Group 2, Québec, re image 1)

"What he's trying to say in this video is just that he's going to look at it with us and he's going to tell us whether it's worth it or not." [TRANSLATION] (Group 2, Québec, re image 1)

- Various elements can be associated with advertising strategies, in particular the deliberately enigmatic title (no mention of product or brand) of the post. The title is a kind of clickbait, which is a promotional technique aimed at arousing people's curiosity and enticing them to play a video clip.

"It's definitely 'click for more.'" (Group 7, British Columbia, re image 2)

“All I can think of is that it's a clickbait. She wants you to click on the video to find out what she got sent.” (Group 6, Alberta, re image 2)

- Certain elements used such as superlatives (“THE BIGGEST,” “EVER”) exclamation points, capital letters and complimentary terms are perceived as lacking in authenticity.

“It's the way she's pointing and the words THE BIGGEST BOX. It looks like advertisement for the cosmetics.” (Group 3, Ontario, re image 2)

- The promotion of free products (“sent” “for free”) is very often associated with sponsored partnerships, and the term “PR box” is a marketing concept that refers to the practice of companies sending promotional boxes.

“The fact it says it's a PR box, I know that are boxes that companies send to people to literally promote their stuff.” (Group 4, Ontario, re image 2)

“The PR box, but her saying she just got sent it instead of “look what I bought, “it's more” look what arrived for free.” (Group 4, Ontario, re image 2)

✓ **Special events**

Opinions on this marketing technique are divided as to whether or not it is promotion or advertising.

- Some of the respondents perceived that the posts presented were advertisements, particularly due to the fact that companies were identified in them, the beauty of the influencer and the gratitude she expresses toward the company.

“She's really a well-known personality who's representing a brand to do spin-off marketing, therefore indirectly persuading people to use L'Oréal products. (...) First of all, she has a very beautiful photo that makes her look really great with beautiful makeup, hairstyle and clothes. Immediately after, it says, ‘a big thank you to L'Oréal.’ So it's really just a post in which she thanks the L'Oréal team for making her look beautiful, so for me, it's indirectly an advertisement to use L'Oréal products.” [TRANSLATION] (Group 1, Québec, re image 1)

- Some other respondents considered that, because these posts are based on sharing experiences related to certain themes (travel, exotic destinations, etc.) and because there is an emphasis on different elements, they have the impression that there is no product placement or that this is only secondary. This makes the posts appear more natural, spontaneous and authentic.

“Without any background for the company, like Brad said, it comes across to me that it's just a post from a person saying ‘I had fun’ it's more like a personal page thing.” (Group 7, British Columbia, re image 3)

“I like that it looks more spontaneous, nobody is perfect and airbrushed and they aren't all in matching pre-thought out poses, it looks like they took one shot and were done with it, ‘let's get our free rental car and go,’ it looks like they're going to have fun and I think that something like this speaks more to me than something with someone laying on the hood of a car saying ‘check out my Hertz’ where you can tell it's been pre-lit and everything. This looks more organic even though you know it's sponsored.” (Group 6, Alberta, re image 4)

3.1.2. Data related to the psychological component

What impact does influencer marketing have on consumers? Is it different from traditional advertising? In addition to these points, this part of the study also focuses on participants' trust in influencers and on advertising identification. We approached these questions by presenting the participants with a montage of a post on which the label “advertisement” was displayed. Most of the data collected can be found in section 4 of the Discussion Guide.

In general, participants consider advertising by influencers to be more insidious and more effective than traditional advertising. In fact, they sometimes have difficulty distinguishing it from the rest of the influencer's post. In addition, participants feel manipulated by certain practices, which affects their confidence and makes them extra vigilant.

✓ *Impact of influencer advertising vs. impact of traditional advertising*

All of the study participants said that influencer advertising has a greater effect on them than advertising shown on TV. They feel the former is more devious than the latter, and is also more subtle and more personalized, particularly because they get to see the influencer and to follow them. They also say that it is especially difficult for them to distinguish between sponsored and unsponsored content in an influencer post. In addition, they find influencer advertising more impactful, precisely because it is personalized and because followers choose it for its spontaneity and authenticity. They are less affected by TV advertising, which they feel is staged, immediately identifiable, and imposed.

“Advertising by influencers is more insidious because of the lack of standards, whereas on TV, it's pretty obvious. The show starts at a certain point, then it stops, there's a pause for commercials, and it starts off again. So knowing what is an ad and what is not is very clear-cut, it's more defined. It's really the subtlety factor, because in the 4 photos, there is no convention that clearly defines whether it is an advertisement or not; it's much more devious ” [TRANSLATION] (Group 1, Québec)

“I was saying, I pay more attention to the influencers because on TV, I feel it's more generic, it's not just for me or a limited amount of people, it's for everyone. You can't really trust how truthful that commercial is, but with an influencer it's more personalized, I can watch the influencers, follow them and see the product they're talking about, for example the shirt that I bought because I saw the person wearing it not just once or twice, I knew he was invested in the product before I bought it. (...) The influencer has more impact.” (Group 5, Maritimes)

*“The TV ad is scripted, someone paid the people in the ad, even if they don't use the product.”
(Group 3, Ontario)*

Figure 1¹⁴²



TV commercials



Advertisements by influencers

Clear standards, identifiable by all	No standards, difficult to distinguish sponsored content from unsponsored content
General, and imposed on viewers	Contextualized, lifelike, personalized and chosen by followers
Prepared and staged	Appear more spontaneous and authentic

✓ **Impact of certain marketing techniques on users**

- *When the contest technique was used, the participants from the French-speaking groups had more difficulty understanding that the advertising presented was sponsored by the company Yoko Shop, and therefore detecting the business partnership between the influencer and the brand.*
- *The ad featuring special events was appreciated by attendees, who felt it was natural. They struggled to differentiate it from the rest of the influencer content, however.*
- *Participants were wary of sponsored content posted by influencers when a post was shared. Such content was deemed unreliable and irrelevant, as it did not appear to reflect a genuine opinion or experience. Paradoxically, respondents said they recognized that advertising is part of the influencer’s job and accept that. However, they said they expect influencers to remain honest and transparent toward their followers if they post content on behalf of a brand.*
- *When the Takeover technique was used, respondents generally misunderstood or only partially understood the post.*
- *Respondents are particularly grateful to influencers who are transparent and honest about their connections with brands.*

✓ **Impact on users of Robot influencer and fake account practices**

142. This figure illustrates the responses of focus group respondents about the differences they see between traditional advertising and influencer advertising.

- *The (virtual) Robot influencer: Respondents considered this practice to be rather deceptive, because it is contrary to what they look for in an influencer, i.e. their unique personality, their background and their authentic experiences, their objective, independent opinions, the feeling of closeness, even identification that it provides. None of the respondents wanted to have anything to do with such an influencer.*
- *Fake accounts: Respondents feel manipulated when faced with this type of practice, which they also describe as a tool for manipulating opinions that most often takes the form of a “bot” (a kind of robot). To expose them and protect themselves in the future, they look out for a number of specific features. In particular, they are wary if they contain a string of comments that are very laudatory and not very nuanced, especially if they are identical or general with very little detail (“empty of experience”). Once they become suspicious, respondents may go so far as to identify suspicious accounts by verifying various details: does the name of the account seem genuine or is it just a series of numbers? Is there a profile image? How many followers does the account have? Is the account active? Does the activity appear to be automated?*

✓ **Impact on trust placed in influencers**

The respondents' trust in an influencer depends on the authenticity of the content they post, the effectiveness of their recommendations and the time they put into following up. The more time they devote to this, the more they are trusted.

“Moderate because some work for me, some don't. (...) It depends on what impact it has given me. That's how I weigh the influencer.” (Group 3, Ontario)

“It could be high if after repeated interactions and purchases I agreed with, but I think it takes a long time to establish that kind of trust.” (Group 4, Ontario)

- *For this reason, the participants consider that their trust in influencers is moderate; it is not blind. Consequently, some participants feel they have to compare the content proposed by influencers with external sources and opinions, such as information available on the internet or in the media as well as comments from Internet users, followers or their relatives.*

“I would read articles or maybe double-check the facts and then I would decide if I'm going to use the information or not.” (Group 6, Alberta)

“What makes the difference for me makes is when I hear from a friend: ‘I really loved this,’ or ‘I heard about it from so and so.’ For me, this establishes a bit more credibility about that influencer.” (Group 4, Ontario)

✓ **Impact of advertising identification**

The participants were asked to react twice to the same screenshot, the first time when there was no mention of “advertisement,” and the second time when the label “advertisement” was affixed to it. The exercise left no one indifferent. Some participants were put off by the word “advertising.”

“It's not necessary. It's a bit too much. The idea of following influencers, you end up knowing it. I really liked the #ad or #partnerad hashtags, but to add advertisement, that would maybe influence me to stop following it if it isn't done subtly enough. People are going on Facebook less and less because it's full of ads.” [TRANSLATION] (Group 2, Québec, re image 3B)

“Big mistake, that shouldn't be there, no way! That totally loses the intrigue, the sexy nature of it. (...) It takes away from the influencing, this person all of a sudden, you lose any sense of connection for sure.” (Group 7, British Columbia, re the 3D image)

- However, some considered this to be the most transparent, honest way to present the advertisement, as the banner ad allows followers to spot sponsored content immediately without having to pore over every detail in the post. In this way, they are given the flexibility to choose the content they really want to consume.

“You don't need to move your eyes down and actually spend any time reading the post to see what they've curated for a message. You can either be turned off and ignore it, with the previous one you could at least have taken the time to read and realize it's an ad and maybe stop reading or keep going.” (Group 4, Ontario, re image 3 D)

- Others believe that this way of identifying advertising would be appropriate in the case of minors who do not have the same level of discernment as adults; it would warn them explicitly and protect them.

“As a parent I would prefer this better, especially if they're geared towards younger kids. As an adult, I'm hoping I'm capable of figuring out what is an ad and what isn't, even now driving with my 7-year-old I have to tell him it's advertising, they're not always telling you the whole story and I know it's hard for kids and young teens to differentiate between real life and an ad. I actually appreciate the big ‘advertisement’ stamp on it. If it was her decision to put the stamp on it, I would respect it more. If it was Instagram or mandated, like the #ad is, maybe I would respect it a little bit less. I think if they would be upfront, I would respect that a lot in an influencer ‘this is an ad’ right upfront, not just because they have to say it.” (Group 6, Alberta, re 3D image)

3.1.3. Data related to the regulatory component: disclosure and rights

Are the participants aware of the disclosure symbols recommended by Ad Standards as well as their rights in relation to the subject under study? This is what we will see here. The questions asked to collect this data can be found in Sections 3, 4 and 5 of the Discussion Guide.

- ✓ **About the obligation to disclose the link that connects them with to the company**

Opinions are divided on this question. Some participants consider that influencers already respect the standards and that they do not need to disclose the material connection they have with a company, while others believe that there is legal vagueness here. Yet others don't know what to think.

"I'm pretty sure they've changed social media laws a few years ago and that they are legally required to say #ad." (Group 4, Ontario)

"I don't know if it was the social media organization or the government, but it's more of a consumer thing, it was intended to be more of a consumer protection or transparency so that people know they are being compensated in some way to be talking about these products." (Group 4, Ontario)

"On paper they're probably not obligated, (...) it's never been expected because it's a relatively new kind of advertising." (Group 3, Ontario)

"I'm definitely not sure if it's a legal obligation. That kind of stuff is so fuzzy, I definitely have no idea." (Group 6, Alberta)

- However, some participants do not want disclosure for various reasons.

"I think influencers are business people, they're not doing posts and getting likes just because they feel like it. It's their job. I think if you're a savvy business person, you need to be open and transparent with your customers. (...) I think influencers would be held to the same kind of standards, not the same as a big huge bureaucracy but the same standard to which other businesses would have a level of transparency with their customers." (Group 5, Maritimes)

"I prefer to stay with the subtlety and for them not to say formally that they are advertising for a certain brand. In the end, we'll find out, or if it's not subtle enough, let them say it, I don't have a problem with that." [TRANSLATION] (Group 2, Québec)

✓ **About recourse**

No participant mentioned ever having a problem with an influencer. However, they might consider seeking remedies if this became necessary as a result of a purchase made based on one of their recommendations. This could include sharing their experience over the networks, warning other users of product failures and influencer dishonesty, making a complaint to the social network administrator, contacting the company, or contacting the influencer.

However, opinions are divided on the issue of corporate responsibility. Some participants believe that in the event of a faulty product, only the company that made it would be responsible, unless that company was owned by the influencer, while others believe that when an influencer commits to promoting a product, he becomes responsible for what may arise.

“Go to the brand itself if there is a problem. If that company does not belong to the influencer, (...) the influencer is just a face for reaching as many people as possible. The only customer service department to contact is the company’s. The influencer is just a spokesperson for the company.” [TRANSLATION] (Group 2, Québec)

“Influencers essentially give me their recommendations and if the product turns out to be a dud, I will blame them for their recommendation. They put their name on that statement and the product has to back it up. It's like if a friend recommends a restaurant to me and it gives me food poisoning I'm going to blame that friend for that shitty recommendation.” (Group 7, British Columbia)

✓ **About Disclosure Symbols**

Participants were asked to comment on their understanding of the disclosure symbol appearing on the projected images as well as the clarity of these symbols. Both Anglophones and Francophones found that the most transparent and appropriate practice for revealing the partnership between an influencer and a company is adding the hashtags #partner or #ad in the descriptive text. Francophones, however, felt that that the #commandite (sponsor) hashtag we presented to them was not very clear.

- **#travelwithbeckstar @beckstarcosmetics:** Respondents guessed that this was advertising, but their views were divided as to the clarity of the disclosure. Some respondents found this method of disclosure to be clear, but others felt, on the contrary, that it raised suspicions about the existence of a paid partnership as well as about the purpose of the post.

“I could go and post a picture of anything and put those same hashtags and tag people Beckstar Cosmetics without getting paid, it doesn't denote payment for a partnership to someone.” (Group 6, Alberta)

- **#ad and # sponsored:** French speakers are not very familiar with the use of the #sponsored (#commandité) hashtag, which in addition is hidden among other hashtags. They do not see it as a clear disclosure of special ties with the brand:

“She hides it among her other hashtags, it's not very visible; I like it when it's clearly marked that it's sponsored, that it's an ad, no matter what they call it.” [TRANSLATION] (Group 2, Québec)

English speakers, on the other hand, find the hashtag #ad both subtle and unambiguous, provided it is placed at the beginning of the text. For many participants, this hashtag makes it possible to clearly announce the advertising nature of a post without turning it into an irritating advertising clip:

“It's concise, right up front, it's small enough not to take away, it's not like that giant banner on the other one. It's crystal clear.” (Group 3, Ontario)

- **#partner:** In general, this symbol is considered clear and effective. However, some respondents believe that it is more ambiguous than the hashtag #ad because the idea of partnership does not always imply remuneration.

"It's not as clear because we kind of been trained to know that when you see #ad, that means it's paid promotional content, from my perspective this is almost a backhanded way to sneak around the fact that it's an ad." (Group 4, Ontario)

"It's not super clear to me because partner can mean different things and it's also at the end, so it's a possibility, but I don't think it's super clear." (Group 3, Ontario)

- **#SampleProductReceived, #produitoffert:** Opinions on this disclosure practice were far more mixed. For many respondents, the hashtag #ProduitReceived is not explicit enough because it does not clearly indicate whether the influencer has made an agreement with the company or has a material connection with it:

"It's unclear. I don't know if it was a sample product received as part of a box of something they've ordered, a subscription box, I don't know if it was a sample product received, sometimes you buy something and you get a free whatever with it so it's not necessarily telling me that this is an ad or a sponsored post." (Group 5, Maritimes)

- **Identification of brands on images/products**

Opinions on this method of disclosure were not unanimous. For many respondents, it does not clearly show the link between the influencer and the brand.

"This one is a little misleading because I can shop for coffee and tag the coffeeshop in my Instagram post, it doesn't mean I'm definitely getting paid for it and it doesn't mean it's an ad. It looks to me like a way to get out of having to disclose that you're targeting someone, which is a little misleading." (Group 6, Alberta)

"I think, from all the ones you showed, it's probably the least transparent because nowhere in the hashtags is there any mention of partnership, promotion, financial incentive. This one is probably the most misleading." (Group 3, Ontario)

3.2. Semi-structured interview data: advertising aimed at children

This section is made up of data from 15 interviews conducted with young people aged 6 to 17 as well as their parents. Of these young people, 6 were from Québec, 5 from Ontario, 1 from the Maritimes, 2 from Alberta and 1 from British Columbia. Interviews were conducted in French in Québec and in English in the other provinces.

Note that some questions include a visual medium showing images of techniques used in influencer marketing or disclosure symbols recommended by Ad Standards.

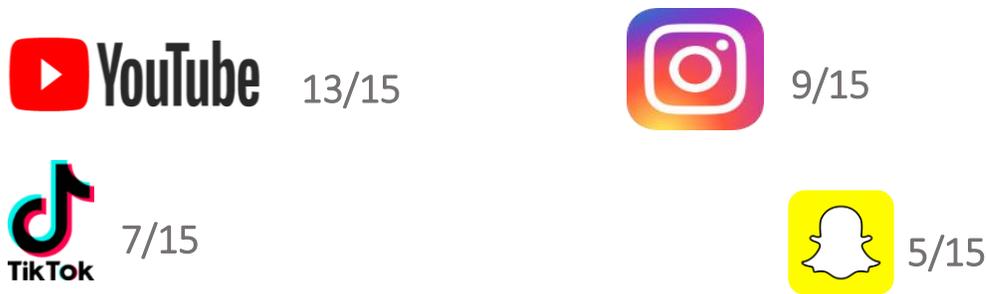
We summarize the answers the participants gave about their knowledge of influencer marketing and their perceptions and experiences in this area.

3.2.1. Data related to the marketing component

Preliminary questions about the knowledge of the phenomenon and the habits of young people in relation to it¹⁴³

The most popular social network channel among the 15 young people surveyed is YouTube; this is closely followed by Instagram and TikTok. In addition, about a third of the participants use Snapchat and Facebook.

Figure 2¹⁴⁴



These young people mainly follow teenage or young adult influencers who are amateurs who have acquired a reputation on social networks. Only a few of them follow celebrities or child influencers. The most popular influencers and the ones often mentioned among these young people were Charli D’Amelio and her sister Dixie, as well as their friend Addison Rae. These influencers are between 16 and 20 years old and each have tens of millions of followers. They feature dances on TikTok and video clips on YouTube, where they talk about their lives. They are popular with girls and boys in both age groups: children (6-12 years old) and adolescents (13-17 years old).

“I follow Charli D’Amelio because she does dances and stuff like that. And then I do dances and stuff. Also I follow Addison Rae. She’s like Charli D’Amelio. She also does dances and stuff.” (girl, Alberta, 6-12 years old)

“Charli D’Amelio. She sells products and she also talks about everybody is beautiful and stuff like that. Dixie D’Amelio also and all the TikTok stars. And they’re all really positive. And I think it has a really good effect on us kids.” (girl, Ontario, 13-17 years old)

143. The data in this part is taken from answers to questions 1.1. to 1.6. of the questionnaire.

144. These are logos of the social media channels most visited by the 15 young people who participated in the semi-structured interviews.

These young people most often follow influencers during leisure time, after returning from school, in the evening (after dinner until bedtime) and on weekends. Some young people watch YouTube during breakfast or at lunchtime.

They follow influencers primarily to discover new things, learn more about a topic, stay on top of particular trends, feel inspired, or just have fun.

“I think it's learning about cool things like DIYs and learning how to do tie-dye and baking and I think it's just really cool to learn about those things.” (girl, British Columbia, 6-12 years old)

“It's a little entertainment, and I like watching videos, seeing the things I'd like to have and give me an idea of what I want. I often watch YouTubers for information and entertainment and to see what games there are. It's because I don't have one and I want to learn about the games for when I go to friends' houses, so I'll know what they're talking about so that I won't get left out of the conversation. To learn.” [TRANSLATION] (boy, Québec, 6-12 years old)

“They inspire people to do things and teach people how to do stuff. They give good information.” (Maritimes, boy, 6-12 years old)

A) Data related to the creator

✓ **About the influencer's “double hat”**

When asked how they saw the role of the influencers, most responded that they posted content, partly to share knowledge, inspire and entertain, and partly to promote themselves and attract as many followers as possible.

“They inspire people. saying inspiring things and doing inspiring things.” (boy, Maritimes, 6-12 years old)

“It's more for entertainment and giving stuff away. They don't have much of a role, but it's a job like any other, they tell us their ideas. It's more like a hobby.” [TRANSLATION] (boy, Québec, 13-17 years old)

“They make content for you, post stuff for you to make you feel not bored, to make you feel happy, calm, relaxing, make you less stressed and maybe take a break from anxiety or stress.” (girl, Ontario, 13-17 years old)

“Influencers are on social media like Instagram, TikTok, and Facebook, and they're just thinking about posting stuff, attracting people and getting as many followers as possible. They want to be recognized.” [TRANSLATION] (boy, Québec, 6-12 years old)

- However, a few of the older ones said that influencers also try to sell products and convince their followers to buy them.

“He's someone who gives his opinion on things, like they say, he's an influencer, he's well-known, his opinion will often influence ours. Sometimes he will partner with brands to promote items to buy, they influence people to go and buy it.” [TRANSLATION] (girl, Québec, 13-17 years old)

✓ **About child influencers**

The phenomenon of child influencers seems very familiar to the participants.

- *Young people's perspective:* Even though children are familiar with the phenomenon, they don't follow child influencers, but rather teenage influencers or young adults (in their twenties or thirties). Kids seem to want to follow influencers a little older than them.

“I find people that are my age, they're not as entertaining. They're really boring.” (girl, Alberta, 6-12 years old)

- *Parents' perspective:* Most parents had already seen or heard about child influencers.

“Child influencers (6-7 years old), she watched them a year or two ago, because this year she is following teenage and young adult influencers.” [TRANSLATION] (mother of a girl 6-12 years old, Québec)

- Although parents accept the phenomenon of child influencers, whom they see as role models for their offspring, they still have certain reservations about them.

“I have mixed feelings about child influencers. They're too young to have millions of people watching them. That's why I'm reluctant for my daughter to make videos. But at the same time, I tell myself, even more this year because her school is closed, she will be seeing other people outside her inner circle. That still has its advantages under these circumstances.” (mother of a girl 6-12 years old, Québec)

“As long as it's positive, I think it's okay, because it shows that you don't have to be all grown up to be able to accomplish things. Like I work with kids and I've heard them say many times 'I can't do it'. And so I think if you see kids being able to do it, then it might give them that incentive to try rather than saying 'I can't do it'. I think that it can influence them to have that kind of thinking.” (mother of a girl, 6-12 years old, British Columbia)

A) Technical data related to the products (Unboxing)

The majority of young people surveyed, regardless of their age, had already watched unboxing-type videos, In particular, toy unboxing video clips seemed to be, or had previously been, a strong trend among participants.

3.2.2. Data related to the psychological component

✓ **Impact of the techniques used on advertising message recognition among young people**

A screenshot of an unboxing video with no advertising label was presented to young people. Regardless of their age, the majority had seen unboxing-type videos before. The toy unboxing video was the example participants cited most often.

Recognition of the advertising message

- Most of the participants, especially the younger ones, did not recognize the advertising message behind the technique: *“They unbox a toy just to show it.” (girl, Ontario, 6-12 years old)*
- When asked about where the products they receive came from, some said that the influencers buy them themselves; others said that the manufacturers send them to the influencers. By asking further questions, it became clear that they did not fully understand the concept of advertising, i.e. being sent a product or being paid for speaking favourably about a product.
- Several young people said that influencers use unboxing videos to attract views and clicks. In their view, this is a way for influencers to show the things they have received and in that way boost their own value by demonstrating their influence (because brands only want to deal with important influencers):

“The influencer wants to show his new PS5 to his followers to get more followers. To make more money.” [TRANSLATION] *(girl, Québec, 6-12 years old)*

“It's opening a package in front of a camera to get views, followers and likes.” [TRANSLATION] *(boy, Québec, 13-17 years old)*

- A few children stated that in the unboxing videos, influencers never see the products before they unbox them. They comment on them and compare them “live.” The fact that influencers share their discovery with their followers is what makes it entertaining and interesting.

“Unboxing makes it more exciting and it makes the video longer.” *(girl, Alberta, 6-12 years old)*

“I like these videos because it shows what it's like to see and use the product. It feels like I'm unboxing it myself.” *(boy, Maritimes, 6-12 years old)*

✓ **Impact of influencer advertising vs traditional advertising**

- *Young people's perspective:* Children consider messages broadcast on television or even before or during YouTube video clips to be advertising. However, when an influencer talks about a brand, they don't always think of it as a form of

advertising. Many, especially the younger ones, seem to believe it to be mainly an objective recommendation. What is more, traditional advertising messages are not very popular with children, who feel that they lack authenticity, in particular.

“I know she knows the difference between like if there's an ad in the video, like if the video stops and an ad plays. I don't think she knows the difference that they're advertising a product. She talks about being sponsored, but I don't think that she understands that the reason why they're showing that product is because a company sponsored that person to share that product to advertise it so that people would buy it. I don't think she understands that concept yet.” (mother of a girl, 6-12 years old, British Columbia)

“I would definitely be like a different influence because television is acting, right? So it doesn't give me the same, realistic.... I honestly see a difference because like ... Television, I mean, commercials are so annoying, right? So we just don't want to see them, but then if like we press on a video on YouTube, let's say that's advertising. Like if you wanting to see it, right?” (girl, Ontario, 13-17 years old)

“Youtubers influence me more than a perfume ad with a dance in it that's totally irrelevant; in a real ad, they say what a great perfume it is. Let's admit it; a perfume unboxing is already more than just saying what they think, it is already more influencing than somebody just taking pictures and then calling it a perfume ad.” [TRANSLATION] (boy, Québec, 6-12 years old)

- **Parents' perspective:** Almost all the parents reported that their children do not watch television or other traditional media, or watch them very little. Consequently, the vast majority of parents state that their children are far more influenced by social media than by television.

“It's definitely social media, not TV. On our TV, we choose the content: it's Netflix or Tou.tv. We're the ones who make the choice. When she watches influencers, she follows them, and then she discovers new things. Otherwise, the only ads she sees are on YouTube. I would say it is the influencers she watches that have the most influence on her.” [TRANSLATION] (mother of a girl, 6-12 years old, Québec)

“He doesn't watch as much TV. So most of his product knowledge is from influencers, YouTube channel.” (mother of a boy, 6-12 years old, Ontario)

- A large proportion of parents said they felt obliged to remind their children that what they were watching was a form of advertising. In fact, several parents explained that they had to make it clear to their children that the influencers are sponsored and receive the products free of charge, and/or get money in exchange for favourable comments.

“No, he doesn't see everything, whether in print ads or otherwise. Me, when I see a PS5, I say to myself 'Nice product placement,' the guy is paid for that. He isn't aware that they just did a product placement and now they're trying to sell him a PS5. I think he sees part of it, but he doesn't see all of it.” [TRANSLATION] (mother of a boy 6-12 years old, Québec.)

"I don't think they really realize what a big part ads play to these influencers. They have no idea that gets to be the big part of what they do. Because they're making money off of these, by exposing these products to people. So, no, I don't think he has an idea. Like that unboxing thing, they have no idea this is technically an ad for what's in the box. There's a real grey zone." (mother of a boy 6-12 years old, Ontario)

"I know she knows the difference between like if there's an ad in the video, like if the video stops and an ad plays. I don't think she knows the difference that they're advertising a product. She talks about being sponsored, but I don't think that she understands that the reason why they're showing that product is because a company sponsored that person to share that product to advertise it so that people would buy it. I don't think she understands that concept yet." (mother of a girl 6-12 years old British Columbia)

✓ **About the impact of influencers on young people's identities**

Children are so influenceable in terms of their identities that they end up wanting to become influencers someday. Some young people are doing this already.

- Children want to become influencers and entertain, inform and inspire others, just like their own influencers do for them.

"I would like that because every day I try to practice dances and I want people to watch them." [TRANSLATION] (girl, 6-12 years old, Québec)

"I want to do that so other kids can learn how to read and stuff, so they can get better at reading, and I think that would be fun for other kids to learn." (girl, 6-12 years old, British Columbia)

- Some children admitted to being influencers themselves. Indeed, they occasionally publish video clips or stories of all kinds, in which they comment on products they have tried, or even play video games online. However, none of them have yet been approached by brands to recommend their products.

"Yes, I'm an influencer. I do post my videos on Facebook and Instagram. On my mom's channel, I do reading. I'll read a story. Having a book in my hand and reading it. Now we have progressed to taking pictures of the images in the book and just making a video or talking with the pages showing so people can read along." (girl, 6-12 years old, British Columbia)

"Oh, totally, I just got strip lighting and D-lighting for my bedroom and I did a TikTok on that and definitely that would influence other people. Dancing, and sometimes making sort of joke videos, but mostly dancing. On TikTok. I have hundreds of followers." (girl, 6-12 years old, Alberta)

"I'm a YouTuber. So far I haven't made a lot of videos, but I have done some on video games. The YouTubers I watch inspire me. I can see that they don't seem embarrassed, they are used to it, it's their job, it's no big deal for them to make a video, so I would like to be like them, but not to have a job like that. I also have friends who are YouTubers." [TRANSLATION] (boy, 6-12 years old, Québec)

✓ **About interactions with influencers and their place in their lives**

Very few young people interact with influencers. Most of the children interviewed read or view their posts. Some will write a comment or rate a post with a “like.”

“They have a lot of followers, there's not much chance they'll respond to me. Most of the time I post a comment, but I don't expect them to respond. Sometimes I answer story surveys, but that's all.” [TRANSLATION] (girl, 13-17 years old, Québec)

- Influencers are undoubtedly part of the lives of young people. Many say that viewing video clips is part of their daily routine and that they are eager to discover new content from their influencers. Although some young people perceive influencers as friends, the majority do not. All of them, however, seem to have integrated them into their daily lives.

“I just view what they do. I don't interact with them. I don't really write comments. But I watch them all the time so they are part of my life in a way. I would want to resemble them. I want to do fun challenges like they do and bake cool things like they do.” (girl, 6-12 years old, British Columbia)

“I watch every day, but he's not that much part of my life. He is not like a friend. But I would like to resemble him. I want to do all the stuff that he does while he plays. So I try applying it. Like a whole bunch of hard stuff that I tried to learn, but it's really hard.” (boy, 6-12 years old, Ontario)

“Yes. I want to do the same things, look like them, dance like them.” [TRANSLATION] (girl, 6-12 years old, Québec)

- *Parents' point of view on the place of influencers in their children's lives:*

For parents, influencers become actors in the lives of their children, who constantly talk about them and report what they say. According to them, some children even come to identify with or want to look like the influencers they follow. It seems that such behaviour is more common in girls than in boys.

“Yes, she talks about what she's watching all the time. I never listen to them for long, but I know them. She talks about them all the time. I know their names. She says, “Charli D'Amelio did this or that. I say, “It's a beautiful dance, where did you learn that?” She says, “It was Addison.” [TRANSLATION] (mother of a girl 6-12 years old, Québec)

“She wants to be like them.” (mother of a girl 13-17 years old, Ontario)

“Yes. Definitely, by trying to copy what they do, to look a bit like those people, their hair or their makeup.” [TRANSLATION] (mother of a girl 6-12 years old, Québec)

“I don't hear him talking much about the influencers, to be honest. He watches it, like he mentioned, I guess, to get better at the game because they have their insight of how to better

play the game. So he wants to get better. So he watches them to learn new tricks.” (mother of a boy, 6-12 years old, Ontario)

✓ **The impact of influencer recommendations on young people in general**

Almost all young people say they follow the recommendations of influencers on products and brands (toys, makeup, clothing, etc.). However, some kids see these recommendations as a form of product review and appreciate the influencer researching and testing products for them. Interesting fact: several young people stated that the gamers they follow don't recommend products, but only play.

“They recommend products a lot. Like there's this other channel that I watch, it's called Hyper where they play like Roblox and when they buy something new, they give you a recommendation of the website, so you can buy the things that they bought and like the companies sponsoring that. Makes me want to buy some of these things, but not all of them.” (girl, 6-12 years old, British Columbia)

“For sure. Some of the different brands that I follow, like different makeup things, influencers they're promoting different things, and it's not that they're like, ‘Oh, try this.’ It's like, ‘This is why you should,’ or ... Specific brands. That's obviously in the beauty industry. They're like, ‘Okay, this is the brand, this is why you should have it.’ If you have eyelash extensions, have non-oil, and this is the brands that have it. It's, for me, doing research too. It helps me. It's beneficial. So, you don't have to research the ingredients in every product.” (girl, 13-17 years old, Alberta)

“Some of them make like YouTube videos and stuff and then they show their skincare routine or their makeup routine. They have a clothing line.” (girl, 13-17 years old, Ontario)

✓ **Impact on children's consumption choices - children's perspective**

The children's comments show that the influencers' recommendations have an impact on their consumption choices.

“They have sponsors and they say you should buy this because it's really good. I asked my parents to buy Lankybox merch. They play this game called Roblox. And I play Adopt Me on Roblox.” (boy, 6-12 years old, Ontario)

“Charli and Dixie D'Amelio and Addison Ray have their own makeup with their faces on it. I never asked my parents to buy any of their products, but I did buy a Charli D'Amelio magazine. I saw it at the grocery store, and begged daddy to get it. There were some TikTok Trends about how Charli and Addison Rae dress.” [TRANSLATION] (girl, 6-12 years old, Québec)

✓ **Impact on children's consumption choices - parents' point of view**

The majority of parents confirmed that their children had already asked them to buy products recommended by the influencers they follow. This tendency was observed more in girls than in boys.

“Does she want these things? Let me tell you, she’s watched some videos and says, ‘Mommy, they’ve got this really cool thing, I really want it.’ Like LOL toys. Hatchimals. Shopkins. She likes to collect them. Lego. She always wants me to buy the supplies to make slime. Like if somebody is using a particular thing, she’s like, ‘Oh, Mom, I need to buy this because it will make my slime better.’ So even just like a special glue or a special paint or something. There’s like markers that she’s seen that she thought were really neat. She’s like, ‘Oh, you need to buy me these markers.’ So I mean, there’s so many different things. Perler beads. She likes to make those like Perler bead things. They’re like the little melty beads and you put them on a template and you iron it. So she actually watches videos of people making them and then she herself makes it.” (mother of a girl, 6-12 years old, British Columbia)

“We were looking for an item in the mall, I don’t remember what, and so we went to Hollister and we saw that one of her favourite people on YouTube (Charli D’Amelio) was the spokesperson for that store. Once we went to that store, and we saw that Charli D’Amelio was the spokesperson, she became more interested in buying from that store and we went there a lot more.” (mother of a girl, 6-12 years old Alberta)

✓ **About advertising identification**

The screenshot of the unboxing video was shown to the young people again, but this time with the label “advertisement.” When the young people were asked about the difference between this image and the version without this mention, they said that the label clearly indicated that it was advertising:

“This is an advertisement. It is what they’re doing, because it’s actually saying that. You’re not having to guess.” (girl, 13-17 years old Alberta)

“It’s a good thing they added it [the label] because it helps tell the person watching the video that it’s really to showcase the product, so that they’ll buy it. It makes things clear.” [TRANSLATION] (girl, 13-17 years old, Québec)

- Nevertheless, it must be remembered that children, especially the youngest (under 13), do not fully understand the concept of advertising. They realize that influencers are pitching a product, but not all of them know that influencers receive compensation for speaking favourably about a product.

“They’re advertising the product. Like showing the product and telling you that you should buy this product.” (boy, 6-12 years old Ontario)

“I feel like it means to show something, like to show the product, so more people will be interested in it. I’m not actually sure.” (girl, 13-17 years old, Ontario,)

- It appears that some of the children interviewed do not understand the meaning of the words “publicity” or “advertising” at all and what they refer to. This finding even surprised several parents, who were unaware of their children’s ignorance.

“I don't know what that means.” (girl, 6-12 years old Ontario)

- Finally, when the children were presented with two images (one with a label indicating that it is an advertisement and the other without such a mention) and asked which of the two images they preferred, most indicated the one without the advertising label. They said they don't like to feel that someone is trying to sell them something. The advertising label seems to put them off, as does advertising on television and in videos.

“I would most tend to watch the one without the word advertising. Because I feel like the one with the word advertising makes it like they're trying to sell you something, which you don't really want to be sold.” (girl, 13-17 years old, Ontario)

“The word makes me want to watch it less. Because if I'm seeing ‘advertising’ during all the video, I would get annoyed with it and wouldn't want to see it because I don't like watching ads.” (boy, 6-12 years old, Ontario)

3.2.3. Data related to the regulatory component: Disclosure and rights

✓ About disclosing the link between influencers and brands

Instagram posts include the symbol #ad (for interviews in English) or #collab (for interviews in French). Among English-speaking children, only a few had ever seen #ad in social media posts, while no French-speaking child was familiar with #collab. Note that children who do not use Instagram are not familiar with these hashtags.

- When we asked about the meaning of #ad, about half of the English-speaking children were able to tell us that posts labeled like this are, or include, an advertisement. However, as mentioned previously, we noticed that these children do not fully understand the meaning of the term advertising as it relates to influencers.

“No, never seen it. I don't really know what it means to be honest.” (boy, 6-12 years old, Ontario)

“I've never seen it, but I would say that they're advertising children's clothing.” (girl, 13-17 years old, Ontario)

“I've seen hashtag ad before. It's saying it's promoting something. An ad is. They're getting paid for putting it in there. I mean, you get paid for ads. In that certain product or clothing or makeup or whatever it is, they're promoting it. And the more likes you get or the more shares or whatever, you're going to get compensated for it. They're promoting her dress.” (girl, 13-17 years old, Alberta)

- The French hashtag #collab was not well understood by the French-speaking children interviewed.

“Never seen this hashtag. It's not clear what it means.” [TRANSLATION] (girl, 6-12 years old, Québec)

“They're collaborations, they act like s partners, that means that the watch website must tag the lady. The influencer helps the watch, the watch helps the influencer.” [TRANSLATION] (boy, 13-17 years old, Québec,)

✓ **About parental awareness of laws applicable to advertising to children**

Most parents surveyed knew little about regulations governing to advertising to children.

“Not that I'm aware of. If there are laws, it's news to me.” (mother of a boy, 6-12 years old, Ontario)

▪ *Parents' perspective in general*

The parents surveyed said they see a lot of ads on television or on social media that appear to be targeting children, which gives them the impression that advertising to children is permitted.

“I would say it's allowed, just because I see so many ads, whether it's on the internet or TV, or they do seem to be targeted towards children who are going to want something. And then they're going to go to an adult and find a way to get it. I'm not aware of any cutoffs or any laws around it myself. But it's not something I've ever looked into either, but the ads do seem to target quite young children sometimes depending on the products.” (mother of a boy, 6-12 years old, Maritimes)

“I don't know if by law it is prohibited or not, I don't know the legality of that, but I think that it is geared towards children. So I think that they try to target kids, but the kids don't understand, so they don't know that they're being targeted.” (mother of a girl, 6-12 years old, British Columbia)

▪ *Parents' point of view in Québec*

Parents in Québec do not seem to know that there are laws in their province that prohibit commercial advertising aimed at children under 13 years of age. Those who think that certain legal limitations do exist do not know from precisely what age they apply.

“It is allowed, I think. I think it's from school age, 6, maybe I'm wrong.” [TRANSLATION] (mother of a girl, 6-12 years old, Québec)

“I think it's legal, but I don't know.” [TRANSLATION] (father of a boy, 6-12 years old, Québec)

I don't know, but I'd like to say, it's 14 years old at the very least, but officially, I don't know. I would say that if we can go to the doctor on our own at 14 years old, make a decision on our own, I would like to say that it's under 14 years old.” [TRANSLATION] (mother of a boy, 6-12 years old, Québec)

3.3. Focus groups and semi-structured interviews: comparing responses

We noted some similarities and some differences in what was said in the focus groups made up of adults and the semi-structured interviews with minors accompanied by their parents. The adult participants said they knew about influencers and influencer marketing, while young people knew about influencers but were less familiar with the phenomenon of influencer marketing. However, even adults who claimed to be familiar with influencer marketing said they had difficulty differentiating paid and brand-driven ads from disinterested, genuine recommendations from influencers.

Adult participants did not know about virtual influencers (Robots) and disapproved of the practice, whereas young people and their parents were familiar with the phenomenon of child influencers and welcomed it. However, these young people were still more inclined to follow older influencers than child influencers.

As for the other techniques, the majority of adults were familiar with the ones we presented, with the exception of the Takeover technique, which seemed less well-known among French speakers. Furthermore, not all the participants perceived the advertising message behind these techniques, particularly with regard to *Unboxing*, *Takeover* and *Special Events*. All the young people recognized the Unboxing technique, but the majority of these were unaware of the advertising message that may have been behind it.

The techniques used in influencer marketing are very popular with adults and young people alike. According to the adults, advertising by influencers, although it can sometimes be difficult to distinguish from the rest of the content, is more effective than traditional advertising, especially since it appears to be more natural and therefore affects them more. For their part, the children recognize messages shown on television or even those preceding or during YouTube video clips as advertising, but do not always realize that when an influencer talks about a brand, he may be doing a type of advertising. Neither the young people nor the adults watch ads on television or on the internet, but will follow influencers all the way through their presentation.

Displaying the “advertising” label on influencer posts left no one indifferent. The adults reacted strongly to this label, which they found exaggerated, claiming it would discourage them from viewing the rest of the post. They nonetheless agreed that it would be the most transparent way to present advertising and that it would be especially pertinent for young people. The children, for their part, clearly stated that the label “advertising” makes it clear it is advertising. They did not really understand, however, what the term advertising means. Like adults, they said advertising turns them off.

As for the disclosure symbols suggested by Ad Standards, both English and French-speaking adults considered that the hashtags #partner or #ad in the descriptive text clearly express the influencer’s material connection with a company. In addition, only a few English-speaking children had ever noticed #ad in a social media post, while no French-speaking child knew about #collab. Only half of the children understood that these hashtags refer to advertising.

As regards the obligation to disclose a material connection, the adult participants considered either that influencers do not have the right to disclose this link, or that there is legal vagueness here. Some said that they did not know what the situation was.

With regard to advertising intended for children, the parents of the young people interviewed consider that advertising aimed at children is authorized because of its omnipresence on the Internet. As for parents in Québec, most do not know that advertising is prohibited for children under 13, and those who are aware there is a prohibition do not know to which age group it applies.

CHAPTER 4. DATA ANALYSIS

This chapter is devoted to the analysis of the data collected within the framework of this research in order to answer the general research question, which is: From the standpoint of transparency, does the current regulation in Canada respond effectively to the challenges raised by the advertising techniques used in influencer marketing? The answer to the general research question will emerge gradually through the answers given to the specific sub-questions that are recalled below.

Based on the analytical framework we presented in Chapter 2, we will perform our analysis of marketing techniques and their impacts, which constitute the marketing and psychological components of the framework, in the light of the laws, standards and policies that constitute the regulatory component of the framework. Our analysis will therefore draw conjointly on the field data collected from study participants and the regulations in force respecting the issues raised and will be supplemented by elements drawn from the doctrine and interviews with experts.

The research sub-questions are as follows:

1. Are influencer marketing techniques considered to be advertising techniques?
2. What impact do influencer marketing techniques have on users?
3. What impact does advertising identification have on users?
4. What recourse is available to consumers in the event of a problem?
5. What do other jurisdictions teach us?

A reminder of the variables of the analytical framework our analysis is based on:

SUMMARY TABLE OF VARIABLES

VARIABLES	
A. MARKETING COMPONENT	B. PSYCHOLOGICAL COMPONENT
<ol style="list-style-type: none"> 1. Techniques related to the creator 2. Techniques related to the product 	<ol style="list-style-type: none"> 1. The impact of influencer marketing techniques on users' identification of the advertising message 2. The impact of influencer marketing techniques on user choices 3. The impact of advertising identification on consumer choices
C. REGULATORY COMPONENT	

1. Laws
2. Standards
3. Terms of use

4.1. Sub-question 1: Are influencer marketing techniques considered to be advertising techniques?

According to some authors,¹⁴⁵ commercial advertising serves both the producer and the consumer. It allows the former to place their products or services on the market or broaden their visibility, while it informs the second of the existence of certain products and services as well as their characteristics. To some extent, advertising is necessary for the functioning of the consumer economy. According to these same authors, however, this type of advertising does not offer only advantages, in particular because the information transmitted to the public is generally biased and incomplete.

Influencer marketing also involves the transmission of information from producer to consumer. Moreover, the participants in our study, whether adults or children, greatly appreciate receiving new information from influencers. In their eyes, influencers are references for new information; they channel it and help them make choices. From this point of view, it can be said that some influencers, at least in part, achieve their goal of inspiring others. Moreover, for influencer Audrey Scoropad, it was this same desire¹⁴⁶ that motivated her to become an influencer. When it comes to product placement, things are more complex. For instance, participants sometimes find it difficult to differentiate between recommendations that have been dictated by brands from disinterested, genuine recommendations by influencers.¹⁴⁷ This confusion varies depending on the age group and the techniques used. It will be recalled that we previously drew a distinction between techniques linked to the creator and techniques linked to products (see 2.2.1.). It turns out that these two categories are very often inseparable, because the very personality of the influencer is the driving force behind product sales. When choosing an influencer, marketing agencies also take into account how many followers they have and their level of commitment.¹⁴⁸

Adults

For adults, the confusion very often stems from the fact that they cannot clearly distinguish when their influencer is just an influencer and when they are engaging in influencer marketing by advertising. This ties in with what the literature has to say about the influencer's "double hat," as discussed earlier. For example, when they started off as influencers, they used the Unboxing technique simply to show products that they chose themselves. Later, they may have entered into agreements with companies to use the same technique to promote those

145. Nicole L'Heureux, Marc Lacoursière, *Droit de la consommation*, Cowansville, Éditions Yvon Blais, 6th edition, 2011, p. 479.

146. Interview conducted on April 15, 2021 with influencer Audrey Sckoropad. Ms. Scoropad works mainly in the field of wellness, motherhood and healthy eating.

147. Comments made by a participant in the discussion groups: "I'm really wary (...) because I never know what they've been paid to say (...) or whether it's something they actually believe themselves." (Group 4, Ontario).

148. Interview conducted on April 15, 2021 with influencer Audrey Sckoropad. Ms. Scoropad works mainly in the field of wellness, motherhood and health food.

companies' products. For some consumers, it is simply a matter of continuity. They don't see the difference between what the influencer does for personal gain and what constitutes ad placement.¹⁴⁹

This confusion is even greater when it comes to virtual influencers, a phenomenon that users seems to know little about. This is not surprising because, according to some marketing professionals,¹⁵⁰ the existence of blocking software is causing advertisers to resort to increasingly subtle techniques for conveying advertising messages without the consumers' knowledge. More and more advertisers are producing content that they give away free to customers, who as a result are less likely to perceive the practice as advertising.¹⁵¹

It is important to emphasize the general impression that an advertisement gives from the point of view of the consumer.¹⁵² According to the Supreme Court of Canada in *Richard v. Time*, the perspective to be considered is similar to that of the "ordinary shopper in a hurry," that is, the perspective of a consumer who pays no more than a normal amount of attention to what jumps out at them upon their first contact with an advertisement. The standard set by the Supreme Court for advertising is that of the "gullible and inexperienced consumer."¹⁵³ It is therefore important to keep this criterion in mind when designing any advertising message.

Children

Confusion about advertising is more pronounced among children than adults. In fact, most children simply don't consider the possibility that an advertising message could be behind a marketing technique. Among children, the very notion of advertising is very abstract or unrecognized. Some may understand that the commercial that airs before or during an online video is similar to what they can see on television, but they do not understand that the influencer's words may be concealing an advertisement. This is even more true when the influencer looks like them, as in the case of child influencers

The children and parents who participated in our study do not associate child influencers with advertising aimed at children at all. Some parents only see them as role models for their own children. What is more, some of the children interviewed revealed to us that they were influencers themselves. It should be noted that none of them had yet signed a contract with a brand.

To determine whether an advertisement is aimed at children, different criteria apply¹⁵⁴ including how the advertising message is presented. Accordingly, when an advertisement designed for children is presented in such a way that it children under 13 years of age can access it, it can be

149. "Without any background for the company, like Brad said, it comes across to me that it's just a post from a person saying, 'I had fun.' It's more like a personal page thing." (Image 3, Group 7, British Columbia).

150. Sol Tanguay, "Le ciblage publicitaire en ligne, dans le consommateur numérique: une protection à la hauteur de la confiance ?" In Pierre-Claude Lafond and Vincent GAUTRAIS (eds.), *Le consommateur numérique: une protection à la hauteur de la confiance*, Montréal, Éditions Yvon Blais, 2016, p. 174.

151. Sol Tanguay, "Le ciblage publicitaire en ligne, dans le consommateur numérique: une protection à la hauteur de la confiance ?" In Pierre-Claude Lafond and Vincent GAUTRAIS (eds.), *Le consommateur numérique: une protection à la hauteur de la confiance*, Montréal, Éditions Yvon Blais, 2016, p. 174.

152. RSQ, cP-40.1, s. 218.

153. *Richard v. Time Inc.*, 2012 CSC 8, [2012] 1 RCS, para. 67.

154. RSQ, cP-40.1.

concluded that the advertisement is aimed at them.¹⁵⁵ The use of child influencers is, in our opinion, a means of attracting children. When kids gradually move away from younger influencers and onto older ones, they may be exposed to content that is unsuited to their age group. This is problematic, especially since children have a strong tendency to identify with role models that influence them, therefore incurring the risk of imitating behaviour that is inappropriate for their age group.

These results are similar to those observed in research carried out elsewhere in the world. For instance, a study conducted out in England in 2019 entitled “Labeling of influencer advertising”¹⁵⁶ reveals that 80% of people aged 14 to 63 consult social networks on a daily basis, yet only a third of these people realize that many of the posts made by certain influencers are sponsored. Does this not signal a disjuncture between the regulations and what happens in the real world?

4.1.1. Legal framework: the notion of advertising applied to influencer marketing techniques

The difficulty that the participants had in perceiving the advertising message when influencer marketing techniques were used makes us wonder whether certain provisions might not be added to the existing regulations to address these techniques. It will be noted that the adult participants viewed contests and affiliate marketing techniques¹⁵⁷ as an opportunity to advertise or promote. The participants in the study were very alert to cues such as promotional codes and discounts on purchase prices. In addition, companies see the personalization of promotional codes as a means of assessing the selling power of their influencers and remunerating them accordingly.¹⁵⁸ It is possible that the comparative ease with which the advertising use of these techniques is recognized is a result of the fact that they are already widely used to advertise in other contexts, in traditional marketing or online generally.

A. Laws

In Canada and in the provinces, there are laws and regulations that can be applied to advertising, and to false or misleading advertising in particular. Chief among these is the federal *Competition Act*. In addition, the Competition Bureau has published guidelines, specifically for the electronic context, on the application of the *Competition Act* to representations on the Internet.¹⁵⁹ It is important to clarify that we are not concerned with privacy laws in this study.

a) *The Competition Act*

155. Nathalie Jackson, “La publicité commerciale destinée aux enfants,” in Pierre-Claude-Lalond (ed), *La publicité, arme de persuasion massive: Les défis de l’encadrement législatif*, Montréal, Éditions Yvon Blais, 2012.

156. <https://www.asa.org.uk/resource/labelling-of-influence-advertising.html> [Accessed November 1, 2019].

157. Thibault Vincent: *L’affiliation: Booster ses ventes sur Internet*. Online:

https://www.google.ca/books/edition/L_affiliation/mMmnAU-Jd74C?hl=en&gbpv=1&dq=L'affiliation+vincent&pg.

158. According to some participants in the study: “They get a discount code with his name, the reason why he has ryan50, they will know how many people he influenced to buy that product, so it’s like a commission. If he has 100 people using that code, that’s how they can tell “on the contract, this is what we agreed, 100,000 people used your code, we’ll pay you that.” (Image 3, Group 5, Maritimes).

159. Competition Bureau of Canada, *Enforcement Guidelines: Application of the Competition Act to Representations on the Internet*, http://publications.gc.ca/collections/collection_2010/ic/lu54-1-2009-eng.pdf.

As already pointed out, the *Competition Act*¹⁶⁰ does not define what advertising is, but prohibits false or misleading advertising. Some parallels can be drawn between what is set forth in its provisions and certain influencer marketing techniques.

Section 74.01 (1) and creator-related techniques

This section of the Act emphasizes, in particular, that the behaviour of anyone who in any way gives a member of the public misleading information in a material respect is open to scrutiny. In the guidelines, a material respect¹⁶¹ is defined as any representation that prompts a person to adopt conduct which, on the basis of that representation, appears to them to be advantageous. The omission of relevant information could be seen as a material fact, according to the Competition Bureau, which emphasizes that this test relates to whether the representation is likely to induce a consumer to buy a product or service:

"[A] representation will be false or misleading in a material respect if, in the context in which it is made, it readily conveys an impression to the ordinary citizen which is, in fact, false or misleading and if that ordinary citizen would likely be influenced by that impression in deciding whether or not he would purchase the product being offered."¹⁶²

In the context of influencer marketing, it could be considered that a material fact has been omitted if an influencer or a child influencer uses their status to promote a product or service in exchange for a benefit or remuneration without being transparent in this regard, or if a company passes off a virtual robot as a human influencer without saying so. Thus, according to our understanding, the Law does not determine the form that an inducement may take, nor does it list all possible representations, but provides a concept that makes it possible to include the techniques used in influencer marketing due to the false impression they can give.

As for the "general impression test," the *Guidelines*¹⁶³ point out that businesses should not assume that consumers will read all of the information on a website, just as they will not read every word in a printed document. Therefore, all the information that a company is required to disclose to prevent a representation from becoming false or misleading should be prominently displayed so that consumers can easily see it.

Section 52.1 (1) and product-related techniques

Section 52.1 (1) defines telemarketing as a¹⁶⁴ **practice** that consists of communicating **orally by any means of telecommunication to promote, directly or indirectly**, the use of a product or business interest. According to the *Guidelines*,¹⁶⁵ this article applies to situations in which "interactive telephone communications" occur. However, it specifies: "As *technology evolves*

160. *Competition Act* (RSC, 1985, c. C-34) published at www.lois.justice.gc.ca.

161. Competition Bureau of Canada, *Enforcement Guidelines: Application of the Competition Act to Representations on the Internet*, http://publications.gc.ca/collections/collection_2010/ic/lu54-1-2009-eng.pdf.

162. *R. v. Kenitex Can. Ltd. et al.* (1980) 51 CPR (2d) 103.

163. Competition Bureau of Canada, *Enforcement Guidelines: Application of the Competition Act to Representations on the Internet*, http://publications.gc.ca/collections/collection_2010/ic/lu54-1-2009-eng.pdf.

164. The bold type used in this paragraph was added by the author.

165 http://publications.gc.ca/collections/collection_2010/ic/lu54-1-2009-eng.pdf.

with regard to telecommunications and Internet services, new modes of communication will be evaluated on a case-by-case basis.”

The question arises as to whether certain techniques used in influencer marketing, especially those related to products such as unboxing or the production of video-sponsored posts, might not, based on a case-by-case analysis, be seen as a form of telemarketing. Indeed, since these techniques consist in offering products on the internet through visual and oral presentation, why should they not be likened to telemarketing? Especially since, according to the Competition Bureau, the term telemarketing refers to direct communications between two or more people. The *Competition Act* requires the disclosure, in a fair and reasonable manner at the beginning of each communication, of several pieces of information, including the identity of the person on whose behalf the communication is made. By combining these techniques with telemarketing, it might become clearer that it is indeed a sales technique, thereby perhaps making it easier to apply the law.

Section 74.06 and contests

With regard to contests, s. 74.06 of the *Competition Act* states that the actions of anyone who organizes a contest, particularly with the aim of promoting a product, are open to review. This practice appears to be transposable to influencer marketing due to the fact that influencers propose contests to attract followers and boost a brand's visibility.

In the case of advertising contests, this section of the law imposes certain obligations, including the proper, fair and timely disclosure of certain items such as the number and value of the prizes, the regions to where they apply, and any fact known to the person that significantly affects the chances of winning.

b) Consumer protection laws

As noted above, most provinces in Canada have laws to protect consumers from certain business practices. Most of these laws include provisions for advertising and prohibit false or misleading advertising.¹⁶⁶

In Québec, the *Consumer Protection Act (CPA)*,¹⁶⁷ like the *Competition Act*, does not define the term advertising but uses, in its s. 216, a broader concept, namely representation, which includes an affirmation, a behaviour or an omission. The advantage of this concept, in our estimation, is that it covers a range of techniques and practices such as those used in influencer marketing. Moreover, in her work on the analysis of this law, author Pauline Roy emphasizes that “advertising” is understood to mean preparing, using, distinguishing, distributing, publishing or disseminating an advertising message or causing such a message to be published or disseminated.¹⁶⁸

166. E.g.: RSQ, cP-40.1, s. 215.

167. RSQ, cP-40.1.

168. Pauline Roy, *Droit de la protection du consommateur, Lois et règlements commentés*, 2nd edition, Éditions Yvon Blais, 2009, p. 53.

Like the *Competition Act*, s. 218 of the CPA emphasizes that the general impression of a representation must be taken into account in determining whether it constitutes a prohibited practice. Section 217 specifies that it is not important whether a contract is concluded following this representation for the practice to be considered prohibited. Section 228 of the Act prohibits failing to mention a material fact during a representation made to a consumer, which may well include the techniques used in influencer marketing; this section is similar to s. 74.01 (1) of the *Competition Act*.

In addition, s. 230 b) of the CPA prohibits, by any means whatever, the use of any pretext for soliciting the sale of goods or the provision of services. In our opinion, an influencer who uses their status to sell a product or provides a service to their followers without disclosing the link that connects them to the brand or the company is in contravention of this section because they are using their “influencer hat” to attract their followers, while at the same time wearing the hat of a marketing agent by drawing the attention of followers to a product that they want to sell.

In the case law relating to s. 230 (b), there are examples of consumers who received a call from someone who announced to them that they had won a competition that they had not taken part in. It is claimed in this case that the competition was a pretext to sell a product to consumers.¹⁶⁹ We also wish to mention the case of a consumer who received a call advising him that he had won an alarm system and an accommodation package when, on site, he learned that accommodation would cost him \$65 per day.¹⁷⁰ These cases admittedly did not occur in a context of influencer marketing, but the procedures followed may well be the same as ones used in that domain.

It is noteworthy that Québec is the only province to have specific provisions prohibiting the use of advertising techniques towards children, which are set forth in s. 248 and s. 249 of the CPA. The first section forbids all commercial advertising directed at persons under the age of 13, and the second defines the criteria for determining whether or not the message is aimed at children. It is relevant to ask whether one should take into account the platform used when analyzing the context. Is there any difference between a platform designed only for children and any other platform? We believe not, because if we consider that child influencers can be found on such a network, it is possible that we will find advertising on it that is aimed at children, whether or not the network is designed for adults or children. The future will tell us more, and will probably involve some case-by-case analyses.

In Ontario, the *Consumer Protection Act, 2002*, which governs consumer contracts, also does not define what advertising is. However, in s. 14 (14), it particularly prohibits any unfair practice that it defines as using innuendo or ambiguity about a material fact. This is consistent with the provisions of Québec’s CPA and the *Competition Act*. In addition, in s. 17 (3) of the Act, the legislator raises an exception with regard to representations made in good faith in the normal course of a merchant’s activities. This section states that the fact of printing, distributing, broadcasting or televising in good faith, on behalf of others, an assertion accepted in good faith to this end in the ordinary course of commercial activities is not an unfair practice. However, the law gives meaning to the expression “to advertise” in the section dealing with advertising of

169. *Goyette v. 9351-0303 Québec inc.*, 2019 QCCQ 5349.

170. *Lefebvre v. 9067-3732 Québec inc. (Adsecurmax)* 2006 QCCQ 856.

illegal sites. Thus, s. 13.1, which prohibits advertising an online gaming site, specifies in points 13.1 (3) and 13.1 (4) that a person is advertising only if the source of the advertisement is located in Ontario or if the advertisement is directed primarily at residents of Ontario. This section is interesting in the context of globalization, when the Internet enables unlimited dissemination. Furthermore, the expression “*advertising*” means disseminating information by any means with a view to promoting the use of an online gaming site.

It should be noted that on December 1, 2020, the Ontario Ministry of Government and Consumer Services launched a public consultation with the aim of modernizing its consumer protection law, which had not been reviewed since its entry into force in 2005.¹⁷¹ According to the consultation paper entitled *Consumer Protection Act, 2002 Review Consultation Paper*,¹⁷² the proposals include clearer, more consistent rules for consumer contracts in general, improved protection against unfair practices by promoting a clearer, more robust approach to unfair practices, and the prohibition of contracts that mislead consumers about their rights as well as recourse to stronger, clearer remedies for consumers.

In Alberta, the *Consumer Protection Act* (formerly the *Fair Trading Act*)¹⁷³ contributes, in its definition of unfair practices, elements that may be pertinent to techniques related to both the creator and the products. For instance, s. (6) (a) points out that a supplier who does or says something that might reasonably deceive or mislead a consumer commits an unfair practice. We also deduce, from the reading of s. (6) (z), that the fact of creating confusion among consumers with regard to the status of the influencer and the non-disclosure of the advertising nature of their intervention could qualify as misleading and therefore be considered an unfair practice. In addition, a representation that appears objective when it is made principally to sell goods or services, may also be considered an unfair practice unless there is a clear indication that it is an advertisement or a promotion. Note that s. (4) (a) of Alberta’s *Consumer Protection Act* could apply to influencer marketing techniques.

Like s. 217 of the Québec CPA cited above, s. 8 of Alberta’s *Consumer Protection Act* emphasizes that it is not necessary for a transaction with a consumer to have been concluded in order for it to be considered an unfair practice.

Finally, it should be noted that part 4 of the Alberta law, which is made up of s. 42 and its paragraphs, concerns electronic media. This section gives the Minister the power to adopt regulations governing online marketing, particularly with regard to the various forms of media and marketing (s. 4a).

British Columbia has the *Business Practices and Consumer Protection Act*. However, when it comes to advertising, Consumer Protection BC, the body responsible for enforcing the Act, directs consumers to Advertising Standards Canada (ASC).¹⁷⁴ Note, however, that in s. 6 of part 1 of the *Business Practices and Consumer Protection Act*,¹⁷⁵ which contains definitions and information on the application of the Act, the legislator designates an advertiser as a supplier who publishes advertising and states that in the event of misleading advertising, an advertiser

171. <https://www.ontariocanada.com/registry/view.do?language=en&postingId=35387>.

172. Consulted online: <https://www.ontariocanada.com/registry/view.do?language=en&postingId=35387>

173. <https://www.canlii.org/en/ab/laws/astat/sa-1998-cf-1.05/149494/sa-1998-cf-1.05.html>

174. <https://www.consumerprotectionbc.ca/2017/05/misleading-advertisements-what-can-be-done-about-it>

175. <https://www.canlii.org/en/bc/laws/stat/sbc-2004-c-2/latest/sbc-2004-c-2.html>.

acting on behalf of another supplier (the one from whom the misleading advertising originates) is not responsible for the fault if they can prove that they were unaware of this fact.

In light of the above discussion, it appears that there are provisions in various applicable Canadian laws governing advertising that cover the techniques used in influencer marketing, both those related to the creator and those related to the products. These laws allow us to clearly associate the techniques in question with advertising and commercial practices that are covered by such laws. However, considering that influencer marketing is a recent practice, the application of the various provisions will depend on how the courts interpret them.

4.1.2. The Canadian Code of Advertising Standards

This Code is administered by Ad Standards, a Canadian association of companies that has decided to self-regulate.¹⁷⁶ It defines the acceptability criteria that ensure the integrity and viability of advertising in Canada.¹⁷⁷ It contains 14 clauses that specify what constitutes acceptable advertising. This Code does not replace the laws in force in Canada, but lays down important criteria about the form that an advertisement can take. For example, Clause 2 of the Code, entitled “Disguised Advertising Techniques,” clearly stipulates that no advertising should be presented in a format or in a style that conceals the fact that it is an advertisement. This clause relates to the issue of transparency, which is the subject of this research, and addresses the techniques relating to the creator as well as the other techniques we deal with in the research.

For Ad Standards, it is the Advertising Standards Council (ASC)¹⁷⁸ that is responsible for examining complaints about possible violations of the Code. In analyzing complaints relating to Clause 2, the Council provides clarifications. For instance, in the context of a complaint against the advertiser Nextdoor of Toronto,¹⁷⁹ the complainant alleged that the fact that the advertiser sent him letters promoting his services in the form of a “neighborhood hub” was misleading. In fact, the letters sent by the advertiser were not identified as advertising. They were presented as a means of socializing among neighbours, and even appeared to have been posted by neighbours.

Based on the definition of advertising in the Code, which reads, “Any message (...) the content of which message is directly or indirectly controlled by the advertiser (...) and communicated in any medium (except those listed under Exclusions) to Canadians, with the intent to influence their choice, opinion or behaviour,” the Council found that the advertiser's letter to consumers was indeed intended to convince them to subscribe to his application. The Council concluded that this was clearly advertising. It is possible to draw a parallel here with the techniques used in influencer marketing, such as creating confusion about the status of the influencer or opening a box in front of the camera. If the goal is to convince followers, it is in fact advertising.

176. <https://adstandards.ca/>

177. <https://www.opc.gouv.qc.ca/commercant/pratique-commerce/publicite-loi/norme-canada/>.

178. <https://adstandards.ca/complaints/>

179. The complaint was about the advertiser Nextdoor Inc. in Ontario: <https://adstandards.ca/complaints/complaints-reporting/recent-complaint-case-summaries/>

In another complaint based on Clause 2 and directed against Winnipeg Gold Buyers,¹⁸⁰ the plaintiff alleged that the advertisement was presented as a news item, which was misleading. The majority of Council members agreed with the complainant that the commercial was formatted in such a way as to suggest that it was news, and that it was only at the end that it became clear to the viewer that this was an advertisement. Here again, a parallel can be drawn with influencer marketing techniques that actually convey an advertising message.

Clause 7 of the Code deals with testimonials, specifying that they must be based on adequate information or on appropriate information related to the product or service identified. With regard to children, the Code makes a distinction between advertising aimed at children and advertising aimed at minors. The first is addressed in Clause 12 and the second in Clause 13. With regard to advertising aimed at children, it states that it is forbidden to exploit their credulity and inexperience. We can therefore conclude that the same would be true of the use of child influencers to attract other children, which can be seen as exploiting children's credulity. As for advertising aimed at minors, the Code prohibits attractive advertisements featuring products that are prohibited for minors and stipulates that anyone appearing in such advertisements must be an adult. Hence, the Code does not prohibit advertising aimed at children, but stipulates that it be presented in a context that is safe for them.

4.1.3. Social media policies

Social networks have adopted various policies ranging from general terms of use to community rules, including advertising rules (or policies). In some cases, there are also rules relating to branded content¹⁸¹ and policies governing virtual items.¹⁸² This is what emerged from our analysis of four of the networks most used by study participants: Instagram,¹⁸³ Snapchat, TikTok, and YouTube.

When it comes to advertising, some networks make a clear distinction between branded content posts that creators or editors (influencers) create in the ad manager and other ads that we see on social media.¹⁸⁴ The first are those that concern us in the context of this research, while the second are paid ads that companies post on social media channels in order to promote their products.¹⁸⁵

This form of advertising is a way of funding social media networks, thus allowing them to offer their service to users free of charge.¹⁸⁶ Reading through Instagram's Terms of Use, we understood that those who use this network consent to their personal data being used in order to send them advertising based on their interests.¹⁸⁷ Even YouTube Kids is financed by advertising.¹⁸⁸ However, according to the advertising policy of this network, advertising is

180 <https://adstandards.ca/fr/plaintes/rapports-sur-les-plaintes/decisions-recentes/>.

181. In the case of Instagram: <https://www.facebook.com/business/help/221149188908254>.

182. In the case of TikTok: <https://www.tiktok.com/legal/virtual-items?lang=en>.

183. <https://www.facebook.com/policies/ads>.

184. See branded content (Instagram):

https://www.facebook.com/help/instagram/116947042301556?helpref=page_content.

185. <https://www.facebook.com/help/instagram/478745558852511>.

186. See the "How is our service funded" section of the Instagram Terms of Service:

<https://www.facebook.com/help/instagram/478745558852511>.

187 <https://www.facebook.com/help/instagram/478745558852511>.

188. https://support.google.com/youtube/answer/6168681?hl=fr&ref_topic=9257895.

limited to: “So, when you select a YouTube video in the app, you may see an ad bumper followed by a video with an ‘ad’ disclaimer preceding the video you selected. These are ‘Paid advertisements.’”¹⁸⁹ For its part, TikTok emphasizes that its platform can generate income from the use of its services, particularly through advertisements, sponsorships or promotions.¹⁹⁰

The rules related to the use of advertising in influencer marketing are spread out here and there throughout the various policies of the above-mentioned networks. These policies concentrate primarily on banning certain advertising content, including false claims.¹⁹¹ However, some platforms have special provisions for certain forms of advertising.

About the techniques

a) YouTube

YouTube's advertising policy is quite interesting considering the range of techniques used in influencer marketing and the fact that it gives concrete examples of what it prohibits as practices. For example, in “Misleading ad design,”¹⁹² the platform prohibits advertisements that are not identifiable as such. In the examples it presents to help interpret this clause, the platform cites advertisements that are indistinguishable from other content and advertisements that use surreptitious techniques to hide their nature. These are concrete examples of what is being done in influencer marketing, based on what emerged from the discussions and interviews carried out in the context of this research.

In addition, the platform sets editorial requirements¹⁹³ allowing only clear, professional-looking ads that direct users to content that is relevant, useful, and easy to interact with. It also formulates certain requirements regarding the use of affiliate links. In fact, depending on the platform, these links¹⁹⁴ must offer unique value to users in addition to being functional, useful and easy to find. In our opinion, this last requirement relates to affiliate marketing. The platform prohibits making misleading statements, which it defines as obscuring a statement or omitting important information about the identity, affiliations or qualifications of the influencer.¹⁹⁵ This definition seems relevant to creator-related techniques, which can have the effect of blurring the status of the influencer or the “hat” they are wearing. Information about the influencer’s qualifications is important for users, as it can figure heavily in their decision of whether or not to follow one of their recommendations.

YouTube also prohibits withholding or distorting information about the advertiser's company, product or service.¹⁹⁶ In addition, in the Help section¹⁹⁷ of the platform, YouTube defines by

189. https://support.google.com/youtube/answer/6168681?hl=fr&ref_topic=9257895.

190. See section 9 of TikTok's terms of service: <https://www.tiktok.com/legal/terms-of-use?lang=en>.

191. In the case of Instagram, the information can be found in section 3 of the advertising rules; in the case of Snapchat, it can be found in the advertising policy, “False Content” section.

192. See YouTube's advertising policy: <https://support.google.com/adspolicy/answer/6020955>

193. See YouTube's usage policy, Editorial section: <https://support.google.com/adspolicy/answer/6020955>.

194. See YouTube's usage policy, “Destination requirement” section: <https://support.google.com/adspolicy/answer/6020955>.

195. See YouTube's Advertising Policy, “Misleading Representation” section: <https://support.google.com/adspolicy/answer/6020955>

196. See YouTube Advertising Policy, “Unacceptable Business Practices” section: <https://support.google.com/adspolicy/answer/6020955>.

means of a set of questions and answers what it means by product placement, support and sponsorship. It states that product placements are pieces of content created for a third party in exchange for compensation, or when that third party's brand, message or product is directly incorporated within the content.

A support (referral), is content created for an advertiser or a marketing specialist. They contain a message that the public is likely to believe, that reflects the opinions, beliefs or experiences of the content creator or endorser. A sponsorship, on the other hand, is content that has been funded in whole or in part by a third party. They usually promote the third party's brand, message or product without embedding it directly within the content. Finally, the platform provides specific guidelines for contests. For example, in addition to having to respect its terms of use and other policies, contests cannot be run through ad units.

b) Instagram

Instagram devotes a few lines to how to disclose information in policies relating to branded content.¹⁹⁸ For example, the network indicates that branded content originates from a creator or publisher who introduces his professional partner or who is influenced by the latter in the context of a financial or other exchange. Instagram emphasizes to its users that they must comply with all applicable laws and regulations, including ensuring that they provide all the necessary information to those who follow them, such as indicating the commercial nature of the content they publish.

Instagram has some format restrictions. For example, branded content can only be used where the branded content tool is available (such as Facebook Stories or Instagram Posts). In addition, pre-roll, mid-roll or post-roll ads are prohibited in video or audio content, as are the use of an advertising banner in video clips and images, the use of captions during the first three seconds of a video clip and for more than three consecutive seconds in the middle or end of it, as well as in Facebook or Instagram stories. It would be interesting to analyze, in the context of future research, what real impact these location requirements have on the recognition of advertising messages by social network users. Finally, Instagram prohibits affiliate marketing of low-quality or disruptive content.¹⁹⁹

a) Snapchat

This platform emphasizes that those who use its network as part of a promotional offer, a competition or a lottery must ensure that they comply with legal requirements.²⁰⁰

b) TikTok

This social network emphasizes that the services of its platform are provided for private and non-commercial use.²⁰¹ It clearly states, in section 7 of its Terms of Service entitled Your Use of

197. <https://support.google.com/youtube/answer/154235?hl=en#zippy=%2Cwhat-do-we-mean-when-we-talk-about-paid-product-placements-sponsorships-endorsements>

198. <https://help.instagram.com/116947042301556>

199. See section 24 of Instagram's advertising rules.

200. <https://support.snapchat.com/en-US/a/promotions-rules>

201 <https://www.tiktok.com/legal/terms-of-use?lang=en>.

the Services, that it is prohibited to use the platform for advertising or commercial solicitation purposes, unless expressly authorized by the platform. In the same section, TikTok prohibits anyone from pretending to be a person or an entity that they are not, from making a false declaration or inaccurately presenting themselves as being affiliated with another person or entity.

Other practices

All platforms prohibit fraudulent practices, but YouTube and TikTok clearly identify specific influencer marketing practices. For example, its Community Guidelines,²⁰² YouTube prohibits any practice aimed at artificially increasing the number of views and likes.

TikTok, in the *Spam and Fake Engagement* section of its Community Guidelines,²⁰³ forbids users to share instructions on how to artificially increase “views,” “likes,” “followers,” exchanges or comments. The platform also prohibits the sale or purchase of “views,” “likes” and “followers.” It also prohibits practices generating an artificial volume of interactions. Finally, the platform prohibits the exploitation of several TikTok accounts under false or fraudulent pretexts or to disseminate commercial spam.

Advertising aimed at children

At the outset, we should point out that all the platforms under study either set the minimum age for the use of their networks at 13,²⁰⁴ or at the minimum age prescribed in the user's country. Nevertheless, some platforms, such as YouTube, allow the use of the YouTube Kids network or application by younger children if a parent or legal guardian gives permission. It should be remembered that, among the young people questioned in this research, adolescents use their own accounts, while half of young people aged 6 to 12 use the account of one of their parents or have a personal account that is linked to one of their parents' accounts. YouTube prohibits targeted advertising and data collection on YouTube Kids, but although certain forms of advertising are prohibited, influencer marketing is not. YouTube Kids therefore prohibits any contest or promotion of sweepstakes, even free ones, as well as a list of products aimed at children under 13 years old.²⁰⁵ But electronic video games and their accessories are not prohibited, unless their industry classification indicates that they are unsuitable for audiences of age 12 or younger.²⁰⁶

Instagram permits advertising to children as long as it does not promote inappropriate, illegal or questionable products, services or content.²⁰⁷ On the other hand, Snapchat clearly prohibits advertising aimed at children under the age of 13—this is stated in the platform's prohibited content section.²⁰⁸ Accordingly, advertisers are required to ensure that their ads are suitable for

202 https://www.youtube.com/intl/ALL_ca/howyoutubeworks/policies/community-guidelines/?ut

203 <https://www.tiktok.com/community-guidelines?lang=en>.

204 See the terms of use and the advertising rules of the different platforms.

205 See the YouTube Kids Advertising Policy: Beauty and Fitness Products, Paid Dating Ads, Food and Drink, Illegal Products.

206 See the YouTube Kids Advertising Policy.

207. See Instagram advertising rules, Illegal products or services section: <https://www.facebook.com/policies/ads>.

208. See Snapchat's advertising policy, prohibited content section: <https://snap.com/en-US/ad-policies>

Snapchatters over the age of 13.²⁰⁹ As for TikTok, as stated above, advertising is simply prohibited except with prior authorization from the platform.

Because they are closer to emerging practices or completely at the origin of these practices, the rules set forth by Ad Standards and the policies of certain platforms are more concrete in nature than the laws. In addition, our conclusion is that the provisions set forth in both laws and standards can be adapted to the realities of influencer marketing. However, it is the mechanisms set in place to ensure they are applied that truly make a difference.

4.2. Sub-question 2: What impact do influencer marketing techniques have on users?

Anyone with an interest in media realizes that the issue of influencers is gaining ground, and the main problem raised seems to be transparency.²¹⁰ The reason is simple: these practices have an impact on consumers. But what exactly is that impact? Is it the same as that of traditional advertising? The participants in our focus groups and semi-structured interviews gave us a clear answer. In fact, because they do not meet any standard, are more lifelike, and appear more spontaneous and authentic, these advertisements have more impact on the public than traditional advertisements.

Consequently, it becomes important for Internet users to become aware of the advertising nature of the messages transmitted by influencer marketing and the techniques used in the domain.

4.2.1. The impact of influencer marketing techniques on advertising message identification: misleading advertising

The techniques used in influencer marketing are perhaps more refined than those used in traditional advertising, but they have the same goal: to convince the public in order to successfully sell products. The distinctive feature of influencer marketing is its potential for creating confusion, which opens the way to deceptive practices. Such a situation calls for heightened transparency.

Influencer Marketing Techniques and Misleading Advertising

The Supreme Court decision *Richard v. Time* centered on a personalized advertisement sent to a consumer by Time Inc. The ad told him he had won a million-dollar jackpot, but this turned out to be no more than a pretext to invite him to subscribe to the company's magazine. Even though the Court of Appeal refused to see it as a misleading advertisement, the Supreme Court, for its part, pointed out that the general impression is assessed by disregarding the consumer's personal attributes, and rejected the interpretation of the average consumer put forward by the

209. See Snapchat's advertising policy: <https://snap.com/en-US/ad-policies>.

210. <https://www.lapresse.ca/affaires/2021-04-16/les-influenceurs-et-les-photos-retouchees.php>.

Court of Appeal. According to the Supreme Court, favouring the moderately intelligent consumer criterion would have reduced the level of protection available to the consumer.²¹¹

There is a parallel to be drawn between the approach used by *Time* to attract consumers, namely, using a pretext or creating a certain impression (in *Time's* case, that of having won) to sell them a product, and the techniques used by influencers. The influencer succeeds by creating a bond of trust with their followers, which they do initially with their authentic content. They then proceed to use this trust to encourage them to buy products while they are playing a different role, one that is not clearly disclosed. Such a context is conducive to the creation of a climate of mistrust that threatens to alienate consumers from honest producers who respect the rules of the game. Such a climate could become a significant hindrance to the proper functioning of advertising.²¹² Data collected from participants in our adult focus groups shows trust in influencers to be only moderate.

“Moderate because some work for me, some don't. (...) It depends on what impact it has given me. That's how I weigh the influencer.” (Group 3, Ontario)

According to the Supreme Court of Canada, the aim of Title II of Québec's *Consumer Protection Act* (CPA), which deals with prohibited practices, is to enable consumers to trust merchants on the basis of the general impression left by the advertisement.²¹³ Indeed, the CPA prohibits not only false representations, but also misleading representations, and judges a representation to be misleading when it has the capacity to mislead.²¹⁴ To demonstrate its misleading nature, it is not necessary to provide proof that it has actually deceived a consumer.²¹⁵

According to this law, misleading representations may take the form of an allegation, omission or behaviour.²¹⁶ Section 74.01 of the *Competition Act* is consistent with this interpretation and speaks of reviewable conduct. For example, the representations in question must be intended for a possible consumer, but are not conditional on the conclusion of a contract.²¹⁷ In this case, the influencers' followers are potential consumers. Although few of the adult participants said they had purchased products recommended by influencers, the situation is quite different for children.

Another element to be considered in the assessment of deceptive nature is advertising about a material fact already mentioned, which can be found in both s. 52 (1) et seq, 74.01 (1) and in s. 228 of the Québec CPA. According to the authors,²¹⁸ the fault does not lie in the degree of discrepancy between what is advertised and the reality. The criterion is not the value to the purchaser of the advertised good, but the extent to which the misleading statement acted on them in deciding to act. Thus, an advertisement can be false and misleading even if the consumer suffers no loss as a result of their decision and even if they make an advantageous

211. *Richard v. Time Inc.*, 2012 CSC 8, [2012] 1 RCS, para. 76.

212. Inspired by Nicole L'Heureux, Marc Lacoursière, *Droit de la consommation*, Cowansville, Éditions Yvon Blais, pp. 479-480, 2011.

213. *Richard v. Time Inc.*, 2012 CSC 8, [2012] 1 RCS, para.55.

214. Nicole L'Heureux, Marc Lacoursière, *Droit de la consommation*, Cowansville, Éditions Yvon Blais, p. 495, 2011.

215. RSQ, cP-40.1, s. 217.

216. RSQ, cP-40.1, s. 216L.PC

217. RSQ, cP-40.1, s. 217.

218. Nicole L'Heureux, Marc Lacoursière, *Droit de la consommation*, Cowansville, Éditions Yvon Blais, 2011.

purchase. The damage lies **in the fact that the consumer is induced to act** by a misleading statement, which he would not have done if the advertisement had depicted the actual situation.

4.2.2. The impact of influencer marketing techniques on user choices

Children

Impact on children's choices

While few adults follow the product recommendations made by influencers, the reality is different for children. The majority of parents interviewed during the semi-structured interviews confirmed that their children had already asked them to buy products recommended by the influencers they follow.

“We were looking for an item in the mall, I don't remember what, and so we went to Hollister and we saw that one of her favourite people on YouTube (Charli D'Amelio) was the spokesperson for that store. Once we went to that store, and we saw that Charli D'Amelio was the spokesperson, she became more interested in buying from that store and we went there a lot more.” (Alberta, mother of a daughter, 6-12 years old).

In our study, parents of children who play video games are less likely to consider that their children have integrated influencers into their lives. However, it is our understanding that these children follow the recommendations that influencers such as these make about their video games.²¹⁹

If we refer to a recent decision²²⁰ rendered by the Superior Court of Québec in the context of a class action lawsuit brought against the company Epic Games Canada ULC and Epic Games Inc., we realize quite quickly the damage these games can cause to young children. Paragraph 47 of this decision states that the plaintiffs allege that their 9-year-old son developed an addiction to the game of Fortnite in the days directly following the opening of his account. The addiction was so severe that the child used all his savings and all the gifts of money his family had given him to buy PlayStation cards that allowed him to acquire V-Bucks, which gave him access to cosmetic features (such as character models, or even a Battle Pass for the game and dances), which in turn allowed him to expand his range of purchasable items.

This confirms the hypothesis outlined at the beginning of this report that, in the online environment, the distance between children and their favourite characters appears to be reduced, which can reinforce the impression of parasocial interaction. Children are more likely to engage in such relationships than adults. Their cognitive abilities are still limited, so they are attracted by amusing, likable characters, which can also lead to a preference for products presented to them in the same way.

219. Compare with these comments made by a participant in the discussion groups: *“I don't hear him talking much about influencers, to be honest. He watches it, like he mentioned, I guess, to get better at the game because they have their insight of how to better play the game. So he wants to get better. So he watches them to learn new tricks.”* Ontario, mother of a boy, 6-12 years old).

220. *F.N. v. Epic Games Canada*, 2021 QCCS 104, para. 47 (92).

From a strictly legal standpoint, Québec is the only province to ban advertising aimed at children. Although the standards that apply to all provinces state that advertising must not exploit a child’s credulity, inexperience or sense of loyalty, by their very nature, the advertising techniques used in influencer marketing tend in that direction. The techniques create confusion about the nature of the advertising message and the very ability of children to handle the concept of advertising. In s. 2 (f) of their guidelines, the Ad Standards²²¹ directly prohibit inviting children to purchase an advertised product or inducing them to ask their parents to purchase or inquire about this product. However, the children interviewed did ask their parents to buy them products. The advertising in this case is not direct, but subtle. The difficulty therefore resides in how to implement this guideline. In our opinion, government action should target social networks in order to ensure better protection of children.

To date, only Snapchat and TikTok have banned advertising aimed at children. However, there are certain practices on these platforms that are similar to this type of advertising, even though no agreement exists between a brand and an influencer.²²²

In addition, the impact of influencers on children is such that more and more children also want to become influencers. What is more, certain young people interviewed in our study had already succeeded in doing so, but had not yet been approached by a brand. One may wonder about the effects that the role of influencer could have on these children, since social networks risk exposing them instantly to comments of every kind. Are children mature enough to handle this flood of comments? Future studies might attempt to answer this question, which would perhaps lead to better supervision of the phenomenon.

4.3. Sub-question 3: What impact does advertising identification have on users?

The laws in force in Canada prohibit misleading advertising, in other words advertising that is likely to mislead consumers, which may include certain practices used in influencer marketing. However, these laws do not explicitly state that an “advertisement” label must appear on the message, as is done in some jurisdictions. Nonetheless, in its “Digest” of deceptive marketing practices,²²³ the Office of Consumer Affairs says that in order for this label to be clear, the influencer should pay attention to their content and consider whether a new reader will understand that they have a material connection to the company that sells the product in question. If the answer is no or if there is any doubt, the disclosure made by the influencer will not necessarily release them from all liability. We tested two disclosure approaches, the first using the symbols suggested by Ad Standards, and the second with an “advertisement” label as in other jurisdictions, to verify their reception by consumers.

4.3.1. Consumers’ reception of advertising: the identification symbols recommended by Ad Standards

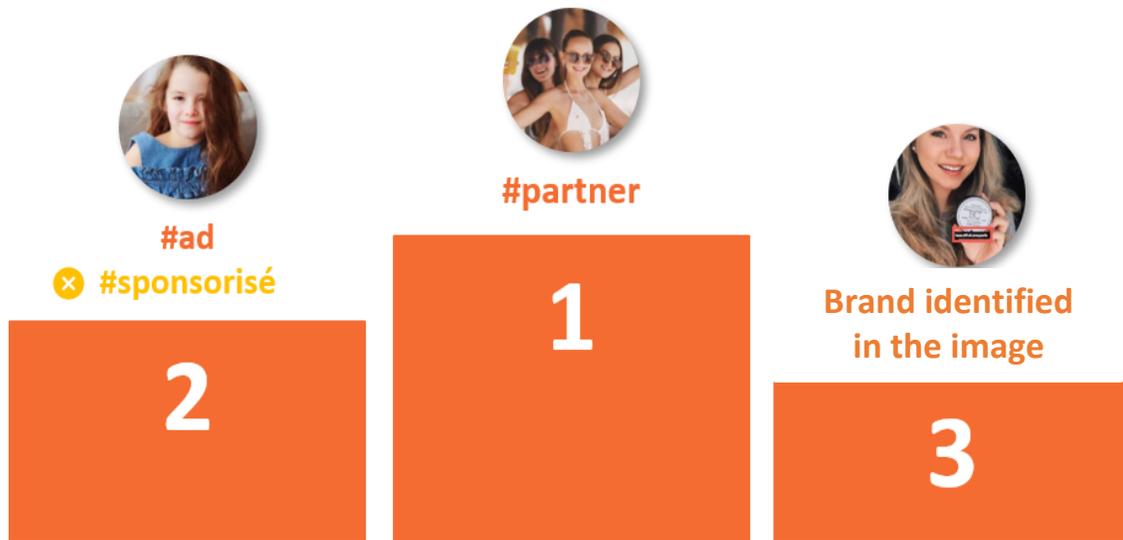
221. <https://adstandards.ca>

222 <https://www.instyle.com/beauty/skin/the-ordinary-peeling-solution-tik-tok-viral-video>

223 <https://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/eng/03946.html>

Ad Standards presents various ways in which advertising nature of a message may be disclosed. As noted above, Guideline 5²²⁴ on the interpretation of Clause 7²²⁵ of the *Canadian Code of Advertising Standards* specifies that a testimonial, review or representation must indicate any material connection between an influencer and the organization that makes a product or service available to them. To facilitate advertising identification, Ad Standards provides a guide that lists disclosure symbols. However, the usefulness of these symbols is also measured by the ability of those to whom these disclosures are addressed to recognize and interpret them.

Figure 3²²⁶



The majority of adults surveyed in our focus groups consider the #partner symbol to be the most transparent for disclosing the influencer's material connection to the business with the use of descriptive text. The disclosure guidelines²²⁷ prepared by Ad Standards recommend adding the brand name before the symbol, i.e. #XYZ_partner, and consider #partner to be ambiguous, which seems quite logical to us. It should be noted that the participants in our groups took the time to analyze the context (i.e. the images) and were able to obtain the information they needed regardless of the symbol, which could explain this discrepancy.

In their day-to-day lives, people don't necessarily take the time to consider all the details they are presented with. They most often react quickly to what jumps out at them. Transparency of

224. <https://adstandards.ca/code/interpretation-guidelines/>

225. <https://adstandards.ca/code/the-code-online>: Testimonials, endorsements or other representations of opinion or preference must reflect the genuine, reasonably current opinion of the individual(s), group or organization making such representations, and must be based upon adequate information about or experience with the identified product or service and must not otherwise be deceptive.

226. This figure illustrates the votes cast by focus group participants on the best symbols for disclosing the link between an influencer and a brand.

227. *Ad Standards, Disclosure Guidelines*, online: https://icas.global/wp-content/uploads/Ad-Standards-Influencer-Marketing-Steering-Committee-Disclosure-Guidelines_FALL2020_08.11.2020.pdf

information should not require long analysis—on the contrary, as the teachings of the Supreme Court declare in *Richard v. Time*.

In addition, there is a distinction between the hashtags #ad and #sponsored (in French: #pub and #commandité),²²⁸ according to articles on this topic. The two hashtags are not interchangeable. The #ad hashtag is used when the brand exercises some editorial control over the topic, which includes providing the editorial concept, subliminal message, and the key hashtag for the campaign, and also when prior approval is required for the post. For example, if the brand is not satisfied with the post, it could go so far as to refuse to pay. When the influencer receives compensation from the brand but the brand does not exercise any editorial control, the hashtag used should be #sponsored.²²⁹ In our view, this distinction must be interpreted in conjunction with the liability attributable to the parties involved in a post. It is clear that literacy in this area needs to be improved, especially among children. Only half of the children surveyed were able to recognize the hashtag #ad.

4.3.2. Reception among Consumers of advertising identification with the inclusion of the word “advertisement”

Figure 4²³⁰



The point of advertising identification is transparency: the avoidance of any confusion regarding the message. This promotes a degree of awareness in those exposed to the image that assists them in making informed choices. One exercise carried out during our focus groups consisted in presenting our participants with the same screenshot twice. The first time, there was no

228. Gowling WLG: *The Basis of Influencer Law: Labels and Disclosures - Gowlessence: A Behind-the-Scenes (Legal) Foray into the Influencer Marketing Industry*: <https://gowlingwlg.com/en/insights-resources/articles/2019/influencer-law-101-labels-and-disclosures/>

229. Gowling WLG: *The Basis of Influencer Law: Labels and Disclosures - Gowlessence: A Behind-the-Scenes (Legal) Foray into the Influencer Marketing Industry*: <https://gowlingwlg.com/en/insights-resources/articles/2019/influencer-law-101-labels-and-disclosures/>

230. This figure illustrates the images presented to the participants during the semi-structured interviews to determine their reaction to advertising identification.

mention in the image, and the second time, it contained the label “advertisement.” The results were very revealing.

It is clear that the label “advertisement” automatically changes the way people look at the image. In fact, the label was off-putting for most of the participants, in particular because it seemed to be closer to their idea of traditional advertising. This is the image that they have presumably rejected by excluding television from their media choices. What is clear is that people appreciate influencers, because of the authenticity the practice conveys. The same, however, cannot be said of influencer marketing, because when the ad is very explicit, participants don't view it until the end.

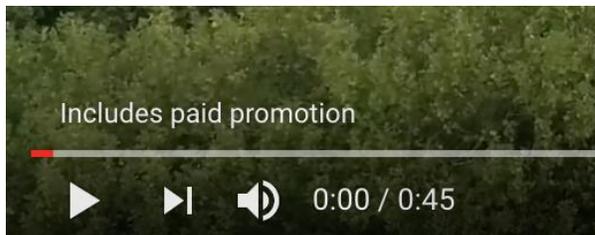
This finding corroborates two things: the fact that influencer marketing can create confusion and the importance of dissociating the influencer’s hat from the advertiser's hat. But how does one go about dissociating them?

This is particularly relevant when the audience is made up of children, because not only are they not familiar with all the symbols recommended by Ad Standards, the very notion of advertising is too abstract for them. They don't really understand what it means, despite the word “advertising” in the image.

Currently in Canada, advertising aimed at children is banned only in Québec. If children under 13 do not understand what advertising is, there are grounds for doubting the effectiveness of any means used to ensure transparency. Would not the solution therefore lie in pure and simple prohibition?

The symbols offered by the platforms

Some platforms offer ways for users to disclose the material connection that binds them to a brand. It is important to ensure that there is a certain consistency between what they suggest and the symbols proposed by Ad Standards, in order to avoid confusing users. For example, Instagram invites its users to use the words “Paid partnership with ...” above their posts, which does not contradict the disclosure objective but differs somewhat from what Ad Standards recommends. On YouTube, each time it is mentioned in the settings that a video contains a paid promotion, the platform automatically broadcasts a 20-second disclosure message.



To avoid confusion and to ensure compliance with Ad Standards recommendations, it is considered prudent to add a familiar, recommended message such as #ad or #pub.²³¹

231. Gowling WLG: The Basis of Influencer Law: Labels and Disclosures - Gowlessence: A Behind-the-Scenes (Legal) Journey of the Influencer Marketing Industry: <https://gowlingwlg.com/en/insights-resources/articles/2019/influencer-law-101-labels-and-disclosures/>

4.4. Sub-question 4: What is the responsibility of the various actors and what remedies do consumers have in the event of a problem?

The respondents interviewed for this study were divided as to whether influencers are legally obliged to disclose an important connection between them and a company.²³² We were not surprised to find that in 2018 and 2019, Ad Standards recorded only 8 and 6 complaints²³³ respectively under Clause 7 of the *Canadian Code of Ad Standards*, respecting adequate disclosure (e.g.: #ad) and the authenticity of the message. We have shown that the lack of clear disclosure of the advertising nature of the message can be considered misleading advertising, and therefore requires various remedies.

4.4.1. At the federal level: Liability of the parties and remedies under the *Competition Act*

There are various stakeholders involved in the field of advertising. This is as true of traditional advertising as it is of influencer marketing. When it comes to false or misleading representations, the *Competition Act*²³⁴ assigns responsibility to the person who originated the representation, who may either be the person who makes the representation or the one who authorizes it be made.²³⁵ Since the Act applies to both legal and natural persons, the merchant, the advertiser and even the influencer could be held liable for a false or misleading representation depending on their degree of involvement. Indeed, in the guidelines on the application of the *Competition Act* to representations on the Internet,²³⁶ it states: “*In its enforcement efforts, the Bureau focuses on the party who ‘causes’ the representation to be made. Determining causation requires an analysis of the facts to ascertain which party possesses decision-making authority or control over content and to assess the nature and degree of their authority or control.*”

Thus, in assessing whether it is appropriate to hold a person responsible for false or misleading representations, the Competition Bureau will take into consideration the guiding principle regarding the *nature and degree of control* that the person exercises over the content, which serves as an indication. The responsibility of each stakeholder is therefore assessed on a case-by-case basis.

- *Responsibility of the influencer*

In its *Deceptive Marketing Practices Digest, Volume 4*,²³⁷ the Competition Bureau takes great pains to point out that influencers must ensure that their followers know that endorsing or

232. Other comments made by participants in the discussion groups: “On paper they’re probably not obligated; (...) it’s never been expected because it’s a relatively new kind of advertising.” (Group 3, Ontario). “I’m definitely not sure if it’s a legal obligation. That kind of stuff is so fuzzy, I definitely have no idea.” (Group 6, Alberta). “I’m pretty sure they’ve changed social media laws a few years ago and that they are legally required to say #ad.” (Group 4, Ontario).

233. See Ad Standards: *Advertising Complaints and Advertising Disputes Report, 2019 Year in Review*, p. 4.

234. *Competition Act* (RS, 1985, c. C-34) published at www.lois.justice.gc.ca.

235. Under subsection 52 (1.2) of the *Competition Act*; see “Guidelines on the application of the *Competition Act* to representations on the internet.”

236. http://publications.gc.ca/collections/collection_2010/ic/lu54-1-2009-eng.pdf.

237. Consulted online: <https://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/eng/04372.html>

reviewing a certain product is in fact a commercial representation, at the risk of incurring their liability. They have to ask themselves, "**Will it be clear to readers who see this content for the first time, that I have a material connection with the company who sells the product?**" If the answer to this is no, or is in doubt, then the **disclosure will not necessarily protect the influencer from potential liability**.²³⁸ In addition, the *Competition Act* provides specific penalties for natural persons.²³⁹ If the court finds that the civil provisions of the *Competition Act* have not been complied with, an individual may be required to pay a penalty of up to \$750,000 for the first order and \$1,000,000 for any subsequent order, according to the *Guidelines on the Application of the Competition Act to Internet Disclosures*.²⁴⁰

Finally, we consider that the hashtags used in the disclosure of a commercial link to a company reflect the degree of liability exercised by both the influencer and the advertising agency. In fact, while the difference between the hashtag #ad and the hashtag #sponsored is based on the brand's editorial control or lack thereof over the content posted by the influencer,²⁴¹ the hashtag used could play a role in determining this liability, considering that the Competition Bureau determines the stakeholders' degree of liability based on their level of involvement.

- *The responsibility of the advertising agency*

Basing ourselves on the decision-making and supervisory power criteria of the Competition Bureau, we find our interpretation to be consistent with that of Maître Sonia Rasquinha of the Lavery law firm,²⁴² which is that if the agency is acting in a creative capacity and is responsible for the content of the advertisement, there is a good chance that it will be held responsible for the false and misleading representation. Following the logic of the hashtags, in the case of using the #ad hashtag, there is a good chance that the involvement of the ad agency is high, which would have an impact on the Competition Bureau's assessment of its level of liability.

- The responsibility of the merchant

The merchant is the party most often targeted when it comes to protecting consumers. In advertising, the merchant is often the party who has the power to decide whether an advertisement is shown or not. He therefore has a good chance of being held liable in a context of influencer marketing.

- Responsibility of the website or the web page host

The *Competition Act* provides a defense that may be invoked by any person who does not exercise decision-making power or control over content, provided that they published or broadcast the content in good faith in the ordinary course of their business activities. This

238. The bold type used in this paragraph was added by the author.

239. Consulted online: <https://www.bureaudelaconurrence.gc.ca/eic/site/cb-bc.nsf/eng/03045.html>

240. http://publications.gc.ca/collections/collection_2010/ic/lu54-1-2009-eng.pdf.

241. Gowling WLG: The Basis of Influencer Law: Labels and Disclosures - Gowlessence: A Behind-the-Scenes (Legal) Foray into the Influencer Marketing Industry: <https://gowlingwlg.com/en/insights-resources/articles/2019/influencer-law-101-labels-and-disclosures/>.

242. Sonia Rasquinha, "Pratiques commerciales trompeuses en ligne: intermédiaires, quels risques juridiques courez-vous ?" Article published on August 2, 2017, consulted online: <https://www.lavery.ca/fr/publications/nos-publications/3027-pratiques-commerciales-trompeuses-en-ligne-intermediaires-quels-risques-juridiques-courez-vous-.html>

person must also have recorded the name and address of the person who gave them the information and the latter must be established in Canada.²⁴³

Given that the practice of influencer marketing in its current form is relatively new, it is difficult for us to say what the courts' actual assessment of the liability of each of the parties will be. However, it should be noted that the *Competition Act* provides two regimes for cases of false or misleading representations, a criminal regime, under s. 52, and a civil regime, under s. 74.01 (1).²⁴⁴

Under s. 52, a person who has made false or misleading representations may face, on conviction and on summary conviction, a fine of up to \$200,000 and up to one year's imprisonment, or one of these sentences, and, on conviction on indictment, to a fine at the discretion of the court or imprisonment for a term not exceeding 14 years, or both, or one of these sentences.

Under the civil provisions of the Act, in this case, **paragraph 74.01 (1) (a)**, the Commissioner may apply to the Competition Tribunal, the Federal Court or the Superior Court of a province (the courts) for an order requiring the person to cease his practices, **issue a corrective notice, pay an administrative monetary penalty or pay a refund to buyers**. When the court orders the payment of an administrative monetary penalty, in the case of a first order, individuals are liable to a maximum penalty of \$750,000 and corporations, to a maximum penalty of \$10,000,000. For any subsequent order, the maximum penalty increases to \$1,000,000 for individuals and \$15,000,000 for corporations. In certain cases, the court also has the power to issue interim orders for the freezing of assets.

Because of the burden of proof incumbent on the Crown under s. 52, authors and professors Nicole L'Heureux and Marc Lacoursière consider that in consumer law, it is preferable for offenders to be prosecuted under of Part VII.1 of the Act when proof beyond a doubt cannot be presented to the court.²⁴⁵

However, the Competition Bureau stresses that in most cases where the Act permits, it will choose to proceed under the civil regime, unless there is clear and convincing evidence that the accused knowingly and recklessly made a false or misleading representation to the public and that criminal prosecution would be in the public interest.²⁴⁶

Self-Regulation: Ad Standards

Note that consumers can file a complaint with Ad Standards. It should also be noted, however, that the *Canadian Code of Advertising Standards* is voluntary; it does not have the force of a law or a regulation. Companies that violate it are only liable to administrative sanctions in the form of reprimands or blame.²⁴⁷

243. See "Guidelines on the Application of the *Competition Act* to Internet Representations."

244. <https://www.bureaudelaconurrence.gc.ca/eic/site/cb-bc.nsf/eng/00513.html>.

245. S.74 et seq, -Nicole L'Heureux, Marc Lacoursière, *Droit de la consommation*, Cowansville, Éditions Yvon Blais, 2011, p. 489.

246. See "Guidelines on the Application of the *Competition Act* to Internet Representations."

247. Pierre-Claude Lafond, *Droit de la protection du consommateur: Théorie et pratique*, Montréal, Éditions Yvon Blais, 2015, p. 257.

4.4.2. At the provincial level: Actors' liability and remedies under the *Consumer Protection Act*

The application of a consumer protection law may also arise at the provincial level. In Quebec, for example, it is possible for a consumer to invoke s. 272 of the CPA with respect to remedies for breach of an obligation imposed by that statute. However, according to the interpretation of the Supreme Court of Canada in *Richard v. Time*, in order to be able to invoke s. 272, the consumer must prove that they entered into a contract with a merchant. Otherwise, the statute cannot be applied given the wording of s. 2.²⁴⁸

Section 2 stipulates that the Act applies to any contract between a consumer and a merchant, which excludes the advertiser. The latter is defined under Title 1(m) of the CPA as “a person who prepares, publishes or broadcasts an advertisement or who causes an advertisement to be prepared, published or broadcast.” For Professor Pierre-Claude Lafond,²⁴⁹ this would include a designer (the advertising agency) and the broadcaster (newspaper, radio, television, Internet). We believe that if an influencer plays the role of designer, he may well have the status of advertiser.

However, s. 2 of the CPA does not rule out the existence of a prohibited practice performed by an advertiser, in this case a deceptive practice. Indeed, the prohibited practice may still take place, because according to s. 217 of the same Act, the commission of a prohibited practice is not subject to the conclusion of a contract. According to the Supreme Court of Canada in *Richard v. Time*,²⁵⁰ this section plays a preventive role and allows the Director of Criminal and Penal Prosecutions to enforce the Act as a preventive measure, in keeping with the legislator’s intention in this regard: “that is, before an unlawful representation dupes one or more consumers by fraudulently inducing them to enter into contractual relationships.”

“This is why s. 217 CPA. exists: its purpose is to make it easier to sanction violations of the Act on a preventive basis by specifying that a merchant’s representation may constitute a prohibited practice even if none of the natural persons targeted by the advertisement entered into a contract as a result of the advertisement.”

Also, in s. 277 of the CPA, included in Chapter III entitled Penal Provisions, it states that any person who contravenes the Act is guilty of an offense.²⁵¹ Section 278 states that an offense constituting a prohibited practice is liable to a fine of \$600 to \$15,000 in the case of an individual, and of \$2,000 to \$100,000 in the case of a corporation.

In addition, s. 2 does not remove all possibility of the consumer’s recourse to civil remedies. For example, by creating a presumption of fraud, s. 253 of the CPA, which applies to the merchant and the manufacturer as well as to the advertiser, grants additional protection to the consumer in situations in which the latter does not wish to, or cannot not exercise a remedy under s. 272.²⁵² According to the teachings of the Supreme Court,²⁵³ the intention of s. 253 is first of all to

248. *Richard v. Time Inc.*, 2012 CSC 8, [2012] 1 RCS

249. Pierre-Claude Lafond, *Droit de la protection du consommateur: Théorie et pratique*, Montréal, Éditions Yvon Blais, 2015, p. 265.

250. *Richard v. Time Inc.*, 2012 CSC 8, [2012] 1 RCS

251 S. 277 a).

252. *Richard v. Time Inc.*, 2012 CSC 8, [2012] 1 RCS

253. *Richard v. Time Inc.*, 2012 CSC 8, [2012] 1 RCS

facilitate the proof of the consumer who chooses to sue a merchant, a manufacturer or an advertiser according to the ordinary rules of common law. In *Richard v. Time Inc*, it states: “In such cases, s. 253 relieves consumers of the obligation to prove that the fraud was determinative in inducing them to give their consent. A rule of evidence such as this is helpful to consumers who want to sue advertisers under the general law, since they cannot take action against advertisers under s. 272 CPA.”

In summary

- In Quebec, both the merchant and the manufacturer can be sued under s. 272 CPA if a contract has been entered into. The options available under this provision include reduction of the obligation, termination of the contract, resolution of the contract, nullity of the contract and even a claim for damages if warranted.

- The advertising agency, the influencer and the web manager can be sued in accordance with the ordinary rules of civil law. By relying on the presumption of fraud in s. 253 CPA, they are exempted from the obligation to prove the decisive character of the fraud on their consent. Finally, based on s. 217, it is possible to prosecute the offender in criminal court as a preventive measure.

Since the analysis of this part of the work is inspired by a Supreme Court ruling on the application of the CEA, we consider that the same reasoning could hold in the other provinces. However, it should be noted that when it comes to punitive damages, there is a difference between Québec and the common law provinces.²⁵⁴ In fact, under common law, punitive damages can be awarded in the context of any civil action in which the party demonstrates that the defending party has displayed malicious, oppressive and abusive conduct that offends the sense of the dignity of the court.²⁵⁵ In Québec civil law, and under article 1621 of the *Civil Code of Québec* (CCQ), punitive damages are awarded when they are provided for by law.

The liability of social networks under the Act to Establish a Legal Framework for Information Technology (AELFIT)

Pursuant to s. 22 of this law, under Québec jurisdiction, a host who is not a search engine avoids all responsibility, unless he is aware that the information he holds is used for an illegal activity. or if he does not act promptly to prevent access to illegal material. Knowledge is therefore an important factor, but it is not presumed because s. 27 of the same law emphasizes that the service provider who acts as an intermediary is not required to monitor the information, or even to identify circumstances indicating that documents are used to allow activities of an illegal nature to be carried out. Therefore, we consider that, in the event of a finding of the existence of illegal content on social networks, it would be appropriate to inform the intermediary of this fact because once they have the knowledge, they have the obligation to act.

It follows from the preceding that the laws in force in Canada do apply to influencer marketing. The wording of certain provisions relating to misleading advertising could apply to the various forms that advertising may take. However, the laws do not determine how the advertising

254. *Richard v. Time Inc.*, 2012 CSC 8, [2012] 1 RCS

255. *Richard v. Time Inc.*, 2012 CSC 8, [2012] 1 RCS

nature of a message must be disclosed. Ad Standards and some platforms do this, but there is a need for harmonization with regard to arriving at a better understanding of consumers and also of the degree of liability that may be associated with the various proposed disclosure symbols.

4.5. Sub-question 5: What can we learn from other jurisdictions?

Our analysis of what is done elsewhere has made us aware of various approaches to the issue of influencer marketing. For example, Germany has a very distinctive intervention with regard to advertising identification, while the United Kingdom has developed a model for intervening with platforms to avoid misleading advertising and for clearly identifying the techniques influencers use as advertising. The U.S. is very active in the field, assigning liability for misleading advertising to the companies that contract with influencers rather than targeting the influencers themselves. Australia, like the U.S., targets companies rather than influencers and has developed a model based largely on self-regulation. Finally, the European Union's model makes social networks accountable by suggesting that these companies provide automatic link translation mechanisms or identification symbols based on the language spoken by the target audience.

4.5.1. Germany

Under German regulations²⁵⁶ each state has its own agency, known as a Media Authority, that is responsible for ensuring compliance with the rules governing advertising. There are a total of 14 Media Authorities in this country. These agencies coordinate their work through the umbrella federal agency, *Die Medienanstalten* (The Media Authorities).²⁵⁷ Thanks to the coordinated work of the Media Authorities, *Die Mediananstalten* ensures uniform regulations at the national level.

Germany has set a high standard for advertising identification. The symbol *#ad* is judged insufficient for disclosing commercial links to consumers.²⁵⁸ Influencers must use the full German terms *#werbung* or *#anzeige* (which translate to *#advertising* or *#display*) as the very first element of their advertising messages.

In addition, in 2019, *Die Mediananstalten* created a best practices guide for influencers and sponsors. This guide contains the legislative and jurisprudential rules applying to influencer marketing²⁵⁹ and provides details with regard to advertising identification. For instance, point 3 of the guide specifies that the advertising identification tools provided by certain platforms such as YouTube, Instagram and Facebook are not, on their own, sufficient to adequately disclose to consumers the commercial connection between the influencer and a company. These tools may be used, but only as a supplement to those recommended by *Die Mediananstalten*, as they were deemed too ambiguous for the average consumer. According to the guide, the fact that it is an advertising message must be identifiable at first glance.

256. <https://www.die-medienanstalten.de/en/about-the-media-authorities>.

257. <https://www.die-medienanstalten.de/en/about-the-media-authorities>.

258. L.G. Heilbronn, *Urt. v. 08.05.2018*, Az.: 21 O 14/18 KfH.

259. <https://www.die-medienanstalten.de/en/areas-of-interest/monitoring-of-advertising>.

The guide created by *Die Medianoanstalten* also confirms that certain techniques used in influencer marketing are in fact advertising. This is emphasized in point 7, which deals with to influencer marketing, and in point 8, which makes it clear that a promotional code is an advertisement: “Links to commercial websites as well as discount codes must also be marked as advertising because the user must know before clicking on the link that there will be advertising on the following website.”

Germany has also made some interesting decisions with regard to disclosure. One of these is that disclosure symbols need to be adapted to the target audience, particularly when accessed by a vulnerable audience such as one made up of young people.²⁶⁰ Indeed, in a decision of the Hagen Court²⁶¹ respecting an influencer who did not disclose business connections with the use of # and @ symbols, the court ruled that she had violated the law. In another decision, the court had to rule on the relevance of inserting several identification symbols at the end of a message. In its analysis, the court states that it is likely that the average consumer will read the description of the post, but not the list of labels that is located at the very end.²⁶²

Finally, the courts had to rule on the question of knowing in which contexts disclosure of the material connection is not necessary. In the *Contra* case,²⁶³ for example, the Court of Appeal stated that the influencer can make a post commenting on a product if they have not been remunerated in any way by the company manufacturing the product. The court also states that, since the influencer has no personal interest in promoting a product or service, they will not be required to make any disclosure to their audience. This decision overturned the first instance decision²⁶⁴ which required influencers to make it clear that their posts were not sponsored by the company producing the product they were promoting.

4.5.2. The United Kingdom

Like Canada, the UK has no specific regulations governing influencer marketing. As the Ad Standards Authority (ASA),²⁶⁵ the agency responsible for regulating advertising in the UK, pointed out in a statement in July 2019²⁶⁶ influencer marketing in that country is regulated by more general marketing and advertising regulations.

There are two main sources of UK influencer marketing regulations: the *UK Code of Non-Broadcast Advertising and Direct & Promotional Marketing*²⁶⁷ (“CAP Code”) and the *Consumer Protection from Unfair Trading Regulations 2008*²⁶⁸ (“CPRs”). In the UK, there are three agencies that are important for regulating influencer marketing: the Ad Standards Authority,²⁶⁹ which ensures that advertisements appearing in UK media comply with the *Advertising Codes*, the Competition and Markets Authority (CMA),²⁷⁰ which is responsible for investigating and

260. <https://www.die-medienanstalten.de/en/areas-of-interest/monitoring-of-advertising>.

261. LG Hagen, Urt. v. 09/13/2017, Az.: 23 O 30/17.

262. KG Berlin, Beschl. v. 11.10.2017, Az.: 5 W 221/17§ 12.

263. *Contra* LG Karlsruhe, KfH, 21.03.2019, Az.: 13 O 38/18.

264. LG Berlin, Urt. V. 24.05.2018, Az.: 52 O 101/18.

265. <https://www.asa.org.uk/about-asa-and-cap/the-work-we-do.html>.

266. <https://www.asa.org.uk/news/influencing-your-choice-of-influencer.html>.

267. <https://www.asa.org.uk/codes-and-rulings/advertising-codes/non-broadcast-code.html>.

268. <https://www.legislation.gov.uk/ukxi/2008/1277/contents/made>.

269. <https://www.asa.org.uk/about-asa-and-cap/the-work-we-do.html>.

270. <https://www.gov.uk/government/organisations/competition-and-markets-authority>.

strengthening competition and consumer protection law enforcement, and the Committee of Advertising Practice (CAP),²⁷¹ which is responsible for drafting advertising codes, notably the *CAP Code*. The CAP is made up of both advertisers and media and agency owners. It is an independent agency that ensures that advertising complies with the laws in force, particularly the *CAP Code*.

A particularly interesting initiative in the United Kingdom is the agreement the country concluded with Facebook Ireland on October 16, 2020. The CMA, the body responsible for investigating advertising matters, obtained a commitment from Facebook Ireland that the company would act more proactively to oblige influencers active on its Instagram platform to respect the commercial link disclosure obligations established by the *CAP Code* and the CPRs.²⁷² Under this agreement, Facebook agreed to implement technology capable of identifying Instagram posts that contain advertisements that do not comply with applicable regulations. Thanks to this tool, the Instagram platform will automatically notify companies whose products are featured by delinquent influencers, so that they can correct the situation. It will proceed either by forcing the influencer to modify their post in accordance with the regulations, or by simply eliminating the post.

What is also interesting in the United Kingdom is the fact that it uses concrete examples of influencer marketing to demonstrate how the law applies in this context. For example, the CMA, the body responsible for investigating advertising, has published a guide called *An Influencer's Guide to making clear that ads are ads*.²⁷³ This guide explains what is meant by *affiliate marketing*, a concept it defines as promoting a good or service by presenting a discount code. It also defines what personal promotion is by saying that it is the act of an influencer promoting their own goods and services. It explains that this type of advertising also includes draws or competitions organized by the influencer, featuring their own products as prizes to be won. Since all of these practices are covered by law, influencers are obliged to comply with the disclosure rules. For example, the advertisements must be easily identifiable by consumers, who should not have to take any action to determine that it is an advertisement (e.g., press “read more” in an Instagram post for more information).²⁷⁴

Another fact to note with regard to this jurisdiction concerns the penalties that are provided for and the resulting degree of compliance. In the event of non-compliance, the ASA renders decisions against offenders, informing them of the practices they are accused of, and demanding that they correct the situation. If these decisions are not followed, the ASA has quite a wide range of sanctions for punishing offenders; in particular, it may require that the various search engines make their posts invisible. For this reason, the ASA indicates that it is rare for violators not to comply with its decisions.²⁷⁵

271 <https://cpduk.co.uk/directory/profile/committee-of-advertising-practice>; <https://www.asa.org.uk/>.

272. <https://www.gov.uk/cma-cases/social-media-endorsements>.

273. <https://www.asa.org.uk/uploads/assets/9cc1fb3f-1288-405d-af3468ff18277299/InfluencerGuidanceupdatev6HR.pdf>.

274. *An influencer's Guide to making clear that ads are ads*, p. 11: <https://www.asa.org.uk/uploads/assets/9cc1fb3f-1288-405d-af3468ff18277299/INFLUENCERGuidanceupdatev6HR.pdf>.

275. <https://www.asa.org.uk/codes-and-rulings/sanctions.html>.

A guide published by the ASA specifies how disclosure should be made to customers aged 12 and under. Advertising intended for children of this age must be particularly easy to identify.²⁷⁶

Here is an example provided by the guide:



4.5.3. The United States

The US Federal Trade Commission (FTC) has the dual mandate of protecting consumers and promoting competition inside the country.²⁷⁷ The FTC intervenes in the influencer marketing industry primarily under s.5(a) of the *FTA Act*²⁷⁸ which prohibits “unfair or deceptive acts or practices in or affecting commerce.” According to the FTC, an advertisement is considered misleading if it is likely to influence consumers to change their consumption habits based on a deceptive practice.²⁷⁹ If it can be demonstrated that a significant minority of persons targeted by the advertisement are unable to clearly distinguish that a post is sponsored, the advertisement will be considered to be misleading.²⁸⁰

Under the *FTC Act*, the FTC has the power to investigate and sanction companies and influencers that violate guidelines established by law. Since 2016, the agency has been increasingly active in ensuring compliance with the law and punishing offenders. For example, in March 2016, the FTC for the first time sanctioned²⁸¹ a company for deceptive influencer marketing practices. According to the FTC, the Lord & Taylor company gave 50 fashion influencers one of their dresses and paid them between \$1,000 and \$4,000 each to post a photo of them on Instagram wearing the dress.

276. CAP, *Recognition of Advertising: online marketing to children under 12*, 2017, online: <<https://www.asa.org.uk/news/new-guidance-on-placing-non-broadcast-ads.html>>.

277. <https://www.ftc.gov/about-ftc/what-we-do>.

278. 15 USC § 45 (a) (1) (2020).

279. 16 CFR § 260.2 (2020).

280. “What is Real? Authenticity, Transparency, and Trust In the Digital Age of Fashion”: I. Article and Note: *Towards Truth in Influencing: Risks and Rewards of Disclosing Influencer Marketing in the Fashion Industry*, 64 NYL Sch. L. Rev. 247, p. 6/16.

281. See Hadley Malcolm, “Lord & Taylor Settles FTC Charges Over Paid Instagram Posts,” *USA Today* (Mar. 15, 2016), <https://www.usatoday.com/story/money/2016/03/15/lord--taylor-settles-ftc-charges-over-paid-instagram-posts/81801972>.

Under the contract, the influencers were given permission to style the dress to their liking, but were required to tag their social media posts with the hashtags “@lordandtaylor” and “#DesignLab.”²⁸² Influencers were also required to submit the content of their posts to social media for review before publication. Lord & Taylor did not then require the influencers to disclose their commercial links in their posts. As a result, the FTC sanctioned Lord & Taylor for failing to do so. The result was an agreement between the FTC and Lord & Taylor that forbade Lord & Taylor from not disclosing its business ties in sponsored social media campaigns for the next 20 years. This regulation also requires the company to set in place a monitoring and review program to ensure that its future marketing campaigns comply with FTC guidelines.

In 2017, the FTC updated its guidelines²⁸³ in order to adapt them to the reality of influencer marketing and sent over 90 letters to various celebrities, athletes and brands reminding influencers of their obligation to comply with business relationship disclosure standards.²⁸⁴ It should be noted that aside from the FTC, there are state laws that are inspired by the FTC Act that provide for the possibility of bringing civil suits against brands that adopt deceptive influence marketing tactics.²⁸⁵ One example is New York’s *General Business Law* § 349 (hereinafter “GBL § 349”) which prohibits “deceptive acts or practices in the conduct of any business.”²⁸⁶ To date, however, there have been relatively few civil suits brought under state consumer protection laws.²⁸⁷

Finally, the United States also has the *Langham Act*, a federal law that regulates trademarks and anti-competitive practices. Unlike the FTC guidelines and state consumer protection laws, the *Langham Act* imposes no obligation to disclose business relationships between the influencer and the sponsor.²⁸⁸ It is well established that what qualifies as misleading advertising under the *FTC Act* does not necessarily qualify as misleading advertising under the *Langham Act*.²⁸⁹

282. See Hadley Malcolm, “Lord & Taylor Settles FTC Charges Over Paid Instagram Posts,” *USA Today* (Mar. 15, 2016), <https://www.usatoday.com/story/money/2016/03/15/lord--taylor- settles-ftc-charges-over-paid-instagram-posts / 81801972>.

283. Three FTC Actions of Interest to Influencers, FTC (Sept. 7, 2017), <https://www.ftc.gov/newsevents/blogs / business-blog / 2017/09 / three-ftc-actions-interest-influencers> (outlining three developments regarding FTC’s regulation of social media influencers, including updating FTC’s Endorsement Guides); Endorsement Guides.

284. FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship, FTC (Apr. 19, 2017), <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose>. The list of celebrities who received a letter from the FTC includes Jennifer Lopez—who posted a picture of herself captioned “birthday weekend in Vegas!!” against a backdrop of Beluga vodka, Allen Iverson, Lindsay Lohan, and Heidi Klum. See Ryan Barber, “Who Got Those Social ‘Influencer’ Letters from the FTC? Read the Full List” (May 4, 2017) <https://www.law.com/sites/almstaff/2017/05/04/who-got-those-social-influencer-letters-from-the- ftc-read-the-full-list />.

285. See *Blue Cross & Blue Shield of NJ, Inc. v. Philip Morris USA, Inc.*, 818 NE2d, 1140, 1143 (2004) (explaining that NY Gen. Bus. Law § 349 includes a private right of action “allowing [consumers] to bring suit on their own behalf without relying on the Attorney General for enforcement”).

286. NY Gen. Bus. Law §349 (McKinney 2020).

287. Joseph M. Forgione: “What is real?” *Authenticity, Transparency, Volume 64*, Issue 3, pp. 8-16.

288. See, for example. *Clark Consulting, Inc. v. Fin. Solutions Partners, LLC*, No. 05-CV-06296, 2005 WL 3097892, at *3 (S.D.N.Y. Nov. 17, 2005) (“[T]he [Lanham] Act imposes no affirmative duty of disclosure . . . and a claim cannot be based on the failure to disclose a fact.”); *McNeilab, Inc. v. Am. Home Prod. Corp.*, 501 F. Supp. 517, 532 (S.D.N.Y. 1980) (“[A] failure to inform consumers of something, even something that they should know, is not per se a misrepresentation actionable under s. 43(a) of the *Lanham Act*.”). It is also worth noting that standing under the *Lanham Act* requires “a plaintiff [to] plead (and ultimately prove) an injury to a commercial interest in sales or business reputation proximately caused by the defendant’s misrepresentations.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 140 (2014). This nullifies its usefulness to consumer advocacy organizations such as Truth in Advertising and Public Citizen, which might otherwise bring claims against businesses for deceptive influencer

4.5.4. Australia

The *Australian Consumer Law*²⁹⁰ (ACL) regulates advertising in general and therefore applies to influencer marketing. Under ss. 18 and 29 of the ACL,²⁹¹ it is forbidden to make false representations about goods or services. Since this is a law of general application, it is not designed to deal with the specificities of influencer marketing. Influencer marketing in Australia is therefore overseen by a network of agencies that together form a self-regulatory system.²⁹² Based on the provisions of the ACL, the Australian Association of National Advertisers (AANA), a self-regulatory body, is responsible for adopting and administering a Code of Ethics²⁹³ Clause 2.7 of which requires transparency in matters of publicity. Based on this requirement, another self-regulatory body, the Australian Influencer Marketing Council (AIMCO), founded in 2019 and made up of members of the influencer marketing industry, has produced a best practice guide. On the basis of Clause 2.7 of the Code of Ethics, it imposes two obligations on influencers²⁹⁴:

- (1) Do not produce content that could mislead consumers;²⁹⁵
- (2) Do not make false statements.²⁹⁶

In the event of a breach of the Code of Ethics, a complaint can be filed with another self-regulatory body, the Ad Standards Board (ASB). This agency may then order the removal of problematic marketing communications, or even order modifications, but their decisions are not binding or enforceable, and they do not apply to individual influencers. Responsibility for advertising compliance with legislation is in the hands of brands and agencies.²⁹⁷ In the event that influencers and sponsors refuse to correct their delinquent posts, the ASB can then transfer the complaint to the Australian Competition and Consumer Commission (ACCC),²⁹⁸ the independent regulatory authority created by the *Australian Consumer Law*²⁹⁹ (ACL), the Australian equivalent of the *Consumer Protection Act*. This agency's mandate is to guarantee consumer protection by ensuring implementation of, and compliance with, the ACL. It is this body that will then be able to sanction offenders.³⁰⁰

campaigns. See generally *Truth In Advertising*, <https://www.truthinadvertising.org/> (last visited Mar. 16, 2020); *Public Citizen*, <https://www.citizen.org/> (last visited Mar. 16, 2020)..

289. *L & F Prod. v. Procter & Gamble Co.*, 845 F. Supp. 984, 1001 (SDNY 1994).

290. *Competition and Consumer Act 2010* (Cth): <https://www.legislation.gov.au/Details/C2018C00437>.

291. https://www.legislation.gov.au/Details/C2013C00620/Html/Volume_3#_Toc368657823.

292. <https://sociallawco.com.au/australian-influencer-marketing-laws-and-codes/>.

293. <https://aana.com.au/self-regulation/codes-guidelines/code-of-ethics/>.

294. *AIMCO Code of Practice* July 1, 2020, p. 6:

https://static1.squarespace.com/static/5f741c44029c373fe632e647/t/6086291e459fe342811ca536/1619405087615/AIMCO_Code_of_Practice_July_1_2020.pdf.

295. *Competition and Consumer Act 2010* (Cth) sch 2, s.18: <https://www.legislation.gov.au/Details/C2018C00437>.

296. *Competition and Consumer Act 2010* (Cth) sch 2, s.18: <https://www.legislation.gov.au/Details/C2018C00437>.

297. <http://classic.austlii.edu.au/au/journals/CommsLawB/2017/7.pdf>.

298. <https://www.accc.gov.au/about-us/australian-competition-consumer-commission>.

299. *Competition and Consumer Act 2010* (Cth): <https://www.legislation.gov.au/Details/C2018C00437>.

300. <https://sociallawco.com.au/australian-influencer-marketing-laws-and-codes/>.

For some, the fact that Australia's influencer marketing system is based primarily on self-regulation weakens the Australian model,³⁰¹ as this results in non-compliant posts not being reported to the ASB and ultimately, to the ACCC.³⁰²

4.5.5. The European Union

Article 7 of the EU's *Unfair Commercial Practices Directive* (UCPD)³⁰³ is devoted to misleading omissions. Accordingly, a commercial practice is considered to be misleading if the merchant omits information that could allow the consumer to make an informed decision, (Article 7 (1)). Furthermore, under Article 7 (2), providing information in an unclear or ambiguous manner, or in such a way that the consumer fails to identify the underlying commercial intention, is considered a misleading omission.³⁰⁴ We believe that this article clearly addresses the techniques used in influencer marketing, both those relating to the person and those directly related to the product.

In general, regardless of the national legislation of each of the Member States, the UCPD provides that an influencer's post falls within the scope of Art. 7 (2) as soon as the following three questions can be answered in the affirmative³⁰⁵ :

1. Does the influencer play the role of a merchant?
2. Does the influencer carry out commercial activities within the meaning of the UCPD by posting sponsored content?
3. Do influencer posts that cannot be clearly identified as sponsored deceive consumers in their consumption decisions?

The European Court of Justice (ECJ) has made a ruling confirming two aspects of these questions. First, when an influencer promotes a brand, they are participating in a commercial activity within the meaning of the UCPD.³⁰⁶ They therefore qualify as a merchant within the meaning of the law. Second, the primary obligation to disclose commercial links nevertheless remains with the sponsor rather than the influencer.³⁰⁷

According to author Rossana Ducato, it is therefore important for a sponsor to stipulate, in a contract, that an influencers who promotes their products or services adequately discloses the

301. <http://classic.austlii.edu.au/au/journals/CommsLawB/2017/7.pdf>.

302. <http://classic.austlii.edu.au/au/journals/CommsLawB/2017/7.pdf>, p. 2.

303. <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1585324585932&uri=CELEX%3A02005L0029-20220528>.

304. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32005L0029>.

305. Rossana Ducato, "One Hashtag to Rule Them All? Mandated Disclosures and Design Duties in Influencer One Hashtag to Rule Them All? Mandated Disclosures and Design Duties in Influencer Marketing Practices," CRIDES Working Paper Series no. 4/2019; to be published in Ranchordás, S. and Goanta, C. (Eds), *The Regulation of Social Media Influencers*, 2019, Edward Elgar Publishing, Forthcoming, p.8: file:///C:/Users/client/Downloads/2019%20-%20R.%20Ducato%20-%20Working%20paper%204-2019%20(1).pdf.

306. Box C-391/12, § 38.

307. See Geraint Howells, Hans-W Micklitz and Thomas Wilhelmsson, *European fair trading law: The unfair commercial practices directive* (Routledge 2006), 68.

nature of their commercial links when sharing a post.³⁰⁸ The European Union also adds some important requirements with regard to social networks. As stated by the European Commission in its guide on the application of the UCPD, platforms may not mislead consumers by their actions or omissions.³⁰⁹ Therefore, the UCPD places an obligation on social media to design their platforms so as to ensure that influencers and sponsors have the option of disclosing their commercial links in a way that is obvious to consumers. Despite this, it is incumbent on influencers and sponsors to disclose their commercial links in their posts.³¹⁰

Again according to R. Ducato,³¹¹ this obligation placed on social media is very important, especially when influencers operate in several linguistic markets. For example, if an influencer shares a post with the tag #advertising, that commercial link disclosure would not necessarily be understood by German consumers who don't speak English. In such a case, platforms could simply perform automatic label translation to ensure that the disclosure is understood by all users, regardless of their native languages.

Finally, the European Union has issued a directive aimed at regulating visual content, the Audiovisual Media Service Directive (AVMSD).³¹² This directive was recently amended to take into account certain platforms such as YouTube. The AVMSD requires EU member countries to put safeguards in place to ensure that consumers can easily recognize commercial audiovisual content published online. This guideline therefore applies to video influencer marketing.

R. Ducato, "One Hashtag to Rule Them All? Mandated Disclosures and Design Duties in Influencer Marketing Practices," CRIDES Working Paper Series no. 4/2019; to be published in Ranchordás, S. and Goanta, C. (Eds), *The Regulation of Social Media Influencers*, 2019, Edward Elgar Publishing, Forthcoming, C. (Eds), *The Regulation of Social Media Influencers*, 2019, Edward Elgar Publishing, Forthcoming, pp. 16–44.

309. Commission Staff Working document "Guidance on the implementation / application of Directive 2005/29 / EC on Unfair Commercial Practices" accompanying the document "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A comprehensive approach to stimulating cross-border e-Commerce for Europe's citizens and businesses."

310. R. Ducato, "One Hashtag to Rule Them All? Mandated Disclosures and Design Duties in Influencer Marketing Practices," CRIDES Working Paper Series no. 4/2019; to be published in Ranchordás, S. and Goanta, C. (Eds), *The Regulation of Social Media Influencers*, 2019, Edward Elgar Publishing, Forthcoming.

R. Ducato, "One Hashtag to Rule Them All? Mandated Disclosures and Design Duties in Influencer Marketing Practices," CRIDES Working Paper Series no. 4/2019; to be published in Ranchordás, S. and Goanta, C. (Eds), *The Regulation of Social Media Influencers*, 2019, Edward Elgar Publishing, Forthcoming, pp. 39/44.

312. <https://ec.europa.eu/digital-single-market/en/audiovisual-media-services-directive-avmsd>.

CHAPTER 5. CONCLUSION AND ANSWER TO THE GENERAL RESEARCH QUESTION

In this research, we began by addressing the context of influencer marketing and asked whether the regulations in force in Canada meet the challenge posed by this practice from the standpoint of transparency. This context brought into play marketing, psychological and legal components. Since the general research question focuses on transparency in advertising, we built an analytical framework around the principle of advertising identification aimed at clearly presenting the advertising nature of a message or item of information.

In doing this, we conducted a qualitative field survey on a population made up of adults and children in order to verify how the practice of influencer marketing is perceived. Subsequently, our study of the legislation, standards, social network policies, doctrine and jurisprudence allowed us to analyze the data collected in the light of this corpus. This analysis enabled us to answer the research sub-questions,³¹³ then progressively, to answer the general research question.

The analysis allowed us to observe that certain techniques used in influencer marketing created some confusion about their advertising character. This confusion was even more pronounced among young people under 13, for whom the very notion of advertising is quite abstract. We also found that influencer marketing techniques were welcomed among research participants, which was not the case with traditional advertising.

In children, this acceptance translates into requests for their parents to purchase products recommended by influencers. Among adults, not everyone fully understood the nuances between hashtags used online. Very few children recognized the #ad or #pub symbols, especially the young French speakers. Although many participants were just as turned off by the inclusion of the word “advertising” on posts as by traditional advertising, others considered it to be the most transparent means of identification. To protect consumers with regard to advertising, the Supreme Court has set the standard of the “credulous and inexperienced consumer,”³¹⁴ which is similar to that of the ordinary buyer in a hurry. In order to avoid an advertisement having a deceptive effect, the general impression given is therefore very important. If there is confusion about the existence of an advertising message underlying a technique used by an influencer, this could engage the responsibility of various stakeholders in the process, both the advertiser and the influencer as well as the merchant. The symbols used to disclose the nature of the advertisement must be clear and must also be understood by the users of these channels.

We also found a lack of consistency between the symbols proposed by the Ad Standards and those offered by some networks, which could lead to further confusion about advertising identification. It is true that the laws in force in Canada are applicable to influencer marketing. It is also true that the terms of certain provisions relating to misleading advertising may be applicable to various forms of advertising, including influencer advertising. However, these laws

313. These sub-questions read as follows: Are influencer marketing techniques considered advertising techniques? What impact does influencer marketing techniques have on users? What impact does advertising identification have on users? What remedies do consumers have in the event of a problem? What can we learn from other jurisdictions?

314. *Richard v. Time Inc.*, 2012 CSC 8, [2012] 1 RCS, para. 67.

do not establish how the advertising nature of a message is to be disclosed. While the symbols used are a possibly decisive factor in establishing the liability of the actors, an intervention by the legislator would not be unwelcome in this regard. In addition, advertising aimed at children remains an important issue to consider.

Children, especially those under the age of 13, do not fully understand the concept of advertising, yet are influenced by it. Therefore, the symbols currently used do not have much impact on them, and worse, some simply do not recognize them. From this point of view, banning advertising aimed at children seems to us to be the right solution to protect them. To date, only Québec has adopted provisions in this area and, here again, the context would benefit from being clarified with regard to influencer marketing.

In light of the above, the answer to the general research question is that the current regulatory framework responds only partially to the realities of influencer marketing. To have a real impact, interventions must be well thought out. Some examples offered by foreign jurisdictions may afford inspiration. The UK's agreement with Facebook Ireland, which committed to using technology to identify Instagram posts featuring non-regulatory ads, is one inspiring example. In addition, Germany intervened to demand that influencers use the German terms #werbung or #anzeige in full rather than the #ad sign, in order to facilitate understanding among the public.

Finally, certain avenues could be explored in the context of future research. Our work not only revealed differences in literacy between adults and young people, but also between Francophones and Anglophones. Further research based on the profiles of users, not merely on the basis of language, that takes other relevant factors into account, might identify sectors in which urgent action is needed to attain higher digital literacy among Canadians.

This study also revealed the emerging practice of child influencers. Studies on the phenomenon as well as on its possible impacts on the actors, in particular with regard to the management of their finances, could provide a general orientation for the legislative interventions required in this domain.

Finally, an analysis of the impact of the advertising disclosure symbols used on the liability of actors in the field of advertising would assist in consolidating knowledge in this field.

5.1. Our recommendations

Option consommateurs recommends:

That the federal and provincial governments:

- Intervene in order to specifically regulate advertising identification in influencer marketing, taking inspiration from models presented in this research, particularly those of Germany and the European Union
- Study the possibility of harmonizing advertising identification symbols and specifying their impact in terms of the responsibilities of the actors

- Intervene to clarify the status of stakeholders in the context of influencer marketing and, consequently, of recourse for consumers
- Inject the necessary funding to promote literacy about influencer marketing among young people
- Take action across Canada to ban online advertising directed at children under 13
- Make influencers aware of the risks of advertising among children

That the platforms:

- Collaborate with governments by putting in place mechanisms likely to detect problematic advertising on social networks
- Insert clauses prohibiting advertising aimed at children in their policies of use as well as the consequences in the event of non-compliance
- Inform influencers and Internet users of the presence of these clauses

That consumers:

- Pay attention to the techniques used in influencer marketing and make informed decisions
- Ensure that their children are familiarized with the concept of advertising and are sensitized to the disclosure symbols and the techniques used in influencer marketing
- Inquire about available remedies in the event of problems.

That advertising agencies and influencers:

- Disclose their commercial links
- Make sure the public understands their method of disclosing these links
- Inform themselves about the legal implications of the various symbols they use as well as their online behaviour