

Famously Fake: Using the Law to Reverse the Demise of Social Media Credibility

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* J.D., May 2023, The George Washington University Law School. Thank you to Professor Meredith Rose for her assistance in drafting this Note, to the other professors and students who are too many to name that helped along the way, and to the professionals I met in graduate school who let me pick their brains about the practical difficulties they faced in this industry.

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I. INTRODUCTION

Caroline Calloway was arguably the first social media influencer.¹ She amassed hundreds of thousands of followers in the early days of Instagram by sharing her personal experiences, thoughts, and feelings about her life as an American traveling around Europe and attending the University of Cambridge.² This was a different era of social media, when sharing such intimate details with the public was shocking and the concept of social media influencers was so new that Calloway's classmates and acquaintances treated what Calloway was doing like it was a joke.³ By spring 2015, Calloway had accumulated 300,000 followers on Instagram.⁴ While this would be a relatively small following today, in 2015, it made her one of the most influential people on the Internet. A year later, Calloway graduated Cambridge with Instagram fame in one hand and a \$500,000 book deal in the other.⁵ She set the standard and blazed a trail for all future social media influencers to follow. The only problem was it was all—or at least mostly—fake.⁶

Calloway did not initially want to be an influencer.⁷ Calloway always wanted to be a writer, and when she was rejected by publishers because no one wanted to publish or read the memoir of a nobody (even a rich nobody), she decided to become a somebody.⁸ Fortunately for Calloway, there was a new social media app on the market called Instagram.⁹ She recognized the potential Instagram had to offer and decided to stamp her name on it.¹⁰ With the help of her best friend Natalie Beach, Calloway posted high-quality pictures and detailed captions about her life.¹¹ Her follower count soared, and thanks to Calloway, it became clear to the world that there was a market for non-traditional celebrities to build influence and fame on social media.¹² Eventually, Calloway was offered the book deal of her dreams, but she became so caught up in her Instagram fame that she struggled to finish the book that publishers had offered her half a million dollars to write.¹³ Beach,

1. See Harling Ross, *Was Caroline Calloway the First Instagram Influencer?*, REPELLER (June 20, 2018), <https://repeller.com/caroline-calloway-interview/> [<https://perma.cc/ZSY6-NB9F>].

2. *Id.*; Jacob Shamsian et al., *How Caroline Calloway Went from Instagram Influencer with a \$500,000 Book Deal to the Creator of Her Personal 'Fyre Festival'*, INSIDER (Sept. 11, 2019, 11:10 AM), <https://www.insider.com/caroline-calloway-book-deal-instagram-career-2019-1> [<https://perma.cc/SY2A-CCW4>].

3. Shamsian et al., *supra* note 2.

4. *Id.*

5. *Id.*

6. See generally *id.*; see generally Natalie Beach, *I Was Caroline Calloway*, CUT (Sept. 10, 2019), <https://www.thecut.com/2019/09/the-story-of-caroline-calloway-and-her-ghostwriter-natalie.html> [<https://perma.cc/YL96-YVKD>].

7. Beach, *supra* note 6.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. Beach, *supra* note 6.

always the helpful best friend, started writing the book for Calloway.¹⁴ It was not long after this that Calloway finally confessed something to Beach—Calloway’s fame had not grown organically from years of posting interesting, aspirational content.¹⁵ It grew because Calloway had been buying tens of thousands of followers to boost her numbers in the hopes of convincing publishers that people cared what she had to say.¹⁶ Calloway bought her way to being one of the first truly famous Internet stars and to a lucrative book deal.¹⁷ Not long after Beach found out, publishers rescinded Calloway’s book deal without any public explanation, and Calloway’s influence on social media began to wane.¹⁸ It was only years later, when Beach decided to come out and tell her side of the Caroline Calloway story, that people found out why.¹⁹ Today, Calloway is famous as a woman who took advantage of her fans and the companies she promoted, and lost everything because of it.²⁰

She may have been the first, but Caroline Calloway was by no means the last influencer to try to buy their way to fame and fortune.²¹ Today, it is even easier for influencers like Calloway to abuse the system.²² The robust advertising agencies and marketing departments of old are being replaced with the whims of a single individual, often a teenager, who does not work for or have any longstanding relationship with the brand.²³ Companies have made this change out of necessity.²⁴ The repercussions of buying fake

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*; Lauren Frias, *Instagram Influencer Caroline Calloway Bought Followers and Created Her Own Fan Base to Sell Her Unwritten Memoir, Her Ghostwriter Claims in an Explosive New Essay*, INSIDER (Sept. 10, 2019, 10:18 PM), <https://www.insider.com/instagram-influencer-caroline-calloway-bought-followers-created-own-fan-base-2019-9> [<https://perma.cc/KYX2-EHYJ>].

18. Frias, *supra* note 17.

19. Beach, *supra* note 6.

20. Shamsian et al., *supra* note 2.

21. Frias, *supra* note 17; see Gil Appel et al., *The Future of Social Media Marketing*, J. ACAD. MKTG. SCI. 79, 89 (2019); see Tom Huddleston Jr., *How Instagram Influencers Can Fake Their Way to Online Fame*, CNBC (Feb. 4, 2021, 2:58 PM), <https://www.cnbc.com/2021/02/02/hbo-fake-famous-how-instagram-influencers-.html> [<https://perma.cc/QGL9-BBSU>].

22. See Appel et al., *supra* note 21; see *Demand for Fake Instagram Followers Shot Up 71% This Year*, MEDIKIX, <https://web.archive.org/web/20210418003958/https://mediakix.com/blog/fake-instagram-followers-growing-demand/> [<https://perma.cc/37A7-DPSL>] (last visited Jan. 23, 2022) [hereinafter *Demand for Fake Instagram Followers*].

23. See Shareen Pathak, *Brands Are Using Influencers like Ad Agencies*, DIGIDAY (May 24, 2017), <https://digiday.com/marketing/brands-using-influencers-like-ad-agencies/> [<https://perma.cc/7KUQ-XQ7M>].

24. See Danielle Wiley, *How to Use Influencers as Your Brand’s Secret Weapon for the Next Normal*, FORBES (Sept. 28, 2021, 7:00 AM), <https://www.forbes.com/sites/forbesagencycouncil/2021/09/28/how-to-use-influencers-as-your-brands-secret-weapon-for-the-next-normal/> [<https://perma.cc/L3DY-P9SD>].

followers are usually limited to diminished credibility, though people like Caroline Calloway prove that the payoffs can be massive.²⁵

Demand for fake followers is growing every day, and social media companies have done comparatively little to curb the rampant use of fake followers on their platforms.²⁶ The truth of the matter is social media companies do not *want* to get rid of fake accounts.²⁷ One study conducted by Ars Technica found that Facebook leaves up 95% of fake accounts on their social media platforms, even after those accounts are reported.²⁸ Twitter has even been known to verify fake accounts as celebrities or influencers to such an extent that they recently had to suspend their verification process entirely.²⁹ On the rare occasion social media companies have made attempts to curb fake followers or engagement, they have always taken action against websites selling fake followers rather than influencers purchasing them.³⁰ Facebook Inc., now called Meta, has personally filed several lawsuits against companies selling fake Instagram followers, which would be admirable if any of them had amounted to anything.³¹ Only one company, who was previously the subject of a New York Times investigation, experienced any substantial

25. Frias, *supra* note 17; See Caroline Forsey, *Why You Shouldn't Buy Instagram Followers*, HUBSPOT (May 6, 2022), <https://blog.hubspot.com/marketing/buy-instagram-followers> [<https://perma.cc/3E25-SZHS>].

26. See *Demand for Fake Instagram Followers*, *supra* note 22; Kate Cox, *Social Media Platforms Leave 95% of Reported Fake Accounts Up, Study Finds*, ARS TECHNICA (Dec. 6, 2019, 2:42 PM), <https://arstechnica.com/tech-policy/2019/12/social-media-platforms-leave-95-of-reported-fake-accounts-up-study-finds/> [<https://perma.cc/TFA3-SMVY>].

27. See Jack Morse, *Why Social Media Companies Won't Kill Off Bots*, MASHABLE (Feb. 6, 2018), <https://mashable.com/article/facebook-instagram-twitter-bots> [<https://perma.cc/JCR9-KZUB>].

28. See Cox, *supra* note 26.

29. See Sophie Webster, *Twitter to Halt Its Verification Process After Several Fake Accounts Got Verified*, TECH TIMES (Aug. 13, 2021, 6:08 PM), <https://www.techtimes.com/articles/264121/20210813/twitter-halt-verification-process-several-fake-accounts-verified.html> [<https://perma.cc/6YUG-THMU>].

30. *Facebook Sues over Sales of Fake Accounts, Likes and Followers*, CBS NEWS (Mar. 1, 2019, 9:16 PM), <https://www.cbsnews.com/news/facebook-lawsuit-over-sales-of-fake-accounts-likes-and-followers-china/> [<https://perma.cc/M42V-Y49Z>].

31. See Paul Grewal, *Cracking Down on the Sale of Fake Accounts, Likes and Followers*, META (Mar. 1, 2019), <https://about.fb.com/news/2019/03/sale-of-fake-accounts-likes-and-followers/> [<https://perma.cc/Q4YL-PWG2>]; Jessica Romero, *Taking Action Against Fake Engagement and Ad Scams*, META (Oct. 20, 2020), <https://about.fb.com/news/2020/10/taking-action-against-fake-engagement-and-ad-scams/> [<https://perma.cc/HAW2-Z248>].

consequences for their actions.³² The odds that social media companies will take action, and the odds that action will be effective, are negligible and insufficient to deter these websites.³³

To prevent further damage, action must be taken to curb the demand. Brands experience immense damage, estimated at over \$1 billion in 2019 alone, with that number growing as influencer marketing grows.³⁴ Given that social media platforms are not helping, brands themselves deserve to be empowered to mitigate the damage.³⁵ If we hope to see any real, concrete change, brands need to be given the opportunity to pursue the influencers who are creating the demand for fake followers. This can be done under current law by interpreting the definition of fraud to encompass the actions of these influencers.

This Note will begin with an explanation of how influencer marketing came to prominence in the marketing industry. It will then examine the role of influencers, why they have influence, and why marketers use them as a resource. The Note will then look at why and how influencers deceive marketers using bots and social pods and what damage it may do to brands. Following the Background section will be an analysis of how these influencers may be held liable. This section will consider whether influencers may be charged with fraud at the state level in order to curb their online falsifications. The elements of fraud—misrepresentation, knowledge of falsity, intent, and justifiable reliance—will each be considered, as will potential defenses influencers may raise to each, and factors that may limit which brands may utilize this method. The Analysis will also briefly discuss the resulting damages that are required for brands to experience for influencer activity to be considered fraud.

32. Nicholas Confessore et al., *The Follower Factory*, N.Y. TIMES (Jan. 27, 2018), <https://www.nytimes.com/interactive/2018/01/27/technology/social-media-bots.html> [<https://perma.cc/C6ZT-TTMM>]; see Press Release, FTC, Devumi Owner and CEO Settle FTC Charges They Sold Fake Indicators of Social Media Influencer; Cosmetics Firm Sunday Riley, CEO Settle FTC Charges That Employees Posted Fake Online Reviews at CEO's Direction (Oct. 21, 2019), <https://www.ftc.gov/news-events/press-releases/2019/10/devumi-owner-ceo-settle-ftc-charges-they-sold-fake-indicators> [<https://perma.cc/GH75-6EW5>] [hereinafter FTC Press Release] (levying \$2.5 million settlement against Devumi CEO); Press Release, N.Y.S. Off. Att'y Gen., Attorney General James Announces Groundbreaking Settlement with Sellers of Fake Followers and 'Likes' on Social Media (Jan. 30, 2019), <https://ag.ny.gov/press-release/2019/attorney-general-james-announces-groundbreaking-settlement-sellers-fake-followers> [<https://perma.cc/4NTD-BBF8>] (announcing settlement that prohibits engaging in similar activity).

33. See FTC Press Release, *supra* note 32 (showing the FTC judgments and lawsuits in 2019); see Cox, *supra* note 26; Nicholas Confessore & Gabriel J.X. Dance, *On Social Media, Lax Enforcement Lets Impostor Accounts Thrive*, N.Y. TIMES (Feb. 20, 2018) <https://www.nytimes.com/2018/02/20/technology/social-media-impostor-accounts.html> [<https://perma.cc/TJ95-2KXS>].

34. Emma Grey Ellis, *Fighting Instagram's \$1.3 Billion Problem – Fake Followers*, WIRED (Sept. 10, 2019, 8:00 AM), <https://www.wired.com/story/instagram-fake-followers/> [<https://perma.cc/8JFG-FSQ4>] (showing the billions in damages brands have lost in advertising to fake followers).

35. *Id.*

II. BACKGROUND

A. Marketing Shifts

Since Caroline Calloway's rise to fame, there has been a significant shift in the marketing industry towards influencers.³⁶ The advent of digital marketing methods has been slowly pushing traditional marketing out of frame for years.³⁷ Digital marketing, or marketing using the Internet, has significant advantages over traditional methods such as newspapers and television. Digital marketers can easily track relevant data, such as how many people see an ad and with which ads consumers interact.³⁸ This data can help marketers customize ads to individual consumers and improve the overall quality of ads.³⁹

Unfortunately, digital marketing has exacerbated some of the worst issues facing marketers. Over the last few decades, the number of ads the average consumer sees per day has risen to between 4,000 and 10,000; but as the number of ads has grown, the effectiveness of each has lessened.⁴⁰ Consumers are understandably burnt out.⁴¹ They are tired of boring and irrelevant ads, have shorter attention spans, and treat marketers with a healthy amount of mistrust.⁴² Most ads do not factor into the consumer decision-

36. See Yusha Charles, *Why Is Influencer Marketing So Important in 2021?*, LINKEDIN (Apr. 25, 2021), <https://www.linkedin.com/pulse/why-influencer-marketing-so-important-2021-yusha-charles/> [<https://perma.cc/H7JP-M3ME>] (including a list of reasons brands have turned to influencers for help in the digital age).

37. See generally Hamza Shaban, *Digital Advertising to Surpass Print and TV for the First Time, Report Says*, WASH. POST (Feb. 20, 2019, 9:53 AM), <https://www.washingtonpost.com/technology/2019/02/20/digital-advertising-surpass-print-tv-first-time-report-says/> [<https://perma.cc/4NUZ-CQQK>].

38. See *id.*

39. *Id.*

40. See Tara Drosset, *How Many Times Must You See an Ad to Actually Remember It?*, RED CROW MKTG. (July 7, 2021), <https://www.redcrowmarketing.com/2021/07/07/how-many-times-must-you-see-an-ad-to-remember-it/> [<https://perma.cc/GAR2-5MQ8>] (discussing how people barely remember seeing ads, and now they require repetition to even register); see Sam Carr, *How Many Ads Do We See a Day in 2021?*, PPC PROTECT (Feb. 15, 2021), <https://ppcprotect.com/blog/strategy/how-many-ads-do-we-see-a-day/> [<https://perma.cc/W3Y8-N99E>].

41. See Nishat Mehta, *Give Consumers the Ads They Want*, FORBES: COMM. COUNCIL (Mar. 7, 2018), <https://www.forbes.com/sites/forbescommunicationscouncil/2018/03/07/give-consumers-the-ads-they-want/> [<https://perma.cc/UNP8-7T62>]; see Bill Lee, *Marketing Is Dead*, HARV. BUS. REV. (Aug. 9, 2012), <https://hbr.org/2012/08/marketing-is-dead> [<https://perma.cc/2SXA-FYP6>].

42. See Mehta, *supra* note 41; see Lee, *supra* note 41; see Kai Ryssdal, *Goldfish Have Longer Attention Spans Than Americans, and the Publishing Industry Knows It*, MARKETPLACE (Feb. 11, 2014), <https://www.marketplace.org/2014/02/11/goldfish-have-longer-attention-spans-americans-and-publishing-industry-knows-it/> [<https://perma.cc/J9JQ-PY4H>] (commenting on consumer attention span and how it has forced even the book industry to adapt, shorten time spans between books, and shorten books themselves to get Americans to pick them up; also noting shortening of attention span from twelve to eight seconds in thirteen years).

making process, and marketers are essentially paying for expensive background noise.⁴³ This is where influencers can be of great benefit.

B. Influencers

Influencers are social media users who have the ability to influence the decision-making processes of their audience.⁴⁴ Influencers can exist at a macro or micro scale; users with as few as a thousand followers are referred to as “micro-influencers,” while household names with hundreds of millions of followers are considered “macro-influencers.”⁴⁵ Most celebrities have large fanbases who listen to what they have to say, and while many of them could likely be considered influencers based on their persuasive power, the name usually only applies to those who became popular first and foremost for their activity on social media.⁴⁶

1. Growing Influence

Influencers, regardless of the size of their audience, have to spend time investing in a relationship with their followers.⁴⁷ Influencers build a personal brand by making followers feel like friends, which leads their followers to trust and value the influencer’s opinions.⁴⁸ This is one manifestation of “parasociality,” a psychological concept referring to one-sided relationships where one party falsely perceives or misinterprets the existence of a friendship or relationship with the other.⁴⁹ This most commonly exists between celebrities and fans who believe they have a personal relationship

43. Debora Bettiga & Lucio Lamberti, *Future-Oriented Happiness: Its Nature and Role in Consumer Decision-Making for New Products*, FRONTIERS PSYCH., May 15, 2020, at 1, 5-6 (referring to ads as background noise due to lack of emotional response to them by consumers).

44. Werner Geysler, *What Is an Influencer? – Social Media Influencers Defined [Updated 2022]*, INFLUENCER MKTG. HUB (July 27, 2022), <https://influencermarketinghub.com/what-is-an-influencer/> [<https://perma.cc/FW6K-Y9D5>].

45. *Id.*

46. Paul Jankowski, *Not All Influencers Are Celebrities . . . Not All Celebrities Are Influencers, Part 2*, FORBES (Mar. 5, 2021, 10:52 AM), <https://www.forbes.com/sites/pauljankowski/2021/03/05/not-all-influencers-are-celebrities-not-all-celebrities-are-influencers-part-2/> [<https://perma.cc/7FZH-6FAG>].

47. Steven Woods, #Sponsored: The Emergence of Influencer Marketing (2016) (B.S. thesis, University of Tennessee, Knoxville) (available at https://trace.tennessee.edu/cgi/viewcontent.cgi?article=3010&context=utk_chanhonoproj) [<https://perma.cc/5BWE-FBB4>].

48. Kate Ng, *Celebrity Endorsements Only Influence 4% of Shoppers, Survey Says*, INDEP. (Jan. 24, 2022, 9:46 AM), <https://www.independent.co.uk/life-style/fashion/celebrity-influencer-endorsements-fashion-consumers-b1999000.html> [<https://perma.cc/74T3-7YWS>] (discussing that micro-influencers having significantly more sway over their followers than celebrities or even mega-influencers because of the relationship they have with their followers); Lotte Bugge, *Why Influence Not Advertising is the Future for Brands*, TALKING INFLUENCE (Dec. 21, 2021) <https://talkinginfluence.com/2021/12/21/why-influence-not-advertising-is-the-future-for-brands/> [<https://perma.cc/2M6X-FBGQ>].

49. See generally Chen Lou, *Social Media Influencers and Followers: Theorization of a Trans-Parasocial Relation and Explication of Its Implications for Influencer Advertising*, J. ADVERT., Mar. 2021, at 4.

with the celebrity, who they believe cares about them individually.⁵⁰ Parasocial dynamics are marked by significant power imbalances between the object of parasociality (the celebrity) and the perceiver of parasociality (the fan), and this is particularly prevalent on social media.⁵¹ Influencers actively play into parasocial relationships to gain influence over their followers.⁵²

As a result, even though followers *know* influencers are monetizing their presence, they also trust the relationship influencers have cultivated and generally believe influencers are less likely than companies or distant celebrities to lead them astray for their own personal gain.⁵³ In some cases, an influencer disclosing that they are making money off of their followers actually benefits them because it adds to the followers' perception that they are in an open, honest relationship.⁵⁴ Some influencers create content that emphasizes that they would never do wrong by their followers.⁵⁵ Influencers love to remind followers they do not partner with everyone that offers them money or exposure and that they only accept partnerships they genuinely believe would benefit their followers.⁵⁶ This adds to the perception that influencers are honest, trustworthy, and authentic in a way that traditional marketing has not been able to generate in recent years.⁵⁷

2. Influencer Marketing

Marketers are trying to find new, creative ways to get their ads in front of consumers and to get those consumers to pay attention to their ads; to

50. *Id.*

51. *Id.*

52. *Id.*

53. See Joel Mathew, *Understanding Influencer Marketing and Why It Is So Effective*, FORBES: YOUNG ENTREPRENEUR COUNCIL (July 30, 2018, 8:00 AM), <https://www.forbes.com/sites/theyec/2018/07/30/understanding-influencer-marketing-and-why-it-is-so-effective/> [<https://perma.cc/Z56W-JZU2>] (discussing how followers are not skeptical of influencer ads in the same way that they are skeptical commercials; followers are also less skeptical of influencers than celebrities who became famous); see generally Woods, *supra* note 47.

54. See Lou, *supra* note 49.

55. See Safiya Nygaard, *Trying Products That Asked to Sponsor Me (Not Sponsored)*, YOUTUBE (Oct. 7, 2018), <https://www.youtube.com/watch?v=cY4e0uvp7uI> [<https://perma.cc/DRF9-ZA87>] (trying brands that requested sponsorship that she refused or did not respond to because she only wants to promote products that she feels she knows enough about to recommend).

56. See *id.*

57. Lauren C., Comment to *Trying Products That Asked to Sponsor Me (Not Sponsored)*, YOUTUBE, <https://www.youtube.com/watch?v=cY4e0uvp7uI&lc=UgwpovbiduZJVvBDdr14AaABAg> [<https://perma.cc/MDG7-ST2B>] (where a comment with thousands of likes is praising Safiya for how responsible she is in what brands she chooses to do sponsorships with); Shraddha Kulshrestha, Comment to *Trying Products That Asked to Sponsor Me (Not Sponsored)*, YOUTUBE, <https://www.youtube.com/watch?v=cY4e0uvp7uI&lc=UgxzpLr0MZxl8DRsFO94AaABAg> [<https://perma.cc/24Y7-DGGJ>] (where a comment with thousands of likes is praising Safiya for being a “non-sponsored queen” on a video where she mentions multiple times that some of her other content is sponsored, just that she refused the sponsorships from the particular companies highlighted in this video).

accomplish this, marketers are turning to influencers for help.⁵⁸ Paying influencers to post ads is one of the most effective ways marketers achieve this, and it has several benefits over traditional marketing.⁵⁹ Influencers can leverage the trust they have built up with consumers to the brand's benefit.⁶⁰ Moreover, if a marketer does their research and chooses an influencer who projects values and interests similar to that of their brand, they will likely find that the ad connects more frequently with the influencer's followers than it would with the population at large who would see a traditional ad.⁶¹ The growing reliance on influencers is evident in the fact that 86% of marketers plan to maintain or increase their influencer marketing budget in 2022.⁶²

While marketers consider many factors when choosing which influencers to partner with and how much they are worth, the primary factors are follower count and engagement on posts.⁶³ The follower count of an influencer can give marketers an idea of the size of the audience an influencer has listening to them.⁶⁴ In traditional marketing, marketers used to have to estimate how many people would see an ad they posted in the paper or ran on television; on social media, marketers can look to follower counts for an exact or nearly exact number of people who will see whatever they pay the influencer to post.⁶⁵ Engagement, the other primary factor marketers take into account, is a measure of what percentage of followers like or comment on a post.⁶⁶ Engagement can give marketers an idea of how effective advertising with a particular influencer will be and thereby how much that influencer is worth.⁶⁷ Influencers with high engagement are believed to have more active followers who pay closer attention to their posts; this suggests that their followers care more about what the influencer has to say and will be more willing to take the influencer's opinion into account when they post an ad endorsing or vouching for a brand.⁶⁸

58. See Carr, *supra* note 40.

59. See generally Mathew, *supra* note 53.

60. See *id.*

61. See Shannon Burton, *The Right Fit: How to Find Influencers for Your Brand's Marketing Campaign*, SPROUT SOC. (Jan. 25, 2021), <https://sproutsocial.com/insights/how-to-find-the-right-influencers/> [<https://perma.cc/MS4M-9ZDH>].

62. Kristen Baker, *What Will Influencer Marketing Look Like in 2022?*, HUBSPOT (June 15, 2022), <https://blog.hubspot.com/marketing/how-to-work-with-influencers> [<https://perma.cc/LSP6-Z7NL>].

63. See Mathew, *supra* note 53 (factoring followers and reach into price of influencers).

64. See Geysler, *supra* note 44.

65. *Digital Versus Traditional Marketing: What Today's C-Suite Needs to Know*, WHARTON ONLINE (July 17, 2019), <https://online.wharton.upenn.edu/blog/digital-versus-traditional-marketing/> [<https://perma.cc/ES2Z-XKTX>].

66. See Xabier Vicuña, *Choosing the Right Influencers: The Metrics That Matter*, FORBES: BUS. COUNCIL (Dec. 9, 2020, 7:20 AM), <https://www.forbes.com/sites/forbesbusinesscouncil/2020/12/09/choosing-the-right-influencers-the-metrics-that-matter/?sh=5096df54709a> [<https://perma.cc/3NH6-KLLT>] (explaining why engagement is as or more important than follower count).

67. See *id.*

68. See *id.*

3. Influencer Revenue

Influencers are now vying for billions of dollars in advertising revenue. The influencer marketing industry's estimated revenue for 2021 was approximately \$13.8 billion, and that number is projected to surpass \$15 billion in 2022.⁶⁹ Followers and engagement are critical when brands determine how much of that money an individual influencer is going to get.⁷⁰ For example, Charli D'Amelio, one of the five most followed influencers on the social media video app TikTok, charges between \$100,000 and \$250,000 per sponsored video she posts to her TikTok account.⁷¹ There is no definitive formula for calculating how much a brand will pay a star, but the correlation between followers, engagement, and money is well documented.⁷² Looking to Instagram, influencers with a million or more followers will typically make \$7,500 or more per post, while those who fall between half a million to a million usually make around \$5,000 per post, with value per post increasing or decreasing as follower and engagement counts increase or decrease.⁷³

C. Deceiving Marketers

To increase their popularity (and their paychecks), many influencers will pay or trade for fake followers and fake engagement.⁷⁴ This practice is not limited to aspiring influencers but is common even among established influencers.⁷⁵ There are two ways to go about generating fake influence on social media: bot accounts and pods.

1. Bot Accounts

The most obvious method of falsifying activity on social media is bot accounts. Bot accounts are social media accounts that are not created or

69. Jacinda Santora, *Key Influencer Marketing Statistics You Need to Know for 2022*, INFLUENCER MKTG. HUB (Aug. 3, 2022), <https://influencermarketinghub.com/influencer-marketing-statistics/> [<https://perma.cc/JJX4-DYHU>].

70. See Vicuña, *supra* note 66.

71. See Abram Brown & Abigail Freeman, *Top Earning TikTok-ers 2022: Charli and Dixie D'Amelio and Addison Rae Expand Fame — and Paydays*, FORBES (Jan. 7, 2022, 6:30 AM) <https://www.forbes.com/sites/abrambrown/2022/01/07/top-earning-tiktokers-charli-dixie-damelio-addison-rae-bella-poarch-josh-richards/> [<https://perma.cc/7YAX-LS5W>] (showing the estimated earnings of the top stars on TikTok in 2021).

72. See Vicuña, *supra* note 66.

73. BRITTANY HENNESSY, *INFLUENCER: BUILDING YOUR PERSONAL BRAND IN THE AGE OF SOCIAL MEDIA* 141 (2018).

74. See Confessore et al., *supra* note 32.

75. See Abhinav Anand et al., *Influencer Marketing with Fake Followers 2* (Indian Inst. of Mgmt. Bangalore, Working Paper No. 580, 2019), <https://www.iimb.ac.in/sites/default/files/2019-02/WP%20No.%20580%20%28Revised%20Feb%202019%29.pdf> [<https://perma.cc/TG52-U8EM>].

operated by real people.⁷⁶ They are created *en masse*, often through hacking, and are used for the purpose of following and engaging with content when their creator has paid for them to do so.⁷⁷

There are websites devoted to selling bot accounts and bot engagement for every conceivable social media platform from Goodreads to Instagram.⁷⁸ Buying followers is an incredibly easy process. Websites only need to be provided with credit card information, a website, and a username, and they can make you famous overnight.⁷⁹ At a premium, websites selling this type of fake influence will go to great lengths to mask purchased followers and engagement.⁸⁰ Websites will make fake followers that look like real people and automated comments that, at a basic level, still appear related to the post they are left on.⁸¹ Some websites will even trickle in purchased followers, creating the fake accounts and following the influencer slowly over time to mimic real growth.⁸²

2. Pods

The other, less common way influencers gain unearned influence is through pods.⁸³ Pods vary greatly in size and rules, but the overall premise is much the same. Pods are private groups of real people where influencers trade likes and follows on other influencer's accounts for likes and follows in return.⁸⁴ Some pods are very narrow in scope, requiring influencers to all be from similar industries or share some common aesthetic, while others are essentially free-for-alls, letting in anyone who is willing to like and follow in

76. See Stefano Cresci et al., *Fame for Sale: Efficient Detection of Fake Twitter Followers*, DECISION SUPPORT SYS., Dec. 2015, at 56 (“Fake followers are those Twitter accounts specifically created to inflate the number of followers of a target account.”).

77. See Masarah Paquet-Clouston et al., *Can We Trust Social Media Data? Social Network Manipulation by an IoT Botnet*, in #SMSOCIETY'17: PROC. FROM THE 8TH INT'L CONF. OF SOC. MEDIA & SOC'Y 1, 2 (2017).

78. See, e.g., *Buy Goodreads Ratings, Reviews, Votes, Followers and Friends*, BADDHI SHOP, <https://baddhi.shop/product/buy-goodreads-ratings/> [<https://perma.cc/VYU4-QADY>] (last visited Apr. 10, 2022); *6 Best Sites to Buy Instagram Likes Reviewed (2022)*, AMNY, <https://www.amny.com/sponsored/buy-instagram-likes/> [<https://perma.cc/GW9N-QTA4>] (last visited Apr. 10, 2022).

79. *Buy Instagram Likes with Instant Delivery*, TWICSY, <https://twicsy.com/buy-instagram-likes/> [<https://perma.cc/V5K6-55JG>] (last visited Mar. 12, 2022).

80. See Confessore et al., *supra* note 32; see Ellis, *supra* note 34.

81. See generally Confessore et al., *supra* note 32.

82. Ellis, *supra* note 34.

83. See Janith Weerasinghe et al., *The Pod People: Understanding Manipulation of Social Media Popularity via Reciprocity Abuse*, in WWW '20: PROCEEDINGS OF THE WEB CONF. 2020 1874, 1874 (2020) (“Pods are online groups designed to facilitate systematic reciprocity abuse, a term coined by DeKoven et al. describing an agreement between users to interact with each other's content, thereby increasing its popularity and consequent importance to the content curation algorithm.”).

84. See *id.* at 1875.

return.⁸⁵ The primary selling point of pods is that they are usually free to participate in and are harder to detect than bot accounts.⁸⁶

While pods may give a sense of realism that bot accounts do not, they are just as inauthentic.⁸⁷ The end result of both is the same: inflated follower counts and fake engagement.⁸⁸ Pods are just as much a business transaction as purchasing followers, and most pods even have rules or guidelines which actively state that members are not part of the pod to become friends but are simply there to serve as popularity generators for each other.⁸⁹

Members of a pod may be real people, but they are likely not subject to an influencer's effects because they are not following or engaging with that influencer out of any care for what they have to say or emotional involvement with their content.⁹⁰

3. Prevalence of Deception

It is estimated that over half of all social media influencers have utilized some form of fake influence during their careers.⁹¹ Fake followers are commonplace at this point, and influencers try to downplay it as though it is an accepted industry practice. However, marketers and real followers do not share in that acceptance.⁹² Real followers on social media websites have expressed an active disdain for influencers who use fake followers and engagement, and even though they are not losing money to the practice like brands are, real followers still dislike the practice.⁹³ A study in 2019 found

85. See *id.* at 1876 (“Some pods are designated for Instagram users who post about specific topics . . .”).

86. See generally Weerasinghe et al., *supra* note 83.

87. See *id.*; see John Boitnott, *How to Avoid Social Media Pods and Still Build an Audience*, ENTREPRENEUR (Oct. 12, 2020), <https://www.entrepreneur.com/article/357164> [<https://perma.cc/LWW4-TK5E>] (“Although engagement pods aren’t the same as ‘buying’ followers and likes, the process still essentially means you are creating fake likes and artificially enhanced engagement rates. The intent behind Instagram pods, for example, is to climb up the engagement ranks by manipulating Instagram’s algorithm and follower counts, as opposed to organically targeting audience members that can convert into customers.”).

88. See *id.*

89. See Emma Brown, *Do Instagram Pods Work? The Truth Behind Instagram’s Latest Engagement Hack*, HOOTSUITE (Oct. 12, 2018), <https://blog.hootsuite.com/instagram-pods/> [<https://perma.cc/6VWC-5EZH>] (“Don’t use the chat to chat (this is purely business, no pleasantries allowed).”); see generally Weerasinghe et al., *supra* note 82, at 1874–76.

90. See generally *id.*

91. Eugene Tsaplin, *How to Avoid Getting Scammed by Influencers with Fake Followings*, ENTREPRENEUR (Jan. 21, 2022), <https://www.entrepreneur.com/article/391195> [<https://perma.cc/5ADX-GZ6G>].

92. See Keith Weed, *When It Comes to Influencer Relationships, It’s Complicated*, UNILEVER (July 22, 2018), <https://www.unilever.com/news/news-search/2018/when-it-comes-to-influencer-relationships-its-complicated/> [<https://perma.cc/G4N4-JMY9>] (disavowing influencers who use fake followers or bots as dishonest in statement by the CMO of Unilever); see Fatih Catagay Akyon & M. Esat Kalfaoglu, *Instagram Fake and Automated Account Detection*, in INNOVATIONS IN INTELLIGENT SYS. & APPLICATIONS CONF. 1, 1 (2019).

93. See *71% Of Consumers Will Unfollow Influencers with Fake Followers*, SMART INSIGHTS (Oct. 22, 2019), <https://www.smartinsights.com/online-pr/71-of-consumers-will-unfollow-influencers-with-fake-followers/> [<https://perma.cc/4AL3-AG8P>] [hereinafter *71% Of Consumers*].

that over 70% of U.S. and U.K. social media users would unfollow an influencer if they found out they had purchased influence at any point.⁹⁴ Brands and marketers do not take kindly to fake influence either.⁹⁵ Influencer marketing agency Mediakix ranked fake followers and engagement as the number one problem facing marketers, and 50% of marketers agreed it was their primary challenge on the job.⁹⁶ Marketers see fake followers as a form of lying or scamming.⁹⁷

Fake activity subverts the goal of advertising: to reach real people, with real purchasing potential, via real engagement on an influencer's sponsored posts.⁹⁸ Brands are paying influencers to reach people whose opinions will be affected by the influencer's involvement and who may be willing to purchase a product after seeing an ad; they are not paying to receive likes from bots or random individuals who are only there as part of a business transaction.⁹⁹ Smaller influencers (and those hoping to become influencers) will pay bot accounts for follows and engagement to gain the attention of marketers, and influencers with more established followings or who are looking to grow their followings will purchase or trade for followers or engagement on their posts to move up into a new pay bracket.¹⁰⁰

Today, an estimated one in ten accounts on Instagram is a bot account; a 2020 Twitter sweep of fake activity took out over 70 million bot accounts, and even that barely made a dent.¹⁰¹ The problem touches engagement as well. Fifty percent of Instagram engagement with sponsored posts is estimated to be fake.¹⁰² The practice of fake followers and engagement on social media

94. *See id.*

95. *See These Are the Influencer Marketing Trends Shaping 2021*, MEDIKIX, <https://web.archive.org/web/20220114085203/https://mediakix.com/influencer-marketing-resources/influencer-marketing-trends/> [<https://perma.cc/567R-WUJF>] (last visited Mar. 19, 2022); *see 95 Million Bots: One in Ten Instagram Accounts Is Fake*, BASIC THINKING, <https://www.basichinking.com/bots-instagram-accounts-fake/> [<https://perma.cc/ZDU3-CXED>] (last visited Mar. 19, 2022) [hereinafter *95 Million Bots*].

96. *See id.*

97. *See* Paquet-Clouston et al., *supra* note 77, at 5.

98. *See* Gian Fulgoni, *Fraud in Digital Advertising: A Multibillion-Dollar Black Hole*, J. ADVERT. RSCH., June 2016, at 122.

99. *See* Akyon & Kalfaoglu, *supra* note 92, at 1 (“The detection of fake engagement is crucial because it leads to loss of money for businesses, wrong audience targeting in advertising, wrong product predictions systems, and unhealthy social network environment.”).

100. *See How to Spot Fake Followers on Instagram*, MEDIKIX, <https://web.archive.org/web/20210525120327/https://mediakix.com/blog/fake-followers-on-instagram/> [<https://perma.cc/66VJ-RNWQ>] (last visited Mar. 19, 2022).

101. *See 95 Million Bots*, *supra* note 95; Andrew Hutchinson, *New Fake Account Removals Highlight Twitter's Bot Problem Once Again*, SOC. MEDIA TODAY (Apr. 4, 2020), <https://www.socialmediatoday.com/news/new-fake-account-removals-highlight-twitters-bot-problem-once-again/575488/> [<https://perma.cc/TGS6-6V3R>].

102. *See* Hutchinson, *supra* note 101; *see* Shareen Pathak, *Cheatsheet: What You Need to Know About Influencer Fraud*, DIGIDAY (Nov. 3, 2017), <https://digiday.com/marketing/cheatsheet-need-know-influencer-fraud> [<https://perma.cc/G5FE-BRZ7>].

platforms is prolific and only growing in popularity.¹⁰³ Searches and demand for fake followers went up by 71% in 2019 alone.¹⁰⁴ Most estimates place the losses generated by brands advertising to fake followers to be higher than a billion dollars per year.¹⁰⁵

III. ANALYSIS

Something needs to be done to curb the rampant problem of fake activity on social media. Brands are losing, conservatively, over a billion dollars every year to influencers who think that fake followers are acceptable, and social media companies are financially disincentivized to help because their business model benefits from a higher user count generated by bots and the income generated by influencers.¹⁰⁶ With this kind of widespread loss and lack of assistance, we need to empower brands to take action against influencers who are abusing their business deals. Moreover, consumers feel deceived by influencers who purchase fake followers, and there is a vested public interest in seeing social media clean up its bot account problem and limit improper personal engagement.¹⁰⁷

The Federal Trade Commission (FTC) has previously provided detailed guidance to influencers on when they need to disclose their involvement with or endorsement by a brand, but they have said far less on the practice of falsifying social media activity.¹⁰⁸ In the wake of the New York Times investigation and New York Attorney General's case against the bot-selling

103. See generally *95 Million Bots*, *supra* note 95; see Pathak, *supra* note 102; *Why Are So Many People Still Buying Fake Social Media Followers?*, MEDIUM: GAIN (May 9, 2017), <https://blog.markgrowth.com/why-are-so-many-people-still-buying-fake-social-media-followers-743d380b813b> [<https://perma.cc/QS7Q-EG53>].

104. See *Demand for Fake Instagram Followers*, *supra* note 26.

105. See Anand et al., *supra* note 75, at 3; Megan Cerullo, *Influencer Marketing Fraud Will Cost Brands \$1.3 Billion in 2019*, CBS NEWS, (July 25, 2019, 1:49 PM), <https://www.cbsnews.com/news/influencer-marketing-fraud-costs-companies-1-3-billion/> [<https://perma.cc/J7TP-NB8J>].

106. See Brett Molina & Jessica Guynn, *Facebook Is Losing Users for the First Time Ever and Shares in Meta Have Fallen off a Cliff*, USA TODAY (Feb. 3, 2022, 7:00 PM), <https://www.usatoday.com/story/money/2022/02/03/facebook-users-decline-meta-stock/6651329001/> [<https://perma.cc/TF74-7ZX2>] (discussing how for the first time ever, Facebook's user count dropped in 2022, and when it did, their stock plummeted.) We can infer from this that if Facebook made any real effort to remove the copious amount of bots on Instagram and Facebook, their user counts would drop, and their stock would tank again.

107. See Appel et al., *supra* note 21, at 89.

108. See FTC Press Release, *supra* note 32; see generally FTC, DISCLOSURES 101 FOR SOCIAL MEDIA INFLUENCERS, FTC ENDORSEMENT GUIDELINES (2019), https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf [<https://perma.cc/J5TY-Y9CU>].

website Devumi, the FTC did file a complaint against Devumi.¹⁰⁹ The case, which was the first of its kind, settled.¹¹⁰ In a statement, the FTC said that:

By selling and distributing fake indicators of social media influence to users of various social media platforms, the FTC alleges the defendants provided their customers with the means and instrumentalities to commit deceptive acts or practices, which is itself a deceptive act or practice in violation of the FTC Act.¹¹¹

While this signals a willingness to tackle the practice of buying and selling fake followers, the FTC has yet to take any steps to enforce this against influencers themselves, nor has the FTC ever made mention of the practice of participating in social media pods.¹¹² Moreover, given that this complaint took place in 2019 and damages in the billions are still being racked up today, it seems apparent that something more needs to be done; this statement does, however, provide definitional guidance for holding those influencers accountable by other means.¹¹³

These influencers could likely be held liable under current fraud law if current definitions of fraud were interpreted in ways favorable to brands. Cases of influencers committing fraud are unlikely to be regularly brought in federal court, regardless of statute interpretation, for a number of reasons including: the comparatively small amount of money at issue for each individual sponsored post, federal statutes more frequently applying to fraud where the government is the victim or vehicle of the fraud, and actions already being undertaken within the industry in some states.¹¹⁴ Thus any action within the industry will likely come at the state level.¹¹⁵ There is some variation from state to state regarding the actual text of their fraud tests, but the applications of these tests are sufficiently similar that the outcome in one state regarding

109. *See id.*

110. *See* FTC Press Release, *supra* note 32; *see generally* Complaint for Permanent Injunction and Other Equitable Relief, *FTC v. Devumi, LLC*, No. 9:19cv81419 (S.D. Fla. Oct. 18, 2019); Athena Jones, *First on CNN: NY Attorney General Targets Fake Social Media Activity*, CNN (Jan. 30, 2019, 4:03 PM), <https://www.cnn.com/2019/01/30/tech/new-york-attorney-general-social-media/index.html> [<https://perma.cc/M5B9-YWYJ>].

111. *See* FTC Press Release, *supra* note 32.

112. *See id.*

113. *See id.*; *see* Ellis, *supra* note 34.

114. *See generally* 18 U.S.C. § 1341; *see* Jones, *supra* note 110; *see State vs. Federal Fraud Charges*, PRICE BENOWITZ LLP, <https://criminallawyerwashingtondc.com/blog/state-vs-federal-fraud-charges/> [<https://perma.cc/BT6H-FSG9>] (last visited June 2022) (“The determination of whether a particular fraud case will be brought in Superior Court or federal court depends mainly upon whether or not the fraudulent conduct is in violation of federal law or involved an attempt to gain benefits through either a federal agency or federal program.”); *see Federal Fraud Charges*, SPODEK L. GRP. (May 26, 2020), <https://www.federalattorneys.com/federal-fraud-charges/> [<https://perma.cc/8EMT-HV5C>] (listing types of federal fraud crimes such as mail fraud, wire fraud, Medicare fraud, and tax fraud which all involve the federal government as the vehicle or victim).

115. *See generally* *State vs. Federal Fraud Charges*, *supra* note 114.

the issue of influencer's fake followers will likely be the same in most others.¹¹⁶

The requirements for fraud in New York and California are applied so similarly that, when a conflict arises regarding which state's law should be applied to a fraud case, courts have found it unnecessary to explicitly decide which to apply.¹¹⁷ The elements of a fraud claim in New York and California are: (1) a misrepresentation, (2) knowledge of falsity, (3) intent to defraud, (4) justifiable reliance, and (5) resulting damage.¹¹⁸

A. A Misrepresentation

The first element of liability for fraud is a misrepresentation of a material fact.¹¹⁹ In California and New York, this element of fraud is generally interpreted as including any false representations, misrepresentations, some non-disclosures, and some concealments.¹²⁰ Many other states include non-disclosures and concealments in their definitions of fraud, but states have widely varying definitions of what types of non-disclosures and concealments are allowed to be considered fraudulent.¹²¹ It is best, in determining the broader scope of potential liability of influencers for their social media

116. *Compare, e.g., Lazar v. Superior Court*, 909 P.2d 981, 984 (Cal. 1996) (“The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or ‘scienter’); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.” (quoting 5 WITKIN, SUMMARY OF CALIFORNIA LAW § 676 (9th ed. 1988))), *with Spies v. Deloach Brokerage, Inc.*, 169 F. Supp. 3d 1365, 1374 (S.D. Ga. 2016) (“The tort of fraud consists of the following five elements: ‘(1) false representation or omission of a material fact; (2) scienter; (3) intention to induce the party claiming fraud to act or refrain from acting; (4) justifiable reliance; (5) damages.’” (quoting *Lehman v. Keller*, 677 S.E.2d 415, 417-18 (Ga. Ct. App. 2009))); *and Bullman, Inc. v. Nevada Bell*, 825 P.2d 588, 592 (Nev. 1992) (“The[] elements [of fraud] are: 1. A false representation made by the defendant; 2. Defendant’s knowledge or belief that the representation was false (or an insufficient basis for making the representation); 3. Defendant’s intention to induce the plaintiff to act or to refrain from acting in reliance upon the misrepresentation; 4. Plaintiff’s justifiable reliance upon the misrepresentation; and 5. Damage to the plaintiff resulting from such reliance.” (citing *Lubbe v. Barba*, 540 P.2d 115, 117 (Nev. 1975))) (comparing all three definitions which each have different wording). There may be specific cases that would be affected by these differences, but the broader issue at play does not likely lend itself to any varying interpretation in these tests. Therefore, it is sufficient to address one.

117. *In re Decade, S.A.C., LLC*, 612 B.R. 24, 37 (Bankr. D. Del. 2020) (“With respect to fraud claims generally, New York and California define fraud using the same elements Additionally, the Parties similarly define fraud in the execution, fraudulent inducement, and fraudulent misrepresentation.”).

118. *Id.* at 24.

119. *Lazar v. Superior Court*, 909 P.2d 981, 984 (Cal. 1996).

120. *Petersen v. Allstate Indem. Co.*, 281 F.R.D. 413, 419 (C.D. Cal. 2012) (“[M]isrepresentation . . . includes either false representation, concealment or nondisclosure”) (internal quotations omitted); *In re Decade, S.A.C., LLC*, 612 B.R. 24, 37 (Bankr. D. Del. 2020); Peter R.J. Thompson, *An Outline of 23 California Common Law Business Torts*, 13 PAC. L.J. 1, 6 (1981).

121. *See McCullough v. World Wrestling Ent., Inc.*, 172 F. Supp. 3d 528, 563 (D. Conn. 2016) (laying out where Connecticut courts have a different definition and different application of non-disclosed facts in a fraud case).

activities, to stick to the broadest applicable portions of that definition and consider just false representations and misrepresentations of material fact.

The use of bot accounts for fake followers and engagement would almost certainly be a false representation of a material fact.¹²² Material facts are defined “to mean that, counterfactually, the plaintiff would have acted differently but for the alleged misrepresentation or omission.”¹²³ Followers and engagement are the driving forces behind why an influencer is chosen to market a brand, and they are the determining factor in what an influencer will get paid for a given piece of content.¹²⁴ Influencers have used bot accounts to falsely represent this number to brands.¹²⁵ Brands have no use or wish to market to bot accounts because the purpose of advertising is to convince real people to purchase a product or service.¹²⁶ Bots are not real people and do not have a disposable income to spend on a brand, so the brand does not care for them to see their ads.¹²⁷ Because they know no brand would willingly pay for a bot to see their account, influencers falsely represent these bots as real people with the hope of getting paid extra for the fake influence as well as their real influence.¹²⁸ But for the false representation of their follower and engagement counts, an influencer’s compensation would be drastically different, presuming the brand would work with them at all; this is, therefore, a false representation of a material fact.¹²⁹

This issue includes an added layer of complexity in the realm of social media pods. Follower and engagement counts are still material facts, but some influencers may argue that engaging in pods is not a false or misleading representation.¹³⁰ Pods are made up of real people and real engagement, even if done so for their members’ own benefit.¹³¹ If a follower or engagement count is merely a representation of how many people are present on an influencer’s page to view and interact with an ad, then it could be said that the members of the pod meet this very low qualification of being “real.” Moreover, some pods require members to share some common trait which would have them fall within the target market of a brand.¹³² It also cannot be assumed that, simply because members of a pod are getting something out of engaging with an influencer’s content, that they are not affected by ads they

122. See generally Paquet-Clouston et al., *supra* note 77, at 5 (indicating how marketers already see this as fraud and misrepresentation).

123. *FDIC v. Murex LLC*, 500 F. Supp. 3d 76, 111 (S.D.N.Y. 2020) (quoting *City Trading Fund v. Nye*, 72 N.Y.S.3d 371, 378 (Sup. Ct. 2018)).

124. See Paquet-Clouston et al., *supra* note 77.

125. See Appel et al., *supra* note 21.

126. See *id.*

127. See Harry Kabadaian, *How Bots Steal Your Online Advertising Budget*, ENTREPRENEUR (July 13, 2018) <https://www.entrepreneur.com/article/313943> [<https://perma.cc/Y672-5YB7>].

128. See *id.*

129. HENNESSY, *supra* note 73.

130. See Lauren O’Neill, *Influencers Have Secret Engagement Pods. I Joined One.*, VICE (Nov. 9, 2021, 4:30 AM), <https://www.vice.com/en/article/pkpy5g/influencers-have-secret-engagement-farms-i-joined-one> [<https://perma.cc/MD6B-FGLW>].

131. See Weerasinghe et al., *supra* note 83, at 1874.

132. See *id.* at 1877–78.

interact with. Ads often unintentionally affect consumers.¹³³ Just because members of a pod are there for their own benefit does not mean they will not, for example, think a product on a fellow pod member's page is intriguing.¹³⁴ The only way for a brand to be certain that influencer pods would be considered false representation would be to specify when dealing with influencers that they are paying them based on their number of followers, excluding pod activity. In this scenario, if an influencer fails to accurately convey the prevalence of pod activity on their account, brands could argue that this constitutes a material misrepresentation.

B. Knowledge of Falsity

The second element of liability for fraud, which is easily settled in this scenario, is knowledge of falsity.¹³⁵ Knowledge of falsity is a condition which can be met in several ways; the primary definition relevant for influencers would be: "knows or believes that the matter is not as he represents it to be ... or knows that he does not have the basis for his representation that he states or implies."¹³⁶ When individuals purchase followers or become involved in pod activity, they assuredly have knowledge of their own actions.¹³⁷ They are aware of how many fake followers and how much fake engagement they have paid for. They also know how many members are in their pod following and engaging with their activity in exchange.¹³⁸ Thus, they have specific knowledge of how much they have falsely represented their influence.

Knowledge of falsity does, however, present one potential defense for those who purchased from bot accounts. In the FTC's Devumi complaint, several of Devumi's customers did not know that they were paying for fake activity; rather, they thought they were paying for authentic endorsements.¹³⁹ This would suggest that some Devumi users thought they were paying real people for the likes and follows they received, a legitimate misconception

133. See generally Jenna Gross, *The Subconscious Implications of Marketing*, FORBES: AGENCY COUNCIL (Dec. 19, 2017, 8:30 AM), <https://www.forbes.com/sites/forbesagencycouncil/2017/12/19/the-subconscious-implications-of-marketing/> [<https://perma.cc/WX4B-HVAX>] (explaining the subconscious effects of ads). Some, though certainly not all, will affect the subconscious of consumers around them in some way; particularly where you can be guaranteed that consumers are actually looking at the ad.

134. See, e.g., ZOE GANNON & NEIL LAWSON, *THE ADVERTISING EFFECT: HOW DO WE GET THE BALANCE OF ADVERTISING RIGHT*, 8 (2010), <https://www.compassonline.org.uk/wp-content/uploads/2013/05/The-advertising-effect-compass.pdf> [<https://perma.cc/7NQ4-BDLK>].

135. *Gold v. L.A. Democratic League*, 122 Cal. Rptr. 732, 743 (Ct. App. 1975); *Lazar v. Superior Court*, 909 P.2d 981, 984 (Cal. 1996).

136. *Cummings v. HPG Int'l, Inc.*, 244 F.3d 16, 25 (1st Cir. 2001).

137. See Weerasinghe et al., *supra* note 83, at 1874 (showing how influencers get involved in pods and that it is a willing process).

138. See *id.* at 1877–78.

139. See FTC Press Release, *supra* note 32.

given that bots are designed to look as much like real people as possible.¹⁴⁰ Whether they genuinely had this misconception or not, users of the website could easily make this claim because many bots impersonate real people or take other measures to look like legitimate accounts to avoid being caught in sweeps by social media websites.¹⁴¹ However, it seems unlikely that the FTC intended to give influencers a sweeping defense to fraud claims where they merely needed to claim they reasonably thought the bots were real people. In the same complaint, the FTC implied that purchasing fake followers was deceptive, which supports the idea that they did not intend to create a defense.¹⁴² If Devumi users operated under a reasonable belief that the followers they had purchased were real people, this would still put their activity on par with pods in that they believed the followers were real people but knew they were not following them because of a genuine affinity toward the influencer.

This element also protects honest influencers from overeager brands attempting to catch them up in lawsuits. Bot accounts in particular are known to follow people who have not paid for their services in order to create a veneer of legitimacy as a defense against being taken down.¹⁴³ Most public individuals have at least some following from bot accounts as a result of this activity.¹⁴⁴ Even honest influencers who have never paid for bot accounts will likely have some number of bot followers simply due to their reach.¹⁴⁵ They do not have knowledge of particular bot accounts or how many bot accounts follow them, so they have no ability to disclose that information to brands in any way that would suggest knowledge of the falsity of those accounts.

C. Intent to Defraud

Intent is the next element of a fraud claim.¹⁴⁶ California courts have held that “it is the element of fraudulent intent or intent to deceive that distinguishes it from actionable negligent misrepresentation and from nonactionable innocent misrepresentation.”¹⁴⁷ It is the element of intent which makes fraud actionable, irrespective of any contractual or fiduciary duty one

140. Asaf Greiner, *The Hidden Costs of Identity Theft*, FORBES (June 1, 2018, 7:30 AM), <https://www.forbes.com/sites/forbesagencycouncil/2018/06/01/the-hidden-costs-of-identity-theft/> [https://perma.cc/PEU2-K95X].

141. Adrienne Jeffries, *It's Your Face. It's Your Photos. Meet the Creepiest Kind of Instagram Spambot.*, VERGE (Sept. 3, 2014, 8:29 AM), <https://www.theverge.com/2014/9/3/6097891/its-your-face-its-your-photos-meet-the-new-creepy-breed-of-instagram-spambot> [https://perma.cc/V6V2-RCAJ].

142. See FTC Press Release, *supra* note 32 (“By selling and distributing fake indicators of social media influence to users of various social media platforms, the FTC alleges the defendants provided their customers with the means and instrumentalities to commit deceptive acts.”).

143. Kate Moffatt, *This Is Why You Keep Getting Those Random Instagram Followers*, ELLE AUSTL. (June 24, 2017, 11:39 PM), <https://www.elle.com.au/culture/random-instagram-followers-13543> [https://perma.cc/4YNP-8CA6].

144. See *id.*

145. See *id.*

146. *In re Decade*, S.A.C., LLC, 612 B.R. 24, 37 (Bankr. D. Del. 2020).

147. *City of Atascadero v. Merrill Lynch*, 80 Cal. Rptr. 2d 329, 355 (Ct. App. 1998).

party might owe another.”¹⁴⁸ Under California law, this intent must be to deceive, not merely to induce.¹⁴⁹

1. Intent with Fake Engagement

Intent is a unique issue, which is best divided not along the lines of pod or bot accounts, but on whether the fraudulent activity occurred through engagement or followers. While fake engagement can be, and often is, directed at non-sponsored posts in the hopes of making the influencer seem popular enough to warrant partnership with a brand and to hide the use of fake engagement on brand posts, fake engagement on non-sponsored posts is an issue more readily dealt with by false inducement claims than fraud.¹⁵⁰ When a sponsored post is the subject of the fake engagement, it usually makes the intent element clear. Fake engagement, when purchased through bot accounts, is purchased for a particular post sponsored by a particular brand.¹⁵¹ Bots do not hand out engagement for free, nor do they randomly distribute likes to various posts on an account.¹⁵² In pods, fake engagement only occurs on posts created at the pod’s designated time to reciprocate activity or by linking to a particular post in the pod’s chat.¹⁵³ Either way, fake engagement does not happen on every post and is a specifically-directed activity.¹⁵⁴ Thus, when fake engagement occurs on a sponsored post, it is specific, and its intent to gain additional revenue for the influencer is evident in the act.¹⁵⁵

2. Intent with Fake Followers

The difficulty in proving intent in the case of fake followers on social media is that, in many cases, the followers are obtained at a different time

148. *See id.*

149. *See* Sun ‘n Sand, Inc. v. United Cal. Bank, 582 P.2d 920, 942 (1978) (holding that it was not sufficient that the bank had presented checks, as that was merely inducement, but they also needed an intent to deceive Sun n’ Sand, which was not present); *see* Thompson, *supra* note 120, at 7.

150. *See generally* Weerasinghe, *supra* note 83

151. *See generally* *Buy Instagram Likes with Instant Delivery*, BUZZOID, <https://buzzoid.com/buy-instagram-likes/> [<https://perma.cc/NLZ4-KTLN>] (last visited Apr. 10, 2022) [hereinafter *Buy Instagram Likes*] (showing in the ‘What information do I need to provide’ section, Buzzoid’s website expressly says “[t]he only information we need is your username and instructions regarding which photo or video you want to receive the likes,” meaning the purchaser has to choose and instruct Buzzoid exactly which post to like). *Id.*

152. *See id.*

153. *See* Weerasinghe et al., *supra* note 83, at 1877–78; *see* Boitnott, *supra* note 86.

154. *See* Weerasinghe et al., *supra* note 83.

155. *See generally* Pathak, *supra* note 103 (documenting that 50% of engagement on sponsored posts in a day was fake.) This is an extremely high ratio of inauthentic activity, and given that influencers have to go out of their way to purchase fake activity and profit off of engagement on sponsored posts, there can be an inferred relationship between that profit and the purchase of these followers.

than the agreement with the brand is made.¹⁵⁶ In pods, it is slightly easier than with bot accounts to find fraudulent intent regarding followers because, regardless of how long ago an individual chose to join the pod, pods require continuous community involvement.¹⁵⁷ Real people will likely not continue to follow an individual that they only followed out of reciprocity if that individual ceases to benefit them in return.¹⁵⁸ If an influencer decides to part ways with a pod or cease their pod activity, they will likely be unfollowed by a majority of the pod members and could easily argue that pod members who do not unfollow them when they cease their pod activity are now passive, willing followers because they are receiving nothing in return.¹⁵⁹ Continuous involvement in a pod is evidence of the intent to defraud.

Bot accounts, however, are not a continuous action; they are a single event purchase.¹⁶⁰ If that purchase happens near striking a deal with a marketer, then intent can be inferred from the act. For example, if an influencer purchases followers shortly before opening negotiations with a brand, then the intentional link between the act of purchase and deceiving the brand is obvious. It is less obvious when an influencer purchases followers well in advance; influencers often purchase followers early in their careers to help build an audience or simply because they want to be perceived as popular.¹⁶¹ At the time of purchase, these followers are not being used to deceive a brand, and the influencer may not have considered using them in a marketing deal. However, the influencer is unlikely to admit to the purchase, even if they do have the knowledge. While social media websites will occasionally attempt to purge bots, as previously referenced, the vast majority of fake accounts, even when reported, will not be removed by a social media website.¹⁶² Failure to disclose the prior purchase during brand negotiations is evidence of the intent to profit from the deception, even if the original purchase was not made specifically to deceive a brand.

D. Justifiable Reliance

The fourth element of a fraud claim is a justifiable reliance on the fraudulent information (in this case, follower count and engagement rates)

156. See generally *Buy Instagram Likes*, *supra* note 151 (stating that the process by which fake likes are purchased requires directing them to a specific post, but the process by which fake followers are purchased only indicates what account you want them on and what quality of fakes you want, and as Buzzoid states, premium followers will last for years before Instagram gets around to taking them down).

157. See Weerasinghe et al., *supra* note 83; see Boitnott, *supra* note 87.

158. See Weerasinghe et al., *supra* note 83; see Boitnott, *supra* note 87.

159. See Weerasinghe et al., *supra* note 83; see Boitnott, *supra* note 87.

160. See generally *Buy Instagram Likes*, *supra* note 151.

161. See *id.* (discussing what package of followers to purchase and considering what stage in the process of becoming an influencer the account followers are being purchased for is at, as newer accounts need premium followers that they are less likely to lose and are more likely to hold up to scrutiny given how few followers they have).

162. Cox, *supra* note 26; Maya Kosoff, *Can Twitter Purge Its Bots Without Killing Its Bottom Line?*, VANITY FAIR (June 27, 2018), <https://www.vanityfair.com/news/2018/06/can-jack-dorsey-twitter-purge-bots-without-killing-bottom-line> [<https://perma.cc/7L79-ZJDG>].

that has been given to the brand in question.¹⁶³ While it would be reasonable for a normal person to rely on publicly available numbers to tell them how many followers and how much engagement another individual has, brands are different. They have greater resources and knowledge at their disposal which may significantly affect what level of reliance is justifiable on their part.

There are multiple instances in which it would be unjustifiable for a brand to rely on information given to them by an influencer. One example would be if a brand investigated an influencer to determine whether their reported followers and engagement are real. The fact that a brand independently investigated the information given to it makes it difficult to claim it relied on the falsity.¹⁶⁴ Another example would be if the brand's experience and intelligence should counsel against reliance.¹⁶⁵ Some brands have a large amount of experience at their disposal which may negate their justifiable reliance on influencer's followers and engagement.

1. Investigations

Brands primarily rely on bot detection websites to conduct independent investigations of an influencer's follower count.¹⁶⁶ These websites are readily available across the Internet, and most are free for anyone to use.¹⁶⁷ However, the accuracy of the majority of these websites is questionable at best, and they tend to overestimate the number of bot accounts associated with an influencer.¹⁶⁸ Many will catch inactive accounts who influencers have no control over just as readily as they will catch bots.¹⁶⁹ Even methods that claim to be more advanced tend to be newer versions of the same technology, utilizing publicly viewable features of an account to label them bot or human which can be avoided by sophisticated bots and the use of pods.¹⁷⁰

163. *Gold v. L.A. Democratic League*, 122 Cal. Rptr. 732, 739 (Ct. App. 1975); *Lazar v. Superior Court*, 909 P.2d 981, 984 (Cal. 1996).

164. *See Outdoor Cent., Inc. v. GreatLodge.com, Inc.*, 688 F.3d 938, 942 (8th Cir. 2012).

165. *Scottish Heritable Tr., PLC v. Peat Marwick Main & Co.*, 81 F.3d 606, 615 (5th Cir. 1996) ("The justifiableness of the reliance is judged in light of the plaintiff's intelligence and experience.").

166. *Fake Influencer & Credibility Tool*, GRIN, <https://grin.co/fake-influencer-tool/> [<https://perma.cc/62U6-AN2C>] (last visited Apr. 10, 2022); *FAKECHECK.CO*, <https://www.fakecheck.co/> [<https://perma.cc/KQ6U-5MQY>] (last visited Apr. 10, 2022).

167. *See Fake Influencer & Credibility Tool*, *supra* note 166; *see FAKECHECK.CO*, *supra* note 166.

168. *See James Parsons, How Accurate Is the Twitter Audit Follower Checker?*, *FOLLOWS.COM* (Feb. 12, 2022), <https://follows.com/blog/2022/02/accurate-twitter-audit-checker> [<https://perma.cc/3CEV-SBVY>] (discussing the Twitter Audit, an app that is an excellent example of how inaccurate these checking websites and apps can be because these programs cannot distinguish between bots and the inactive or low effort accounts of real people).

169. *See id.*

170. *See generally* Shad Mohammad et al., *Bot Detection Using a Single Post on Social Media*, in 2019 THIRD WORLD CONF. ON SMART TRENDS IN SYS. SEC. & SUSTAINABILITY 215 (2019) (mentioning previous methods of detection which earmark accounts based on viewable information, but also suggesting a new method of far more advanced detection which has yet to be widely implemented).

There is little case law that suggests that brands, or others alleging fraud, would have an active responsibility to conduct independent investigations into influencer metrics.¹⁷¹ Brands are welcome to choose whether to investigate information or rely on it, but if they choose to investigate, they may not be able to claim justifiable reliance.¹⁷² Use of these websites may be argued by influencers to be a form of independent investigation, which makes brands aware of their fake followers and thereby makes reliance unjustifiable.¹⁷³ The inaccuracy of these methods would be a brand's best defense in instances where they did use one. These websites were not created in partnership with the social media platform itself; they are developed by third parties who have varying degrees of expertise and credibility.¹⁷⁴ Even if brands choose to utilize them, they would not be able to rely on them for any degree of accuracy.¹⁷⁵ If they did, due to the detection of inactive users in most cases, brands would likely underpay influencers, which causes an entirely different problem.

Independent investigation is a less pressing issue for brands regarding pods. There are many pods scattered across the Internet on a wide variety of platforms, and there is no way for a brand to be sure they have found and checked them all for involvement with a given influencer, even if they were to attempt conducting an independent investigation.¹⁷⁶ If pods were open to the public, with an obvious membership, it would defeat their entire purpose of seeming to offer each other organic support. Such investigations, even when attempted, could not be considered thorough or confirmatory in any way.¹⁷⁷

2. Brand Experience

The experience of brands on social media is a more significant defense that may be put forward by influencers, though it varies greatly depending on the brand. Many brands have a long and storied history involving influencers

171. *Field v. Mans*, 516 U.S. 59, 70 (1995) (commenting on the Restatement's expounding upon of justifiable reliance by explaining that a person is justified in relying on a representation of fact "although he might have ascertained the falsity of the representation had he made an investigation." (quoting RESTATEMENT (SECOND) OF TORTS § 540 (AM. L. INST. 1977))).

172. *See generally id.*

173. *See id.*

174. FAKECHECK.CO, *supra* note 166.

175. *See Parsons, supra* note 168.

176. *See Weerasinghe et al., supra* note 83.

177. *See id.*

and celebrities in their marketing campaigns.¹⁷⁸ It is difficult, given the prevalence of fake activity on social media, to believe that any brand reliant on influencers has *not* been affected by fake activity of some kind and is not acutely aware of the dangers. If we are to believe that one in ten accounts on Instagram is fake and that Facebook leaves up 95% of reported bot accounts, influencers may argue that fake activity is generally so common as to be an expected part of social media.¹⁷⁹ Influencers, therefore, would not be wrong to suggest that influencer-savvy brands should anticipate this to some degree. Even within those parameters, influencer-savvy brands would still have some room for argument depending on the particular facts of an influencer's case, such as just how much falsification a brand should expect from a given influencer and how open they were with influencers in asking about their fake activity.

However, the fact that some brands have sufficient expertise that they cannot claim to reasonably rely on influencers does not mean that all brands do. Courts consider a party's personal expertise to determine whether it reasonably relied on the fraudulent activity; they do not suggest that merely because one party possesses sufficient knowledge, a similarly situated party would be expected to as well.¹⁸⁰

Because of trends in advertising, many businesses who lack resources and are technologically unaware have been pushed into the influencer space with little understanding of what they are getting themselves into. Moreover, small business relationships with influencers are often initiated by the influencers themselves.¹⁸¹ Influencers asking for free stuff from small business owners is a common exploitative trend in modern social media, and the Internet is littered with examples of small businesses being pressured or blackmailed into giving influencers their services for free.¹⁸² These businesses are often uninformed of the risks and consequences associated with social media influencers and sometimes do not even mean to or want to be involved in the first place.¹⁸³ They are relying on influencers out of necessity and are placing their trust in the influencers as individuals, hoping that they will not be led astray.¹⁸⁴

178. See generally Peter Suci, *History of Influencer Marketing Predates Social Media by Centuries – But Is There Enough Transparency in the 21st Century?*, FORBES (Dec. 7, 2020, 9:43 AM), <https://www.forbes.com/sites/petersuci/2020/12/07/history-of-influencer-marketing-predates-social-media-by-centuries-but-is-there-enough-transparency-in-the-21st-century/?sh=21f0d09340d7> [<https://perma.cc/WAG2-5JDQ>]; see, e.g., Naomi Fry, *Fake Famous and the Tedium of Influencer Culture*, NEW YORKER (Feb. 20, 2021), <https://www.newyorker.com/culture/on-television/fake-famous-and-the-tedium-of-influencer-culture> [<https://perma.cc/2CGB-GP8Q>] (discussing the HBO documentary “Fake Famous,” which promotes buying fake followers as a means of getting famous).

179. Cox, *supra* note 26.

180. See *Field v. Mans*, 516 U.S. 59, 70 (1995).

181. Hannah Dobrogosz, *28 Screenshots That Prove Influencers Are Absolutely Out of Control*, BUZZFEED (Dec. 13, 2021), <https://www.buzzfeed.com/hannahdobro/entitled-influencers> [<https://perma.cc/H66L-3YQ3>].

182. See *id.*

183. See generally Akyon, *supra* note 92 (explaining the risks with influencers and how businesses are unaware when they initially pay on).

184. See Carr, *supra* note 40.

There is one category of brands, however, to whom influencers can say, categorically, that they owe no reliance, and that is those who actively contribute to the problem. In recent years, some brands have even been known to engage in the purchase of fake followers themselves.¹⁸⁵ It would be difficult for such brands to claim that they expected an influencer's follower or engagement count to be accurate given their own unclean hands. In those cases, fake followers are a two-way street.¹⁸⁶ For all the brand knows, they are paying an influencer more than they are worth; for all the influencer knows, they are being contracted to work for a company who is not nearly prominent enough to warrant their partnership.

Purchasing followers makes some brands active contributors to the problem. To assume that the mere existence of fake followers necessarily creates an atmosphere of unreasonable reliance would be to ignore the hard work of thousands of influencers who have built their popularity honestly. In instances where it can be proven that brands themselves purchased undisclosed followers, influencers would easily be able to negate a justifiable reliance, though brands who have not themselves engaged in fraudulent activity would still have recourse.

E. Damages

There is a clear monetary damage to brands in these instances: brands are overpaying influencers by an amount equal to their faked activity.¹⁸⁷ Calculating what an influencer would be worth based on real engagement and real followers can determine how much a brand overpaid, and thereby how much they are owed for the fraudulent activity. Moreover, brands may wish to argue a more arbitrary level of damage experienced to their brand's name by being associated with fraud.¹⁸⁸ A brand's reputation may or may not experience a negative impact if it becomes clear that they were associated with influencers who fake social media influence.¹⁸⁹ Real followers disapprove of fake activity, and will unfollow influencers whose reliance on fake activity has been made public.¹⁹⁰ The backlash may extend to the influencer's affiliated brands as well. Moreover, depending on the company, some brands may simply look bad by not being aware of the fraud,

185. See Nicole Perlroth, *Researchers Call Out Twitter Celebrities with Suspicious Followings*, N.Y. TIMES: BITS (Apr. 25, 2013, 4:57 PM), <https://bits.blogs.nytimes.com/2013/04/25/researchers-call-out-twitter-celebrities-with-suspicious-followings/> [<https://perma.cc/2Q9Z-BA5F>] (accusing brands like Pepsi of having fake followings).

186. See *id.*

187. See Santora, *supra* note 69.

188. Masa Mustafa Al-Qatami, *The Effects of Social Media Influencer Attributes on Collaborating Brand Credibility and Advocacy* (2019) (M.S. thesis, Qatar University, College of Business and Economics) (available at https://qspace.qu.edu.qa/bitstream/handle/10576/11689/Masa%20Al-Qatami_OGS%20Approved%20Thesis.pdf?sequence=1&isAllowed=y) [<https://perma.cc/3SCG-T6V4>].

189. See *id.*

190. See *71% Of Consumers*, *supra* note 93.

particularly if their brand has a reputation for honesty or integrity. These damages are not as easily quantifiable and would depend on specific facts.

IV. CONCLUSION

Influencer marketing is a growing industry with a growing problem. In the face of social media companies who refuse to take action, brands need to be empowered to clean up social media platforms that are now serving as their place of business. Holding influencers accountable for the fraud they are perpetrating against brands would not only curb the monetary damages brands experience but would also disincentivize bot account creators from continuing to flood social media with inauthentic behavior. Being an influencer is a difficult job, and those who are unwilling to put in the work to earn authentic growth should not be allowed to jump to the top of their industry simply because that industry exists online.

